

FILED
COURT OF APPEALS
DIVISION II

09 NOV 25 PM 12:57

No. 37731-4
STATE OF WASHINGTON COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON
BY [Signature]
DEPUTY

MARK A. LAVERGNE,

Appellant,

and

TERESA GRIMSELY-LAVERGNE,

Respondent.

On Appeal from Thurston County Superior Court
Honorable Pamela Casey

Appellant's Reply Brief

~~This document was received but
SHOULD NOT be considered.~~

12/4/09 [Signature]
Date Signature

Accepted for
filing Clerk's Ruling
12/11/09

Dennis J. McGlothin
Attorney, WSBA No. 28177
Serin Ngai
Attorney, WSBA No. 38350

Counsels for Appellant Mark A. LaVergne
Olympic Law Group, PLLP
1221 East Pike Street, Suite 205
Seattle, Washington 98122
(206) 527-2500

ORIGINAL

Table of Contents

| | |
|--|-----------|
| A. Reply to Respondent's Fact Statement | 1 |
| B. Reply Argument | |
| 1. The Trial Court Exceeded Its Jurisdiction When It Went Beyond Enforcing The Dissolution Decree And Final Child Support Order. | 10 |
| 2. The Trial Court Modified The Final Child Support Order When It Ordered Mark To Pay \$37,308.66 In Back Child Support In Nanny, Extra Help And Day Care Costs And \$19,598 In Medical Insurance Payments. | 12 |
| 3. The Trial Court Modified The Property Distribution Provisions In The Dissolution Decree. | 12 |
| 4. The Trial Court Merely Enforced The Decree When It Adjudicated The Amounts Mark Was Owed Pursuant To The Decree. | 16 |
| 5. The Trial Court Exceeded Its Authority Under RCW 26.09.170(1) When It Modified The Property Distribution Provisions In A Final Dissolution Decree. | 17 |
| 6. The Trial Court Erred When It Modified The Final Dissolution Decree In Post-Judgment Proceedings. | 17 |
| 7. The Dissolution Decree Was A Final Decree That Determined The Parties' Property Rights. | 18 |
| 8. Mark Preserved, And Did Not Waive, His Right To Appeal The Trial Court's Actions. | 19 |
| 9. The Trial Court Erred When It Awarded Mark Liabilities And Debts And Awarded Teresa Property That Did Not Exist When The Decree Was Entered. | 20 |

| | |
|---|-----------|
| 10. The Trial Court Erred When It Characterized The \$12,337 In Taxes Teresa Paid As Real Property Taxes When They Were, In Fact, Personal Property Taxes. | 21 |
| 11. The Trial Court Abused Its Discretion When It Enforced The Parties' CR2A Agreement. | 22 |
| a. The Trial Court Necessarily Abused Its Discretion In Enforcing The CR2A Agreement Because It Did Not Properly Understand The Law That Distinguishes Between A Separation Agreement And A Property Settlement Agreement. | 22 |
| 12. Even The Property Settlement Provisions In The CR2A Agreement Were Abrogated Because There Is Insufficient Evidence To Conclude The Parties Did Not Reconcile And Did Not Intend To Abrogate The CR2A Agreement. | 23 |
| 13. Teresa is not Entitled to Attorney Fees. | 24 |

Table of Authorities
Cases

| | |
|--|------------|
| <i>Ambrose v. Moore</i> , 46 Wash. 463, 90 P. 588 (1907) | 18 |
| <i>Campbell v. Campbell</i> , 234 N.C. 188, 190, 66 S.E.2d 672 (1951) | 22 |
| <i>Capital Sav. & Loan Ass'n v. Convey</i> , 175 Wash 224, 227, 27 P.3d 136 (1933) | 23 |
| <i>City of Bellingham v. Chin</i> , 98 Wn. App. 60, 66, 988 P.2d 479 (1999) | 22 |
| <i>Furgason v. Furgason</i> , 1 Wn. App. 859, 860, 465 P.2d 187 (1970) | 18 |
| <i>Hanson v. Hanson</i> , 55 Wn.2d 884, 887, 350 P.2d 859 (1960) | 16 |
| <i>In re Marriage of Hulscher</i> , 143 Wn. App. 708, 716-17, 180 P.3d 199 (2008) | 1 |
| <i>LaHue v. Keystone Inv. Co.</i> , 6 Wn. App. 765, 776, 496 P.2d 343 (1972) | 1 |
| <i>Little v. Little</i> , 96 Wn.2d 183, 194-95, 634 P.2d 498 (1981) | 18 |
| <i>Molvik v. Molvik</i> , 31 Wn. App. 133, 135, 639 P.2d 238 (1982) | 14, 17, 18 |
| <i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 880, 73 P.3d 369 (2003) | 24 |

Statutes

| | |
|------------------|--------|
| 19 WAPRAC §13.11 | 14 |
| 20 WAPRAC §32.29 | 17 |
| 20 WAPRAC §32.40 | 18 |
| CR 60 | 18 |
| RAP 7.2 | 11, 19 |
| RAP 10.3(6) | 21 |
| RCW 26.09.050 | 18 |
| RCW 26.09.080 | 18 |
| RCW 26.09.170 | 18 |
| RCW 26.09.170(1) | 17 |
| RCW 84.04.090 | 21 |

A. REPLY TO RESPONDENT'S FACT STATEMENT

Teresa's fact statement in her response brief requests this Court accept her trial testimony and declarations as true even though the trial court did not make a finding her testimony was either credible or true. This Court should refuse her invitation to adopt her unilateral testimony as true especially since there was conflicting evidence at trial.

Appellate courts typically do not make factual findings not made by the trial court. *In re Marriage of Hulscher*, 143 Wn. App. 708, 716-17, 180 P.3d 199 (2008). There is a rare exception, however, if the evidence is uncontradicted. *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 776, 496 P.2d 343 (1972). Here, the evidence was sharply contradicted and, therefore, this Court should not find Respondent's supposed "facts" as being true. In fact, many supposed "facts" she asserts as true are contrary to the uncontradicted facts and findings in the record.

Without limiting the foregoing's generality, below are certain facts that are not findings and not supported by the record.

