

STATE OF WASHINGTON COURT OF APPEALS  
No: 291103

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IN RE:

CARLOS VIGIL,

Petitioner,

vs.

CAROL ANN VIGIL,

Appellant

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. By way of entry of a “Decree of Dissolution” and “Findings of Fact” and Conclusions of “Law on May 24, 2010, the Superior Court of Spokane County (hereafter Superior Court) erred in bifurcating the proceedings contrary to well established case law and proceeding contrary to an operative automatic bankruptcy stay. [CP179-183].

2. More specifically, the Superior Court erred in entering the final decree on May 24, 2010 when it ruled:

. . . at section 3.1 of the final decree “the marriage of the parties is dissolved.” [CP173]

. . . and at sections 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.13 of the final decree “trial on this issue is reserved pending the lifting of the automatic bankruptcy stay.” [CP180]

. . . and at section 3.15 of the final decree that “the automatic restraining order entered on January 02, 2009 remains in full force and effect pending final resolution of the remaining issues, except that the order does not restrain either party from executing any will, trust, or other estate planning document. Such documents remain subject to the courts final determination in this matter.” [CP181]

3. The Superior Court also erred in entering the May 24, 2010 “Findings of Fact” at sections 2.11, 2.12, and 2.14 wherein it stated:

. . . “reserved pending the lifting of the automatic bankruptcy stay.” [CP177].

4. As regards the May 24, 2010 “Conclusions of Law”, the

Superior Court also specifically erred in entering conclusion of law 3.3 which states:

. . . “The court should determine the marital status of the parties, all other issues concerning the identification, valuation and/or division of property and debt, maintenance and attorney fees are reserved pending the lifting or termination of the automatic bankruptcy stay.” [CP178].

5. Also, as regards the May 24, 2010 “Conclusions of Law,” the Superior Court erred in entering conclusion of law 3.5 and 3.6 which state:

. . . “reserved pending the lifting or termination of the automatic bankruptcy stay . . . The court has authority to bifurcate and enter a decree.” [CP178]

6. Also, as regards the Superior Court’s May 24, 2010 oral opinion, the Superior Court erred when it ruled:

. . . “The Court [in Marriage of Little] focused heavily on what at that time was a new change in the statute as of 1973, recognizing that delay is to be avoided and that the overarching principles balance the prejudice of unfair delay with the risk of hasty determination. The Court analyzed in some detail the policy behind Washington’s requirement to wait 90 days, or at that time 150 if counseling was requested after service. Here in this case those cooling off periods, if you will, certainly have been passed, and the main focus of this matter for the Vigils in the final determination is and will continue to be the financial aspects of the case, which if, in fact, there has been a bankruptcy filing will be preserved and will be part of the automatic stay.” [RP39-41; 42 lines 1-9]

7. Also, as regards the Superior Court's May 24, 2010 oral opinion the Superior Court erred when it ruled:

. . . "The U.S. Code, and this Court is going to defer to federal law when it comes to authority in jurisdictional matters over bankruptcy, is clear in exempting from the automatic stay, and this is Title 11, Chapter 3, Subchapter IV, Section 362, automatic stay. Except as provided, and it lists certain judgments and other acts, legislative pronouncements under Subsection A, and then it goes on in Subsection B to include: "The filing of a petition under certain Federal provisions does not operate as a stay." Then Sub 1, under Subsection A of this section, and now I am dropping to Subsection (ii), "The commencement or continuation of a civil action or proceeding concerning child custody, visitation or the dissolution of a marriage except to the extent that such proceeding seeks to determine the division of property." So dissolution issues are exempt except a division of property, property of the estate or if there was domestic violence." [RP39-42, Lines 1-9]

8. Also, as regards the Superior Court's May 24, 2010 oral opinion the Superior Court erred when it ruled:

. . . "So the Court does have jurisdiction to move forward on the dissolution question, but all aspects of property, debt and liability as well as distribution will be subject to the bankruptcy filing if it, in fact, has taken place and, again certainly the Court would hope to have had some sort of documentation of the bankruptcy." [RP39-42, lines 1-9]

9. Also, as regards the Superior Court's May 24, 2010 oral ruling the Superior Court erred when it ruled:

. . . “We will move forward. The Marriage of Little case is very clear in its provisions that it is not a jurisdictional defect. It may have been at that time a procedural irregularity or error or defect but, again, the Little case on page 198 of the Washington Reports volume talks about objections being waived. Now, in that case, it was waived by failure to object or raise the question on appeal. Here that whole question of delay was being argued as being detrimental to the other side. The facts of that objection do not apply here.” [RP39-42, lines 1-9]

