

FILED

MAR 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Nos. 29235-5-III, 29332-7-III

IN THE COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

In re the Marriage of
FRANCES J. BOGART,
Petitioner/Respondent,
and
WARREN G. BOGART,
Respondent/Appellant.

APPEAL FROM THE SUPERIOR COURT OF WALLA WALLA
COUNTY, THE HONORABLE JOHN W. LOHRMANN, JUDGE

BRIEF OF APPELLANT

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III. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's Motion for Relief from Order Re: Sale of Real Property.
2. The trial court erred in finding appellant in contempt.
3. The trial court erred in awarding attorney fees to respondent for contempt.
4. The trial court erred in ordering appellant to sign a listing agreement for the River Road property.
5. The trial court erred in awarding respondent attorney fees at trial and on appeal.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court lack subject matter jurisdiction to order, post-dissolution, a sale of real property awarded to appellant in the dissolution? (Pertains to Assignments of Error Nos. 1-5).
2. Does a modification of the property distribution provisions of a decree of dissolution require compliance with RCW 26.09.170 (1)? (Pertains to Assignments of Error Nos. 1-5).
3. Did respondent and the trial court fail to comply with RCW 26.09.170 (1) in ordering the sale of appellant's River Road property? (Pertains to Assignments of Error Nos. 1-5).
4. In the Order Re: Sale of Real Property, did the trial court exceed its jurisdiction by implying in the Decree of Dissolution a reasonable

time for respondent to satisfy the judgment for an offsetting award in the Decree of Dissolution? (Pertains to Assignments of Error Nos. 1-5).

5. If the trial court lacked subject matter jurisdiction to order the sale of appellant's River Road property, is the trial court's Order Re Sale of Real Property void? (Pertains to Assignments of Error Nos. 1-5).
6. If the trial court's Order Re Sale of Real Property is void, did the trial court err in finding Appellant in contempt? (Pertains to Assignments of Error Nos. 2-5).
7. May the court find a party in contempt for violation of the property distribution provisions of a decree of dissolution? (Pertains to Assignments of Error Nos. 2-3).
8. Is the court required to enter findings of fact setting forth the basis of contempt? (Pertains to Assignments of Error Nos. 2-3).
9. Is the trial court required to enter a finding of bad faith or intentional conduct in order to support an order of contempt? (Pertains to Assignments of Error Nos. 2-3).

10. If the order of contempt is invalid, did the trial court also err in awarding attorney fees for contempt? (Pertains to Assignments of Error Nos. 2-3).
11. If the trial court lacked jurisdiction to order that the property be sold, did the trial court also lack jurisdiction to order appellant to list the property for sale? (Pertains to Assignments of Error Nos. 2-5).
12. Did the trial court err in awarding respondent attorney fees at trial and on appeal without considering the parties' need for and ability to pay such fees? (Pertains to Assignments of Error Nos. 2-5).

V. STATEMENT OF THE CASE

A. FACTS

Appellant, Warren Bogart, and Respondent, Frances J. (Bristow) Bogart, were married in June, 1994.¹ The parties separated in June, 2007.² Appellant worked as a builder-developer.³ Appellant owned and operated a corporation, W.G. Bogart Contractors and Building, Inc., which owned two houses in Grandview and a duplex.⁴ Appellant also owned and operated Bogart Land Development, LLC, which owned four unsold lots.⁵ Appellant's largest asset is his residence at 455 North River Road, Prosser.⁶ Appellant is over 80 years of age, and suffers from congestive heart failure.⁷

Respondent, Frances J. (Bristow) Bogart, was 80 years old at the time of trial in February, 2009.⁸ Respondent suffers from the effect of a stroke, walks with a cane, has high blood pressure, and is an insulin-

¹ CP 9.

² CP 9.

³ CP 13-14.

⁵ CP 21.

⁶ CP 21.

⁷ RP II p. 17.

⁸ CP 15-16.

dependent diabetic.⁹ Respondent's age and health preclude further education or training, and she is currently unemployable.¹⁰

B. PROCEDURAL HISTORY

Respondent commenced this action for dissolution of the parties' marriage in July, 2007.¹¹ In January, 2009, following a trial, the trial court entered a written decision.¹² In February, 2009, the trial court entered findings of fact and conclusions of law.¹³ Therein, the trial court found that all of appellant's separate property was so intertwined with community property as to lose its separate identity.¹⁴ The trial court placed the net value of the River Road Property at \$422,957.¹⁵ The trial court placed the net value of all community property at \$511,382.¹⁶ The trial court awarded respondent an equalization judgment in the amount of \$250,000, secured by the real and personal property awarded to appellant.¹⁷ The trial court awarded respondent spousal maintenance in the amount of \$1,250 per month until the equalization judgment was

⁹ CP 15-16.

¹⁰ CP 15.

¹¹ CP 9.

¹² CP 13-18.

¹³ CP 8-18.

¹⁴ CP 9, 12.

¹⁵ CP 13.

¹⁶ CP 12.

¹⁷ CP 12, 14.

paid.¹⁸ The trial court declined to award attorney fees to either party, given the sizable equalization payment awarded to respondent.¹⁹ In February, 2009, the trial court entered a decree of dissolution.²⁰

In January, 2010, respondent filed a motion to sell real property.²¹ Therein, respondent sought an order to place the River Road property for sale.²² On January 25, 2010, at the hearing on the matter, the trial court expressed its reservations whether it had jurisdiction to order, post-dissolution, a sale of real property that had been awarded to appellant in the decree:

THE COURT: Well, that's my biggest concern, Mr. McAdams, is this has come up two or three times in the last year in the context of a pending dissolution. And I've read those cases over and over. And the main cases are In re: Marriage of Bobbitt, 135 Wn. App., 8. ...
... Well one of these cases, the Bobbitt case, says it's been the rule. And I'm reading from a different opinion that I had written in another case, but it says it's the rule in Washington that the trial court does not have jurisdiction to order the sale of a party's assets without their consent because there is no statutory brand of such power to the trial court. Despite this rule there are cases in

¹⁸ CP 10.

¹⁹ CP 17.

²⁰ CP 19-30.

²¹ CP 35-36.

²² CP 25.

which the trial court ordered the sale based upon the facts of the case, but in each case the trial court's consideration of the issue occurred during the pendency of the case or at the conclusion of the trial, not after a full and final division of the property had been made. So I don't know.