1. Teresa suggests she allowed Mark to stay in the marital home she was awarded because Mark was depressed and told her he was looking for a home, but that just never happened.¹ The judge made no findings this was correct and the testimony was disputed. To be sure, Teresa's Response Brief even states Mark claims there was reconciliation and that they decided to not follow the agreement.²

2. Teresa then claims she did not throw Mark out of the marital home she was to receive in the CR 2A Agreement because Mark was depressed. There is no support for this proposition. Nowhere did Teresa testify that Mark's alleged depression played any

¹ Respondent's Brief (RB), pg. 8

² *See* RB, pp 7 – 8 ; 1 Jan RP 112; and 2 Jan RP 264-65.

part in her decision not to enforce the CR 2A Agreement. Teresa cites the record to support her claim, including citing to a declaration she filed and nowhere does she mention Mark's depression as the reason she allowed Mark to stay.

3. Teresa then suggests she allowed Mark to remain in the marital home because Mark needed assistance to help care for the children. The trial judge not only made no such finding; rather she found that Teresa testified that was the reason – not that the trial judge found that to be the reason.³ In fact, the trial judge, in her oral ruling, discounted Teresa's testimony and stated "I'm satisfied that both parties knew how to care for both children."⁴

Teresa then goes farther and suggests she decided to revive the divorce proceeding in 2007 because "Aaron's feeding tube was out." Teresa blatantly distorts the record. Aaron's feeding tube was only in for 2 years after he was born.⁵ Aaron was born in January 2003.⁶ Aaron's feeding tube was out for over 2 years when Teresa revived the divorce in 2007. In fact, the feeding tube was removed about 3 months after the CR2A Agreement was signed and was out when Teresa's attorney struck his final orders presentation in January 2005.⁷

4. Teresa states she thought Mark was "looking for a place of his own" when she allowed him to stay for almost three years in the marital home she was to be awarded. This is contradicted by the facts in this case. First, the trial court found the parties had "a marital estate that is in the millions: and "big bank accounts."⁸ Second, Teresa, herself,

³ FOF No. 12, CP 832

⁴ CP 812 ln 17-18.

⁵ 2 Jan RP 228

⁶ *Id.*

⁷ CP 15.

⁸ Findings of Fact No. 5, CP 830.

testified in a declaration that Mark had the financial ability to have his own place and even had the Second Avenue Property that was awarded to him in the CR 2A Agreement and Decree.⁹ Third, the testimony cited by Teresa shows that Mark never looked for a place and that she “accepted it.”¹⁰

5. Teresa suggests she paid Mark \$602,000 “in accordance with the formula contained in the [CR2A Agreement].”¹¹ This is not true. Teresa argues the family-owned business only had \$911,000 in the bank, therefore, she did not have to pay the full \$750,000 down payment.¹² If Teresa’s argument is correct that the business only had \$911,000 in the bank, then the formula in the CR2A Agreement would have only required her to pay Mark \$561,000.¹³ So, whatever the \$602,000 payment was for, it was not a down payment “in accordance with the formula in the [CR2A Agreement].”

6. Teresa further states Mark not only turned control of the family-owned business over to Teresa, but that he also “made no material decisions” regarding the business.¹⁴ There is no finding this is true. There is also plethora evidence showing it is not true. Mark was consulted on various aspects of the business,¹⁵ consulted with people on jobs and went to job sites,¹⁶ was involved in buying and selling the business’ vehicles,¹⁷ and was involved with the Freightliner truck purchase for the business.¹⁸

⁹ CP 401, ¶28

¹⁰ 1 Jan RP 20

¹¹ BR Pg.8

¹² See BR f.n. 38.

¹³ The CR2A Agreement, Attachment A, ¶(c), provides \$750,000 down payment “presupposes 1.1 million + in corp. bank If less that 1.1 then [down payment] is reduced by the difference.” Ex 1. If the business had only \$911,00, then the difference between \$911,000 and the contemplated \$1,100,000 would be \$189,000. Subtracting the \$189,000 difference from the contemplated \$750,00 down payment would result in a revised \$561,000 down payment

¹⁴ RB pg. 9

¹⁵ 2 Jan RP 307

¹⁶ 2 Jan RP 259

¹⁷ 2 Jan RP 307

¹⁸ 1 Jan RP 193-94.

7. Teresa states she made monthly \$16,837.65 payments to Mark between November 2004 and July 2007. Finding of Fact No. 14, however, shows Teresa diverted at least one of these payments to her own private account. Teresa testified it was reissued, but the court made no finding that her testimony was true.¹⁹ In fact, Teresa's bookkeeper testified that she deposited the check into the joint account Teresa used and was never asked to correct it.²⁰ This shows at least some of the payments that were to be made to Mark under the CR2A Agreement were, in fact, commingled and used for community purposes.

There was ample uncontroverted evidence there was commingling between the parties after the CR2A Agreement was signed. Teresa admitted she used the parties' other joint account to pay for business expenses, including payments to employees and that Mark's money helped pay these expenses.²¹ To be sure, the trial judge stated "these parties commingled their affairs for four years following that Settlement Agreement."²² Later, she also concluded, "it is very difficult, if not impossible, to be certain what was owed between the Petitioner and Respondent based on the way they conducted their finances."²³ Teresa's lawyer conceded "the parties...ignored the CR2A Agreement promptly after it was executed and cohabitated in the home on Fairview Road."²⁴

This is an about face from the trial judges understanding when she enforced the CR2A Agreement. There she said, in relation to reconciling the parties' accounts, "I think once you look at the records that they're going to be easily resolved."²⁵ This

¹⁹ *See* FOF No. 14, CP 832.

²⁰ 1 Jan RP 82.

²¹ 3 Jan RP 451.

²² 1 Aug RP 31.

²³ *See* Narrative Report of Proceedings for the October 28, 2009 hearing

²⁴ 2 Aug RP 295.

²⁵ CP 818.

underscores the fact the trial judge did not have a clear understanding when she enforced the CR2A Agreement about how hopelessly the parties' commingled their accounts during the 33 month period they cohabitated with one another and their children in the same bed, in a big home, while not concluding their divorce. Obviously this came to light when she was trying to reconcile the parties' accounts herself.