10. Also, as regards the Superior Court’s May 24, 2010 oral ruling the Superior Court erred when it ruled:

. . . “We will move forward then with the bifurcation. With that then, Counsel, I will ask Mr. Nelson to---the court does need in this unique setting to have findings. . . . I will ask you, Counsel, to be ready to provide findings as it relates to this pretrial ruling. Having said that, then we will move forward with the narrow question of dissolution and all remaining issues will pend final dispensation after bankruptcy resolution or waiver from the stay.” [RP39-42, lines 1-9]

11. Also, as concerns the Superior Court’s May 24, 2010 oral opinion the Superior Court erred when it ruled:

. . . “Under the unique circumstances the issues before the Court are clear, and Mr. Geissler has through his representation of Ms. Vigil achieved the furthest remedy that probably could be addressed in the Court’s stay of any of these transfer issues except the estate planning issues. Without actually having evidence of that particular stay, I am sorry, the filing of the bankruptcy, I am somewhat limited, but in recognition of bankruptcy jurisdiction I am satisfied that no part of the property or debt distribution can be stayed. I am not sure that this court would have authority, however, to subjugate the assets if, heaven

forbid it doesn't happen, but if Mr. Vigil does not survive the discharge of the bankruptcy. That is why the Court is recognizing that exception as it relates to his estate planning." [RP 39-42, lines 1-9]

12. Also, as concerns the Superior Court's May 24, 2010 oral opinion the Superior Court erred when it ruled:

. . . "Now, this is a very unique situation where the health of one of the parties is so very precarious, but the evidence before the Court, particularly where this matter has been going on for so long and if I am not mistaken, if I heard correctly, I believe I heard Ms. Vigil testify that Mr. Vigil hasn't—Mr. Vigil took all financial support or withheld financial support for ten years. Again that just adds more facts to the Court's understanding that this matter is one in which this marriage is irretrievably broken." [RP39-42, lines 1-9]

13. Also, as concerns the Superior Court's May 24, 2010 oral opinion the Superior Court erred when it ruled:

. . . "The jurisdiction of the Court over the parties, over the subject matter is established and hasn't been disrupted by the Little case and the unique facts render a determination and bifurcation on the status of the marriage important at this time. I have not had a competency challenge per se to Mr. Vigil's ability to conclude that the marriage is irretrievably broken. Because there does appear to be extended family, this matter does need to be resolved, at least as to the status of the marriage." [RP39-42, lines 1-9]

14. Also, as concerns the Superior Court's May 24, 2010 oral opinion the Superior Court erred when it ruled:

. . . "And based on these unique facts I am satisfied that there is sufficient evidence to establish this marriage is

irretrievably broken. All financial determinations will be stayed but, again, counsel, it is a very uncomfortable position to be in where I do not have supporting documentations to establish that there actually is a bankruptcy. So with that, I am going to ask counsel to provide that to the Court, although I know it will be after the Court's recognition of that fact. . . . This matter will be subject to further proceedings depending upon the direction that any other Federal matters take." [RP 39-42, lines 1-9]

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether, as a matter of law, the Superior Court had the authority to bifurcate the proceedings and dissolve the marriage without addressing the ancillary issues of property division, division of liabilities, spousal maintenance, fees, and costs. [Assignments of Error numbers one through fourteen].

2. Whether, as a matter of law, the Superior Court had the authority to enter a decree of dissolution and bifurcate the issues of property, liability, and spousal maintenance knowing the wife, the day before trial, had filed a petition under Chapter 13 of the U.S. Bankruptcy Code? [Assignments of Error numbers one through fourteen].

3. Whether the Superior Court, abused its discretion, by entry of a decree of dissolution without also addressing the property, liabilities, spousal maintenance and other issues? [Assignments of Error numbers one through fourteen].

4. Whether, the Superior Court, abused its discretion, by failing to continue the trial to effectuate relief from the federal bankruptcy stay?

[Assignments of Error numbers one through fourteen].

## II. STATEMENT OF THE CASE

This matter concerns entry of a decree of dissolution of marriage [CP179-183] and findings of fact and conclusions of law [CP175-178] wherein a trial court bifurcated the issues, dissolved the marriage, over the wife's objection, and reserved for later determination, the distribution of the property, the division of the liabilities, the award of spousal maintenance, attorneys fees, other professional fees and costs, all in violation of a federal bankruptcy stay. [CP175]. Subsequently, the husband died.

