

No. 43232-3-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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In Re The Marriage of:

MERRY WOECK,  
Appellant,

v.

DOUGLAS WOECK,  
Respondent.

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On Appeal from the Pierce County Superior Court  
Cause No. 11-3-03031-7  
The Honorable Judge Ronald L. Culpepper

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APPELLANT'S OPENING BRIEF<sup>1</sup>

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**I. INTRODUCTION**

This matter involves an over-ten year marriage between Douglas and Merry Woeck began on October 29, 2001. The Decree and other final orders were entered February 24, 2012 over Merry Woeck's Motion to Void and Set Aside the CR2A Agreement signed by the parties on August 11, 2011 prior to Merry Woeck vacating the marital home. Merry Woeck articulated several reasons to the Trial Court why the Agreement should be voided including non-performance, severe emotional duress, undue influence, and subsequent breach of its terms. The parties' annual household income was approximately \$200,000 per year at the date of separation. Douglas Woeck made seventy-five percent (75%) of the household income and provided for the parties' insurance benefits and retirement planning via his union employment for ILWU-PMA. He also paid all of the couple's tax liability from 2001 through 2011.

Douglas Woeck is a longshoreman in Local 52, the Clerk's Union, who grosses over \$12,000 a month. The CR2A Agreement promises Merry Woeck a total of \$10,000 to be paid over the course of a year as moving costs, spousal maintenance and a \$5000 distribution from the 401K benefits. To date, Merry Woeck, n/k/a Broberg, has received \$4700 (only 40% of what Douglas Woeck grosses in a month).

During the marriage, Merry Woeck split her time between running her own law practice and being a stay-at-home wife and step-mother. This arrangement was set up in anticipation of the couple having more children. Merry Woeck's practice focused primarily on criminal public defense and some family law cases. Merry Woeck suffered repeatedly during the over ten-year marriage from domestic violence and abuse by Douglas Woeck.

In 2003, Douglas Woeck was charged with Assault 4<sup>th</sup> Degree Domestic Violence following a head-butting incident. Reporting this incident of domestic violence was particularly embarrassing to both parties, especially because Merry Woeck practiced in Federal Way Municipal Court. Douglas Woeck successfully completed a diversion agreement to earn a dismissal of the Assault 4<sup>th</sup> Degree case. However, the cycle of domestic abuse had already begun before this incident. While the incidents of violence were limited, the recurrence of verbal, emotional and financial abuse were more and more frequent until it became the daily norm causing Merry Woeck to seek counseling and withdrawal from friends and family. The shame and isolation were overwhelming.

In June 2011, Douglas Woeck decided he was done. He didn't want to be married anymore. He told Merry they needed to file for divorce and that he was keeping all of "his" income, employment benefits and retirement, and the gun collection. After all she is an attorney, so she

could make her of own income and provide for herself. Merry Woeck pointed out this arrangement was facially unfair given the community property laws and her very real inability to even raise the moving costs required to vacate the family home. Douglas Woeck offered his father as a mediator to settle on something “fair” they could both live with going forward. The CR2A Agreement cements only what Douglas Woeck was willing to part with from “his” resources to allow Merry Woeck to make a fresh start. It does not represent a fair and equitable division of the community assets or adequately account for the couples’ lifestyle prior to separation. It also fails to value the community liabilities. Douglas Woeck basically continued living the couples’ lifestyle alone leaving Merry Woeck to struggle with a disproportionate amount of the community resources. Douglas Woeck also continued the domestic abuse causing Merry Woeck to seek and obtain two separate restraining orders during the course of the dissolution action.

Appellant has moved unopposed to supplement the record on appeal with the case files from the restraining order cases. No decision has been rendered on that Motion to Supplement the Record filed July 2, 2012. However, Appellant requests leave to amend her Opening Brief when and if the unopposed Motion to Supplement the Record is granted.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred when it failed to make a fair and equitable division of the community assets pursuant to RCW 26.09.080 (RP 11 Ins 7-25—RP 12 ln 1, RP 12 ln 25--RP 13 Ins 1-5, CP 11-72 (Sealed Financial Source Documents filed by Merry Woeck on February 21, 2012), CP 259, CP 260, CP 264-266, CP 270-273).
2. The Trial Court erred when it entered an “ORDER” enforcing the CR2A Agreement and denying the Petitioner’s Counter Motion to Void and Set Aside CR2A Agreement on February 24, 2012 (RP 9 Ins 8-17, RP 10 Ins 8-25, RP 11, RP 12, RP 13 Ins 1-5, CP 259).
3. The Trial Court erred when it failed to fairly and accurately value the community assets prior to entering a Decree of Dissolution and Findings of Fact (RP 11 Ins 8-25, RP 12, RP 13 Ins 1-5, CP 11-72, CP 263-268, CP 269-275).
4. The Trial court erred when it adjudged in the Decree that “1.1 Restraining Order Summary: Does not apply.” (CP 269 Ins 16-17, RP 9 Ins 8-12, RP 11 Ins 17-25, RP 12 ln 1). At a minimum, the two restraining order cause numbers should have been referenced. (CP 132-133, CP 140-143, CP 217 pp 2).

5. The Trial Court erred when it adjudged in the Decree that “1.2 Real Property Judgment Summary” without valuing the home or considering the means and needs of the parties’ regarding housing. (RP 12 ln 25--RP 13 lns 1-5, CP 11-72).
6. The Trial Court erred when it adjudged in the Decree that “1.3 Money Judgment Summary: Does not apply” without first making a determination as to the needs of the parties and each spouses ability to pay the debts and liabilities assigned to them. (RP 12 ln 25--RP 13 lns 1-5, CP 11-72).
7. The Trial Court erred by decreeing section 3.2 Property to be Awarded to the Husband without first making a determination as to the community assets and liabilities and a decision as to what would be a fair and equitable division thereof based upon chapter 26.09 RCW. (RP 12 ln 25--RP 13 lns 1-5, CP 11-72).
8. The Trial Court erred by decreeing section 3.3 Property to be Awarded to the Wife without first making a determination as to the community assets and liabilities and a decision as to what would be a fair and equitable division thereof based upon chapter 26.09 RCW. (RP 12 ln 25--RP 13 lns 1-5, CP 11-72).

9. The Trial Court erred by decreeing section 3.4 Liabilities to be Paid by the Husband without first making a determination as to the community assets and liabilities and a decision as to what would be a fair and equitable division thereof based upon chapter 26.09 RCW. (RP 12 ln 25--RP 13 lns 1-5, CP 11-72).
10. The Trial Court erred by decreeing section 3.5 Liabilities to Paid by the Wife without first making a determination as to the community assets and liabilities and a decision as to what would be a fair and equitable division thereof based upon chapter 26.09 RCW. (RP 12 ln 25--RP 13 lns 1-5, CP 11-72).
11. The Trial Court erred by decreeing section 3.7 Maintenance without first making a determination as to the community assets and liabilities and a decision as to what would be a fair and equitable division thereof based upon chapter 26.09 RCW (RP 12 ln 25--RP 13 lns 1-5, CP 11-72, CP 272).
12. The Trial Court specifically erred by decreeing in section 3.7 “Payments shall be made directly to the other spouse” in the face of a valid Domestic Violence Protection Order prohibiting contact with the spouse receiving support (RP 9 lns 8-17, RP 11 lns 17-25-

RP 12 ln 1, CP 272, CP 254 lns 21-22 “Merry has the protection of the court, as she requested”).