8. Teresa asserts Mark was presented periodic accountings and knew that the business separated his personal expenses.²⁶ Not only is this not a finding the trial court made, it is completely contrary to the trial court's finding that "[t]here was no evidence that Mr. LaVergne knew about these accounting practices."²⁷ This finding has not been challenged on appeal and is a verity.

9. To support her argument that the CR2A Agreement's provisions were complied with, Teresa asserts:

a. Her lawyer prepared documents, including a UCC Security Agreement and Financing Statement and forwarded them to Mark's counsel.²⁸ There were no findings to this effect. Teresa's citations to the record do not establish what documents, if any, her counsel prepared or sent to Mark's counsel and do not establish that any documents were ever received by Mark's counsel. Not only that, Teresa previously signed declarations testifying that Mark's counsel was supposed to prepare the UCC documents for her signature.²⁹

²⁶ BR Pg. 9.

²⁷ FOF No. 10, CP 831.

²⁸ BR pg. 9

²⁹ CP 73.

In her Response Brief, however, Teresa somehow insinuates that Mark needed to sign the security interest for the debts she owed Mark.³⁰ This insinuation is not correct. Mark was owed the debt, Teresa was to receive the asset, and Teresa was to grant the security interests to Mark to assure the debt to him was repaid. It was Teresa, therefore, and not Mark, who needed to sign the documents granting Mark a security interest.

b. “Mark retained real estate awarded to him.”³¹ Again, this is misleading. No titles, deeds or paperwork of any kind were signed by the parties from the time the CR2A Agreement was signed and the Dissolution Decree was entered as Mark owned the property in his separate name before he was married to Teresa.³² No title had to be transferred. Despite that, Teresa testified she treated Mark’s property as though it was her own when she executed the coffee stand lease for five years when she only had a right to occupy the premises for one year under the CR2A Agreement.³³

The only real estate that needed to be conveyed from one to the other was the Fairview home that was to be awarded to Teresa under the CR2A Agreement because that was titled in both names. Teresa admits this never happened.³⁴

c. “Mark was held harmless from all corporate debt.”³⁵ This is not true. In fact, the trial court required Mark to pay \$7,583.33 in credit card charges to the business’ credit card account and \$529.65 for charges to the business’ account.³⁶

d. “The vehicles were divided as provided for in the [CR2A Settlement Agreement].” Again, this is misleading because the vehicles were not divided at all.

³⁰ RB Pg. 10

³¹ RB Pg. 9

³² 1 Jan RP 139.

³³ 3 Jan RP 446-47

³⁴ RB Pg. 10

³⁵ RB PG. 9

³⁶ Second Amended Findings of Fact and Conclusions of Law, ¶¶I and P, CP 1552-53.

Mark's vehicle was always in his name and Teresa's vehicle was always leased by the business.³⁷ There was no change.

e. Mark's receiving \$16,837.65 as being exactly what he was owed pursuant to the CR2A Agreement's payoff schedule.³⁸ First, there was no payoff schedule. The only purported payoff schedule in the record was prepared in 2007, well after the payments began and was created after the payments began.³⁹ In fact it was prepared April 11, 2007 according to the date on the schedule. Moreover, it is not based on true facts. For instance, it assumes the \$602,000 down payment was made on October 25, 2004. First, there is no evidence that payment was made on that date. In fact, the evidence is to the contrary. The payment was purportedly made pursuant to a formula established by Harry Slusher, the arbitrator, in his November 26 2004 Arbitrator's Decision, Trial Ex. 1. Since the formula was not developed until November 26, 2004, it logically flows the down payment made pursuant to that formula would have had to have been made after the date the formula was developed.

Teresa then grossly distorts the record by suggesting Mark had no explanation as to why he was paid these amounts other than to "say they had always been paid money from the company, so what's the difference."⁴⁰ Truth be told, Mark testified that he and Teresa discussed the payments many times during the 33 months they cohabitated with the children after the CR 2A Agreement was signed and that Teresa explained to Mark that she was drawing a like amount from the business.⁴¹ In fact, Teresa did increase her

³⁷ 2 Jan RP 303-05.

³⁸ RB 27-28.

³⁹ CP 219.

⁴⁰ RB pps 27-28.

⁴¹ 1 Jan RP 125-26.

monthly wages to over \$16,000 per month and the parties did generally receive the same amount from the business.⁴²

10. Teresa minimized the parties' non-compliance with the CR2A Agreement:

a. Not only was the Fairview home not transferred to Teresa as contemplated by the CR2A Agreement, but the mortgage payments came from the parties' joint account. West Coast Bank Account No. 205, in which some of Mark's monthly \$16,837.65 checks were deposited,⁴³ was the account from which the Fairview mortgage payments were paid.⁴⁴ Not only were some of Mark's checks deposited into this joint account, he also deposited money into this account to cover deficiencies created by the automatic debit for the Fairview home mortgage.⁴⁵

b. Teresa generally admits "the investment accounts were not transferred right away."⁴⁶ To be sure, the Met Life and Edward Jones accounts were not transferred until 2007 – 4 years after the CR2A Agreement was signed.⁴⁷ Moreover, Teresa used \$27,417.78 in dividends from the Atlas and WNC investment accounts during the 33 months the parties lived together after the CR2A Agreement was signed⁴⁸ and was ordered to repay it to Mark.⁴⁹

c. Teresa goes so far as to argue "there has been no material breach by one party and in fact Teresa has complied with the primary provisions of the [CR2A

⁴² See Teresa's 2005 tax return. CP 272 and 282. Her gross wages were \$196,256 annually, which translates to \$16,354.67 monthly.

⁴³ FOF NO. 14, CP 832.

⁴⁴ See Trial Exhibit 7 showing auto pay to Wells Fargo from joint account no. 205.

⁴⁵ 2 Aug RP 253; CP 345; CP 315-16;

⁴⁶ RB Pg. 10

⁴⁷ 3 Jan RP 466-69.

⁴⁸ 2 Jan RP 208

⁴⁹ CP 1553, ¶T.