Procedural Facts: On January 21, 2009 this matter commenced with the filing of a summons and petition for dissolution of marriage. [CP1-9] However, a response to the petition was never filed. Yet, on May 21, 2009, a case scheduling order was issued setting the trial date for November 09, 2009. [CP111]

Thereafter, despite the lack of a response, on October 29, 2009 an amended case scheduling order was issued continuing the trial to March 08, 2010. [CP113] And, on March 01, 2010, another request was filed to continue the trial date. [CP115]

Thereafter, on March 03, 2010, the Superior Court issued an order wherein it stated "the petitioner may bring a motion before the trial court

to discuss pre-trial estate planning and the issue of whether the court has jurisdiction to bifurcate the issue of the status of the parties' marriage from the issues of property and debt division." [CP31, lines 11-22] Despite the lack of a response, trial was again continued to May 04, 2010. [CP128] Thereafter, trial was again continued to May 24, 2010. [CP169]

At the March 03, 2010 hearing the Superior Court specifically invited briefing on the issue of bifurcation from Ms. Vigil's counsel. [RP3, lines 11-22] The court stated "I am denying now, but I am inviting briefing. I would really be benefited I think with an understanding of whether that is an appropriate bifurcation and, if so, you may renew that and bring that back." [RP31] Mr. Vigil's counsel never provided the Superior Court the requested briefing. [RP31] Nor did Mr. Vigil's counsel ever file a formal written motion for bifurcation. [RP31] And, as noted, there was still no filed response to the petition.

Nonetheless, as counsel for Ms. Vigil informed the court at the trial May 24, 2010, "in the case of Little vs. Little, 96 Wn. 2d 183, 634 P. 2d 498, . . . bifurcation is not an appropriate way to go in this and not to go forward today. My client is opposing that." [RP34, lines 2-12] Moreover, as represented by counsel, Ms. Vigil had commenced a bankruptcy the previous Friday. [RP33, lines 17-24]. The Superior Court thereafter recessed to review the case of Marriage of Little. [RP34, lines 13-24]

Counsel for Mr. Vigil argued the filing of the bankruptcy was a waiver of Marriage of Little. [RP35, lines 8-25; 36; 39, lines 17-22] On the other

hand, counsel for Ms. Vigil pointed out the automatic stay filed in the bankruptcy court needed to be lifted before the dissolution case could go to trial in any form. [RP38, lines 9-19] The Superior Court then orally ruled as follows:

. . . Admittedly the Court has not undertaken a comprehensive review of cases since the Marriage of Little in 1981. The Court there focused heavily on what at that time was a new change in the statute as of 1973, recognizing that delay is to be avoided and that the overarching principles balance the prejudice of unfair delay with the risk of hasty determination. The Court analyzed in some detail the policy behind Washington's requirement to wait 90 days or at that time 150 if counseling was requested after service. Here in this case those cooling off periods, if you will, certainly have been passed, and the main focus of this matter for the Vigils in the final determination is and will continue to be the financial aspects of the case, which if, in fact, there has been a bankruptcy filing will be preserved and will be part of the automatic stay. However, the U.S. Code, and this Court is going to defer to federal law when it comes to authority in jurisdictional matters over bankruptcy, is clear in exempting from the automatic stay, and this is Title 11, Chapter 3, Subchapter IV, Section 362, automatic stay. Except as provided, and it lists certain judgments and other acts, legislative pronouncements under Subsection A, and then it goes on in Subsection B to include: "The filing of a petition under certain Federal provisions does not operate as a stay." Then Sub 1, under Subsection A of this section, and now I am dropping to Subsection (ii), "The commencement or continuation of a civil action or proceeding concerning child custody, visitation or the dissolution of a marriage except to the extent that such proceeding seeks to determine the division of property." So dissolution issues are exempt except a division of property, property of the estate or if there was domestic violence. So the Court does have jurisdiction to move forward on the dissolution question, but all aspects of property, debt and

liability as well as distribution will be subject to the bankruptcy filing if it, in fact, has taken place and, again certainly the Court would hope to have had some sort of documentation of the bankruptcy. Having that, I am simply going to rely on counsel's representations. We will move forward. The Marriage of Little case is very clear in its provisions that it is not a jurisdictional defect. It may have been at that time a procedural irregularity or error or defect but, again, the Little case on page 198 of the Washington Reports volume talks about objections being waived. Now, in that case, it was waived by failure to object or raise the question on appeal. Here that whole question of delay was being argued as being detrimental to the other side. The facts of that objection do not apply here. We will move forward then with the bifurcation. With that then, Counsel, I will ask Mr. Nelson to---the court does need in this unique setting to have findings. . . . I will ask you, Counsel, to be ready to provide findings as it relates to this pretrial ruling. Having said that, then we will move forward with the narrow question of dissolution and all remaining issues will pend final dispensation after bankruptcy resolution or waiver from the stay." [RP39-41; 42 lines 1-9]

