

No. 42629-3-II

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

IN RE THE MARRIAGE OF

JAMES BRIAN PARKER,

Appellant.

v.

ELIZABETH MARIE PARKER,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
2012 JUL 12 AM 11:32
STATE OF WASHINGTON
BY DEPUTY

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE ISSUES

1. Did the husband fail to comply with the terms of the Amended Decree of Dissolution of Marriage by failing to remove the wife from the home mortgage for two and one-half years?

2. Was the wife's obligation to quit claim her interest in the family home to the husband a condition concurrent with the husband's obligation to remove her from the mortgage?

II. RESTATEMENT OF THE CASE

James and Elizabeth Parker's marriage was dissolved on February 1, 2007.¹ CP Supp. Appendix A. In relevant part, the Decree of Dissolution Marriage (hereinafter referred to as Decree) provided the following:

1. The family home was awarded to the parties as tenants in common. It was on the market and was to remain on the market until sold. The husband was required to pay the mortgage, taxes and insurance until sale and the net proceeds were to be divided sixty six percent to the wife and thirty four percent to the wife.
2. The husband was required to pay the wife child support and maintenance.

CP Supp. Appendix A.

¹ Hereafter the parties will be referred to as "husband" and "wife."

Subsequent to the entry of the Decree, the husband became delinquent in his child support and maintenance obligations in the total amount of \$15,395.00. This ultimately resulted in three separate judgments against him for that amount and for \$3,000.00 in attorney fees. The total amount due was \$17,395.00. CP Supp., Appendix A.

In December of 2008, the parties agreed to amend the Decree to transfer title of the home to the husband by quit claim deed and conditionally forgive the husband's obligation to pay the judgments for delinquent support and attorney fees. CP Supp. Appendix A. The condition for forgiving the judgments was the requirement that the husband comply with all provisions of the Amended Decree of Dissolution of Marriage entered on December 8, 2008 (hereafter referred to as Amended Decree) "forthwith," including removing the wife from the mortgage on the family home. CP, Supp., Appendix A. The husband was also required to transfer ownership of his 401(k) account to the wife.

The Amended Decree did not prescribe a time for the wife to sign a quit claim deed but it did require the husband to remove her from the mortgage "forthwith."

Shortly after execution of the Amended Degree, the husband demanded that the wife sign the quit claim deed so he could refinance and remove her from the mortgage. At this time, however, the husband was also attempting to obtain a second mortgage (even before removing the wife from the first mortgage) through a line of credit on the home through Bank of America, separate from the refinance. RP at 79-81; CP, Exhibit 3; CP, Exhibit 8; CP, Exhibit 9; CP, Exhibit 10; CP, Exhibit 16 at 7; CP, Exhibit 16 at 10. Had he been successful in obtaining the line of credit, the wife would not only have still been on the first mortgage, but the house would have been further encumbered by a line of credit in the range of \$125,000 to \$200,000, the exact opposite of what the wife was attempting to accomplish.² RP at 80; CP, Exhibit 16 at 8.

The husband did not relieve the wife from the mortgage until June, 2011, two and one-half years after he agreed to “forthwith” remove her from the mortgage. On the other hand, the wife executed a quit claim deed on January 9, 2009. CP, Exhibit 4. She

² Signing a quit claim deed in and of itself would not have relieved the wife of her mortgage obligations. It would have, however, relinquished her ownership interest putting her in an obvious precarious financial position.

delivered it to the husband in April of 2009, albeit it was an unintentionally defective deed that was corrected at the time it needed to be effective in June of 2011, when the husband finally made arrangements to remove her from the mortgage. CP, Exhibit 4. The wife never received any information that a loan was ready to close, necessitating her delivery of the deed. RP at 108-109. She was prepared to deliver a deed when closing was ready. RP at 108. The only reason she did not execute the quit claim deed earlier is because she did not want to be obligated for the mortgage on a home she did not own, particularly if it became further encumbered. RP at 109; CP, Exhibit 13. Even so, she delivered the deed more than two years before she was removed from the mortgage as a sign of good faith. CP, Exhibit 16 at 8; CP, Exhibit 16 at 12.