Agreement].”⁵⁰ This is obviously not true. First, Teresa’s lawyer previously conceded “the parties...ignored the CR2A Agreement promptly after it was executed and cohabitated in the home on Fairview Road.”⁵¹ Second, Mark was awarded a \$109,519.46 “net” monetary judgment against Teresa for her “net” non-compliance with the CR2A Settlement Agreement.⁵² This is after the trial court deducted amounts for Mark’s non-compliance. That means Teresa did not comply with over \$200,000 in monetary obligations and Mark did not comply with substantial monetary obligations. Moreover, neither Teresa nor Mark complied with many non-monetary provisions such as finalizing the divorce; transferring the Fairview home; closing accounts; and executing deeds of trusts, security agreements and financing statements. These breaches cannot fairly be characterized as trivial and non-material, either individually or in the aggregate.

11. Teresa then discounts Mark’s and her noncompliance with the CR2A Agreement by stating that the provisions that were not complied with were minor and that she was not aware that they had been carried out.⁵³ These minor items she was not aware about include the fact the dissolution was not finalized, although that was her responsibility to carry out⁵⁴ and the Fairview home transfer and related deed of trust. Her lawyer said, “the parties...ignored the CR2A Agreement promptly after it was executed and cohabitated in the home on Fairview Road.”⁵⁵

Not only is her characterization that the non-complied with provisions were minor implausible, so is her assertion that she was unaware that they were not carried out. For

⁵⁰ RB Pg. 40

⁵¹ 2 Aug RP 295.

⁵² CP 1613-14.

⁵³ RB Pg. 11

⁵⁴ 2 Jan RP 386-87.

⁵⁵ 2 Aug RP 295.

example, how did she not know the divorce was not completed when she was supposed to provide the proof to finalize it? Moreover, how did she not know that the West Coast Bank Accounts were not closed and divided as set forth in the CR2A Agreement when she signed a directive to West Coast Bank not to close the accounts and had purposefully kept them open,⁵⁶ Finally, on July 13, 2009 Teresa closed the parties' other West Coast Bank joint bank account no. 206 and had the money transferred to an unknown account.⁵⁷ That was the same day she signed a declaration testifying under oath that Mark closed the account.⁵⁸

12. Teresa recites in lengthy detail her sexual relation with Peter Klein and others while her and Mark cohabitated after the CR2A Agreement to somehow show there was no reconciliation.⁵⁹ This was insubstantial since Teresa's and Mark's marital relationship was plagued with Teresa's sexual infidelity, even according to Teresa's own father, Alan Scott.⁶⁰ Moreover, there was no finding or evidence that Mark knew about Teresa's relationship with Peter Klein. Mr. Klein testified he was rarely at Teresa's home and never when Mark was there.⁶¹

B. Argument

1. The Trial Court Exceeded Its Jurisdiction When It Went Beyond Enforcing The Dissolution Decree And Final Child Support Order.

The trial court only had jurisdiction to enforce the Decree and Final Child Support Order in this case. Teresa previously argued this exact position and this Court issued a ruling embracing Teresa's position. In her memorandum seeking to strike the August

⁵⁶ 1 Jan RP 159; Trial Ex 42; 2 Jan RP 249-50, 397-98; 3 RP 406-07; and 3 RP 411-12.

⁵⁷ CP1529

⁵⁸ CP 74, ln 15-20.

⁵⁹ RB pps 12-13.

⁶⁰ 2 Jan RP 222.

⁶¹ 1 Jan RP 103 and 167.

2008 hearing dates, Teresa argued: “This case has been completed and is on appeal;” “The [trial] court has no other authority in this proceeding so long as the case remains on appeal;” and “RAP 7.2 restricts the [trial] court in doing anything other than enforcing the decision that it has already made.”⁶² This Court agreed with Teresa’s position and issued a ruling stating the trial court only had jurisdiction to enforce the Decree and if the trial court was going to modify the Decree, then it needed to seek this Court’s relinquishment of jurisdiction prior to entering any order modifying the Decree.⁶³ No motion or petition was ever made to this Court to relinquish jurisdiction. For the reasons expressed below, the trial court’s Second Amended Findings of Fact and Conclusions of Law⁶⁴ and Judgment⁶⁵ modified the original Dissolution Decree without this Court first relinquishing jurisdiction.

Prior to the trial court entering the Second Amended Findings of Fact and Conclusions of Law, Mark filed a brief expressly telling Teresa and the trial court that it would be necessary to get this Court’s approval prior to entering the Second Amended Findings of Fact and Conclusions of Law and related judgment.⁶⁶ Mark then filed a Notice of Appeal directed to the Second Amended Findings of Fact and Conclusions of Law and this Court issued a letter on December 4, 2008 further notifying the parties and the trial court that “counsel has not complied with the court’s ruling of August 18, 2008.”⁶⁷ Mark responded to this Court’s December 4, 2008 letter by letter dated December 19, 2008 stating his position that he did not prevail on the issues other than

⁶² See CP 1672, ln 10; and 1673, ln 13-14 and 17-19.,

⁶³ See August 18, 2008 ruling by Commissioner Schmidt.

⁶⁴ CP 1541-54.

⁶⁵ CP 1613-14

⁶⁶ CP 1110-1112.

⁶⁷ CP 1587.

enforcing the Dissolution Decree and was not the party who needed to seek this Court's relinquishment of jurisdiction.⁶⁸ Despite being copied on Mark's letter, Teresa did nothing. She did not respond to this Court's December 4, 2008 letter; she ignored Mark's brief to the trial court and proceeded to have the trial court enter findings and judgment in this matter on issues Mark believes go beyond enforcing the Decree.

2. The Trial Court Modified The Final Child Support Order When It Ordered Mark To Pay \$37,308.66 In Back Child Support In Nanny, Extra Help And Day Care Costs And \$19,598 In Medical Insurance Payments.

The trial court modified the Final Child Support Order when it ordered Mark to pay \$37,308.66 in back child support in nanny, extra help and day care costs and \$19,598 in medical insurance payments. The Final Child Support Order drafted by Teresa stated back support was "N/A" and stated there was no judgment "because no...back child support has been ordered."⁶⁹ Teresa did not select the language in the mandated child support form that would have shown back child support is not affected by the Final Child Support Order. Mark appealed the Final Child Support Order.⁷⁰ Undeniably, the trial court subsequently awarded back child support while the appeal was pending and modified the Final Child Support Order.

3. The Trial Court Modified The Property Distribution Provisions In The Dissolution Decree.

Here, it is clear the trial court's Second Amended Findings of Fact and Conclusions of Law⁷¹ and Judgment⁷² distributed property omitted from the Dissolution

⁶⁸ See Mark's December 19, 2008 letter to this Court.