13. The Trial Court erred by decreeing section 3.8 Restraining Order “Does not apply” when there was clear evidence of harassment and over ten years of domestic abuse by Douglas Woeck in the record before It on February 24, 2012 (RP 9 lns 8-17, RP 11 lns 17-25-RP 12 ln 1, CP 272).
14. The Trial Court erred by decreeing section 3.9 Protection Order “Does not apply” when there was clear evidence of domestic violence and abuse by Douglas Woeck in the record before It on February 24, 2012 (RP 9 lns 8-17, RP 11 lns 17-25-RP 12 ln 1, RP 13 lns 2-5, CP 272).
15. The Trial Court erred by decreeing section 3.15 “Other” when the CR2A Agreement was facially unfair based upon the limited evidence of the parties’ assets and liabilities before it on February 24, 2012. Further inquiry was requested and warranted prior to entry of final orders under chapter 26.09 RCW (RP 11 lns 9-20, RP 12 lns 4-9 “Set it for trial. ...I would like the Court to decide what is equitable in this case, so I’m requesting that we void the CR 2A agreement”, RP 12 ln 25--RP 13 lns 1-5, CP 11-72, CP 273).

16. The Trial Court erred when it entered “Verification by Petitioner/Respondent” stating that Petitioner is “not seeking any relief beyond that specifically requested in the Petition” and included language referring to irrelevant matters related to children the parties did not have in common on February 24, 2012 (RP 12 ln 25--RP 13 lns 1-5, CP 94 sections 1.8 & 1.9, CP 95 sections 1.10, 1.11, 1.12, CP 260-261).
17. The Trial Court erred when it entered Finding of Fact 2.7 incorporating the CR2A Agreement dated August 11, 2011 by reference because the agreement should have been voided and/or found to be invalid. (RP 9 lns 8-17, RP 10 lns 8-25, RP 11-12, RP 13 lns 1-5, CP 217-220, 221 pp 1-3, CP 224-248).
18. The Trial Court erred when it entered Finding of Fact 2.8 “Community Property” because the value of the union pension, 401K, and gun collection had not been determined (RP 11 lns 9-25, RP 12 lns 1-9, CP 11-72).
19. The Trial Court erred when it entered Finding of Fact 2.9 “Separate Property” because the value of the parties’ separate property had not been determined (RP 11 lns 9-25, RP 12 lns 1-9, RP 13 lns 1-5, CP 11-72).

20. The Trial Court erred when it entered Finding of Fact 2.10  
“Community Liabilities” because the amount of the parties’  
liabilities had not been determined (RP 11 lns 8-25, RP 12 lns 2-  
24, CP 11-72).
21. The Trial Court erred when it entered Finding of Fact 2.11  
“Separate Liabilities” because the amount of the parties’ liabilities  
had not been determined (CP 11-72).
22. The Trial Court erred when it entered Finding of Fact 2.12  
“Maintenance” because the community did not adequately provide  
for Merry Woeck based upon the lifestyle of the parties’ during the  
marriage where Douglas Woeck grossed \$14,268.43 in July 2011  
(See CP 264 and CP 25-29).
23. The Trial Court erred when it entered Finding of Fact 2.13  
“Continuing Restraining Order” because there was evidence of  
harassment and domestic violence and abuse by Douglas Woeck in  
the record and a temporary restraining order had previously been  
entered under the dissolution cause number (RP 9 lns 1-3, lns 8-17,  
RP 11 lns 17-25, RP 12 ln 1, RP 13 lns 1-5, CP 107 pp 3-4, CP  
108-111, CP 116, CP 119, CP 120, CP 124-125, CP 129, CP 132-  
133, CP 140-143, CP 148 lns 19-27, CP 149 lns 1-17, CP 197 lns

13-14 “Our relationship was not healthy, hadn’t been for some time, and we simply need to part ways”, CP 217 pp 2 (referencing and incorporating the files, record and submissions contained in Pierce County Cause Numbers 11-3-03031-7, 11-2-04230-3 and 12-2-00105-2) , CP 225 pp3, CP 226 pp 1-3, CP 230 “Duress”, CP 231 pp 2-3, CP 232 pp 1-2, CP 234-235, CP 242 “but since the anti-harassment hearing is currently scheduled for Monday that day is not convenient for him. If the hearing is cancelled Monday would be fine.”)

24. The Trial Court erred when it entered Finding of Fact 2.14 “Protection Order” because there was evidence of domestic violence and abuse in the record and Douglas Woeck admitted to at least one instance of domestic violence in 2003. (See citations for Assignment of Error 23 and CP 254 Ins 21-22 “Merry has the protection of the court, as she requested”).
25. The Trial Court erred when it entered Conclusion of Law 3.2 “The parties should be granted a decree” because there was insufficient evidence as to the valuation of community assets and liabilities in the record (RP 12 Ins 15-25, RP 13 Ins 1-5, CP 11-72).

26. The Trial Court erred when it entered Conclusion of Law 3.4

“Disposition” particularly by stating “The distribution of property and liabilities as set forth in the decree is fair and equitable” when it had insufficient evidence of the community assets and liabilities in the record to make this determination (RP 12 lns 15-25, RP 13 lns 1-5, CP 11-72).

27. The Trial Court erred when it entered Conclusion of Law 3.5

“Continuing Restraining Order” because a continuing restraining order was clearly warranted by the over ten year history of domestic violence and abuse confirmed in the record before it on February 24, 2012 (RP 9 lns 8-17, RP 10 lns 8-10, RP 11 lns 10-25, RP 12 ln 1, CP 133, CP 233, CP 234-235, CP 217 pp 2 incorporating the files, record and submissions contained in cause numbers 11-2-04230-3 and 12-2-00105-2 which include the Domestic Violence Protection Order granted February 21, 2012 and the oral findings of Commissioner Mark Gelman).

28. The Trial Court erred when it entered Conclusion of Law 3.6

“Protection Order” because Merry Woeck was found to be a victim of domestic violence and abuse worthy of court protection from

Douglas Woeck on February 21, 2012 (See citations for Assignment of Error 27).

29. The Trial Court erred when it failed to make an adequate record on appeal to review whether the CR2A Agreement, Decree, QDRO, and other final orders fairly and equitably divide the community assets as requested by appellant (RP 11 lns 9-25, RP 12, RP 13 lns 1-5, CP 11-72, CP 218 pp 5, CP 219 pp1).
30. The Trial Court erred by ignoring Douglas Woeck's failure to perform under the terms and conditions of the CR2A Agreement when it enforced the contract (RP 10 lns 10-25, RP 11-12, RP 13 lns 1-5, CP 227-229).
31. The Trial Court erred by ignoring the confirmed evidence of domestic violence and abuse in the record as it relates to appellant's claim of severe emotional duress during the drafting and execution of the CR2A Agreement when it enforced the contract (RP 9 lns 8-22, RP 10-12, RP 13 lns 1-5, CP 217 pp 2, CP 224-226, CP 230 pp 2 "Duress").

32. The Trial Court erred by ignoring the statutory basis to void the CR2A Agreement under RCW 26.09.070(3). (RP 12 lns 19-25, RP 13 lns 1-5, CP 219 pp 3).
33. The Trial Court erred by ignoring the statutory basis to void the CR2A Agreement under RCW 26.09.070(4). (RP 12 lns 19-25--RP 13 lns 1-5, CP 219 pp 4, CP 220 pp 1-3).
34. The Trial Court erred by ignoring the evidence of inadequate spousal maintenance and failing to adequately provide for Merry Woeck's household and maintenance out of the community funds (RP 12 lns 19-25--RP 13 lns 1-5, CP 220 pp 2-3).
35. The Trial Court erred when it failed to provide adequate health insurance benefits to Merry Woeck (RP 12 lns 15-25--RP 13 lns 1-5, CP 220 pp 2).
36. The Trial Court erred when it failed to order Rule 11 sanctions against Ms. Young and Mr. Woeck in the face of a valid Domestic Violence Protection Order and evident misconduct (RP 3 lns 24-25, RP 4 lns 1-3, RP 6 lns 17-25, RP 7 lns 1-8, RP 8 lns 19-25, RP 9 lns 1-3, CP 219-223, CP 224-246).