Although the husband had been demanding execution of the quit claim deed shortly after the entry of the Amended Decree, he did not even record it until July of 2009. This means that the wife complied with her end of the Amended Decree's requirements two and a half years before he did.

The husband was attempting to convince the mortgage holder to remove the wife from the mortgage by formally releasing

her from the obligation and allowing him to solely assume the mortgage without a refinance. The same day she was asked to contact the company to attempt to arrange an assumption the wife did so. RP at 109; CP, Exhibit 16 at 6-7. The company never responded to her and the assumption did not take place. Even at that stage, he only told the wife that the quit claim deed “would be helpful” to the mortgage holder. CP, Exhibit 16 at 5. This husband implied that he had been told at one time that the deed had to be executed simultaneous with the removal of the wife from the mortgage. RP at 64. The husband claimed that an escrow would not be needed if the mortgage holder had just released her from the mortgage. It would be very simple. RP at 46. That never occurred because the mortgage holder did not respond to her inquiry about doing so and the husband had no communication from the mortgage holder that they would release the wife. CP, Exhibit 16 at 6-7; RP at 69; RP at 75.

The husband was never approved for a refinance loan on the home up to the time the home sold in June, 2011. The loan he attempted to qualify for in January of 2009 was never approved because it was never submitted to a title company, an appraisal was never ordered, and it was not known how long the appraisal

would have taken. RP at 21-22. The broker did not even know if he would qualify if the house appraised at \$1,200,000 and the husband was actually trying to get additional cash out of the loan. RP at 29. The wife was never told to deliver a quit claim deed to a title company because an escrow was never established. RP at 21. Even under questioning by the trial court, the husband admitted that no escrow had been established by January 11, 2009 even though he claimed he needed to close the loan by January 15, 2009. RP at 59-61.

At all times the wife stood ready to deliver the quit claim deed once it was certain that it would result in her removal from the mortgage. CP, Exhibit 16 at 4.

Procedurally this appeal results from a Motion and Declaration Authorizing Release of Funds filed by the husband on June 16, 2011(CP Supp. 1), closely followed by a Motion for Entry of Judgment for Back Support and Attorney Fees and Declaration of Petitioner in Support of Motion and in Reply to Respondent's Motion filed on June 21, 2011. Resp. Supp. CP 2. The court conducted motion hearings on June 24, 2011 and July 15, 2011 on the two motions and determined a testimonial trial was necessary. The trial occurred on August 8, 2012.

III. LAW AND ARGUMENT

A. Standard of Review

Dissolution of marriage orders are reviewed for manifest abuse of discretion and the party challenging the trial court's decision has the burden to prove such manifest abuse. *Marriage of Wilson*, 165 Wn. App. 333, 339-40, P. 3d. 485 (2011){ TA \l "Marriage of Wilson, 165 Wn. App. 333, 339-40, P. 3d. 485 (2011)" \s "Marriage of Wilson, 165 Wn. App. 333, 339-40, P. 3d. 485 (2011)" \c 1 }. The challenging party can only succeed if it proves that the decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *Marriage of Wilson*, 165 Wn. App. at 339-40, 267 P. 3rd 485 (2011); *Marriage of Littlefield*, 33, Wn. 2d 39, 46-47, 940 P. 2d 1362 (1997){ TA \l "Marriage of Littlefield, 33, Wn. 2d 39, 46-47, 940 P. 2d 1362 (1997)" \s "Marriage of Littlefield" \c 1 }.

Manifest abuse of discretion has been more particularly described in *Marriage of Landry*, 103 Wn. 2d 807 at 809, 669 P. 2d 214 (1985){ TA \l "Marriage of Landry, 103 Wn. 2d 807 at 809" \s "Marriage of Landry, 103 Wn. 2d 807 at 809" \c 1 }:

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. 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.

