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COURT OF APPEALS  
DIVISION II  
2013 JUN -5 AM 11:58  
STATE OF WASHINGTON  
BY Cm  
DEPUTY

NO. 44296-5-II

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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ANN E. MILLS,

Appellant,

v.

PAUL WIERENGA,

Respondent.

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REPLY BRIEF OF APPELLANT

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Stephen L. Olson  
Olson & Zabriskie, Inc.  
104 West Marcy Avenue  
Montesano, WA 98563  
(360) 249-6174

## TABLE OF CONTENTS

|                                   |   |
|-----------------------------------|---|
| I. RESPONSE TO INTRODUCTION ..... | 1 |
| II. SUMMARY OF ARGUMENT .....     | 4 |
| III. CONCLUSION .....             | 5 |

## **I. RESPONSE TO RESPONDENT'S STATEMENT OF CASE AND PROCEDURE**

After a 15 year marriage, the trial court entered a Decree of Dissolution in this case dividing the assets. The Decree of Dissolution entered on November 10, 2011 stated in Paragraph 3.15, "The Court intends to make an equal division of the assets of the parties". The Court recognized that the values set forth in the attached Exhibit A, may not be current values for the various financial accounts of the growth or loss that may have occurred therefore the Court gave either party the right to file a motion with the court to ask for an adjustment if necessary. The Court retained jurisdiction to resolve any disputes as to the adjustments and motion of either party. CP 149 (Page 4 of Decree).

It is clear that the Court recognized that the figures set forth in Attachment A were not current or accurate figures and intended that the parties have equal division after considering all the factors and offsets that were to be considered by the parties. The Court knew that adjustments would be necessary to accomplish an equal division.

At the time of entry of the Decree and subsequent amended order, unbeknownst to anyone, except Mr. Wierenga, Mr. Wierenga had withdrawn \$51,331.00 out of the joint IRA accounts. The division of the assets that the parties agreed to was based upon the belief that the temporary restraining orders had been complied with and that no one had

clandestinely taken any monies out of the accounts and put them in their own names. CP 164 (Declaration of Vini Samuel).

The Decree was entered on November 10, 2011 and it wasn't until May 3, 2012 and May 14, 2012 that Mr. Wierenga wrote various emails acknowledging that he had withdrawn \$51,231.00 out of these accounts without telling Ms. Mills. CP 162 (Copy of email). The Respondent, in their brief, calls this amount *di minimus*. The Respondent contends that since he was required to withdraw monies, that he had no obligation to either seek permission of the Court to violate the restraining order nor any obligation to advise anyone that he had taken the monies out of these accounts and put the monies into clandestine accounts in his name. For some reason, Mr. Wierenga believes that this was an excuse for his actions in violating the restraining order. There is no evidence in this record that indicates that Ms. Mills was aware of these actions until May of 2012.

The Respondent's Brief indicates that they believe that at the time the divorce was granted, Ms. Mills believed that Mr. Wierenga misdirected funds and failed to disclose assets, but he points to no evidence to show that Ms. Mills had any knowledge of Mr. Wierenga taking the \$51,231.00 as previously indicated in violation of the restraining orders at the time she signed the Decree. Nor is there any evidence to indicate that she was aware of this on April 17, 2012 when an order amending the Decree was entered.

The Respondent contends by signing this amended order that they intended to fully and finally compromise and settle all issues. The declaration on file, (Affidavit of Vini Samuel) indicates that the

compromises that were made were based on the documentation provided and the affirmation that Mr. Wierenga followed the orders in place. CP 164. Her declaration makes it clear that she was not provided any documentation showing that Mr. Wierenga withdrew funds inconsistent with the temporary orders. CP 164. It is clear that any agreed orders and/or compromises were entered into without knowledge of the misrepresentations of Mr. Wierenga, and that had she known of said actions, she would not have approved of the final Decree and amendment without an additional award of funds.

In addition to taking \$51,331.00 out of the community accounts, Mr. Wierenga represented to the court that he had paid \$28,471.00 of his separate monies into the community IRA accounts.

