

FILED

MAR 18 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

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

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In re the Marriage of

FRANCES J. BOGART,  
Petitioner/Respondent,

and

WARREN G. BOGART,  
Respondent/ Appellant.

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

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RESPONSE OF FRANCES J. BOGART TO  
BRIEF OF APPELLANT

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### **III. STATEMENT OF THE CASE**

#### **A. FACTS**

Frances (Bristow) Bogart, hereafter "Bristow," and Warren G. Bogart, married June 6, 1994. CP 9. Ms. Bristow filed for divorce on July 11, 2007. CP 1. After trial, Judge Zagelow hand wrote his decision. CP 13-18. The handwritten decision was read to the parties and counsel on January 7, 2009. CP 13. The handwritten decision was incorporated by reference into the Findings and Conclusions and Degree of Dissolution which were entered on February 19, 2009. CP 8-18 and CP 19-30.

The Decree awarded Ms. Bristow \$250,000 to equalize the community property. CP 20. The Decree, in the handwriting of Judge Zagelow, secured the judgment ". . . by the real and personal property of the husband, the corporation, and the LLC." CP 25. The Decree also required Mr. Bogart to sign a mortgage against the family home, the four (4) lots, the duplex, and the farm land. CP 21. Judge Zagelow further found that Mr. Bogart had the ability to generate income and had sufficient wealth to pay \$1,250 per month spousal maintenance to Ms. Bristow until her equalization award was paid in full. CP 28.

Judge Zagelow also found false Mr. Bogart's sworn pretrial testimony insisting his sole monthly income was \$1,535, with the evidence showing monthly income in 2008 of \$7,290. CP 27.

Ms. Bristow, after seeing her ex-husband repeatedly breach his promises to borrow money or sell the home, filed a motion in late August to force the appointment of a neutral realtor. CP 107. The court denied the motion, but encouraged that the house be sold. CP 107.

Another motion to use a neutral realtor was filed January 7, 2010. CP 35. Mr. Bogart responded by a pro se declaration, though Mr. Ricky Kimbrough was purportedly representing Mr. Bogart. CP 38. Mr. Bogart's declaration said he had listed the house. CP 38. Ms. Bogart responded with her declaration, stating her belief that Mr. Bogart's realtor was her "ex-husband's puppet." CP 40. She thought the home would never be sold without the appointment of a neutral realtor. CP 40.

Judge Lohrmann heard the motion on January 25, 2010. Neither Mr. Bogart nor Mr. Kimbrough appeared. CP 41. Judge Lohrmann requested authority. Ms. Bristow's counsel responded with authority on January 26, 2010. CP 42. Among other authorities quoted, the response cited *Marriage of Sedlock*, 69

Wn. App. 484, 849 P.2d, 1243 (1993). The *Sedlock* case was quoted in part from page 503 as follows:

In summary, finding no Washington case law directly addressing whether courts have jurisdiction to order a forced sale of a couple's house in a dissolution action, and in light of the number of cases in which the Washington Supreme Court has affirmed the lower courts forced sales of property, we now hold that the trial court has jurisdiction to order the sale of the family home.

...  
There was more at issue than the wisdom of Marcia's desire to keep the home. Thomas getting his equitable share of the home within a reasonable time coupled with the desirability of an equitable allocation of the tax liability following a sale of the home provided a tenable basis for the court's decision.

Judge Lohrmann entered his letter decision granting the motion on January 27, 2010. CP 45.

Mr. Bogart objected. CP 47. He stated:

My specific objection is to the portion of the proposed Order that requires a neutral realtor, unless Colleen Akerblade is deemed and considered a 'neutral realtor' for the purpose of this order.

The proposed order was drafted by Ms. Bristow's attorney. Copies were presented by letter to the court, with copies to Mr. Bogart and Mr. Kimbrough, reminding them of the local court rule to file their proposed order or objection within fifteen days. CP 48. The order was entered February 12, 2010. CP 50 - 52. Mr.

Bogart then attempted ex parte communication with the court. CP

53 - 69. His attempted ex parte communication stated:

I am not refusing to sell it, I have done what you advised me to do and put it on the market. Now what I am hearing is that Mr. McAdams thinks he can pick a realtor and set an asking price. Not only will I disagree with this I will appeal if necessary.

But, Mr. Bogart did not timely appeal the order of February 12, 2010.