⁶⁹ CP 861, ¶3.20 and CP. 855 ,Section I Judgment Summary.

⁷⁰ CP 883.

⁷¹ CP 1541-54.

⁷² CP 1613-14

Decree and otherwise improperly modified the property distribution in the Dissolution Decree.

a. The Trial Court Modified The Property Distribution Provisions In The Dissolution Decree When It Required Mark To Reimburse Teresa For Corporate Debt

The trial court modified the property distribution provisions in the Dissolution Decree when it required Mark to Reimburse Teresa for corporate debt.⁷³ The Dissolution Decree awarded Teresa the liabilities identified as her liabilities in the CR2A Agreement.⁷⁴ The CR2A Agreement clearly and unambiguously distributes all the corporate and business liabilities to Teresa. It states,

W is keeping all interest in the corporation (MAL, Inc, dba A+ Septic & Plumbing). She will hold [Mark] harmless, defend and indemnify her (sic) from all liabilities of the corporation (past, present & future).⁷⁵

To be sure, the “past, present and future” was crossed out and then subsequently notated to be “back in.”⁷⁶ Despite this clear award in the Decree to Teresa of all past, present and future corporate liabilities, the trial court, after the Decree was entered, then required Mark to reimburse Teresa for corporate credit card charges and charges to the business account. This contradicts and modifies the liability distribution in the CR2A Agreement and the Decree.

b. The Trial Court Modified The Property Distribution Provisions In The Dissolution Decree When It Awarded Teresa The Coffee Stand Lease.

There is no dispute: (1) The Dissolution Decree terminated the parties’ community and that community property that was not distributed in the Decree was then

⁷³ Findings 5 and 12 CP 1623-24.

⁷⁴ Decree, ¶3.4, CP 852

⁷⁵ CP 29

⁷⁶ *Id.*

owned by the parties as tenants in common.⁷⁷ (2) The coffee stand lease was in existence when the Decree was entered.⁷⁸ (3) The coffee stand was community property because it was acquired during marriage and while the parties lived together.⁷⁹ The coffee stand lease, therefore, was owned by the parties as tenants in common once the Decree was signed because it was community property omitted from the Decree.

To bring this point into sharp focus, the coffee stand lease was for 5 years and Teresa did not even have the right to occupy the premises for more than one year. The coffee stand lease was for 5 years.⁸⁰ Pursuant to the CR2A Agreement Teresa's business only had a right to occupy the premises for 1 year.⁸¹ Clearly, Teresa had no right under the CR2A Agreement to collect coffee stand rents for 5 years.

c. The Trial Court Modified The Property Distribution Provisions In The Dissolution Decree When It Retroactively Awarded Property Not Mentioned In The Decree Or CR2A Agreement.

The trial court also modified the property distribution provisions in the Decree when it retroactively awarded Teresa property that did not even exist when the Decree was entered. In the Second Amended Findings of Fact and Conclusions of Law and the Judgment, the trial court awarded Teresa insurance proceeds for a boat lift.⁸² Neither the Decree nor the CR2A Agreement mentions anything about a boat lift or insurance proceeds. Since the Dissolution Decree and CR2A Agreement are both silent about this

⁷⁷ *Molvik v. Molvik*, 31 Wn. App. 133, 135, 639 P.2d 238 (1982); *See, also*, 19 WAPRAC §13.11.

⁷⁸ FOF No. 17, CP 1625 (“several months after the CR2A was signed the coffee stand was up and running and has operated ever since.”)

⁷⁹ The CR2A was signed on September 21, 2004. FOF No.2, CP 830. The parties were not divorced until April 29, 2008, CP 850-54. The parties lived together, and not separate and apart, during that 33 month period after the CR2A Agreement was signed and the parties' divorce. FOF No. 4, CP 830. This is the time the coffee stand lease came into existence. FOF No. 17, CP 1625

⁸⁰ 3 Jan RP 446-47

⁸¹ Trial Ex. A., Pg. 7, ¶8(d) (“and 1 year lease market rate”)

⁸² *See* Finding 4. CP 1546-47.

property, the trial court necessarily modified the Decree when it adjusted the existing property distribution to account for this non-existent property.

d. The Trial Court Modified The Property Distribution Provisions In The Dissolution Decree When It Retroactively Awarded Debts Not Mentioned In The Decree Or CR2A Agreement.

The trial court modified the property distribution provisions in the Decree when it retroactively awarded debts not mentioned in the Decree or CR2A Agreement. Mark argues the trial court modified the property distribution provisions in the Decree when it subsequently offset the amounts he was owed pursuant to the Decree by various expenses Teresa paid prior to the Decree being entered. The trial court found the following obligations to have been paid by Teresa prior to the Decree being entered: insurance payments (\$19,598)⁸³; tax preparation charges (\$2,786);⁸⁴ utility charges (\$2,866.89),⁸⁵ taxes (\$12,337);⁸⁶ and insurance payments (\$7,646).⁸⁷ Teresa's Response Brief does not contend the Decree or incorporated CR2A Agreement mentioned these obligations. By entering the Second Amended Findings of Fact and Conclusions of Law and Judgment, the trial court modified the amounts Mark was entitled to pursuant to the Decree when it required him to reimburse Teresa for these amounts from amounts he was entitled to pursuant to the Decree.

Even if these debts were not paid prior to the Decree being entered, the trial court still modified the Decree because they would have become joint obligations when the Decree was entered. Similar to community property that is omitted from a dissolution

⁸³ *See* Finding 3(g), CP 1622 ("These amounts were fully paid prior to the Decree being entered.")

⁸⁴ *See* Finding 9, CP 1547 ("Petitioner fully paid these amounts after the CR2A was signed and before the Decree was entered.")

⁸⁵ *See* Finding 10, CP 1548 ("These charges... were fully paid prior to the Decree being entered.")

⁸⁶ *See* Finding 2(j) CP 1545 ("These property tax payments... were fully paid by Petitioner at the time the Decree was entered.")