...If you give me some authorities, some basis to make a ruling on, I'll be happy to. Otherwise, if I order it and he chooses to challenge it you are going to be in the Court of Appeals and it would be easier just to do an execution sale. I'm not sure easier, but maybe more proper. But give me some authority.....²³

Despite its concerns over the lack of jurisdiction to order such a sale, the trial court nevertheless proceeded to order appellant to place the River Road property for sale with a neutral realtor.²⁴ Respondent did not attend the hearing on the Motion to Sell Real Property.²⁵ Appellant did not have counsel at that time.²⁶

On March 29, 2010, respondent filed a motion for contempt²⁷.

In April, 2010, appellant filed a Motion for Relief from Order.²⁸ In a memorandum filed in support of his motion, appellant argued that after a decree vests title in one of the parties, the court cannot order a sale absent

²³ RP I p. 3 line 22-p. 4 line 2; p. 4 line 12-25; p. 5 line 23-p. 6 line 3.

²⁴ CP 51; APP. 2.

²⁵ CP 50; APP. 2.

²⁶ CP 87.

²⁷ CP 80-81

²⁸ CP 86-90.

foreclosure proceedings (citing *In re Marriage of Bobbitt*, 135 Wn. App. 8, 15, 144 P. 3d 306 (2006)).²⁹ At the hearing on the motion, appellant's counsel quoted from *Marriage of Bobbitt*: "*It has been the rule in Washington that the trial court does not have jurisdiction to order the sale of the party's assets without their consent because there is no statutory grant of such a power to the trial court, ...*"³⁰ Appellant's counsel argued further that the court lacked the authority to rewrite the Decree.³¹ The trial court denied appellant's motion.³² The trial court also found appellant in contempt.³³ Appellant timely filed a Notice of Appeal from that order.³⁴

On July 29, 2010, respondent filed a Motion Requiring Respondent's Signature on Listing Agreement and for Attorney Fees on Appeal.³⁵ At the hearing on August 9, 2010, respondent objected on the grounds that the suggested listing price was twenty percent below the value placed on the River Road property by the trial court in its handwritten decision.³⁶ Respondent further objected to appellant's request for attorney fees on appeal on the ground that respondent made no

²⁹ CP 157-58.

³⁰ RP III p. 39.

³¹ RP III p. 40.

³² RP III p. 42; CP 198-99; APP 3.

³³ RP III p. 42; CP 199; APP 3.

³⁴ CP 207-212.

³⁵ CP 275-288.

³⁶ RP IV p. 62.

showing of her need or appellant's ability to pay such fees.³⁷ The trial court ordered appellant to sign a listing agreement for the River Road property at a price of \$509,500, and awarded respondent \$500 in attorney fees at the trial level and provisional attorney fees on appeal of \$3,000.³⁸ Appellant timely filed a Notice of Appeal from that order.³⁹

VI. ARGUMENT

A. STANDARD OF REVIEW

A trial court's ruling on a motion to vacate a judgment is generally reviewed for abuse of discretion. *Marriage of Hughes*, 128 Wn. App. 650, 116 P. 3d 1042, *review denied*, 156 Wash.2d 1031 (2006). A trial court, however, has a nondiscretionary duty to vacate a void judgment.

Marriage of Maxfield, 47 Wn. App. 699, 703, 737 P. 2d 671 (1987) (“*There is no question of trial court discretion when a judgment is void, unlike attacks on judgments based on other grounds specified in CR 60 (b). The court has a nondiscretionary duty to grant relief.*”); *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn. 2d 544, 549, 647 P. 3d 30, *cert. denied sub nom. Volvo Penta of America v. Kennedy*, 459 U.S. 1037 (1982) *Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P. 2d 754

³⁷ RP IV p. 65-66.

³⁸ RP I p. 67-68; CP 341-42: APP. 4.

³⁹ CP 343-46.

(1988). A trial court's decision to grant or deny a motion to vacate a judgment for want of jurisdiction is therefore reviewed *de novo*. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P. 2d 1229 (1947). A trial court's decision as to subject matter jurisdiction is a question of law that is reviewed *de novo*. *Marriage of Robinson*, --P.3d--, 2010 WL 5298816 at 5.

B. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RELIEF FROM ORDER RE SALE OF REAL PROPERTY.

Error is assigned to the trial court's Order on Contempt and CR 60 Motion.⁴⁰ In support of his motion for relief from the Order Re: Sale of Real Property, appellant argued that as the decree of dissolution had vested title to the real property in appellant, the trial court could not thereafter order a sale absent a foreclosure, citing *Marriage of Bobbitt*, 135 Wn. App. 8, 144 P. 3d 306 (2006).⁴¹

In refusing to grant relief from the Order Re: Sale of Real Property the trial court ignored its concern, expressed on January 25, 2010, at the hearing on respondent's motion for an order to sell appellant's property at

⁴⁰ CP 198-200; APP 3.

⁴¹ CP 157-58.

455 North River Road in Prosser, that it lacked jurisdiction to order the sale of the property after entry of the decree of dissolution.⁴²

The trial court's concerns over its lack of jurisdiction to order, post-dissolution, a sale of real property that the court had previously awarded to appellant accurately reflects the law in Washington on this issue. As noted by the trial court, this issue is indeed controlled by *Marriage of Bobbitt*, 135 Wn. App. 8, 144 P. 3d 306 (2006). In *Bobbitt*, the Court of Appeals viewed the issue as one of jurisdiction. "*It has been the rule in Washington that the trial court does not have jurisdiction to order the sale of the parties' assets without their consent because there is no statutory grant of such power to a trial court. (Citations omitted)*" 135 Wn. App. 15. The Court noted Washington cases that approved the sale of a party's property during or at the conclusion of a dissolution, but not after a final division of the property had been made. 135 Wn. App. 16.

Yet despite recognizing *Bobbitt* as controlling authority on the lack of jurisdiction to order a post-dissolution sale of real property awarded to a former spouse, the trial court proceeded to order such a sale.⁴³ The trial court also invited the parties to bring the matter back before it for

⁴² RP I p. 3 line 22-p. 4 line 2; p. 4 line 12-25; p. 5 line 23-p. 6 line 3.