II. ISSUES FOR REVIEW

1. THE TRIAL COURT'S FAILURE TO DETERMINE THE VALUE OF THE PARTIES' PROPERTY PRIOR TO ENTERING THE DECREE OF DISSOLUTION CONSTITUTES A MANIFEST ABUSE OF DISCRETION NECESSITATING REMAND (Assignments of Error 1-3, 5-11, 15-22, 25-26, 29-30, 32-36).

2. THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION WHEN IT FAILED TO FIND THAT THE SEPARATION CONTRACT WAS VOIDABLE UPON APPELLANT'S MOTION (Assignments of Error 1-36)

A. The Duress Due to the Established History of Domestic Abuse Rendered the Separation Contract Voidable Upon the Appellant's Motion (Assignments of Error 1-36).

B. The Separation Contract was Unenforceable Due to Douglas WoECK's Failure to Value the Retirement and 401K Funds (Assignments of Error 1-36).

3. THE TRIAL COURT ERRORED WHEN IT FAILED TO RESCIND OR VITIATE THE CONTRACT BASED UPON RESPONDENT'S EXERCISED UNDUE INFLUENCE (Assignments of Error 1-36).

4. DOUGLAS WOECK BREACHED THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IMPLICIT IN EVERY CONTRACT BY HIS SUBSEQUENT COURSE OF CONDUCT (Assignments of Error 1-4, 12-36).

5. COSTS AND REASONABLE ATTORNEY'S FEES ARE REQUESTED PURSUANT TO RAP 18.1(b) (Assignments of Error 1-36).

### III. STATEMENT OF THE CASE

#### A. Duration of the Marriage

The parties were married on October 29, 2001 in Las Vegas, Nevada. (CP 94, section 1.5). The Decree of Dissolution and other final orders were entered on February 24, 2012, with the exception of the CR2A Agreement which was entered August 11, 2012 and then incorporated by reference into the Decree and final orders (CP 278-308). This was an over ten-year marriage fraught with many problems, including domestic violence and abuse by Douglas Woeck (RP 9 lns 1-17, RP 10 lns 8-25, RP 11,12, RP 13 lns 1-5, CP 106-138, CP 140-143, CP 148-182, CP 196 lns 18-19, CP 197 lns 5-15, CP 224-235).

In 2003, Douglas Woeck was charged with Assault 4<sup>th</sup> Degree Domestic Violence against Merry Woeck (CP 119, CP 142). The parties previously filed for dissolution in 2008, but that Petition was dismissed (CP 197 lns 5-11, 204-212). Douglas Woeck always made the majority of the income and provided for the parties' health benefits and retirement planning (CP 11-72, CP 206, section 1.10, CP 220, pp 2-3). Douglas Woeck also paid all the tax liability (CP 24-29, CP 38-39, 42-72). Douglas Woeck has a son named, Evan, who Merry Woeck helped raise from 6 years old. (CP 196, lns 18-20, CP 224 pp 2).

B. Separation and Dissolution Proceedings

The parties' agreed date of separation is June 25, 2011 (CP 94, section 1.6). Merry Woeck did not vacate the family home until August 16, 2011(CP 226, pp 2). Five days earlier, on August 11, 2011, the parties executed and filed a Separation Contract and CR2A Agreement (CP 3-7) along with their Petition and Agreed Temporary Order in Pierce County Superior Court (CP 93-100). Within a week, Douglas Woeck was violating the terms of the Separation Contract (CP 226 pp 2-3, CP 227-229). Douglas Woeck also continued the verbal, emotional and financial abuse began during the marriage into the separation period. (CP 119, CP 107-111, CP 120, CP 124-125, CP 129-130). Merry Woeck had to obtain an Anti-Harassment Order and then a Domestic Violence Protection Order to protect herself from Douglas Woeck. (RP 9, Ins 1-17, CP 106-138, CP 148-149, CP 169-170, CP 176-178, CP 217 pp 2, CP 219 pp 2). Douglas Woeck also failed to follow the terms and conditions of the CR2A Agreement and meet the proscribed deadlines (CP 106-138, CP 227-228).

The Final Domestic Violence Protection Order was in place when the trial court granted Douglas Woeck's Motion to Enforce the CR2A Agreement and Enter Finals Orders over Merry Woeck's objection and Countermotion to Void and Set Aside CR2A Agreement on February 24, 2012. This timely appeal follows (CP 278-308). The Decree and other

finals orders were stayed on June 27, 2012 pending the outcome of the appeal based upon appellant's Motion for Reconsideration. A motion to Supplement the Record filed July 2, 2012 is pending and unopposed.

#### IV. ARGUMENT

##### 1. THE TRIAL COURT'S FAILURE TO DETERMINE THE VALUE OF THE PARTIES' PROPERTY PRIOR TO ENTERING THE DECREE OF DISSOLUTION CONSTITUTES A MANIFEST ABUSE OF DISCRETION NECESSITATING REMAND

In a dissolution action, the trial court must divide property in a manner that is "just and equitable" after considering all relevant factors, including the nature and extent of the community and separate property, the length of the marriage, and the economic circumstances of each spouse when the property is divided. RCW 26.09.080. All of the parties' property, both community and separate, is before the trial court for distribution. In re Marriage of Olivares, 69 Wash.App. 324, 328, 848 P.2d 1281, review denied, 122 Wash.2d 1009, 863 P.2d 72 (1993).

In Washington, all property acquired during the marriage is presumptively community property. In re Marriage of Short, 125 Wash.2d 865, 870, 890 P.2d 12 (1995), see also In re Marriage of Mueller, 140 Wash.App. 498, 501, 167 P.3d 568 (2007), citing Short. The appellate court only disturbs a trial court's dissolution rulings if there has been a manifest abuse of discretion. In re Marriage of Brewer, 137 Wash.2d 756,

769, 976 P.2d 102 (1999). A manifest abuse of discretion is defined as a decision based on untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997).<sup>1</sup>

“The valuation of property in a divorce case is a material fact.” Greene v. Greene, 72 Wash.App. 708, 712, 986 P.2d 144 (1999), citing Wold v. Wold, 7 Wash.App. 872, 878, 503 P.2d 118 (1972). “The trial court is required to create a record for appellate review.” Id., citing Marriage of Hadley, 88 Wash.2d 649, 657, 565 P.2d 790 (1970). “If the court fails to do so, the appellate court may look at the record to determine the value of the assets. See id.” But if the values are in dispute, and the appellate court is unable to determine whether the property division is just and equitable, the case must be remanded to the trial court. Greene at 712, citing Marriage of Martin, 22 Wash.App. 295, 298, 588 P.2d 1235 (1979).

In Greene, (Court of Appeals, Division II), the parties’ experts disagreed as the value of the North Carolina properties awarded to the wife and the trial court failed to determine a value for the major asset of the parties. 97 Wash.App. at 712. Accordingly the Court of Appeals was unable to review the fairness of the property division and remanded for

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<sup>1</sup> This summary of the law is substantially adopted from In re Marriage of Scalf-Foster and Foster, 155 Wash.App. 1028 (2010), which is an unpublished Division II case.

trial court pursuant to the Martin doctrine. Id. It is a “must” standard. Martin, 22 Wash.App. at 298.