B. Summary of Argument

The trial court was asked to determine whether it should reinstate judgments for back support and attorney fees based on the husband's lack of compliance with an Amended Decree of Dissolution of Marriage by failing to remove the wife from the home mortgage for two and one-half years after being required to do so. Because the husband failed to remove the wife from the home mortgage "forthwith," he plainly violated the terms of the Amended Decree. The trial court properly exercised its discretion to enforce the Amended Decree and reinstate the judgments.

C. Argument

1. Husband Did Not Comply With the Trial Court's Order to Remove Wife from the Mortgage "Forthwith"

The husband first contends that taking more than two and a half years to remove the wife from the mortgage was acceptable under the terms of the Amended Decree. Br. of Appellant at 8.

Interestingly, the husband claims that “forthwith” connotes a reasonable period of time and that he complied with the terms of the Amended Decree by removing the wife from the mortgage two and one-half years after he was ordered to do so. Yet, in his trial testimony, when he was asked when he thought the wife should have executed the quit claim deed, he said “forthwith.” RP at 95. That testimony, combined with the exhibits he produced evidencing his demands for immediate execution of the quit claim deed make it clear that **he defines forthwith as immediately.** CP, Exhibit 7 (where he asked on December 16, eight days after the Amended Decree was filed if the quit claim deed had been filed); CP, Exhibit 16 page 3 where, on January 5, 2009 he asked about the quit claim deed); CP, Exhibit 8 (where he said on January 11, 2009 he expected to have immediately received the quit claim deed); CP, Exhibit 9 (where he demanded a quit claim deed on January 19, 2009); CP, Exhibit 10 (where he inquired about the quit claim deed on January 21, 2009).

So, his argument that he expected the quit claim from the wife “forthwith” coupled with his immediate post Amended Decree demands for the deed runs counter to his argument that “forthwith” does not mean immediate. If it means immediate for the wife then it

certainly must mean immediate for him. And, on January 9, 2009 he told the wife that the mortgage holder said the quit claim deed "would be helpful" (not required) in the attempt to have the mortgage assumed. CP, Exhibit 16 at 5.

If the inquiry need go further than the husband's own definition of "forthwith," then Webster's Ninth New Collegiate Dictionary agrees with the husband that "forthwith means "immediate." Additionally, Black's Law Dictionary, Revised Fourth Edition defines "forthwith" as:

Immediately; without delay, directly, hence within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch.....
Within such time as to permit that which is to be done, to be done practically and according to the practical and ordinary course of things to be performed or accomplished.....(citations omitted).

Admittedly, and as a practical matter, the term "forthwith" must be put into the context of the particular facts. The husband cites *State ex rel Department of Finance Budget and Business v. Thurston County*, 6 Wn.2d 633, 108 P.2d 828 (1940){ TA \l "State ex rel Department of Finance Budget and Business v. Thurston County, 6 Wn.2d 633, 108 P.2d 828 (1940)" \s "State ex rel Department of Finance Budget and Business v. Thurston County, 6 Wn.2d 633, 108 P.2d 828 (1940)" \c 1 }. However that case simply

involved whether a mental health facility forthwith examined a mental patient soon enough after the prisoner arrived at the facility as required by statute, which used the term “forthwith.” The court held that even though there was some delay in the examination, the patient was also examined by another professional as soon as he arrived so the intent of the statute was met. There are two other cases cited in the quote from the case in the husband’s brief, but both of those cases deal with the timeliness for filing affidavits or prejudice against a judge. They are simply not relevant here.

However, assuming the court must exercise some discretion to determine what “forthwith” means in this case as it relates to the husband’s duty to remove the wife from the mortgage, certainly two and one half years must be considered too long based on the following facts, which support the trial court’s decision:

1. The husband was never approved for the loan that he and his mortgage broker testified he was trying to get immediately after entry of the Amended Decree (negating the requirement that the wife sign the quit claim deed at that time). RP at 21-22. He had gross income of \$12,500 pursuant to the Findings of Fact and Conclusions of Law entered in connection with the Amended Degree. Resp. Supp CP 1. The mortgage broker testified the

husband would not qualify for a loan even if his income were \$15,000 per month because he had purchased another home prior to taking over the marital home pursuant to the Amended Decree. RP at 24-25. The mortgage broker did not even know if he would qualify if the house appraised at 1,200,000.