This appeal followed in due course. [CP184; 185]

Substantive Facts: Thereafter, in the testimony, Ms. Vigil objected to entry of a decree of dissolution. [RP49 lines 2-4] She did not believe the marriage was irretrievably broken. [RP49 lines 5-6] She did not believe Mr. Vigil was acting in a sane or rational manner. [RP49 lines 7-9] She filed a Chapter 13 bankruptcy. [RP50 lines 10-12] And, she objected to bifurcation. [RP50 lines 21-24]

Mr. Vigil also testified he was seventy five years old. [RP44 lines 9-13] He wed Ms. Vigil in May 25, 1957. [RP44 line 19] He was currently under a doctor's care. [RP46 lines 7-11] And, he was taking too many medications to recall. [RP46 lines 10-15]

Additionally, as the declarations indicate, there is a home, [CP24], a piece of real property off Spotted Road, [CP49; 138], and possibly another home. [CP49] There is a sign shop, [CP26 lines 25-26], an art studio, [CP26 lines 25-26], personal property, [CP50], a tractor, [CP50], a backhoe and tiller [CP50], storage containers, [CP50], equipment and "tough sheds". [CP48] There is a retirement pension, [CP168], a business, [CP49], an account in Mexico with \$30,000.00, [CP167], and a checking account with STCU with \$11,000. [CP167]

Lastly, as the declarations further indicate, Ms. Vigil is seventy years old with many health issues of her own, [CP26 lines 8-17], including a bad back, right hip degeneration, both knees are bad, internal digestion problems, female problems, arthritis in joints, and she walks with a cane [CP26 lines 8-17] She only makes \$485.00 per month social security and \$30.00 per month Amway. [CP41; 132] She was asking for spousal maintenance.

Thereafter, the Superior Court further ruled:

. . . Under the unique circumstances the issues before the Court are clear, and Mr. Geissler has through his representation of Ms. Vigil achieved the furthest remedy that probably could be addressed in the Court's stay of any of these transfer issues except the estate planning issues. Without actually having evidence of that particular stay, I am sorry, the filing of the bankruptcy, I am somewhat limited, but in recognition of bankruptcy jurisdiction I am satisfied that no part of the property or debt distribution can be stayed. I am not sure that this court would have authority, however, to subjugate the assets if, heaven

forbid it doesn't happen, but if Mr. Vigil does not survive the discharge of the bankruptcy. That is why the Court is recognizing that exception as it relates to his estate planning. Now, this is a very unique situation where the health of one of the parties is so very precarious, but the evidence before the Court, particularly where this matter has been going on for so long and if I am not mistaken, if I heard correctly, I believe I heard Ms. Vigil testify that Mr. Vigil hasn't—Mr. Vigil took all financial support or withheld financial support for ten years. Again that just adds more facts to the Court's understanding that this matter is one in which this marriage is irretrievably broken. The undisputed facts: Mr. Vigil is 75 years old. The parties married in Utah, May 25, 1957. This matter was filed July 21, 2009, which can be looked on as a technical—well, let's see. This matter was filed January 21, 2009 so the Court recognizes that fact, and that is a reasonable date of separation under the circumstances, although the facts probably were in place much prior to that. The jurisdiction of the Court over the parties, over the subject matter is established and hasn't been disrupted by the Little case and the unique facts render a determination and bifurcation on the status of the marriage important at this time. I have not had a competency challenge per se to Mr. Vigil's ability to conclude that the marriage is irretrievably broken. Because there does appear to be extended family, this matter does need to be resolved, at least as to the status of the marriage. And based on these unique facts I am satisfied that there is sufficient evidence to establish this marriage is irretrievably broken. All financial determinations will be stayed but, again, counsel, it is a very uncomfortable position to be in where I do not have supporting documentations to establish that there actually is a bankruptcy. So with that, I am going to ask counsel to provide that to the Court, although I know it will be after the Court's recognition of that fact. . . . This matter will be subject to further proceedings depending upon the direction that any other Federal matters take.

Additional facts are set forth below as they relate to argument on a specific issue.

### III. SUMMARY OF ARGUMENT

As a matter of law, the Superior Court misapplied In re Marriage of Little, 96 Wn. 2d 183, 634 P. 2d 498 (1981) in granting Mr. Vigil's oral motion to bifurcate and proceed. As a matter of law, the Superior Court could not move forward with the proceedings in the face of the Federal automatic bankruptcy stay. In addition, bifurcation was an abuse of discretion. Even assuming Mr. Vigil did not waive the right to seek bifurcation the Superior Court nevertheless abused its discretion by not allowing a further continuance of the trial in light of the automatic bankruptcy stay.