In the present case, the appellant cited to Greene and Martin in her Counter-motion to Void and Set aside CR2A Agreement and pointed out that the trial court is required to value the couple’s property and make a record for appellate review (CP 218 pp 5—CP 219 pp 1). The trial court made no attempt to value the couple’s property or liabilities despite Merry Woeck filing what little documentation she had (CP 11-72) and pointing out that Douglas Woeck refused to value his pension or 401K benefits prior to execution of the Separation Contract and CR2A Agreement or at any time thereafter (CP 219 pp 3). Douglas simply offered a \$5000 distribution from his 401K if Merry would completely give up all claim to “his” ILWU-PMA union retirement benefits despite the over-ten year marriage (CP 3-7). “On its face the property settlement agreement cannot be just and equitable without a determination of the value of all community assets.” (CP 219 pp 4, last sentence)(See also RCW 26.09.070(3)). There is no evidence in the record on appeal that Judge Culpepper made any effort to determine the value of the community assets or nature of the couple’s liabilities. This error was a manifest abuse of discretion that demands remand.

Despite Merry's request for a trial to allow a fair and equitable division of the assets and liabilities, the trial court made no effort to value the couple's property or liabilities prior to enforcing the Separation Contract over Merry's objection. The trial court further entered a Conclusion of Law that the "distribution of property and liabilities as set forth in the decree is fair and equitable" without any knowledge of whether that was in fact true (CP 266, COL 3.4, Error 26). "Conclusional findings reached on an erroneous basis, and not supported by substantial evidence, are not binding on appeal." Nord v. Eastside Ass'n Ltd., 34 Wash.App. 796, 798, 664 P.2d 4 (1983), citing Schmechel v. Ron Mitchell Corp., 67 Wash.2d 194, 197, 406 P.2d 962 (1965).

Failing to value the couple's assets and liabilities prior to entering a decree was a substantial error of law and manifest abuse of discretion that demands remand for trial pursuant to the Martin "must" doctrine. Greene, 97 Wash.App. at 709, citing Martin, 22 Wash.App. at 298; see also RCW 26.09.080. Appellant hereby requests vacation of all final orders entered February 24, 2012, including the Separation Contract and CR2A Agreement filed August 11, 2011 incorporated therein by reference, and remand for a fair and equitable division of the couple's assets and liabilities after a fair valuation thereof as required by law.

2. THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION WHEN IT FAILED TO FIND THAT THE SEPARATION CONTRACT WAS VOIDABLE UPON APPELLANT'S MOTION.

A. The Duress Due to the Established History of Domestic Abuse Rendered the Separation Contract Voidable Upon the Appellant's Motion.

This may be an issue of first impression. Appellant was unable to find any Washington cases specifically addressing duress and domestic violence with regard to voiding separation contracts. The following analysis reflects the law that is available and on point.

As a contract, a community property agreement is subject to general rules of contract interpretation. Matter of Estates of Wahl, 99 Wash.2d 828, 664 P.2d 1250 (1983). Courts interpret an agreement between spouses like they do other types of contracts. In re Marriage of Mueller, 140 Wash.App. 498, 167 P.3d 568, review denied, 163 Wash.2d 1043, 187 P.3d 270 (2007). When one party to a contract renders the other party vulnerable to pressure and pressures the other party into execution of the contract, the contract can be rescinded on the basis of duress. See Nord 34 Wash.App. at 798-99. For the doctrine to apply, one party must have caused or contributed to the other party's vulnerability and must have exerted the pressure that brought about the decision to enter into the agreement. Id. The acts or threats of the pressuring party cannot amount to duress if he had a legal right to do the threatened act. Nord at 799.

Generally, a showing of “duress” requires proof of a wrongful act that either compels or induces a person to enter a transaction involuntarily. In re J.N., 123 Wash.App. 564, 577, 95 P.3d 414, review denied In Re Welfare of Nightingale, 154 Wash.2d 1003, 114 P.3d 1198 (2004). “If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.” Restatement (Second) Contracts § 175(1).

In Nord case, the defendant, Eastside, presented duress as their primary defense to the agreement with the plaintiff, Nord. Division I found Eastside was not under duress because they had the benefit of counsel and full disclosure of the contract terms prior to signing. The Court of Appeals also found “[t]here is substantial evidence in the record tending to prove that factors other than plaintiff’s activities caused the vulnerability of Eastside.”

In re J.N. involves a minor’s attempt to revoke the relinquishment of parental rights she gave up when she was 15 years old on many grounds including duress. 123 Wash.App. at 568. Division II found that T.N. was not under duress when she relinquished her rights because she was represented by counsel and voluntarily signed the relinquishment of rights. Id. at 577. It should also be noted that In re J.N. was the first time that duress had been applied in a Washington adoption case. Id.

The present case is substantially distinguishable from both Nord and In re J.N. First of all, this does not involve two companies or a 15 year old relinquishing parenting rights, this case involves a married couple with an established history of domestic violence and abuse perpetrated by Douglas Woeck against Merry Woeck (CP 148-149, CP 106-137, CP 140-143, CP 218-220, CP 224-240). However the legal precedent from these cases can still be applied to the facts of this case under contract law.

For the “duress” doctrine to apply, one party must have caused or contributed to the other party’s vulnerability and must have exerted pressure that brought about the decision to enter into the agreement. Nord at 798-99. In the present case, Douglas Woeck contributed to Merry Woeck’s vulnerability and exerted pressure that brought about the decision to draft and file the separation contract via his established role as a domineering abuser (RP 9 lns 14-17, RP 11 lns 14-25—RP 12 ln 1). Ten years of physical, mental, emotional and financial abuse had taught Merry that Douglas was a very real threat to her safety and security (CP 106-138, CP 148-149, CP 225 pp 2-3—CP 226 pp 1). He controlled over 75% of the community funds and had proven over the duration of the marriage that it was his way or nothing (CP 220 pp 2-3). Merry needed the little money he promised to vacate the family home and start a new life. Merry

either cemented the terms of the agreement in writing as dictated by Douglas or got nothing.

The acts or threats of the pressuring party cannot amount to duress if he had a legal right to do the threatened act. Nord at 799. There is no legal right to commit domestic violence or abuse. Chapter 9A.36 RCW defines many of the crimes which are ultimately charged with the domestic violence enhancement pursuant to chapter 10.99 RCW. However, it should be noted that emotional and economic abuse are not specifically defined by the criminal code.<sup>2</sup>

No threat of actual physical violence is required to find that the doctrine of duress applies. The Restatement (Second) Contract defines an improper threat relative to duress as follows:

a. *Improper threat.* The essence of the type of duress dealt with in this Section is inducement by an improper threat. The threat may be expressed in words or it may be inferred from words or other conduct. Past events often import threat. Thus, if one person strikes or imprisons another, the conduct may amount to duress because of the threat of further blows or continued imprisonment that is implied. Courts originally restricted duress to threats involving loss of life, mayhem or imprisonment, but these restrictions have been greatly relaxed and, in order to constitute duress, the threat need only be improper with the rule stated in §176.

Restatement (Second) Contracts § 175 When Duress by Threat Makes a Contract Voidable, **Comment a.**

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<sup>2</sup> The Violence Wheel and Cycle of Violence can be accessed at [domesticviolence.org](http://domesticviolence.org)

The Restatement (Second) Contract §176 defines the rule for an improper threat as follows:

- (1) A threat is improper if
  - (a) what is threatened is a crime or tort, or the threat itself would be a crime or tort if it resulted in obtaining property,
  - (b) what is threatened is a criminal prosecution,
  - (c) what is threatened is the use of civil process and the threat is made in bad faith, or
  - (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
  
- (2) A threat is improper if the resulting exchange is not on fair terms, and
  - (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
  - (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
  - (c) what is threatened is otherwise a use of power for illegitimate ends.

Restatement (Second) Contracts §176.