2. There is no evidence the husband took any other steps to remove the wife from the mortgage after his initial attempt to refinance the house and get a line of credit in late 2008 and early 2009, until he sold the home and paid off the mortgage in June, 2011, even though the wife executed the quit claim deed on January 9, 2009 and delivered it in April, 2009, but the husband did not record it until July of 2009. CP, Exhibit 4; CP, Exhibit 16 at 12.
3. His intent to comply with the Amended Decree and remove the wife from the mortgage was not genuine, given that after demanding the quit claim deed from the wife, he was attempting to obtain a line of credit which would further encumber the property, making the wife's presence on the first mortgage even riskier and precisely what she did not want. RP at 79-81; CP, Exhibits 5, 13 and 16 at 8.

In light of all of this in the record, the husband has failed to satisfactorily demonstrate that the trial court abused its discretion.

2. If Any Conditions Applied to the Husband's Duty to Remove Wife from the Mortgage and the Wife's Duty to Quit Claim the House to Husband, the Conditions Are Concurrent

a. Contract Law Principles Support The Proposition That These Were Concurrent Conditions

The Amended Decree does not prescribe a period of time in which the wife must quit claim the house. It simply says that the wife will quit claim the house to the husband. It does, however, direct the husband to remove the wife from the mortgage "forthwith." Nevertheless, as noted by the trial court in the course of the trial, as a practical matter those acts needed to occur simultaneously in order for each party to be assured that the other would perform, as is typical in any real estate transaction. Finding of Fact 3; RP at 3; RP at 60-62; RP at 65; RP at 124-129. The court even directed the course of the testimony throughout the proceeding based on its belief that common sense and experience dictates the acts be simultaneous. *Id.*

The husband claims that there is no evidence that simultaneous performance was intended. However, the loan broker testified that the closing would occur at a title company where all

documents would be prepared, delivered to the title company and the parties would go to the title company to sign. RP at 22 (confirming the standard manner in which a real estate transaction is closed and supporting the court's findings in this regard).

Concurrent conditions are conditions that require both parties to perform at the same time. As noted in Washington Practice, Contract Law and Performance, vol. 25, section 8.4{ TA \l "Washington Practice, Contract Law and Performance, vol. 25, section 8.4" \s "Washington Practice, Contract Law and Performance, vol. 25, section 8.4" \c 3 }:

Where the promised acts are capable of simultaneous performance, each duty of performance is constructively or expressly conditioned upon conditional tender of the other unless otherwise agree (citing Calamari & Perillo, Contracts, section 11-17, at 429 (5th Ed. 2003). These types of conditions principally occur in contracts for the sale of goods, (payment and delivery and contracts for the conveyance of land (citing Calamari & Perillo, Contracts, section 11-6, at 416 (5th Ed. 2003).

Assuming for the sake of argument that this is a case where the parties have not precisely specified who will perform first, concurrent conditions are typically imposed in the following circumstances, according to Washington Practice Contract Law and Performance, vol. 25, section 8.4 at page 211:

- (a) The same time is fixed for the performance of each promise; or
- (b) A fixed time is stated for the performance of one of the promises and no time is fixed for the other; or
- (c) No time is fixed for the performance of either promise; or
- (d) The same period of time is fixed within which each promise shall be performed, citing *Meeker v. Johnson*, 3 Wash. 247, 28 P. 2d 542 (1891). Calamari & Perillo, Contracts section 11-17, at 430 (5th Ed. 2003 (citing Restatement of Contracts, section 267)).