⁴³ CP 50-52; App. 2.

reargument. *“Either party at any time may bring the matter back before the court should there be any disputes between the parties over this Court’s order requiring sale of said real property.”*⁴⁴

Because the trial court raised the issue of lack of jurisdiction to order sale of the property at the hearing on the motion for order of sale, the matter is properly before the court in this appeal. Appellant also raised the issue in support of his motion for relief from the Order Re Sale of Real Property. *“After a decree vests title to property in one of the parties, the court cannot order a sale absent foreclosure proceedings (Citing Bobbitt).”*⁴⁵ Appellant raised the trial court’s lack of jurisdiction at the hearing on the Motion for Relief from Order.⁴⁶ As the lack of jurisdiction rendered the Order Re Sale of Real Property void, it was properly addressed by appellant’s motion for relief from that order. CR 60 (b) (5); *Long v. Harold*, 76 Wn. App. 317, 319-20, 884 P. 2d 934 (1994); *Marriage of Hardt*, 39 Wash.App. 493, 693 P.2d 1386 (1985).

In any event, the trial court’s lack of jurisdiction to order a post-dissolution sale of real property awarded to appellant in the dissolution can be raised for the first time on appeal. RAP 2.5 (a) (1) provides that

⁴⁴ CP 52; APP 2.

⁴⁵ CP 157-58.

⁴⁶ RP III p. 38-39.

“...a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction...” *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn. 2d 542, 556, 958 P. 2d 962 (1998); *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 943-44, 206 P. 3d 364, review denied, 167 Wn. 2d 1017 (2010); *Inland Foundry, Co., Inc. v. Spokane County Air Pollution Control Authority*, 98 Wn. App. 121, 123, 989 P. 2d 102, review denied, 141 Wash.2d 1007 (2000).

An essential element of a valid judgment or order is subject matter jurisdiction. *State v. Barnes*, 146 Wn. 2d 74, 85, 43 P. 3d 490 (2002).

Subject matter jurisdiction is the authority of the court to hear and determine the type of action before it. *Marriage of Robinson*, 2010 WL 5298816 at 4. A trial court lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. *State v. Barnes*, 146 Wn. 2d 85.

Subject matter jurisdiction requires statutory authority to act. *Lathrop v. State Energy Facility Site Evaluation Council*, 130 Wn. App. 147, 152, 121 P. 3d 774 (2005). “A court has no jurisdiction except that which is conferred by the applicable statutes.” *Marriage of Robinson*, 2010 WL 5298816 at 5; *Palmer v. Palmer*, 42 Wn. 2d 715, 716, 258 P. 2d 475 (1953). The court in a proceeding for dissolution of marriage does not

have any power that cannot be inferred from a broad interpretation of the dissolution statutes. *Arneson v. Arneson*. 38 Wn. 2d 99, 100, 227 P. 2d 1016 (1951).

The trial court lacked statutory authority to modify the property division in the decree of dissolution except as provided in RCW 26.09.170 (1): “*The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.*” The conditions that justify reopening of a judgment are found in CR 60 (b).⁴⁷ Neither respondent’s Motion to Sell Real Property⁴⁸ nor the Order Re: Sale of Real Property⁴⁹ made any attempt to satisfy the requirements of CR 60 (b). Therefore, as in *Marriage of Bobbitt*, the trial court acted without statutory authority by improperly modifying the property distribution provisions of the decree of dissolution.

Similarly, in *Byrne v. Akerlund*, 108 Wn. 2d 445, 739 P. 2d 1138 (1987), the court concluded that the Court of Appeals had erred by implying a reasonable term for satisfaction of a former spouse’s lien on

⁴⁷ APP. 6.

⁴⁸ CP 35-36.

⁴⁹ CP 51: APP. 2.

real property awarded to the other spouse in a marriage dissolution. 108 Wn. 2d 456.

In the Order Re: Sale of Real Property, the trial court concluded that it had the discretion to order the sale of appellant's real property.⁵⁰ To the contrary, as it lacked subject matter jurisdiction over respondent's motion to sell real property, the trial court could do nothing other than deny respondent's motion. *Fontana v. Diocese of Yakima*, 138 Wn. App. 421, 425, 157 P. 3d 443, *review denied*, 163 Wn. 2d 1004 (2008); *Inland Foundry, Co., Inc. v. Spokane County Air Pollution Control Authority*, 98 Wn. App. 123-24. In the Order Re: Sale of Real Property, the trial court concluded further that respondent was entitled to her equitable share of the property within a reasonable time.⁵¹ To the contrary, the trial court was not authorized to rewrite the decree to include such a time, as no language in the decree would support it. In *Byrne v. Ackerlund*, 108 Wn. 2d 445, 739 P. 2d 1138 (1987), the Washington Supreme Court reversed the Court of Appeals for implying a reasonable time provision into the decree of dissolution:

The Court of Appeals should not have
interpreted the dissolution decree because it

⁵⁰ Ibid

⁵¹ Id.

was not a proper subject of a declaratory judgment action. Beyond this, we find error in the court's interpretation. Under contract principles, a reasonable time for performance of an obligation may only be implied where the contract imposes a definite obligation but fails to provide a time for its performance. *See Foelkner v. Perkins*, 197 Wash. 462, 85 P.2d 1095 (1938). Here, the decree imposed on Ackerlund no obligation whatsoever to sell the property. Rather, Ackerlund's sale of the property can appropriately be viewed as a "condition precedent" to the accrual of Byrne's right to enforce payment on her liens. *See Partlow v. Mathews*, 43 Wash.2d 398, 406, 261 P.2d 394 (1953). *See also Huber v. Coast Inv. Co.*, 30 Wash.App. 804, 638 P.2d 609 (1981). Until the occurrence of the requisite real property disposition, Ackerlund is not obligated to pay Byrne. While it may be proper to imply a requirement of payment within a reasonable time *after* the real property is sold, it is wrong to judicially impose a performance deadline on an unripe obligation. In requiring payment within a reasonable time, and then determining that a reasonable time had already passed, the Court of Appeals improperly imposed on Ackerlund an obligation not originally contained in either the decree or property settlement contract.

108 Wn. 2d 455-56.

Byrne and *Bobbitt* provide controlling authority here, and compel the conclusion that the trial court lacked jurisdiction to order, post-dissolution, a sale of real property awarded to appellant in the dissolution.

The conclusion therefore follows that the trial court erred in ordering the property sold, and the trial court abused its discretion in denying appellant's motion to vacate the order of sale.