⁸⁷ *See* Finding 2(i) CP 1545 ("These insurance payments... were fully paid by Petitioner at the time the Decree was entered.")

decree, community debts that are omitted from a dissolution decree become the parties' joint obligations.⁸⁸ Here, the Dissolution Decree and incorporated CR2A Agreement were silent as to certain community obligations that the trial court subsequently ordered Mark to reimburse Teresa such as, insurance payments (\$19,598)⁸⁹; tax preparation charges (\$2,786);⁹⁰ utility charges (\$2,866.89),⁹¹ taxes (\$12,337);⁹² and insurance payments (\$7,646).⁹³ To the extent these obligations existed at the time the Decree was entered, they became the parties' joint obligations and the trial court would have modified the property distribution provisions in the Decree when it required Mark to solely pay them.

4. The Trial Court Merely Enforced The Decree When It Adjudicated The Amounts Mark Was Owed Pursuant To The Decree.

On the other hand, the trial court was enforcing the Decree when it enforced or determined amounts Mark was owed for property and debts that were specifically allocated and awarded to him in the Decree. When awarding property to Mark, the Dissolution Decree specifically awarded Mark the Edward Jones, Atlas, and WNC investment accounts and all interest and dividends on these accounts and it also incorporated the parties' CR2A Agreement.⁹⁴ The CR 2A specifically allocated the West Coast Bank Accounts⁹⁵ and the \$2 million promissory note that Teresa allegedly paid

⁸⁸ *Hanson v. Hanson*, 55 Wn.2d 884, 887, 350 P.2d 859 (1960)

⁸⁹ *See* Finding 3(g), CP 1622 (“These amounts were fully paid prior to the Decree being entered.”)

⁹⁰ *See* Finding 9, CP 1547 (“Petitioner fully paid these amounts after the CR2A was signed and before the Decree was entered.”)

⁹¹ *See* Finding 10, CP 1548 (“These charges...were fully paid prior to the Decree being entered.”)

⁹² *See* Finding 2(j) CP 1545 (“These property tax payments...were fully paid by Petitioner at the time the Decree was entered.”)

⁹³ *See* Finding 2(i) CP 1545 (“These insurance payments...were fully paid by Petitioner at the time the Decree was entered.”) (“

⁹⁴ CP 851, ¶3.2

⁹⁵ Trial Ex. A., Pg. 5, ¶6.

Mark the \$16,837.65 payments upon.⁹⁶ Since the West Coast Bank accounts, the interest and dividends on the various investment accounts and the promissory note were specifically awarded to Mark in the Decree, the trial court merely enforced the Decree when it awarded Mark the amounts he was owed for the West Coast Bank accounts⁹⁷ the dividends and interest related to the parties' various investment accounts;⁹⁸ and the monthly payments Teresa was required to pay Mark pursuant to the CR2A and Decree;⁹⁹

5. The Trial Court Exceeded Its Authority Under RCW 26.09.170(1) When It Modified The Property Distribution Provisions In A Final Dissolution Decree.

Not only did the trial court not have authority to modify the dissolution decree because it was under review by this Court, the trial court was statutorily prohibited from modifying the property distribution provisions in the Dissolution Decree. RCW 26.09.170(1) prohibits trial courts from modifying property distributions in dissolution decrees

6. The Trial Court Erred When It Modified The Final Dissolution Decree In Post-Judgment Proceedings.

Trial courts should not redistribute property that was overlooked or omitted in the original Dissolution Decree through post-decree proceedings in family court. If community property is omitted from a dissolution decree, then the proper remedy is to either vacate the decree under CR 60 or file an independent action to adjudicate the parties' respective rights to the property.¹⁰⁰ It is improper to use post-decree proceedings

⁹⁶ Trial Ex. A., Attachment A, ¶c.

⁹⁷ See Finding No 13 and 14, CP 1548

⁹⁸ See Finding No 16, CP 1549.

⁹⁹ See Finding No 18, CP 1550.

¹⁰⁰ *Molvik*, 31 Wn. App. at 135-36; *See, also*, 20 WAPRAC §32.29.

in family court to re-distribute omitted property.¹⁰¹ This rule avoids conflict with the prohibition from revising property awards in dissolution decrees set forth in RCW 26.09.170.¹⁰² Moreover, the standard for determining the parties' interests post-divorce in omitted property is different than the equitable standards in divorce proceedings.¹⁰³

7. The Dissolution Decree Was A Final Decree That Determined The Parties' Property Rights .

Teresa's argument, and the trial court's oral pronouncement in August 2008, that this was a bifurcated proceeding that divorced the parties and then determined their property rights at a subsequent proceeding is contrary to Washington law. "A decree of divorce is the final adjudication of the rights and obligations of the parties, one to the other. It determines all rights and obligations concerning matters in existence during coverture."¹⁰⁴ In fact, it is the trial court's obligation to adjudicate the parties' rights in all their property when entering a dissolution decree.¹⁰⁵ A trial court cannot reserve property and debt distribution issues for later disposition.¹⁰⁶

Here, the Decree is a final judgment. It has judgment summaries and there is no reservation of jurisdiction in the Decree¹⁰⁷ or in the accompanying Findings of Fact and Conclusions of Law.¹⁰⁸ Moreover, the accompanying documents referenced in the Findings are similarly final, such as the *Final* Order of Child Support¹⁰⁹ and the *Final*

¹⁰¹ *Molvik*, 31 Wn. App. at 135-36 (holding there was no probable error in the family court dismissing a motion for a separate proceeding to determine rights in omitted property because the proper procedure is either a motion to vacate under CR 60 or a separate proceeding)

¹⁰² *See* 20 WAPRAC §32.40

¹⁰³ *Ambrose v. Moore*, 46 Wash. 463, 90 P. 588 (1907); and 20 WAPRAC §32.29.

¹⁰⁴ *Furgason v. Furgason*, 1 Wn. App. 859, 860, 465 P.2d 187 (1970)

¹⁰⁵ RCW 26.09.050; RCW 26.09.080; and *Little v. Little*, 96 Wn.2d 183, 194-95, 634 P.2d 498 (1981).

¹⁰⁶ *Little*, 96 Wn.2d at 194-95.

¹⁰⁷ CP 850-54.

¹⁰⁸ CP 878-82.