The present case involves the use of improper threats, namely continued economic and emotional abuse. Douglas determined the marriage was over and he wanted a divorce in June 2011 (CP 196 lns 18-19 and CP 224 pp 1). It wasn't the first time that he said he wanted a divorce, but it was the last time (CP 196 lns 18-20 and CP 224 pp 1).<sup>3</sup>

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<sup>3</sup> The parties had filed for dissolution in 2008 (CP 210, section 1.10). The amended petition reflects Douglas' refusal to pay any spousal maintenance.

Douglas historically had not wanted to pay any spousal maintenance even though he made 75% of the marital income (compare CP 204-207 to CP 208-211). This necessitated the drafting of the separation contract (CP 3-7) and agreed temporary order (CP 97-100) to give Merry some way to enforce his promises. It did not make the agreement facially fair.

The following law review article explains the vulnerability experienced by victims of emotional violence:

Emotional violence, for instance, can be experienced by women as more frightening and undermining than physical battering, although it is rarely subject to legal sanction on its own and would not qualify as [the legal defense of ] duress [in criminal cases]. Sometimes, of course, a threat of physical violence may be implied. For example, an angry and aggressive threat to withhold all further financial support and to force a wife/partner into prostitution unless she commits a crime may reasonably be perceived as concealing a threat of physical harm.

J. Loveless, *Domestic Violence, Coercion and Duress* (2010), Crim.L.R. pp. 93-108, at p. 97, referencing K.J. Feraro, "Neither Angels nor Demons" in *Women, Crime and Victimisation* (2006), pp. 14-26 and the facts of *Bainton* [2005] EWCA Crim 3572; [2006] M.H.L.R. 183 below.

Douglas Woeck admits to at least one act of domestic violence, namely the head-butting in 2003 charged as Assault 4<sup>th</sup> Degree Domestic Violence (CP 254, lns 19-22). Douglas Woeck also admits "Our relationship was not healthy, hadn't been for some time, and we simply needed to part ways." (CP 197, lns 13-14). Douglas Woeck also admits

“Merry has the protection of the court, as she requested.” (CP 254, Ins 21-22). In fact, the trial court had granted a Domestic Violence Protection Order on February 21, 2012 in a separate cause number over Douglas Woeck’s blanket denials of all other acts of domestic violence and abuse and over his counsel’s objection. Douglas Woeck was simply not found to be credible in the face of ten declarations filed in support of the petition (See CP 218 pp 1).<sup>4</sup>

Three days later in the dissolution action, Judge Culpepper ignored the unchallenged findings of Commissioner Mark Gelman and the valid Domestic Violence Protection Order granted based upon ten years of domestic violence and abuse when he refused to rescind and/or void the Separation Contract entered into under severe duress (RP 12 ln 25—RP 13 Ins 1-5). Merry Woeck explained that she lived with her abuser when she drafted and filed the Separation Contract and that she needed what little money he would give her to move out five days later (RP 9 Ins 8-17, RP 11 Ins 14-23).

As explained above in the sections from Restatement (Second) Contracts, Courts originally restricted the duress doctrine to threats involving loss of life, mayhem or imprison, but these restrictions have

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<sup>4</sup> Appellant hopes specifically to supplement the record on appeal with these ten declarations to better demonstrate the documented history of domestic violence and abuse in the record before the trial court on February 24, 2012.

been greatly relaxed. The following excerpt from the J. Loveless law review helps explain how that process might have come about.

The narrowness of the subjective test in this respect could be ameliorated so as to acknowledge that fact that victims of violence have a greater sensitivity to the risks in their environment than would be obvious to an observer. To a woman whose self-esteem has been demolished by past violence, the fear of violence may be ever-present and overpowering:

“A woman who views her circumstances through the eyes of one who has already suffered abuse at the hands of the coercer may see imminent danger even though some time may pass between the threat and her subsequent criminal act, and even though others may see no serious threat at all.”

Provocation can now consist of cumulative violence provided it culminates in a final provoking event. There is therefore no reason why past domestic violence should not be viewed as cumulative coercion, providing grounds for fear of immediate and physical violence even in the absence of a readily identifiable and specific threat.

J. Loveless, *Domestic Violence, Coercion and Duress* (2010), p.98, referencing Beth I.Z. Boland, “Battered Woman (1980); *The Battered Woman Syndrome* (1984) and *Ahluwalia* [1992] 4 All E.R. 889 CA (Crim Div).

Merry Woeck’s Countermotion to Void and Set Aside CR2A Agreement clearly incorporated all three cause numbers and the files, record and submissions contained therein (CP 217 pp 2). Appellant has also filed an unopposed Motion to Supplement the Record with those files,

and requests leave to amend this opening brief when or if that motion is granted. For now, appellant will cite the record on appeal as it exists.

Douglas Woeck's Response/Reply admits that Merry has the court ordered protection she requested (CP 254, Ins 21-22). Counsel, Heather Young stated "clearly, they have no business being together" (RP 9 Ins 2-3) even after she mischaracterized the evidence before the court by stating "she comes to court with is buyer's remorse and some allegations about events that may or may not have taken place, but if they did, they took place after the entry of the CR 2A Agreement." (RP 3 Ins 24-25 thru RP 4 Ins 1-3). This is simply false. Douglas Woeck and Heather Young admit that Douglas assaulted Merry in 2003, e.g. prior to filing for dissolution on August 11, 2011. Douglas admits the relationship was not healthy, hadn't been for some time. A valid Domestic Violence Protection Order had been issued based upon ten years of domestic violence and abuse.

There were many other acts of domestic violence and abuse throughout the over ten-year marriage that went under reported. Domestic violence routinely goes unreported; this is explained as follows:

Another side of the problem, one that has received less attention, is that most of the cases of domestic violence are unreported. That is, reported cases of domestic violence against women represent only a very small part of the problem when compared with prevalence data. This part of the problem is also known as the "iceberg" of domestic

violence. ...According to this metaphor, most of the cases are submerged, allegedly invisible to society.

Domestic violence against women has been considered a very serious public health problem.

Enrique Gracia, *J Epidemiol Community Health* 2004; 58:536-537<sup>5</sup>

It was clearly explained in Merry's materials in opposition to enforcing the separation contract and in her oral presentation that she is a victim of domestic violence and abuse, that Douglas Woeck "controlled [her] life", and she couldn't "make clear-headed decisions" at the time the CR2A Agreement was drafted (RP 9-11). Judge Culpepper concluded, "Well, I don't see any reason to void the CR 2A agreement. I understand Ms. Woeck is unhappy with it. That's not real uncommon. CR 2A agreements, people think about them later and wish they hadn't done things, and that's, I think, what's happening here, so I'm going to enforce the CR 2A agreement." (RP 12 In 25 thru RP 13 lns 1-5).

Judge Culpepper refused to even consider the possibility that a victim of domestic violence is under duress when she lives with her abuser whether she is an attorney or not. Attorneys are in fact human beings first and foremost. A bar license does not somehow make a person immune to domestic violence or abuse as implied by Ms. Young (RP 4 lns 6-12, RP 7

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<sup>5</sup> This article can be accessed at <http://jech.highwire.org/content/58/7/536.full>.

Ins 19-24, RP 8 Ins 19-25, CP 200-203). What someone does for a living should have no bearing on whether she is treated like a human rather than an argument. This case is a prime example of why Pierce County should have a unified family court program<sup>6</sup> so that one judge hears all of the evidence and the restraining order hearings are not separated from the dissolution case. That does not excuse Judge Culpepper from his burden to review the record in front of him which included the files, records and submissions from all three case numbers and follow the law (CP 217). The Separation Contract and CR2A Agreement should be voided at the appellant's request and the dissolution action should be remanded for trial so a fair and equitable distribution of the assets and liabilities of the marriage can be made in accordance with the law.