It provides no answer here that appellant was also attempting to sell the River Road property. Appellant's attempt to sell property awarded to him in the decree is insufficient to confer jurisdiction upon the trial court that it otherwise did not have, as the parties cannot by consent confer jurisdiction upon the court. *Sullivan v. Purvis*, 90 Wn. App. 456, 460, 966 P. 2d 912 (1998); *Wesley v. Schneckloth*, 55 Wn. 2d 90, 93, 966 P. 2d 912 (1959).

Respondent misplaces reliance upon *Murphy v. Murphy*, 44 Wn. 2d 737, 210 P. 2d 808 (1954) and *Marriage of Sedlock*, 69 Wn. App. 484, 849 P. 2d 1243 (1993). As noted in *Bobbitt*, the real property in *Sedlock* was sold at the conclusion of trial. 135 Wn. App. 16. Similarly, in *Murphy v. Murphy*, the order to sell to real property occurred as part of the decree of dissolution. Here, as in *Bobbitt*, the sale of the real property was made post-dissolution. Thus *Bobbitt*, not *Murphy* or *Sedlock*, provides controlling authority here.

C. THE TRIAL COURT ERRED IN FINDING APPELLANT IN CONTEMPT.

Error is assigned to that portion of the Order Re Contempt and CR 60 Motion that found appellant in contempt for failure to list the family home with a neutral realtor.⁵² As the trial court was void for lack subject matter jurisdiction to order the sale of appellant's real property, it follows that any violation of that order cannot produce a valid order of contempt. *State v. Coe*, 101 Wn. 2d 364, 679 P. 2d 353 (1984) (Contempt judgment reversed where underlying order was a prior restraint and void); *State ex rel. Superior Court of Snohomish County v. Sperry*, 79 Wn. 2d 69, 74, 483 P. 2d 608 (1971) (Void order as a prior restraint cannot support a contempt conviction); *Pearce v. Pearce*, 37 Wn. 2d 918, 921, 226 P. 2d 895 (1951) (Order in husband's interlocutory divorce decree restraining wife from associating with a designated man was void as in excess of court's jurisdiction, and hence wife could not be held in contempt for violating order); *State ex rel. Hillman v. Gordon*, 105 Wash. 326, 177 P. 773 (1919) (Disobedience of an order issued by a court without jurisdiction of the subject-matter is not contempt); *State v. Winder*, 14 Wash 114, 114-15, 44 P. 125 (1896) (Where trial court lacked jurisdiction to appoint receiver,

⁵² CP 199; APP. 3.

appellant could not be held in contempt for violation order to pay over funds).

Mead School Dist No. 534 v. Mead Education Association, 85 Wn. 2d 278, 534 P. 2d 561 (1975) does not compel a contrary conclusion here. The court in *Mead* was not confronted with a void order. In *Mead*, the flaw in the trial court's jurisdiction consisted of the lack of proper authorization for the lawsuit brought by the plaintiff school district. Such a defect was the result of the plaintiff's actions, and was deemed insufficient to excuse the defendants' contempt. 85 Wn. 2d 283-84. Here, in contrast, the defect in jurisdiction consists of the absence of statutory authority to order a post-dissolution sale of property. The court in *Mead* continued to recognize that an absence of jurisdiction to enter the type of order so entered will vitiate contempt. 85 Wn. 2d 284.

Contempt for failure to pay money, including as part of a property settlement, is only proper if the payment is related to support. *Marriage of Curtis*, 106 Wn. App. 191, 199-201, 23 P. 3d 13, *review denied*, 145 Wn. 2d 1008 (2001). In paragraph 3.3 of the Decree of Dissolution, the trial court awarded respondent a judgment for \$250,000, "to equalize the

*division of property between the parties...*⁵³ The judgment awarded to respondent was therefore part of the property settlement, and under *Marriage of Curtis*, appellant may not be held in contempt for failure to pay that judgment.

The Order Re Contempt and CR 60 Motion is defective for lack of findings of fact setting forth the basis of contempt. *Templeton v. Hurtado*, 92 Wn. App. 847, 852-53, 965 P. 2d 1131 (1998). In addition, the order fails to contain a finding of either bad faith or intentional conduct. Such a finding is required. RCW 26.09.160 (2) (b); *Marriage of Davisson*, 131 Wn. App. 220, 224, 126 P. 3d 76, *review denied*, 158 Wash.2d 1004 (2006); *Marriage of James*, 79 Wn. App. 436, 903 P. 2d 460 (1995). A finding of intentional conduct is also required under the general contempt statute. RCW 7.21.010 (1) (b) (“*Contempt of court’ means intentional: ... Disobedience of any lawful judgment, decree, order, or process of the court;...*”).

⁵³ CP 21; APP. 1.

D. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO RESPONDENT FOR CONTEMPT.

Error is assigned to that portion of the Order Re Contempt and CR 60 Motion that awarded attorney fees to respondent.⁵⁴ Error is also assigned to the Judgment Summary and Attorney Fees for Order Re: Contempt and CR 60 Motion.⁵⁵ The trial court based its award of attorney fees on appellant's allegedly contemptuous behavior in refusing to list the River Road property with a neutral realtor.⁵⁶ As set forth above, the contempt itself is invalid. It follows that the trial court's award of attorney fees for contempt must also fail. A valid finding of contempt is a condition precedent to an award of attorney fees under RCW 7.21.020 (3):

The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees. As set forth above, as there was no valid finding of contempt by the trial court, it follows that the trial court likewise could not award attorney fees for contempt.

⁵⁴ CP 199; APP. 3.

⁵⁵ CP 298-99; APP. 5.

⁵⁶ CP 199; APP. 3.

E. THE TRIAL COURT ERRED IN ORDERING APPELLANT TO SIGN A LISTING AGREEMENT FOR THE RIVER ROAD PROPERTY.

Error is assigned to the Order Re: Signature on Listing Agreement, Attorney Fees at Trial Level and Attorney Fees on Appeal.⁵⁷ As set forth above, the trial court lacked subject matter jurisdiction to order that the River Road property be sold. If the trial court could not order that the property be sold, it follows that the trial court had no greater authority to order appellant to list the property for sale.

