

COA No. 42906-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re:

ROBERT ROSS,

Respondent,

v.

TONI HAMILTON,

Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

The trial court erred by ordering the release of all remaining funds held in the Clerk's trust account to Robert Ross's attorney.

### Issues Pertaining to Assignment of Error

1. Did the trial court err by ordering the release of all remaining funds held by the Clerk when the Court of Appeals vacated a \$17,500 award to Mr. Ross that was part of those funds? (Assignment of Error A).

2. Did the trial court err by ordering the release of all remaining funds held by the Clerk when the parties and the court contemplated the preservation and calculation of Toni Hamilton's interest in those funds? (Assignment of Error A).

## II. STATEMENT OF THE CASE

After finding Toni Hamilton and Robert Ross had a committed intimate relationship, the trial court entered a decree of dissolution of that relationship and distributed the property acquired during it. (CP 188-200, 201-210). On review, its decision was affirmed in part, reversed in part, and remanded for further proceedings consistent with the Court of Appeals' opinion. (CP 22). The mandate was issued on September 9, 2011. (CP 23).

During the pendency of the appeal, the court ordered that half the proceeds from the sale of 18 Island View Lane, Cathlamet, Washington, be held by the Clerk of the Wahkiakum County Superior Court. (CP 25). The original amount placed into the court registry was \$357,767.67. (CP 25, 136). Mr. Ross later received a \$30,000 distribution from those proceeds. (CP 25).

After the mandate, Mr. Ross moved to release the funds held by the Clerk. (CP 24). Ms. Hamilton responded with an objection to the motion for distribution of funds held by the Clerk and a request for a fact finding hearing and extended argument. (CP 31). She objected because

[t]he Motion of [Mr. Ross] does not take into consideration the interest of [Ms. Hamilton] in the funds held by the Clerk, or the expenditures made by [her] to maintain the property since trial. (*Id.*).

Ms. Hamilton urged the court to order a division of the proceeds properly allocating to each party their respective interest as detailed in her attached affidavit with supporting exhibits. (CP 31-50).

Among other things, her affidavit stated she was awarded half the value of Mr. Ross's 401k plan that should amount to at least \$247,513.90 and the Court of Appeals reversed an award to Mr.

Ross of \$17,500 to be deducted from the proceeds held by the Clerk. (CP 32-33). In summary, she believed her share of Clerk-held funds to be distributed to her was \$366,396.34. (CP 35).

The attorney for Mr. Ross filed a declaration regarding the 401k account and his efforts to obtain information on it. (CP 55).

The declaration stated in part:

...

3. What I discovered in my discussions with Mr. Roberts [the Peak Oilfield Service plan administrator] and my client is that the 401k account has been rolled over into a Merrill Lynch IRA account. This does little to change the asset, but is significant as it has changed character. It is my understanding that the rollover balance at the time of closing the 401k account was \$192,663. I do not have information that suggests the account balance was ever higher than that amount.

4. It is my understanding that my client, during the appellate process and perhaps before, has been forced to live off of some of the money from the IRA account. If the Court intends to hold a reserve amount to protect a 50% interest of Toni Hamilton in the 401k account, it would seem that, in an abundance of caution, no more than \$120,000 held in the Clerk's account would be appropriate to preserve her interest. I only suggest this amount in an abundance of caution and not as a representation of what she may or may not be entitled to. I expect that more information and briefing may be necessary on this matter to fully resolve the IRA account issues. (CP 56).

As acknowledged by Mr. Roberts, however, a Qualified Domestic

Relations Order was simply not going to work as the vehicle for securing Ms. Hamilton's share of the 401k funds. (CP 58).

At the hearing on the motion to release funds, not only did Mr. Ross's counsel contemplate a division of the Clerk-held funds according to the parties' respective interests, but so also did the trial court. (11/7/11 RP 65-67, 69-70, 72-73). The court was aware that the Court of Appeals had reversed its \$17,500 award to Mr. Ross. (*Id.* at 68-69, 77). Nonetheless, the court ordered the release of all remaining funds held by the Clerk to Mr. Ross's attorney. (CP 61). The funds in the registry included the \$17,500 award that was reversed. (CP 136). Ms. Hamilton appeals this order. (CP 66).

She filed a notice of cash supersedeas. (CP 69). In response, Mr. Ross filed a motion for order limiting application of stay, reject supersedeas, and for CR 11 sanctions. (CP 75). The court then entered an order limiting application of stay, reject supersedeas, and for CR 11 sanctions that ordered immediate disbursement of all money held in the court registry except for \$137,000 and the \$25,000 cash supersedeas to remain in the registry. (CP 80-81).

Ms. Hamilton filed an amended notice of appeal to include the order limiting application of stay. (CP 83). This Court considered the amended notice to be an objection to a supersedeas decision of the trial court, whereupon the Commissioner let stand the order limiting application of stay. (2/14/12 Commissioner's Ruling).

### III. ARGUMENT

A. The trial court erred by ordering release of all remaining funds held by the Clerk when the Court of Appeals vacated a \$17,500 award to Mr. Ross that was part of those funds.