### IV. ARGUMENT

#### STANDARD OF REVIEW

The issues Ms. Vigil raises are governed by the following standards of review insofar as those particular issues entail a combination of issues of law and issues concerning an abuse of discretion by the Superior Court. First, a trial court's oral and memorandum decision, if included in the record, may be considered on appeal. Banuelos v. TSA Washington Inc., 134 Wn. App. 603, 616, 140 P. 3d 652 (2006). Second, the issues are generally considered both in terms of a quantitative determination of substantial evidence as well as to the legal aspects and, thus, reviewed de novo. State v. Horrace, 144 Wn. 2d 386, 392, 28 P.3d 753 (2001). In other words, such review is treated as a question of law,

to be viewed in the light of the facts and evidence presented. Third, pure legal errors including, as here, the proper interpretation and application of a statute, a court rule, or prior case law are reviewed de novo. Horrace, supra. Fourth, with respect to issues addressing the exercise of discretion, the standard of review is “abuse of discretion.” In this vein, a challenge to a decision regarding a domestic relations matter is ultimately examined for manifest abuse of discretion. And, fifth, when the reviewing court addresses an alleged abuse of discretion, questions can and should be separated into questions of fact and the conclusions of law based on those facts. Bartlett v. Betlach, 136 Wn. App. 8, 19, 146 P. 3d 1235 (2006).

A Superior Court’s discretion is abused when the court has based its decision on untenable grounds or for untenable reasons. Deyoung v. Cenex Ltd., 100 Wn. App. 885, 894, 1 P. 3d 587 (2000), review denied, 146 Wn. 2d 1016 (2002). As stated in In re Parentage of Jannot, 110 Wn. App. 16, 22, 37 P. 3d 1265 (2002), aff’d in part, 149 Wn 2d 123, 65 P. 3d 664 (2002):

. . . The abuse of discretion standard is not, of course, unbridled discretion. Through case law, appellate courts set parameters for the exercise of the judge’s discretion. At one end of the spectrum the trial judge abuses his . . . discretion if [her] decision is completely unsupportable, factually. On the other end of the spectrum, the trial judge abuses [her] discretion if the discretionary decision is contrary to the applicable law. . . .

Finally, Mr. Vigil's death during the pendency of this appeal does not abate the proceedings. In re Marriage of Fiorito, 112 Wn. App. 657, 50 P. 3d 298 (2002). The seminal case is In re Marriage of Himes, 136 Wn. 2d 707, 965 P. 2d 1087 (1998).

1. As a matter of law, the Superior Court misapplied In re: Marriage of Little, 96 Wn. 2d 183, 634 P. 2d 498 (1981) in granting Mr. Vigil's oral motion to bifurcate and proceed. [Issue No. 1].

The cases are clear. In re Marriage of Little, 96 Wn. 2d 183, 634 P. 2d 498 (1981); In re Marriage of Hughes, 128 Wn. App. 650, 116 P. 3d 1042 (2005), review denied, 156 Wn. 2d 103, 133 P. 3d 474 (2006); In re Marriage of Ochsner, 47 Wn. App. 520, 736 P. 2d 292 (1987) and In re Marriage of Soriano, 31 Wn. App. 432, 643 P. 2d 450 (1982); hold, a court is not allowed to bifurcate a dissolution proceeding and defer for future resolution ancillary issues of the property, debts, and spousal maintenance. Indeed, as stated by Justices Brown, Sweeney and Schulteis, "domestic relations courts generally do not permit bifurcation of issues such as custody, support, maintenance, and property ancillary to dissolution when the parties' respective interests can be determined in a single litigation." In re Marriage of Hughes, supra., at 658, citing In re Marriage of Little, 96 Wn. 2d 183, 189, 634 P. 2d 498 (1981); Byrne v. Ackerlund, 108 Wn. 2d 445, 457, 739 P. 2d 1138 (1987).

In fact, as stated, in In re Marriage of Oschner, supra., at 527, "the

issue in Little was whether a court could enter a decree of dissolution and defer its decision on ancillary issues such as custody, support, maintenance and division of property until a later time. The court held that RCW 26.09 does not authorize the bifurcation of dissolution and ancillary relief.” See also, In re Marriage of Soriano, at 437, wherein it was stated, “our State Supreme Court recently reaffirmed the long standing rule that the trial court must dispose of all assets brought before it and that a party to marriage dissolution has the right to have his or her interest in the property definitely and finally determined. In re Marriage of Little, 96 Wn. 2d 183, 634 P. 2d 498 (1981), Shaffer v. Shaffer, [43 Wn. 2d 629, 262 P. 2d 763 (1953)], Moore v. Moore, 9 Wn. App. 957, 575 P. 2d 1309 (1973).”