F. THE TRIAL COURT ERRED IN AWARDING RESPONDENT ATTORNEY FEES AT TRIAL AND ON APPEAL.

Error is assigned to that portion of the Order Re: Signature on Listing Agreement, Attorney Fees at Trial Level and Attorney Fees on Appeal that awarded respondent \$500 in attorney fees and costs at the trial level and \$2,500 in provisional attorney fees and costs on appeal, pursuant to RAP 7.2 (d).⁵⁸ That rule provides as follows:

The trial court has authority to award attorney fees and litigation expenses for an appeal in a marriage dissolution, a legal separation, a declaration of invalidity proceeding, or an action to modify a decree in any of these proceedings, and in any other

⁵⁷ CP 341-42; APP. 4.

⁵⁸ CP 342; APP. 4.

action in which applicable law gives the trial court authority to do so.

RAP 7.2 (d) does not set forth criteria for such an award of attorney fees. Instead RCW 26.09.140 establishes the requirements for such an award:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment. Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs....

Under RCW 26.09.140, any award of attorney fees must be taken into consideration the parties' need and ability to pay such fees. The same considerations apply to a provisional award of attorney fees on appeal. *Bennett v. Bennett*, 63 Wn. 2d 404, 418-20, 387 P. 2d 517 (1963). Here, however, the order gives no indication that the trial court gave any consideration to either respondent's need for such fees or respondent's ability to pay the same. In contrast, in the notes attached to the Decree of

Dissolution, the trial court denied attorney fees to either party. “*Given the sizeable equalization payment awarded to the wife, no attorney fees of costs shall be awarded to either party...*”⁵⁹ The trial court’s award of trial and appellate attorney fees to respondent should therefore be reversed.

VII. CONCLUSION

The Order Re: Contempt and CR 60 Motion and the Order Re: Signature on Listing Agreement, Attorney Fees at Trial Level, and Attorney Fees on Appeal should be reversed.

Respectfully submitted



Christopher M. Constantine
WSBA # 11650
Of attorneys for Appellant

⁵⁹ CP 28; APP 1.

VIII. APPENDICES

1. Decree of Dissolution
2. Order Re: Sale of Real Property
3. Order Re: Contempt and CR 60 Motion
4. Order Re: Signature on Listing Agreement, Attorney Fees at Trial Level, and Attorney Fees on Appeal.
5. Judgment Summary and Attorney Fees for Order Re; Contempt and CR 60 Motion.
6. CR 60 (b)

FILED

FEB 19 2009

KATHY MARTIN
WALLA WALLA COUNTY CLERK

COPY

Superior Court of Washington
County of WALLA WALLA

In re the Marriage of:

FRANCES J. BOGART

No. 07-3-00187-0

Decree of Dissolution (DCD)

Petitioner,

and

(Marriage)

WARREN G. BOGART

Respondent.

I. Judgment/Order Summaries

1.1 Restraining Order Summary:

Does not apply.

1.2 Real Property Judgment Summary:

Real Property Judgment Summary is set forth below:

Assessor's property tax parcel or account number:

or

Legal description of the property awarded (including lot, block, plat, or section, township, range, county and state):

See attached legal descriptions.

See Page for full legal description.

1.3 Money Judgment Summary:

Judgment Summary is set forth below:

- A. Judgment Creditor FRANCES J. BOGART
- B. Judgment Debtor WARREN G. BOGART
- C. Principal judgment amount \$250,000.00
- D. Interest to date of Judgment \$
- E. Attorney fees \$
- F. Costs \$
- G. Other recovery amount \$
- H. Principal judgment shall bear interest at 12% per annum
- I. Attorney fees, costs and other recovery amounts shall bear interest at % per annum
- J. Attorney for Judgment Creditor RONALD K. McADAMS
- K. Attorney for Judgment Debtor MICHAEL R. PICKETT
- L. Other:

- A. Judgment Creditor THOMAS P. SAWATZKI
- B. Judgment Debtor WARREN G. BOGART
- C. Principal Judgment Amount \$ 4,695.00
- D. Principal Judgment shall bear interest at 12% per annum
- E. Attorney for Judgment Debtor MICHAEL R. PICKETT

End of Summaries

II. Basis

Findings of Fact and Conclusions of Law have been entered in this case.

III. Decree

It Is Decreed that:

3.1 Status of the Marriage

The marriage of the parties is dissolved.

3.2 Property to be Awarded the Husband

The husband is awarded as his separate property the corporation known as W.G. Bogart Contractors and Building, Inc., which includes the completed houses at 206 and 210 DeAngela Drive, Grandview, Washington, as more fully described on the attached legal

**McADAMS, PONTI,
IVERNETTE &
VAN DORN, P.S.**
Attorneys at Law
103 E. Poplar
Walla Walla, WA 99369

description, the duplex as more fully described on the attached legal description, the corporate equipment, all receivables, and any and all other property belonging to the corporation, subject to the debts of the corporation which the corporation or husband should pay; Bogart Land Development, LLC, which includes the four unsold lots, as more fully described on the attached and incorporated legal descriptions, subject to all debts owed by said LLC; the residence at 455 N. River Road, Prosser, Washington, as more fully described on the attached and incorporated legal description, subject to its debt; the farm land approximating 25 acres, subject to its debt, as more fully described on the attached and incorporated legal description; all personal household goods, effects, automobiles, all bank accounts in his name, miscellaneous property in husband's possession, subject to any debts due thereon, and his social security.

3.3 Property to be Awarded to the Wife

Wife shall be awarded as her separate property her personal effects, all bank accounts in her name, the property per the attached list, her social security benefits, and a Judgment in the sum of \$250,000 to equalize the division of property between the parties, bearing interest from the entry of Judgment at the statutory rate of 12% per annum, secured by the real and personal property awarded to husband as more fully described on the attached exhibits, secured further by the assets of the corporation, including the real property located at 206 and 210 DeAngela, Grandview, Washington, and secured further by the assets of the LLC, including the four lots and the receivable on the sold lot, as all of said real property owned personally by husband or by the entities awarded to him are more fully described on the attached and incorporated legal descriptions. Husband shall sign a mortgage for said Judgment in favor of wife on the family residence located at 455 N. River Road, Prosser, Washington, 206 DeAngela Drive, Grandview, Washington, 210 DeAngela Drive, Grandview, Washington, the four lots in Chula Vista One, Grandview, Washington, specifically Lots 24, 25, 26, and _____, and shall further assign to wife the seller's interest in the sold lot, Lot 10, and shall further sign a mortgage for said Judgment on the duplex more fully described on the attached Exhibit and the farm land consisting of approximately 25 acres, commonly known as Chula Two and El Dorado, as more fully described on the attached legal descriptions.

for security purposes only



3.4 Liabilities to be Paid by the Husband

Husband shall pay and hold wife harmless from all debts owed by W.G. Bogart Construction and Building, Inc., all debts owed by Bogart Land Development, LLC, including, without excluding, any debt to the Blankenships, the debt due on the family residence at 455 N. River Road, Prosser, Washington, the debt due on the farm land more fully described on the attached legal description, any debt owed to Colleen Akerblade, the debt due on the Cadillac, his Visa account, and all debts incurred by husband since date of separation, said date being June 30, 2007.