The court ordered that he be reimbursed those funds from the community account. The Respondent contends that Ms. Mills made copies of all three checks when the Decree was entered. Ms. Mills' declaration makes it clear that the only copy of the check provided was an illegible copy of the front of a check for \$22,000.00 to Charles Schwab. The backside of the check was not printed and there was no indication and the check was illegible and it was unclear where the check was deposited. According to the declaration, Mr. Wierenga refused to provide IRA account information from November of 2009 through October of 2011. Ms. Mills alleges that the other two checks, one for \$2,125.00 and the other for \$4,024.23 was deposited into Charles Schwab Arc Analysis which is Mr. Wierenga's separate account. CP 165 (Declaration of Ann Mills). CP 177 (Responsive Declaration of Ann Mills-copy of illegible

check, front only) (Copy of Schwab statements showing no deposits in community accounts during the periods when the checks were written).

Mr. Wierenga also has not filed a single denial of any of Ann Mills' allegations as set forth in the CR 60 Motion. He does not deny that he took out \$51,331.00 out of the community IRA accounts without advising either the court or Ms. Mills in violation of the restraining order. He does not deny that he placed this money into his own account that was not a community account that was not divided by the court. He has not done this because he is incapable of doing so because the facts are otherwise.

Mr. Wierenga now wants the court to believe without any evidence that the only reason he has not denied the allegations made by Ms. Mills is because of his poor health. The facts are that the reasons that he has not denied that he took the money out of the IRA account in the amount of \$51,331.00 and the reason that he did not deny that he did not deposit three separate checks into his own separate account are because he did so. The record provided to the court clearly would controvert such a statement.

Lastly, there is simply no evidence that he was incapable of signing his name and a declaration, if in fact a denial would have been appropriate.

## **II. SUMMARY OF ARGUMENT**

In the present case, the Decree contemplated equal division of the parties. The Court recognized that the figures in Attachment A of the Decree of Dissolution were old and the Court would eventually have to

give the parties the right to file a motion to seek adjustment if necessary. The parties in this case worked out what they thought was an appropriate adjustment. Unbeknownst to Ann Mills, Mr. Wierenga reduced the community IRA by \$51,331.00 when he took money out the community IRA accounts without notifying the court or Ms. Mills in violation of the existing restraining order. Also unbeknownst to Ms. Mills, was the fact that Mr. Wierenga's representation to the court that he had deposited \$28,149.23 into the community IRA accounts with his separate monies was false. Clearly, Mr. Wierenga was aware of the fact that he had taken said monies out of the IRA accounts without advising Ms. Mills and clearly he is aware of the fact that he had not in fact deposited the monies into the community accounts as he has advised the court. The motion to vacate the Decree in this case pursuant to CR 60 is appropriate as Mr. Wierenga's actions clearly amount to misrepresentation or other misconduct of an adverse party. Any decision to the contrary would be based upon untenable grounds. Ms. Mills should have had the right to make an informed decision with complete knowledge of the true facts when she decided not to seek additional funds from the court as the court Decree permitted.

### **III. CONCLUSION**

The action of the trial court denying the motion to vacate the Decree should be reversed and this matter should be remanded for entry of the order vacating Decree and further appropriate action.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of June, 2013.

OLSON & ZABRISKIE, INC.  
Attorneys for Appellant

By: 

STEPHEN L. OLSON, WSBA #7489

**CERTIFICATE OF SERVICE BY MAIL**

I certify that I caused to be mailed, a copy of the foregoing

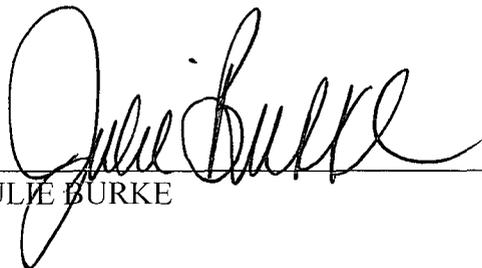
**REPLY BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the

4th day of June, 2013, to the following counsels of record at the

following addresses:

Shelby R. Frost Lemmel  
Masters Law Group  
241 Madison Avenue, North  
Bainbridge Island, WA 98110

Jon Parker  
Parker & Winkelman  
Attorneys at Law  
P.O. Box 700  
Hoquiam, WA 98550-0700

  
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JULIE BURKE