B. The Separation Contract was Unenforceable Due to Douglas Woeck's Failure to Value the Retirement and 401K Funds.

As stated above valuation of property is a material fact in a dissolution case. Greene, 72 Wn.App. at 712. The legislature agrees. RCW 26.09.080 clearly requires a valuation of the property and liabilities and consideration of all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;

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<sup>6</sup> King County Superior Court has a Unified Family Court Program for cases that have multiple King County Cause numbers.

- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership;  
and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective....

RCW 26.09.070 attempts “to promote the amicable settlement of disputes” by allowing parties to contract for maintenance and disposition of property; however, the statute is also very clear to point out that such contracts are binding only after the court consider “the economic circumstances of the parties and any other relevant evidence produced by the parties... that the separation contract was unfair at the time of its execution.” See RCW 26.09.070(1) and (3). “If the court... finds that the separation contract was unfair at the time of execution, it may make orders for the maintenance of either party, the disposition of their property and their discharge of their obligations.” RCW 26.09.070(4).

This is exactly what Merry Woeck requested: follow the law (CP 217-233). Judge Culpepper stated, “Of course, Ms. Young would say the CR 2A agreement is equitable and if the parties reach an agreement, is it for me to redo it for them if they change their minds? CR 2A agreements are binding, pretty much.” This statement reflects a misunderstanding of the law (See RCW 26.09.080, and RCW 26.09.070(1), (3), & (4)). There

was substantial evidence before the Court that the CR 2A agreement was unfair at execution and that material facts were intentionally withheld by Douglas Woeck, namely the value of his union pension and 401K benefits, and the trial court refused to look at it because Merry Woeck drafted the CR 2A agreement (See RP 12 and CP 11-72, CP 106-138, CP 140-143, CP 148-149, CP 197 lns 13-14, CP 217-240).

The pension and 401K benefits are potentially the couple's largest asset and yet there was no disclosure or determination as to its actual value at retirement age which is when the benefits vest. This is a material dispute requiring the separation contract to be voided under RCW 26.09.070. It is impossible to state that the agreement is fair or equitable without first valuing the pension and 401K benefits. Douglas Woeck has both of these benefits. They are separate and distinct benefits which are quite valuable. The Separation Contract and CR2A Agreement should have been voided as facially unfair. Merry Woeck was promised a total of \$10,000 over the course of a year (CP 3-7); Douglas Woeck's monthly income exceeds that figure (CP 25-29). It was an over ten year marriage. All of these facts were before the trial court and nothing was done to simply follow the law, independent of recognizing the domestic abuse duress issue which should have made it obvious the contract was voidable at the victim's request.

3. THE TRIAL COURT ERRED WHEN IT FAILED TO RESCIND OR VITIATE THE CONTRACT BASED UPON RESPONDENT'S EXERCISE OF UNDUE INFLUENCE.

Undue influence and overreaching are a species of fraud and will vitiate a transaction. The essence of undue influence is unfair persuasion.

In Interest of Perry, 31 Wash.App. 268, 272, 641 P.2d 178 (1982); citing Peters v. Skalman, 27 Wash.App. 247, 255, 617 P.2d 448(1980); In re Adoption of Baby Girl K, 26 Wash.App. 897, 905, 615 P.2d 1310 (1980); McCutcheon v. Brownfield, 2 Wash.App. 348, 467 P.2d 868 (1970).

b. *Unfair persuasion*. Where the required domination or relation is present, the contract is voidable if it was induced by any unfair persuasion on the part of the stronger party. The law of undue influence therefore affords protection in situations where the rules on duress and misrepresentation give no relief. The degree of persuasion that is unfair depends on a variety of circumstances. The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment...

Restatement (Second) Contracts §177(1981), comment b;<sup>7</sup> cited by Gerimonte v. Case, 42 Wash.App. 611, 613, 712 P.2d 876 (1986) and Perry at 272.

The elements of undue influence are articulated as follows:

- (1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.
- (2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

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<sup>7</sup> Current through April 2012.

Restatement (Second) Contracts §177 (1981)<sup>8</sup>

This rule protects a person only if she is under the domination of another or is justified by virtue of her relationship with another in assuming that the other will not act inconsistently with his welfare. Gerimonte at 613. Recognized relations include those of parent and child, husband and wife, clergyman and parishioner, and physician and patient. Id. In each case it is a question of fact whether the relation is such as to give undue weight to the other's attempts at persuasion. Id.

A competent person may be subjected to undue influence and his conduct be governed thereby, such result is less likely in case of strong-minded person than one mentally weak and infirm. Tecklenberg v. Washington Gas Elec. Co., 40 Wash.2d 141, 143, 241 P.2d 1172 (1952). It is no longer necessary to prove that the persuasion has "overcome the will" to establish undue influence. Gerimonte, 42 Wash.App. at 615.

Will, gift, or contract can be invalidated on basis of undue influence when it can be said that the influence exerted by donee has been so persistent or coercive as to subdue and subordinate will of donor and take away her freedom of action. Peters v. Skalman, 27 Wash.App. 247, 255, 617 P.2d 448, review denied, 94 Wash.2d 1025 (1980), citing In Re Estate of Martinson, 29 Wash.2d 912, 914, 190 P.2d 96, 97 (1948). Facts which

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<sup>8</sup> Based upon former §497.

give rise to a suspicion of undue influence are (1) the beneficiary occupied a fiduciary or confidential relation to the donor; (2) the beneficiary actively participated in the preparation of the document; and (3) the beneficiary received an unnaturally large share of the estate. In addition, the courts look at the relationship between the parties, the opportunity for exerting undue influence, and the naturalness of the gift. Peters, 27 Wash.App. at 255, citing In Re Estate of Smith, 68 Wash.2d 145, 411 P.2d 879 (1966). The question of whether a transaction is a result of undue influence is one for the trier of fact at trial and will be overturned only if there is no substantial evidence in the record to support the findings of the trial court. Id., citing McCutcheon v. Brownfield, 2 Wash.App. 348, 467 P.2d 868 (1970). The reviewing court is in the same position as the trial court, viewing the facts in the light most favorable to the non-moving party. Hartley v. State, 103 Wash.2d 768, 774, 698 P.2d 77 (1985)<sup>9</sup>; In re Estate of Randmel v. Pounds, 38 Wash.App. 401, 405, 685 P.2d 638 (1984)(the non-moving party is entitled to all favorable inferences that may be deemed from the varying affidavits).

In the Interest of Perry Claudia Perry had a child on March 20, 1981.

On March 24, 1981, outside the presence of the court, she signed a consent

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<sup>9</sup> It should be noted Ms. Young cited to Hartley v. State in her Memorandum of Law In Support of Motion to Enforce CR2A Agreement at page 2 (CP 214 lns 11-12) asserting there was no genuine issue of material fact in dispute.

from relinquishing her child to the Adventist Adoption and Family Services agency in Pasco, WA. 31 Wash.App. at 269. On April 6, 1981, Perry moved to revoke the relinquishment. Id. The motion was granted and the agency appeals contending the trial court erred in concluding Miss Perry's relinquishment was obtained under circumstances amounting to fraud. Id. Here the facts show the relinquishment procedure was commenced after repeated encouragement by Perry's physician. Id. at 273.

It was the physician who contacted the agency, not Perry. Id. She spent her final months of pregnancy away from her home and family, engulfed in the agency's environment. Id. During that time everyone advocated that she place her baby for adoption. Id. Perry was never clearly informed that even though the agency spent money on her behalf she was nevertheless free to return home to Michigan with her baby. Id. She was not encouraged to consider alternatives and was not given an opportunity to seek independent advice. Id. She signed the relinquishment form in front of the agency's attorney only minutes before it was presented in chambers for a judge's signature. Id. Upon return to Michigan, Perry immediately challenged the relinquishment. Id.