Unless otherwise provided herein, the husband shall pay all liabilities incurred by him since the date of separation

3.5 Liabilities to be Paid by the Wife

All debts incurred by wife since date of separation, said date being June 30, 2007.

Unless otherwise provided herein, the wife shall pay all liabilities incurred by her since the date of separation.

3.6 Hold Harmless Provision

Each party shall hold the other party harmless from any collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party.

3.7 Maintenance

Husband shall pay to wife spousal maintenance in the sum of \$1,250 per month commencing January 7, 2009, and continuing on the 5th day of each month thereafter until her equalization is paid in full. This award shall terminate in the event of her death or remarriage.

3.8 Continuing Restraining Order
Does not apply.

3.9 Protection Order

Does not apply.

3.10 Jurisdiction Over the Children

Does not apply because there are no dependent children.

3.11 Parenting Plan

Does not apply.

3.12 Child Support

Does not apply.

3.13 Attorney Fees, Other Professional Fees and Costs

Does not apply.

Given that the Husband has chosen to ignore the separate nature of the various entities, the bottom line is that this Court is going to do the same. I am characterizing all of the property as community. Based on that proposition, the ~~net~~ net assets of the entities are as follows:

corporation	-	43,753
LLC	-	20,000
Personal	-	447,629
Total =		511,382
1/2 each equals		255,691

I am awarding the wife an equalization judgment in the amount of \$250,000⁰⁰, bearing interest from the entry of judgment at the statutory rate. The equalization amount shall be secured by the real and personal property of the Husband, the corporation and LLC.

Bogart Dissolution - Continued Maintenance

A. Findings under RCW 26.09.021

1.) Resources of wife - Minimal

a.) Income - Social Security of 531.⁰⁰/_{m.} net.

b.) Property

1. Cash - Checking : Savings - Approx. 2000⁰⁰

2. Clothes : personal items in Office - Nil Value

c.) Expenses - If attribute 1/3 of expenses directly related to wife residing in Office, her expenses are in range of 1800/m.

2.) The wife's age and health preclude further education or training. The wife is currently unemployable.

3.) The parties standard of living while married was not lavish, but was middle to upper middle class in nature.

4.) The parties were married on June 6, 1994 and separated on June 30, 2007, for a duration of 13 years.

5.) The wife is 80 years old. Her health is getting better after suffering a stroke in March of '07. She still has strength impairment on her left side, walks with the aid of a cane, has high blood pressure and is an insulin.

dependant diabetic.

e.) The Husband is a builder/developer who has properties for sale during a real estate slump. He has testified that he will not have the cash flow to pay any maintenance. While the current market is undeniably difficult, it is noteworthy that the same argument was made in his affidavit of Aug 7, 2007, wherein he was resisting paying temporary maintenance and insisting that his sole income was Social Security of \$1,535/month. Despite these claims of financial ruin in 2007, which were supposed to continue into 2008, Page 4 of Mr. Sawatzki's exhibit 2 shows that the Husband received "management fees" of \$5,121 in Sept, and \$3,000 in Oct, Nov, and Dec of 07. In 2008, Mr. Bogart's entities either paid directly to him, or on his behalf for his benefit, sums totaling \$73,500. Plus, he received his social security of \$1,650/m or \$13,980 for the year, for total payments to him or for his benefit of \$87,480 or monthly payments averaging \$7,290.

In addition to the husband's ability to generate income despite his claims to the contrary, this Court is awarding

property to him in excess of \$500,000.⁰⁰
It is this Court's finding that the Husband
has sufficient wealth which can be
liquidated or borrowed against so that
he has the ability to pay maintenance
to the wife until her equalization
award is paid in full.

This court awards maintenance in the
amount of "1250" per month commencing
Jan 1st, 2009 and continuing ^{on the 5th day of each month} until her
equalization payment is paid in full.
This award shall terminate in the event
of her death or re-marriage.

Given the sizeable equalization payment
awarded the wife, no attorney fees or
costs shall be awarded to either party,
provided that this Court finds that Mr. Bogart
was unable to supply credible financial
information to this court, thus requiring the
appointment of Mr. Sawatzki to analyze
his books. Accordingly, I am awarding
a Judgment for the full amount of
Mr. Sawatzki's fee against the Husband.
Such amount ~~being~~ to be updated for
his total time and submitted to Mr. McAdams
for inclusion in the final Judgment.

ST OF MY BELONGINGS STILL IN WARREN'S HOUSE :

LARGE BOX OF PHOTO'S OF THE JOHNSON AND BRISTOW FAMILY
CEDAR CHEST;

GLASS WITH BRISTOW NAME ON;

CRYSTAL PLATTER WITH LORD'S SUPPER ENGRAVED ON IT;

SMALL BLUE BOOK, IN OFFICE DESK, NAME; 20,000 WORD SPELLING AND
DEFINITIONS;

PHOTO ALBUM, GOLD COLORED PLASTIC, 8" X 6 " LOCATED IN THE CREDENZA IN
HALL BY MEN'S BATHROOM;



BENTON COUNTY

Property Account Summary

Unit No: 10754200031001

Alternate Property Number:

Unit Type: Real Property

Primary Host Property

1613

Address: 455 NORTH RIVER RD
PROSSER WA 99360

Section 2 Township 8 Range 24 Quarter NW: PORTION OF GOVERNMENT LOT 5, DEFINED AS FOLLOWS:
BEGINNING AT A POINT SOUTH 89 DEGREES 35' EAST 2090.3 FEET FROM THE WEST QUARTER CORNER OF
SAID SECTION

2: THENCE NORTH 17 DEGREES 12' EAST 347.3 FEET TO TRUE POINT OF BEGINNING; THENCE NORTH 17
DEGREES 12' EAST 247.7 FEET; THENCE NORTH 43 DEGREES 07' EAST 104.7 FEET; THENCE SOUTH 48
DEGREES 05' EAST