¹⁰⁹ CP 855-62

Parenting Plan.¹¹⁰ To be sure, the trial court's own minutes reflect Teresa was presenting final documents when she presented the Decree, Final Child Support Order and Final Parenting Plan.¹¹¹

Moreover, a "judgment" is the *final* determination of the rights of the parties in the action and includes any *decree* and order from which an appeal lies."¹¹² This Court accepted review of the Decree as a matter of right without objection from Teresa.

Teresa's argument on appeal is inconsistent with the position she previously argued to the trial court and inconsistent with this Court's prior rulings. In her memorandum she filed objecting to the August 2008 subsequent hearings, she argued: "This case has been completed and is on appeal;" "The [trial] court has no other authority in this proceeding so long as the case remains on appeal;" and "RAP 7.2 restricts the [trial] court in doing anything other than enforcing the decision that it has already made."¹¹³ This Court agreed with Teresa's position and issued a ruling stating the trial court only had jurisdiction to enforce the Decree and if the trial court was going to modify the Decree, then it needed to seek this Court to relinquish jurisdiction prior to entering any order modifying the Decree.¹¹⁴ To now argue on appeal that the Decree was not really a final order is simply not made in good faith.

8. Mark Preserved, And Did Not Waive, His Right To Appeal The Trial Court's Actions.

Mark not only did not waive, but fully preserved, his rights to argue these issues on appeal. First, Mark specifically objected to the trial court entering final orders in this

¹¹⁰ CP 868-77.

¹¹¹ CP 827.

¹¹² CR 54(a)(1).

¹¹³ *See* CP 1696, ln 10; and 1697, ln 13-14 and 17-19.,

¹¹⁴ *See* August 18, 2008 ruling by Commissioner Schmidt.

case until the subsequent August 2008 evidentiary hearing took place.¹¹⁵ Mark had no greater responsibility than notifying Teresa and the trial court about his concern and legal position. Armed with this information, Teresa's counsel knowingly chose to lead the trial court into error. As such, Mark fully preserved his arguments to the original Findings, Decree and Child Support Order on appeal.

Moreover, Mark raised the impropriety in the trial court amending the Decree and Final Child Support Order through the Second Amended Findings of Fact and Conclusions of Law and Judgment, including the need to get this Court to relinquish jurisdiction, prior to the trial court entering The Second Amended Findings of Fact and Conclusions of Law.¹¹⁶ As such, he preserved his appellate arguments relating to these Findings and Judgment.

9. The Trial Court Erred When It Awarded Mark Liabilities And Debts And Awarded Teresa Property That Did Not Exist When The Decree Was Entered.

The trial court erred when it retroactively awarded the parties' debts and assets that were not in existence when the Dissolution Decree was entered. Teresa does not provide authority contravening *In re Marriage of White* that states it is improper for a trial court to award assets and debts that are not in existence at the time the dissolution decree is entered.¹¹⁷ The trial court's findings show it retroactively awarded Mark certain debts and liabilities that were in the Second Amended Findings of Fact and Conclusions of Law, but were not in existence at the time the Decree was entered. Specifically, the:

¹¹⁵ CP 825-26.

¹¹⁶ *See* CP 1107-1112.

¹¹⁷ 105 Wn. App. 545,550-52, 20 P.3d 481 (2001)

2004 tax preparation fees;¹¹⁸ utility bills;¹¹⁹ taxes;¹²⁰ insurance payments;¹²¹ corporate credit card charges;¹²² and charges to a corporate account¹²³ were debts and liabilities that were not in existence when the Decree was entered. They also show that the trial court awarded Teresa boat lift insurance proceeds that were not in existence when the Decree was entered.¹²⁴

10. The Trial Court Erred When It Characterized The \$12,337 In Taxes Teresa Paid As Real Property Taxes When They Were, In Fact, Personal Property Taxes.

Teresa does not contest the taxes she was awarded in the Second Amended Findings of Fact and Conclusions of Law were, in fact, personal property taxes.¹²⁵ Instead, she argues they could have been personal property taxes assessed on permanent fixtures affixed to the realty.¹²⁶ She cites no authority to support her argument. That alone should be sufficient for this Court to not consider her argument.¹²⁷ The controlling authority also defeats her argument. RCW 84.04.090 makes clear permanent fixtures affixed to realty are assessed in real property taxes and not personal property taxes. Teresa's argument has no merit.

She then argues the trial court's decision provides Mark an escape if the trial judge was wrong. While there is an escape feature, that does not mean the trial court's

¹¹⁸ See Finding 9, CP 1547 ("Petitioner fully paid these amounts after the CR2A was signed and before the Decree was entered.")

¹¹⁹ See Finding 10, CP 1548 ("These charges...were fully paid prior to the Decree being entered.")

¹²⁰ See Finding 2(j) CP 1545 ("These property tax payments...were fully paid by Petitioner at the time the Decree was entered.")

¹²¹ See Finding 2(i) CP 1545 ("These insurance payments...were fully paid by Petitioner at the time the Decree was entered.") ("

¹²² See Finding 5, CP 1547 ("These charges...were fully paid prior to the Decree being entered.")

¹²³ See Finding 12, CP 1548 ("These charges...were fully paid prior to the Decree being entered.")

¹²⁴ See Finding 4, CP 1546-47 ("There was no evidence that these insurance proceeds were in existence when the Decree was entered.")

¹²⁵ Conclusion E, CP 1627.

¹²⁶ RB Pg. 64.

¹²⁷ RAP 10.3(6).

finding the taxes were real property taxes was supported by the evidence and should not be reversed on appeal. There is no indication that this is Mark's exclusive remedy or that it somehow prevents him from appealing this issue. Again, her argument is without citation to authority.

11. The Trial Court Abused Its Discretion When It Enforced The Parties' CR2A Agreement.

The trial court abused its discretion when it enforced the CR2A Agreement. A trial court abuses its discretion when a decision is arbitrary, manifestly unreasonable, or based upon untenable grounds.¹²⁸

a. The Trial Court Necessarily Abused Its Discretion In Enforcing The CR2A Agreement Because It Did Not Properly Understand The Law That Distinguishes Between A Separation Agreement And A Property Settlement Agreement.