The findings further show the environment at the agency created in Miss Perry's mind an obligation, without option, to repay the agency's expenses by relinquishing her rights to her child. Id. "In view of these

findings, the close relationship of confidence that must have developed and Perry's dependency upon the agency," Division III held that the trial court's conclusion must stand and the relinquishment be set aside. 31 Wash.App. at 273.

Gerimonte involves an action brought by a chiropractor against his patient for a balance owing on the patient's bill pursuant to assignment after insured made only partial payment. 42 Wash.App. at 612. The patient Beverly Case was in an automobile accident in January 1980. Id. Case began chiropractic treatment with Dr. Gerimonte following an automobile accident. Id. On July 22, 1980, shortly after receipt of her first treatment, Case was handed a document entitled "Assignment" that she was requested to sign at Gerimonte's office. Id. This document assigned her rights to payment on a policy of insurance written by Farmer's Insurance Company (Farmers) to Gerimonte. Id. It further stated that if Farmers failed to pay for Gerimonte's services, Case would pay. Id. Case told Gerimonte that she objected to signing the assignment because if Farmers failed to pay his fee in full she would not be able to pay the balance. Id. According to Case, Gerimonte then said if Farmers said they would take care of her, they would. He said, don't worry. Id. So at Gerimonte's insistence, Case signed the document and three more just like it on August 5, 18, and 22. Id. Farmers ultimately paid only \$344.50 leaving Case

stuck with a balance of \$790.50. Id. at 612-13. Gerimonte sued Case and won on summary judgment. Id. Case appealed. Id.

Division I reversed and remanded where Dr. Gerimonte offered no evidence to dispute Case's claim of undue influence beyond his self-serving statement "that Case signed the assignment with full understanding of the implications of its provisions." 42 Wash.App. at 616. None of the evidence on these facts addresses the precise question of whether undue influence was exerted to obtain Case's signature. Id. Division I noted, "[t]his requires an inferential determination of state of mind." Id. The Court went on to quote Preston v. Duncan, 55 Wash.2d 678, 681-82, 349 P.2d 605 (1960) noting: "It seems obvious that in situations where, though evidentiary facts are not in dispute, different inferences may be drawn there from as to ultimate facts such as intent, knowledge, good faith, negligence, et cetera, a summary judgment would not be warranted." Id. at 616. Division I concluded that since Case, the nonmoving party, is entitled to all favorable inferences and Gerimonte failed to demonstrate the nonexistence of undue influence, the trial court erred in granting the motion for summary judgment. Case was awarded costs and attorney fees. Id.

The present case is more like Gerimonte because final orders were entered based upon Douglas Woeck's motion to enforce the CR2A

Agreement based only upon affidavits like a summary judgment motion. The trial court concluded based upon Douglas Woeck's self-serving statements alone that the agreement was fair and equitable (RP 12 lns 10-14, RP 12 ln 25-RP 13 lns 1-5; CP 306 section 3.4 last line). Douglas denied all acts of domestic violence and abuse, except the 2003 Assault 4<sup>th</sup> Degree Domestic Violence charge, even though Commissioner Gelman found his denials not to be credible and granted a one year Domestic Violence Protection Order in favor of Merry Woeck three days earlier on February 21, 2012 (CP 254 lns 19-22). The record, files and submissions from the cause number were before the trial court on February 24, 2012 (CP 217 pp 1). All three cause number were listed (CP 217 pp 1).

The relationship between husband and wife is recognized as a confidential relationship under the fraud case law cited above. The environment Merry Woeck lived in during the marriage was inherently coercive and stressful (CP 106-138, CP 224-240). Douglas admits that he and his attorney Ms. Young recommended changes to the CR2A Agreement and that some of them were made. (CP 250 lns 5-7). Merry Woeck did type up the agreement and briefly consult with an attorney (CP 224 pp 2), but the parties negotiated its terms via David Woeck, Douglas' father to favor Douglas (CP 225 pp 1). Merry has no family living in this area. Her closest relatives are in Spokane. Merry was also attending

regular counseling due to the domestic abuse “before, during and after our separation” (CP 234-235; CP 250 lns 14-15). Douglas never disclosed the value of his pension or 401K to Merry because he didn’t want her to have any part of it (CP 219 pp 1, CP 34<sup>10</sup>). Furthermore, Merry Woeck needed the money Douglas Woeck promised her for moving costs to vacate the family home. (CP 226 pp 2). As a perpetrator of domestic violence and abuse, Douglas Woeck used his position of dominance to bully Merry Woeck into accepting what little money he would allow her from the community funds he controlled. In all he promised her \$10,000 over the course of a year (CP 3-7); less than what he makes in one month (CP 25-29). Merry Woeck is an attorney, but as a victim of domestic violence living with her abuser, she was in a coercive environment and not in a position to bargain freely (RP 9 lns 14-17, RP 11 lns 20-25—RP 12 ln 1). She did not follow the advice of her attorney to file for legal separation because Douglas was so insistent on getting divorced and would not have helped Merry financially if she had looked out for her own best interests (CP 224 pp 2). He had demonstrated this before in 2008 when the parties originally filed for dissolution (CP 204-211).

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<sup>10</sup> CP 34 and CP 35 don’t represent the full value of the retirement benefit at distribution, e.g. retirement age. They only represent the accrual of qualifying years.

The trial court erred when it choose to weigh the affidavits in the light most favorable to Douglas, because that is not the standard applied on summary judgment motions and it was Douglas' motion to enforce the CR2A Agreement and enter final orders (RP 12 lns 20-21). Additionally there was substantial evidence in the record before the trial court that Douglas was in fact a perpetrator of domestic violence including his own admission to the 2003 Assault (CP 106-138). The CR2A Agreement should have been vitiated or rescinded because Douglas exercised undue influence over Merry in obtaining the promises and waivers contained in the separation contract. The Decree and other finals orders, including the Separation Contract and CR2A Agreement filed August 11, 2011 and incorporated therein should be vacated, and this matter should be remanded for trial.

4. DOUGLAS WOECK BREACHED THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IMPLICIT IN EVERY CONTRACT BY HIS SUBSEQUENT COURSE OF CONDUCT.

There is an implied duty of good faith and fair dealing in every contract. Badgett v. Sec. State Bank, 116 Wash.2d 563, 569, 807 P.2d 356 (1991). This duty obligates the parties to cooperate with one another so that each may obtain the full benefit of performance. Metro. Park Dist. v. Griffith, 106 Wash.2d 425, 437, 723 P.2d 1093 (1986). Whether a party breached a contract is a question of fact. Frank Coluccio Const. Co., Inc.

v. King County, 136 Wash.App. 751, 762, 150 P.3d 1147 (2007); citing Palmiero v. Spada Distrib. Co., 217 F.2d 561, 565 (9<sup>th</sup> Cir. 1954)(“the question of breach of any contract, oral or written, is a question of fact to be left to the trier of fact”) and Kohn v. Georgia-Pacific Corp., 69 Wash.App. 709, 725, 850 P.2d 517 (1993). “When the trial court has weighed the evidence, we review factual matters to determine whether the trial court’s factual findings are supported by substantial evidence and, if so, whether the findings support the conclusion of law and judgment.” Id. at 761, citing Brin v. Stutzman, 89 Wash.App. 809, 824, 951 P.2d 291 (1998).

“Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.” Id., citing Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 819, 828 P.2d 549 (1992). “There is a presumption in favor of the trial court’s findings [following trial] and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.” Frank Coluccio Const. Co., Inc. at 761, citing Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wash.2d 364, 369, 798 P.2d 799 (1990).<sup>11</sup>

In Frank Coluccio Const. Co., Inc., the trial court found based upon substantial evidence that King County had violated its implied duty of

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<sup>11</sup> This may not be the standard following a summary judgment motion.

good faith and fair dealing by failing to fulfill several of its contractual duties and pursuing a course of conduct intended only to protect the County's position and interests, to the detriment of the construction companies. 136 Wash.App. at 765. The County further "colluded" with the insurance company to assure that the construction companies "builder's risk" claims would be excluded from any insurance coverage that might be afforded. *Id.* The evidentiary record demonstrates that King County was dishonest in fact and precluded FCCC from receiving the full benefit of performance under the Project contract by falsely representing that it had procured an all-risk policy for the Project, by failing to adjust the builder's risk claims in good faith, and by colluding with Factory Mutual to avoid coverage. *Id.* Division I found that "[s]uch behavior plainly contravened King County's duties of good faith and fair dealing, which exist to promote 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" 136 Wash.App. at 766.

In the present case, Douglas Woeck engaged in a course of conduct whereby he not only failed to meet every deadline in the CR2A Agreement, he blocked access to the family home when Merry was still trying to get her property, and continued to keep her under surveillance and thereby harass her with repeated phone calls, texts and emails (CP

225-228). Douglas also bounced his February spousal maintenance check (RP 10 Ins 10-23; CP 88-91). Douglas Woeck's conduct which amounted to harassment and continued domestic abuse forced Merry to obtain two separate restraining orders because he continued contact after the Anti-Harassment Order was issued through a former mutual friend, Lisa-Ann Spirka. He also filed an unfounded bar complaint against Merry based upon his forwarding of her business emails to his own personal email account via the Comcast site he set up in Merry's name as agreed in the CR2A Agreement. (CP 106-138, CP 140-143, CP 217-248). Judge Culpepper did recognize that Douglas failed to have the QDRO timely prepared for review but stated "[t]hat happens with QDROs all the time. He's still, of course, required to comply with all the terms of it" (RP 10 Ins 23-RP 11 Ins 1-2).<sup>12</sup> Appellant submits based upon the evidence in the record on appeal that Douglas Woeck has violated his implied duty of good faith and fair dealing with his subsequent conduct following the execution and filing of the Separation Contract and CR2A Agreement and that such breach of conduct is a basis to void and set aside the contract.

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<sup>12</sup> Merry Woeck received a letter dated May 22, 2012 from the QDRO Consultants Company, LLC informing Douglas Woeck they "understand you are exercising your ERISA appeal rights under federal law and are disputing the Plan Administrator's interpretation of the QDRO" and explaining that they will wait 90 days from the date of the letter before administering the QDRO. A copy of this letter has been previously filed.

5. COSTS AND REASONABLE ATTORNEY'S FEES ARE REQUESTED PURSUANT TO RAP 18.1(b).

This appeal was necessitated by the filing of respondent's Motion to Enforce the CR2A Agreement and grant final orders. As stated above there was insufficient evidence in the record to make a determination as whether the CR2A Agreement fairly and equitably divided the couples assets and liabilities. There is also substantial evidence in the record that the agreement was facially unfair and entered into under duress due to domestic violence and abuse. Finally, there is substantial evidence in the record that Douglas Woeck exercised undue influence in obtaining the majority of the community assets for himself via his position as a husband and perpetrator of domestic abuse. The appellant hereby requests costs and any reasonable attorney's fees which might be incurred for this appeal pursuant to RAP 18.1(b). A cost bill will be prepared pursuant to RAP 14.4, if appellant is the prevailing party, within the timelines allowed.

V. CONCLUSION

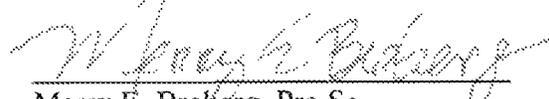
Based upon the arguments of law and fact and the assignments of error assigned above, this case should be remanded for trial with instructions that the couple's property and liabilities need to be valued and determined pursuant to RCW 26.09.080 prior to making a fair and equitable distribution thereof. The Separation Contract and CR2A

Agreement should be vacated, voided, set aside and/or rescinded and the matter should be set in due course for trial. In the mean time, the Trial Court should make a fair provision for temporary monthly spousal maintenance for Merry Woeck pursuant to RCW 26.09.090.

The Trial Court should also be instructed to enter a continuing restraining order consistent with the Domestic Violence Protection Order issued in Pierce County Case No 12-2-00105-2 for a duration of no less than five years based upon the Trial Court's unchallenged finding that the appellant is a ten-year victim of domestic violence and abuse. Appellant also requests that this Court consider mandating that the dissolution action be heard by a different judge based upon Declaration of Jaimee Brodt RE: Bias of Trial Judge, filed March 28, 2012 (CP 320-321) and the Affidavit of Prejudice RE: Judge Ronald L. Culpepper filed April 6, 2012 (CP 322). Finally, appellant requests leave to amend this opening brief when or if her unopposed Motion to Supplement the Record filed July 2, 2012 is granted.

RESPECTFULLY submitted this 7th day of August, 2012, by:

APPELLANT



Merry E. Broberg, Pro Se  
f/k/a Merry E. Woeck  
(WSBA No. 31469)

CERTIFICATE OF SERVICE

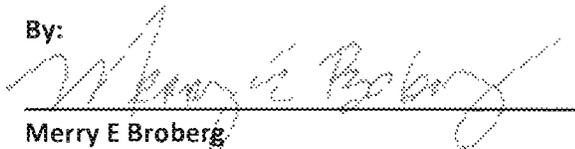
I CERTIFY THAT ON August 7, 2012 I CAUSED A TRUE AND CORRECT COPY OF THE FOLLOWING DOCUMENTS:

OPENING BRIEF OF APPELLANT<sup>1</sup>

TO BE SERVED UPON Tuele and Young, A professional Services Corporation, of which Ms. Sophia Palmer is an associate pursuant to our attached electronic service agreement,

Via email at [spalmer@tuele-young.com](mailto:spalmer@tuele-young.com) and [pam@tuel-young.com](mailto:pam@tuel-young.com) prior to filing the same via attorney portal at <http://www.courts.wa.gov/coa2efiling> in order to comply with RAP 10.2(h).

By:



Merry E Broberg

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<sup>1</sup> Originally filed on 8/6/12 at 5:18 pm, Re-Submitted on 8/7/12 with minor corrections

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TO: Merry Broberg  
FROM: Sophia M. Palmer  
RE: Electronic Service Agreement  
DATE: April 29, 2012

Our office would like to enter into an agreement with you to receive communications and service of pleadings, exclusive of original service of process, electronically.

This Agreement would involve any cases that we currently have between our office, as well as any future cases.

This Agreement can be cancelled, in writing, by either office, at any time, without reason.

Electronic service to our office can be achieved as follows:

Email: spalmer@tuell-young.com (for Sophia M. Palmer); AND  
pam@tuell-young.com (for Pam Ford, Ms. Palmer's Assistant)

Fax: #253-759-0310

If you agree to participate in this reciprocal agreement, please provide the following electronic service information and sign below:

Email: mwoeck@comcast.net

Facsimile: 253 845 6996

Law Office of: AEGIS LEGAL SERVICES, LLC

Signature of authorized individual: Merry E Broberg

Print name of authorized individual: Merry E Broberg

Thank you.

Sophia M. Palmer

# AEGIS LEGAL SERVICES, LLC

## August 07, 2012 - 12:50 PM

### Transmittal Letter

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- Letter
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#### Comments:

Please find Opening Brief of Appellant with Minor corrected re-submitted for filing 8/7/12.

Sender Name: Merry E Woeck - Email: [aegis.legal@comcast.net](mailto:aegis.legal@comcast.net)

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