TO THE SOUTHEASTERLY LINE OF SAID LOT 5; THENCE SOUTHWESTERLY ALONG SAID SOUTHEASTERLY
LINE TO A POINT SOUTH 89 DEGREES 35' EAST FROM THE TRUE POINT OF BEGINNING; THENCE NORTH 89
DEGREES 35' WEST TO

TRUE POINT OF BEGINNING; LESS THE FOLLOWING DESCRIBED TRACT: A TRACT OF LAND LOCATED IN
GOVERNMENT LOT 5, SECTION 2, TOWNSHIP 8 NORTH, RANGE 24 EAST, W.M. BENTON COUNTY,
WASHINGTON, DESCRIBED MORE

PARTICULARLY AS FOLLOWS: THE TRUE POINT OF BEGINNING FOR THIS DESCRIPTION IS THE
NORTHWEST CORNER OF THOSE LANDS DESCRIBED IN THE DEED FILED IN THE BENTON COUNTY
AUDITOR'S OFFICE UNDER AUDITOR'S

FILE NO. 98-016119, THIS CORNER ALSO BEING THE SOUTHWEST CORNER OF THOSE LANDS DESCRIBED
IN THE DEED UNDER AUDITOR'S FILE NO. 831649, FILED IN SAID OFFICE; THENCE SOUTH 81 DEGREES 34'
43" EAST ALONG

THE NORTH LINE OF THOSE LANDS DESCRIBED IN SAID DEED UNDER AUDITOR'S FILE NO. 98-016119, BEING
THE SOUTH LINE OF THOSE LAND DESCRIBED UNDER AUDITOR'S FILE NO. 831649, A DISTANCE OF 343.02
FEET TO THE

SOUTHEAST LINE OF SAID LOT 5, THENCE NORTH 19 DEGREES 52' 17" EAST ALONG SAID LINE A DISTANCE
OF 20.00 FEET; THENCE NORTH 76 DEGREES 33' 51" WEST A DISTANCE OF 340.17 FEET TO A POINT IN THE
EAST LINE

OF THE COUNTY ROAD; THENCE SOUTH 17 DEGREES 46' 04" EAST A DISTANCE OF 50.00 FEET TO THE
POINT OF BEGINNING PER QCD, AUDITOR'S FILE NO. 2002-044472 (11-13-2002)

Notes:

SCANNED

CLERK

APR 12 11:32

[Handwritten signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

In re the Marriage of:
FRANCES J. BOGART,
Petitioner,
and
WARREN G. BOGART,
Respondent

Case No. 07-3-00187-0
ORDER RE: SALE OF
REAL PROPERTY

THIS MATTER came before the court upon Petitioner's Motion to sell the real property located at 455 North River Road, Prosser, Washington. Present in court were Petitioner's attorney, Ronald K. McAdams. Respondent did not appear in person or by counsel. The court considered the Declaration of Thomas P. Sawatzki, the court appointed expert who has a Judgment against said home in the sum of \$4,695, per the Decree of 2/19/2009, further considered Petitioner's Declaration, who also has a Judgment against said home in the sum of \$250,000, per said Decree of Dissolution entered 2/19/2009, and also

ORDER
Page 1

McADAMS, PONTI & WERNETTE,
And VAN DORN, P.S.
ATTORNEYS AT LAW
103 EAST POPLAR
WALLA WALLA, WASHINGTON 99362
(509) 525-5090

107

1 considered Respondent's Declaration. The Court also considered the
2 post hearing correspondence from Petitioner's counsel, dated January
3 26, 2010. Being so advised, and specifically concluding that the court
4 does have discretion to order the sale of this real property and further
5 finding and concluding, especially considering Mrs. Bogart's age, that
6 she is entitled to her equitable share of the property within a reasonable
7 time, it is

8 ORDERED that Warren G. Bogart shall place the real property
9 located at 455 North River Road, Prosser, Washington, for sale with a
10 neutral licensed realtor within 10 days of the date of this Order. The
11 initial price listed shall be the price recommended by the neutral realtor
12 with said realtor to recommend a price that will be likely to result in sale
13 of said property within a reasonable period of time. Petitioner's counsel
14 shall review the recommended price and the Listing Agreement for his
15 approval before signature. Should the parties have a dispute as to what
16 should be the listing price, either party may present that issue to the
17 court for resolution. The realtor shall keep both Respondent and
18 Petitioner's counsel advised as to the progress being made towards sale
19 and, if no progress is being made, the realtor may recommend a lowering
20 of the price, to be agreed upon between the parties or, if necessary, set
21 by the court. Respondent shall at all times cooperate in good faith in
22 selling the real property at the earliest possible date. Upon sale of the
23 property, from the gross proceeds the sales costs shall be paid, the first
24 mortgage shall be paid, Mr. Sawatzki and Petitioner's Judgments, plus

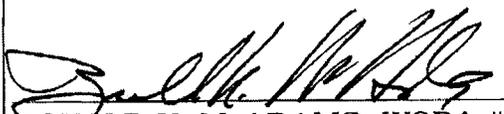
1 accrued interest per the Decree of Dissolution shall be paid, and any
2 remaining balance shall be paid to Petitioner. Either party at any time
3 may bring the matter back before the court should there be any disputes
4 between the parties over this Court's Order requiring sale of said real
5 property.

6 Done in open Court this 12th day of February, 2010.

7
8 
9 _____
10 SUPERIOR COURT JUDGE

11
12
13 Presented by:

14 McADAMS, PONTI, WERNETTE,
15 and VAN DORN, P.S.

16 
17 _____
18 RONALD K. McADAMS, WSBA # 4071
19 Attorneys for Petitioner
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

In re the Marriage of:)
FRANCES J. BOGART,)
Petitioner,)
And)
WARREN G. BOGART,)
Respondent)

Case No.
07-3-00187-0

ORDER RE: CONTEMPT AND
CR 60 MOTION

This matter came before the court for hearing on the 17th day of May, 2010, coming before the court upon Petitioner's Motion for Contempt and Respondent's CR60 Motion. Present in court were Petitioner's counsel, Ronald K. McAdams, and Respondent and Respondent's counsel, Michael S. Mitchell. The court reviewed the file and heard the arguments of counsel. Being so advised and based upon the following court findings, it is

ORDERED, that Respondent's CR60 Motion is denied. The court finds that the facts now argued by Respondent were known to Respondent at the earlier time scheduled for hearing. Respondent did

1 not appear and argue said facts. As such, Respondent has not proven
2 mistake, inadvertence, excusable neglect, newly discovered evidence, or
3 any other reason under CR60 justifying relief from the court's Order.