For, as stated in Little, at 192-194:

. . . This court held in Shaffer v. Shaffer, 43 Wn. 2d 629, 630, 262 P. 2d 763 (1953) that the statute established the duty of the trial court to dispose of all of the property of the parties which was brought before its attention in the trial court action and that the parties had the right to have their respective interests in the property after they were divorced, definitely and finally determined in the decree which divorced them. This interpretation was repeated in Bernier v. Bernier, 44 Wn. 2d 447, 267 P. 2d 1066 (1954) . . . the court was required to make its final ruling with respect to property disposition at the time of the decree . . . Thus, before the enactment of the dissolution act of 1973, it was the established legislative policy as construed by this court, to require the court to rule upon all issues within its jurisdiction at the time of entry of a decree of divorce, although a final determination with respect to custody might be postponed. If it was the intent of the legislature to change that policy, we do not find that intent expressed in the act . . . RCW 26.09.050 is explicit in requiring the court

to take action on ancillary provisions at the time that it enters a decree of divorce. There are provisions for temporary orders prior to entry of "the final decree"(RCW 26.09.060), but there is no provision in the act authorizing a postponement of the hearing in these matters, . . .it is the duty of the Superior Court to rule upon ancillary matters at the time it enters the decree. A party to a marriage dissolution has the right to have his interest in the property of the parties definitely and finally determined in the decree that dissolves the marriage. (Emphasis added)

In light of the foregoing analysis, Ms. Vigil maintains her assignments of error numbers one through fourteen are well-taken with respect to the record and law governing this appeal. Accordingly, the challenged decisions of the Superior Court, as identified in those assignments of error, and which relate to the misapplication of In re Marriage of Little, 96 Wn. 2d 183 (1981) should be reversed and the May 24, 2010, decree found in error. RAP 12.2. Governing law requires nothing less.

2. As a matter of law, the Superior Court could not move forward with the proceedings in the face of the Federal automatic bankruptcy stay. [Issue No. 2].

Construction of Bankruptcy Code statutes is governed by federal law. Crafts v. Pits, 161 Wn. 2d 16, 27, 162 P. 3d 382 (2007). It is axiomatic the provisions of the U.S. Bankruptcy Code barred the Superior Court from proceeding with the trial as Ms. Vigil had, the previous Friday, commenced a Chapter 13 proceeding in federal court triggering the protections of the automatic stay. As such, Mr. Vigil was required to seek relief from the automatic stay in federal court in order to permit the

pending judicial dissolution action to continue as scheduled. Then, the bankruptcy court would determine if Mr. Vigil was entitled to relief from the automatic stay under the factors set forth in Sonnax Indus., v. Tri Component Prods. Corp, 907 F. 2d 1280, 1286 (2<sup>nd</sup> Cir 1990). Indeed, as recently stated in In re: Taub, 10-49215-ess (NYEBC October 08, 2010):

. . . the filing of a bankruptcy petition under the Bankruptcy Code triggers a stay of any act to commence or continue “a judicial, administrative, or other action” to recover a prepetition claim against a debtor, and stays any act to “exercise control over property of the estate.” 11 U.S.C. sec 362(a)(1),(a)(3). The automatic stay is “effective immediately upon the filing” of a bankruptcy petition without further action. Rexnord Holdings v. Bidermann, 21 F. 3d 522, 527 (2<sup>nd</sup> Cir 1994). The automatic stay is a fundamental debtor protection designed to promote equal treatment among creditors and to provide the debtor with a “breathing spell” from the “financial pressures that drove [the debtor] into bankruptcy.” Eastern Refractories Co. v. Forty Eight Insulations Inc., 157 F. 3d 169, 172 (2<sup>nd</sup> Cir 1998)(internal quotations omitted). Notwithstanding this statutory protection, the court may modify the automatic stay for cause, including lack of adequate protection. 11 U.S.C. sec 362(d)(1).(Emphasis added)

As Taub further instructs:

. . . Bankruptcy Code Section 362(d)(1) permits relief from the automatic stay “for cause, including the lack of adequate protection of an interest in property of such party in interest.” 11 U.S.C. sec 362(d)(1). The burden is on the moving party . . .to make an initial showing of cause [for relief from the stay]. Absent such showing, relief from the effect of a stay will be denied.” Schneiderman v. Bogdanovich, 292 F. 3d 104, 110 (2d Cir 2002)(citing Maxxeo v. Lenhert, 167 F. 3d 139, 142 (2d Cir 1999) . . . As several courts have noted “in deciding whether to lift a

stay to allow a creditor to continue litigation in another forum, a bankruptcy court should consider the particular circumstances of the case and 'ascertain what is just to the claimants, the debtor and the estate. (Emphasis added)