The trial court necessarily abused its discretion in enforcing the CR2A Agreement because it did not properly understand the law that distinguishes between a separation contract and a property settlement agreement. A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law.¹²⁹ As conceded by Teresa in her Response Brief, there is a difference in the law between abrogating a separation contract and abrogating property settlement agreement.¹³⁰ She acknowledges that separation contracts deal with ongoing and future support and that consideration for separation contracts is continued separation.¹³¹ When dealing with a separation contract, it is "annulled, avoided and rescinded, at least as to the future, by the act of the spouses in subsequently resuming *conjugal cohabitation*."¹³² (Emphasis added). This rule makes

¹²⁸ *City of Bellingham v. Chin*, 98 Wn. App. 60, 66, 988 P.2d 479 (1999)

¹²⁹ *Bellingham*, 98 Wn. App. at 66.

¹³⁰ RB pps 31-32, *citing* .

¹³¹ RB p

¹³² *Campbell v. Campbell*, 234 N.C. 188, 190, 66 S.E.2d 672 (1951).

sense since the parties' living together destroys the consideration for the separation contract.¹³³ Here, the trial court specifically found the parties had resumed conjugal cohabitation. It found the parties resumed sexual relations immediately after they signed the CR2A Agreement and lived together for 33 months sharing the same bed in the same home.¹³⁴ This is conjugal cohabitation.

Teresa further concedes, as she must, that the CR2A Agreement in this case is a hybrid agreement that contains both separation contract provisions and property settlement provisions.¹³⁵ Here, the CR2A Agreement provided for ongoing support for the parties' minor children.¹³⁶ This provision was specifically enforced by the trial court when it entered the Second Amended Findings of Fact and Conclusions of Law and Judgment.¹³⁷ It was error to enforce these provisions because the parties resided together and jointly paid the children's medical, insurance and day care expenses with community property - money they earned while married and cohabitating.

Because the trial court did not distinguish between the separation contract provisions in the CR2A Agreement and the property division provisions in the CR2A Agreement, reversal is required. At a minimum, the separation contract provisions in the CR2A Agreement were abrogated by conjugal cohabitation. Washington's *Burch*¹³⁸ case, relied on by Teresa, was a property settlement agreement case.

¹³³ "Rescission usually lies where the partial failure of consideration is substantial." *Capital Sav. & Loan Ass'n v. Convey*, 175 Wash 224, 227, 27 P.3d 136 (1933).

¹³⁴ FOF 3 and 4, CP 830.

¹³⁵ RP pps. 32 -33.

¹³⁶ Trial Ex. A., Pg. 1, § II.

¹³⁷ Conclusion of Law G, CP 1628.

¹³⁸ 37 Wn.2d 185 (1950)

12. Even The Property Settlement Provisions In The CR2A Agreement Were Abrogated Because There Is Insufficient Evidence To Conclude The Parties Did Not Reconcile And Did Not Intend To Abrogate The CR2A Agreement.

Even the property settlement provisions in the CR2A Agreement should be abrogated because there is insufficient evidence to conclude the parties did not reconcile and did not intend to abrogate the CR2A Agreement. Here, the trial court specifically found the parties resumed sexual relations and shared the same bed with their children in the same home for 33 months after they signed the CR2A Agreement.¹³⁹ The trial court went further and found that the parties were wealthy and that “it would have been pretty simple in their big house, with their big bank accounts, to set up a second bedroom and to share the nights separately with the children in the family bed.”¹⁴⁰ It was similarly undisputed the parties did not execute any documents to complete the transfers under the CR2A Agreement and Teresa did not finalize the divorce as she was required to do. Despite these findings and uncontroverted evidence, the trial court concluded that the parties did not intend to reconcile or abrogate their CR2A Agreement.¹⁴¹ This conclusion of law, which is reviewed *de novo*,¹⁴² is not supported by the findings of fact. If Washington allows reconciliation to abrogate property settlement agreements, then what case can be more compelling to abrogate an agreement than this case where these facts are present? To not allow abrogation in this instance effectively prohibits reconciliation in any instance.

¹³⁹ FOF Nos. 3 and 4, CP 830.

¹⁴⁰ FOF No. 5, CP 830.

¹⁴¹ Conclusion of Law 7, CP 833.

¹⁴² *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

13. Teresa is not Entitled to Attorney Fees.

Teresa's tax returns showed \$285,323 in adjusted gross income for 2004; \$585,405 in gross income for 2005; and \$704,222 in adjusted gross income for 2006. She was awarded, by her own account, a "successful business"¹⁴³ As such, she does not need attorney fees on appeal and has not demonstrated Mark has a superior financial ability to pay fees. Mark will submit his financial declaration prior to oral argument.

Teresa must be basing her fee request primarily on the merit in Mark's appeal. Mark's appeal is not meritless. Most notably, his arguments regarding the trial court's jurisdiction to act while the matter was appealed and the statutory prohibitions from modifying property distributions in final decrees are compelling.

Respectfully submitted this 20th day of November, 2009.

OLYMPIC LAW GROUP, PLLP

Dennis J. McGlothlin, WSBA No. 28177
Serin Ngai, WSBA No. 38350
Attorneys for Mark LaVergne, Appellant

¹⁴³ RB Pg. 1.

FILED
COURT OF APPEALS
DIVISION II

09 NOV 25 PM 12:57

STATE OF WASHINGTON
BY _____
DEPUTY

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

MARK A. LaVERGNE,

Appellant,

and

TERESA R. GRIMSLEY-
LaVERGNE,

Respondent.

No. 37731-4

Lower Court Case
No. 03-3-01421-5

DECLARATION OF
SERVICE

I, RYAN M. BON, hereby declare as follows:

1. I am employed by the law firm of Olympic Law Group, P.L.L.P., a citizen of the State of Washington, over the age of 18 years, not a party to this action, and competent to testify herein.
2. On November 20, 2009, I caused the following documents:
 - A. Appellant's Reply Brief; and
 - B. Declaration of Service;

to be served on the attorneys at the following addresses:

Robert Martin Morgan Hill
Morgan Hill, PC
2102 Carriage Dr. SW
Building C
Olympia, WA 98502-5700

- VIA FEDERAL- EXPRESS
- VIA FACSIMILE
- VIA EMAIL
- VIA OVERNIGHT
DELIVERY

I certify under penalty of perjury under the laws of the State
of Washington, that the foregoing is true and correct.



Ryan M. Bon/
Legal Assistant