The trial court noted at the hearing on the motion to release funds that it had been reversed by the Court of Appeals on the award of \$17,500 to Mr. Ross. (11/7/11 RP 68-69, 77). At the subsequent hearing on the motion to limit application of stay, Mr. Ross's attorney mistakenly advised the court the \$17,500 was not held back among his client's funds:

I'm not absolutely certain as I sit here but I believe when we had this argument in front of you a month and a half ago I think it was, I believe that I argued that based on a deeper study of that issue that, in fact, that \$17,500 was not part of what was held back, and I think I had the – the escrow information with me at that time. Unfortunately, I didn't come

here today to argue that point so I don't have all of that information with me. (12/13/11 RP 14).

The court entered the appealed-from order releasing all remaining funds held by the Clerk to Mr. Ross's attorney. (CP 61).

To the contrary, however, the \$17,500 judgment in favor of Mr. Ross was indeed included in the funds held by the Clerk. (CP 136). By releasing all funds, including the \$17,500 award reversed on appeal, the trial court clearly erred as it did not follow the directions of the appellate court and failed to act in a manner consistent with the Court of Appeals' opinion upon remand. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 486, 258 P.3d 676 (2011); *Matsyuk v. State Farm Fire & Cas. Co. of Ill.*, 173 Wn.2d 643, 663, 272 P.3d 802 (2012). Therefore, the order releasing funds must be reversed on this ground alone at least with respect to the \$17,500 award to Mr. Ross that was vacated on appeal.

B. The trial court erred by ordering the release of all remaining funds held by the Clerk when the parties and the court contemplated the preservation and calculation of Toni Hamilton's interest in those funds.

As noted by both Mr. Ross's attorney and the trial court, it was within their contemplation that the funds held by the Clerk were subject to the preservation and calculation of Ms. Hamilton's interest in those funds. (CP 56; 11/7/11 RP 65-67, 69-70, 72-73). Moreover, the remand for further proceedings consistent with the Court of Appeals' opinion plainly involved more than a ministerial action by the trial court as urged by Mr. Ross. (11/7/11 RP 2-4). Although the funds in the court registry came from the sale proceeds of the Island View Lane property, that money was not exclusively for Mr. Ross's benefit as it was subject to offsets as outlined in Ms. Hamilton's objection to motion for distribution of funds and attached exhibits. (CP 31-50).

Acknowledging it would have to hold another hearing on the 401k valuation particularly, the trial court nonetheless stated it would make a decision on part of the motion to release funds. (11/7/11 RP 67-68). Instead, the court made a decision to release all funds and failed to exercise the discretion it must when remand involves more than a ministerial action. *See State v. Rodriguez Ramos*, 171 Wn.2d 46, 49, 246 P.3d 811 (2011).

The trial court failed to make valuations on the items claimed by Ms. Hamilton as offsets against the remaining funds. As for the 401k account, it stated:

. . . I'll take a declaration and then make a decision on releasing any of the funds so the sooner you get me that . . . (11/7/11 RP 72).

Subsequently at the hearing on the motion to limit application of stay, Ms. Hamilton's lawyer made this argument:

We made a request for the Court to make a determination on what portion of the funds my client was entitled to that are being held by the Court. The Court has never ruled on it. In fact, the Court has never ruled on the issue of how much of the funds that are held by the Court go to which party. What the Court did previously in the trial in this matter, or after the trial is the Court ordered that those funds be placed in the account for division at a later date after the Court had heard all of the testimony, because the sale occurred before the trial actually occurred and the proceeds of the sale are what this – a portion of this is representative of. The Court has not ruled on our motion to determine how much of that my client is entitled to. What we do know is, and this is based upon [Mr. Ross's] own attorney's Declaration, is exactly the thing that we objected to and that we were concerned about in court when we had our hearing back in November . . . that Mr. Ross may go ahead and – or may have changed or modified the 401k or hidden the funds from the 401k. . .

The point is, the Court has never ruled on our

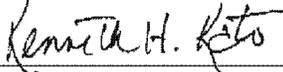
motion. The Court has never made a decision as to what the disposition of the funds held by the Clerk is supposed to be, and until such time as the Court makes a ruling on the division – and if the Court wishes to rule or wished to rule against my client having full disclosure of all information that would be fine. But even [Mr. Ross's] own attorney in his Declaration that was submitted to the Court says that additional discovery will have to be commenced and have to be done before we can make a determination of what amount there was in the 401k. The plan administrator says that the 401k can't be the subject of a Qualified Domestic Relations Order because it's not in existence. It would be a waste of time. (12/13/11 RP 8-9).

By releasing all funds held by the Clerk without making a determination as to Ms. Hamilton's interest in those funds, the court abused its discretion. A manifest abuse of discretion occurs when the court's decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). And discretion unexercised is discretion abused. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320, 976 P.2d 643 (1999). Here, the trial court failed to exercise any discretion whatsoever, thereby abusing it. The order releasing all remaining funds held by the Clerk to Mr. Ross's attorney must be reversed.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Hamilton respectfully urges this Court to reverse the order releasing all remaining funds held by the Clerk and to remand for further proceedings.

DATED this 16<sup>th</sup> day of May, 2012.

  
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**May 16, 2012 - 9:31 AM**

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