See also, Carver v. Carver, 954 F. 2d 1573 (11<sup>th</sup> Cir 1992); In re White, 851 F.2d 170 (6<sup>th</sup> Cir 1988)(automatic stay lifted to allow dissolution action to proceed in state Court)(“the effect of Mr. White’s bankruptcy petition was to halt the divorce proceedings because of the automatic stay provisions of 11 U.S.C. sec 362.”); In re McDonald, 755 F. 2d 715 (9<sup>th</sup> Cir 1985); In re Johnson, 51 B.R. 439 (Bankr E.D. Pa. 1985); Schulze v. Schulze, 15 B.R. 106 (Bankr S.D. Ohio 1981).

Here, Mr. Vigil and his counsel were required to ask the federal court to lift the automatic stay in order to continue with the judicial action in Superior Court. In re Daniels, 316 B.R. 342 (Bankr D. Idaho 2004). Mr. Vigil and counsel failed to do so in violation of the automatic bankruptcy stay. In fact, Mr. Vigil and his counsel had an affirmative duty to suspend the judicial action in state court if there was any misunderstanding regarding the scope of the federal court orders or automatic stay and the “prudent course” was for Mr. Vigil or counsel to seek judicial determination from the bankruptcy court. Daniels, supra., In re Clark, 49 B.R. 704, 707 (Bankr D. Guam 1985)(“where there is uncertainty about an order of the bankruptcy court or the applicability of the automatic stay,

a creditor should petition the court for clarification.”) See also, In re Stuart, 402 B.R. 111 (Bankr E.D. Pa. 2009). Consequently, the Superior Court could not proceed. Indeed, 11 U.S.C. Section 362 of the bankruptcy code provides that filing a bankruptcy petition creates an automatic “stay, applicable to all entities,” Deveny v. Hadaller, 139 Wn. 2d 605, 617, 161 P. 23d 1059 (2007), including the Superior Court.

On the other hand, 11 U.S.C. section 362’s automatic stay does not apply to sales or transfers of property initiated by the debtor. *Id*, citing Schwartz, 954 F. 2d 569,574 (9<sup>th</sup> Cir 1992) And, if Ms. Vigil or the trustee chose not to invoke the protections of section 362, no other party could attack any acts in violation of the automatic stay. *Id*, at 617. Moreover, Ms. Vigil was, under 11 USC section 522, entitled to exempt certain personal property and property value from the bankruptcy estate and retained the right to sell, transfer, encumber or use any property that was exempt. Deveney, 620. Hence, some of the property before the Superior Court was arguably subject, in part, to division at the time of the dissolution of the marriage rather than bifurcation for future resolution. Indeed, a “property division in a dissolution without a monetary award does not establish a creditor/debtor relationship. See, e.g., In re Long, 148 B.R. 904, 907-908 (Bankr. W.D. Mo 1992). Thus, the Superior Court could easily have divided the exempt properties rather than bifurcating the matters, irrespective of the bankruptcy, establishing “ownership”

rather than “creditors.” In re Marriage Penry, 119 Wn. App. 799, 803, P. 3d 1231 (2004).

In sum, and for these additional reasons, Ms. Vigil, once more maintains her assignments of error numbers one through fourteen with respect the federal bankruptcy stay and bifurcation are well-taken. Hence, the challenged decision of the Superior Court, as identified in those assignments of error, should be reversed and the May 24, 2010 decree set aside and the case remanded for trial. RAP 12.2.

3. In addition, bifurcation was an abuse of discretion. [Issue No. 3].

Nevertheless, even assuming, arguendo, Mr. Vigil was somehow entitled in the first instance to a bifurcation, he abandoned and waived his putative right to raise the claim by failing to provide the Superior Court a formal written motion and briefing as directed. [CP31 lines 11-22], And, as stated at Civil Rule 7(b)(1) motions are to be in writing and as stated at Civil Rules 5 and 6, motions must be served and filed at least five days before the hearing.

In short, the putative issue of bifurcation could not be raised under any other provision of the Civil Rules. [CP31 lines 11-22]. Thus, the superior court lacked jurisdiction under the Civil Rules to entertain any further request for bifurcation once Mr. Vigil's counsel failed to file and note a motion for bifurcation with an accompanying brief as the Court

previously instructed. [CP31 lines 11-22] Hence, for the superior court to have simply ignored its previous instructions caused the court to err and abuse its discretion. And in light of this further analysis, Ms. Vigil's, assignments of error numbers one through fourteen, as they again concern the superior court are well-taken. Consequently, the challenged decisions of the superior court, identified in those assignments of error, should be reversed, and the May 24, 2010, decree set aside and the case remanded for trial. RAP 12.2.