Willener v. Sweeting, 107 Wn 2d. 388, 730, P.2d 45 (1986){

TA \l "*Willener v. Sweeting*, 107 Wn 2d. 388, 730, P.2d 45 (1986)"

\s "*Willener v. Sweeting*, 107 Wn 2d. 388, 730, P.2d 45 (1986)" \c 1 },

makes it clear that in a buy sell transaction, when it is not made clear whether buyer or seller should perform first, each must perform at the same time; in that case by depositing into escrow the documents and money to complete the transaction. That is precisely what the wife and trial court contemplated in this case – the deed should be delivered when the promise to relieve the wife from the mortgage was ready to be fulfilled. Instead, the deed was actually delivered over two years prior to the husband fulfilling his promise to remove the wife from the mortgage (April 2009 v. June 2011).

Furthermore, if a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance. *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wash. App. 695, 483 P.2d 880 (1971){ TA \l "*Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wash. App. 695, 483 P.2d 880 (1971)" \s "*Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wash. App. 695, 483 P.2d 880 (1971)" \c 1 }. The husband clearly failed to satisfactorily perform as required under the Amended Decree.

The wife signed the deed in January of 2009, delivered it in April of 2009 and received her requested relief in June of 2011. Under the concurrent condition concept, she was not required to deliver the deed until June 2011, but did so early to avoid the very argument being made by the husband in this appeal. CP, Exhibits 8 and 12. Essentially, the husband's argument puts her in a catch 22. If she prematurely signed the deed she would have risked being on a mortgage and on a second mortgage on property she did not own when she specifically bargained against that outcome. If she did not sign the quit claim deed simultaneous with being removed from the mortgage, she faced exactly what has happened – an

expensive trial, followed by an expensive appeal. The husband has not met his burden to demonstrate manifest abuse of discretion on this issue.

b. Husband's Transfer of his 401(k) Account Interest to Wife Did Not Relieve Him of His Duty to Remove Wife From Mortgage

The husband was required to transfer his interest in his 401(k) account to the wife pursuant to the Amended Decree. CP Supp. Appendix A. Even though he did so, that did not relieve him of his duty to remove the wife from the mortgage "forthwith," as he contends. And although it was clearly partial consideration for the entire agreement, it was not directly connected to the wife's duty to quit claim deed the house to him. In fact, as noted in the husband's brief, the duty for him to transfer his interest in his 401(k) appears in a completely separate paragraph from his duty to remove the wife from the mortgage. Br. of Appellant at 7. And, if the husband was so concerned about the transfer of the house, why did he wait until July of 2009 to record the deed when he received the deed in April, 2009 and had transferred the 401(k) in January of 2009? Exhibit 2.

3. Attorney Fees

Pursuant to RAP 18.1{ TA \I "RAP 18.1" \s "RAP 18.1" \c 4 } (b) and RCW 26.09.140{ TA \I "RCW 26.09.140" \s "RCW 26.09.140" \c 2 } the wife requests an award of attorney fees for having to defend this appeal. The husband should not be granted attorney fees because he delayed removing the wife from the mortgage for two and one-half years after being ordered to do so, while all along demanding that the wife sign the quit claim deed, which she did over two years before being removed from the mortgage. Also, the husband was attempting to further encumber the house, without removing the wife from the mortgage. All of the husband's actions were willful, untimely and posed significant economic risks for the wife, particularly his desire to obtain a second mortgage before removing the wife from the first mortgage. On the other, the wife's brief delay in signing the quit claim deed caused no loss or harm to the husband, particularly since he did not even record it for several months after receiving it.

IV. CONCLUSION

The Respondent respectfully requests this court to affirm the trial court's order and judgment.

RESPECTFULLY SUBMITTED this 9 day of July, 2012.



SCOTT J. HORENSTEIN, WSBA #7864
Attorney for Respondent

July 9, 2012

Clerk of the Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Re: *Parker Dissolution of Marriage*
Our File No. 24527.001
Appeals No. 42629-3-II
Clark County Superior Court Cause No. 05-3-01721-7

Dear Clerk of the Court:

Enclosed, please find an original and a copy of the Brief of the Respondent in the above matter.

If you have any questions, please contact our office.

Very truly yours,



SCOTT HORENSTEIN

Enclosure

cc: Ms. Parker
Attorney Clark

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