4 ORDERED, that Respondent, Warren Glynn Bogart, is found in
5 contempt of court for failure to list the family home for sale with a
6 neutral realtor. Failing appropriate appointment of a neutral realtor
7 within ten (10) days of this Order in accord with the prior Order dated
8 12th day of February, 2010, shall result in Respondent being jailed until
9 he complies. In so ruling, the court finds that Tina Sheperd, as an
10 associate realtor with Colleen Akerblade, broker, is not neutral.

11
12 ORDERED, that Petitioner's counsel shall submit within 10 days of
13 the date of this Order his attorney fees and costs for consideration by the
14 court. The court will consider said submission and award by separate
15 Order a Judgment for attorney fees and costs. This award of attorney
16 fees and costs is based upon Respondent's contemptuous behavior in
17 refusing to list the property with a neutral realtor. It is now also
18 apparent that he sold property post decision, but before entry of the
19 Decree, in an effort to avoid the lien clearly imposed by Judge Zagelow's
20 decision. Further, Respondent sold property post Decree at a time when
21 both he and his then realtor (Akerblade) knew that the net proceeds of
22 \$25,000 should have been applied to the lien. Respondent further
23
24
25

1 attempted to lead the court to believe that Tina Sheperd was a neutral
2 realtor when clearly she was not.

3 Done in open Court this _____ day of May, 2010.

4
5
6 _____
Superior Court Judge

7
8
9 Presented by:

10 McADAMS, PONTI, WERNETTE,
11 and VAN DORN, P.S.

12
13 _____
RONALD K. McADAMS, WSBA # 4071
14 Attorneys for Petitioner

15
16 APPROVED AS TO FORM AND NOTICE
17 OF PRESENTMENT WAIVED:

18
19 _____
Michael S. Mitchell, WSBA #8678
20 Attorney for Respondent

1 This matter came before the court on the 9th day of August, 2010, coming before the
2 court upon Petitioner's Motion for a signature on Listing Agreement, attorney fees at trial
3 level, and attorney fees on appeal. The court heard the arguments of counsel and, being
4 fully advised, it is,

5 ORDERED that Respondent, Warren G. Bogart, shall sign the Listing Agreement
6 proposed by Mr. Davis at a price of \$509,500 (the court split the difference between Mr.
7 Davis's proposed listing price and Mr. Bogart's proposed listing price).

8 ORDERED that Petitioner shall be awarded attorney fees and costs of \$500 at the
9 trial level. Judgment is rendered in said amount.

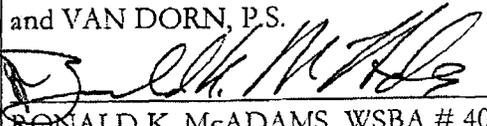
10 ORDERED that provisional attorney fees and costs of \$2,500 shall be awarded on
11 the Appeal pursuant to RAP 7.2 (d). Judgment is rendered in said amount.

12 Done in open court this 19th day of August, 2010.

13
14
15 JOHN W. LOHRMANN
16 SUPERIOR COURT JUDGE

17 Presented by:

18 McADAMS, PONTI, WERNETTE,
19 and VAN DORN, P.S.

20 
21 RONALD K. McADAMS, WSBA # 4071
22 Attorneys for Petitioner

23 APPROVED AS TO FORM AND NOTICE
24 OF PRESENTMENT WAIVED:

25 
Michael S. Mitchell, WSBA #8678
Attorney for Respondent

1 This court entered its Order Re: Contempt and CR 60 Motion on the 7th day of July,
2 2010, in which the court indicated that it would review Petitioner's submission of attorney
3 fees and costs for the purpose of entering a supplemental Order awarding attorney fees and
4 costs. The court has reviewed Mr. McAdams's Declaration Re: Attorney Fees and Costs
5 dated May 31, 2010. Being so advised, and finding that said attorney fees and costs are
6 reasonable for the period from February 16, 2010, through May 25, 2010, it is,

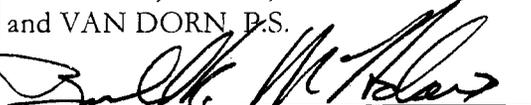
7 ORDERED that Petitioner, Frances J. Bogart, now known as Frances J. Bristow,
8 shall have judgment against Warrant G. Bogart, for attorney fees and costs in the sum of
9 \$4,788.38.

10
11 Done in open Court this 2nd day of ~~July~~^{August}, 2010.

12
13 
14 _____
15 Superior Court Judge

16 Presented by:

17 McADAMS, PONTI, WERNETTE,
18 and VAN DORN, P.S.

19 
20 RONALD K. McADAMS, WSBA # 4071
21 Attorneys for Petitioner

22 APPROVED AS TO FORM AND NOTICE
23 OF PRESENTMENT WAIVED:

24 _____
25 Michael S. Mitchell, WSBA #8678
Attorney for Respondent

ORDER
Page 2

McADAMS, PONTI, WERNETTE
& VAN DORN, P.S.
ATTORNEYS AT LAW
103 EAST POPLAR
WALLA WALLA, WASHINGTON 99362
(509) 525-5090

APPENDIX 6-CR 60(b)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (5) The judgment is void;
- (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- (7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;
- (8) Death of one of the parties before the judgment in the action;
- (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
- (10) Error in judgment shown by a minor, within 12 months after arriving at full age; or
- (11) Any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

IX. CERTIFICATE OF MAILING

I, Christopher M. Constantine, certify that on February 28, 2011, I served upon Respondent and appellant copy of the BRIEF OF APPELLANT by depositing a copy of the same in the United States Mail, first-class postage prepaid, addressed to respondent's counsel and to appellant's co-counsel at the following addresses:

Ronald K. McAdams
McAdams, Ponti, Wernette & Van Dorn, P.S.
103 East Poplar
Walla Walla, WA

Michael S. Mitchell
Attorney at law
129 West Main
Walla Walla, WA. 99362-2817

Dated this 28 day of February, 2011, at Tacoma, Washington.

A handwritten signature in black ink that reads "Christopher M. Constantine". The signature is written in a cursive style with a large, looping initial "C".