4. Even assuming Mr. Vigil did not waive the right to seek bifurcation the Superior Court nevertheless abused its discretion by not allowing a further continuance of the trial in light of the automatic bankruptcy stay. [Issue No. Four].

Even assuming Mr. Vigil and the superior court could nonetheless rely upon oral motions without requested briefs, the trial judge failed to properly consider the prudence of a continuance of the trial in light of the operative effect of 11 USC sec 362 to effectuate a request in federal court by Mr. Vigil for relief from the bankruptcy stay.

Here, the dissolution decree could not, as a matter of law, be bifurcated. As noted above, the superior court lacked such authority. In re Marriage of Little, supra. Consequently, the superior court was not in a position to even consider the issue. Moreover, and as discussed above, the superior court lacked any basis for violating the bankruptcy stay. Hence, "prudence" mandated a continuance. Daniels, supra., Clark,

supra.

As such, as indicated from Ms. Vigil's legal argument above, the superior court clearly misinterpreted and misapplied the factors governing bankruptcy law as well corresponding case law associated with the application for relief from stay. Accordingly, the challenged decisions of the superior court, wherein Mr. Vigil's oral motion to bifurcate and to proceed were granted are founded upon untenable grounds, were entered for untenable reasons, and involved a misinterpretation and misapplication of law, thus, constituting a manifest abuse of discretion by the Court. See, Topliff v. Chicago Ins. Co., 130 Wn. App. 301, 122 P.3d 922, review denied, 157 Wn.2d 1018 (2006); Bar v. MacGugan, 119 Wn. App. 43, 78 P.3d 660 (2003); Stoudil v. Edwin A. Epstein, Jr., Operating Co., 101 Wn. App. 294, 3 P.3d 764 (2001); DeYoung v. Cenex Ltd., 100 Wn. App. 885, 1 P.3d 587, review denied, 146 Wn.2d 1016 (2002). State v. Robinson, 79 Wn. App. 386, 902 P.2d 652 (1995); In re Marriage of Tang, 57 Wn. App. 648, 789 P.2d 118 (1990).

In fact, as reflected by the analysis set forth in In re Taub, it is likely Mr. Vigil upon application for relief from stay would have been granted such relief from stay or even an annulment of the stay upon consideration of the Sonnax factors. Thus, the superior court's failure to continue the matter and order the relief from stay be pursued, was a clear abuse of discretion.

Indeed, if the superior court could not bifurcate the ancillary issues

from the dissolution, and if Ms. Vigil has a right to have the property and debts decided in the decree of divorce, Mr. Vigil was required to ask the bankruptcy court for relief from stay. Daniels, supra., and Clark, supra. Then, pursuant to bankruptcy rule 4001(a)(3) an order granting a motion for relief from an automatic stay is, in turn, stayed until the expiration of 14 days after the entry of the order unless the court orders otherwise. And, ironically, due to the lack of answer to the petition, the issues were not even joined for trial in the first instance.

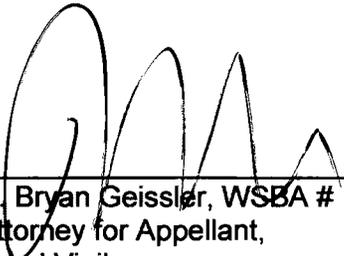
Thus, for this final reason, Ms. Vigil, once again maintains her assignments of error numbers one through fourteen, with respect to abuse of discretion, are well substantiated and, consequently, the challenged May 24, 2010 decisions of the superior court, as identified in those assignments of error, should be reversed and the matter remanded for trial. RAP 12.2.

## **V. CONCLUSION**

Ms. Vigil respectfully requests the challenged decisions of the superior court as set forth in May 24, 2010 decree of dissolution be reversed, the marital status reinstated, and the matter set for trial. Pursuant to RAP 18.1 and RCW 26.09.170 Ms. Vigil requests reasonable attorney's fees and expense. RAP 18.9.

DATED this 6<sup>th</sup> day of December, 2010.

Respectfully submitted:



R. Bryan Geissler, WSBA # 12027  
Attorney for Appellant,  
Carol Vigil

Declaration of Mailing

I, Karen DeMello, under penalty of perjury under the laws of the state of Washington that on the 6<sup>th</sup> day of December, 2010, I mailed a copy, by first class US Mail, of the document this declaration is attached to Jason Nelson, 2222 N Monroe, Spokane, WA 99201.

Dated this 6<sup>th</sup> day of December, 2010 in Spokane, WA.



Karen M. DeMello