A motion for contempt was filed March 29, 2010. CP 80 - 81. It was supported by Ms. Bristow's declaration. CP 75 - 79. The motion requested that Mr. Bogart be held in contempt for refusing to comply with the court's order of February 12, 2010.

Mr. Mitchell appeared as the fifth attorney for Mr. Bogart. CP 84. He filed a motion pursuant to CR 60. CP 86 - 90. He did not assert in the motion, nor the initial declaration signed by his client, that he was relying upon CR 60(5) (that the Order was void), nor did he assert that the court lacked subject matter jurisdiction. His principal assertion was that Mr. Bogart had signed a previous listing agreement in December, 2009. CP 87. Mr. Bogart argued that the court's order would require him to pay two commissions. CP 87. Mr. Bogart's declaration supporting the motion further stated:

No one wants to sell the home and get out from under my maintenance obligation more than I do.

CP 88.

Memorandums were filed. Mr. Mitchell's memorandum argued CR 60(b)(1) (mistake, inadvertence, surprise, excusable neglect, or irregularity). CP 97. His principal argument seemed to be that Mr. Bogart, having signed the prior listing agreement, would end up paying two commissions unless the court's order of February 12, 2010, was set aside.

The first hearing on the Motion for Contempt and Motion for Relief from Order was held April 15, 2010. CP 105 and RP 7-33. The court, in its opening remarks, confirmed that the mortgages ordered by the original decree to secure the judgment were never done. RP 9. Mr. Bogart's counsel did not assert that the court had no authority to order the home to be sold. Instead, Mr. Mitchell stated:

Now, having said that, I understand, and I want to make it very clear, we are not here to say, your honor, you can't order him to sell the house. RP 16.

Mr. Bogart's counsel stated the thrust of his argument, as follows:

But we're really asking for today is relief from the part of the order that says he's got to go list it with someone else, because that really breaches this

listing agreement that exists, plus exposes him to potentially a double commission on this. RP 16.

Mr. Mitchell further stated:

I mean no one wants to sell this property more than he does. RP 16.

Judge Lohrmann then ordered delivery of the mortgages. RP 31.

He further ordered that further information be provided to the court so that an informed decision could be made. RP 29, 30, 31.

Further information was provided to the court. The information suggested that the listing agreement asserted by Mr. Bogart signed in December, 2009, was bogus (CP 112 – 114); that Mr. Bogart had sold a lot prior to trial and did not disclose the sale at the time of trial (CP 134, 135, and 138); that Mr. Bogart sold three lots prior to the entry of the formal decree in an effort to avoid the liens and did not apply the proceeds to the liens that he knew by the oral reading had been imposed (CP 135, 138); that Mr. Bogart had sold two lots after the decree without applying the proceeds to the liens (CP 135, 138); and that Mr. Bogart provided the mortgages ordered by the court without a due date, apparently taking the position that the decree did not require a due date so none was required on the mortgages. CP 135.

It was later discovered that Mr. Bogart on 12/16/2009 conveyed for \$40,000 each lots 27 and 28 to Mr. Torres. CP 324, 327. Mr. Torres was one of Mr. Bogart's workmen. CP 307. Note that these sales were not included in Mr. Bogart's attorney's listing of sold property. CP138. Mr. Bogart suspended his contractor's license on 12/17/2009. CP 329. Mr. Torres, in turn, took out building permits on these two lots on 12/21/2009. CP 332, 333. Tina Sheperd of New Century Realty, was the real estate agent for both pieces of property. One sold for \$126,000 on 4/26/2010. CP 338. The other sold for \$125,000 on 5/11/2010. CP 336. The agent's remarks on both houses states: "These homes are selling fast so hurry." CP 336 and 338. These facts proven from the record should be contrasted with Mr. Bogart's declaration of January 29, 2010, where he stated: ". . . real estate development business has continued to deteriorate and now this business (Bogart Land Development, LLC) has been shut down." CP 306. Mr. Bogart went on to state that Warren Bogart Construction had been ". . . closed for about two to three months." CP 306.

Ms. Akerblade's declaration disclosed that she knew of the liens imposed against Mr. Bogart (she was at the trial and heard the judge's oral decision) and knew that the proceeds from the

sales of the lots were to be applied to Ms. Bristow's liens. CP 162.

Mr. Bogart, in his declaration, again stated:

No one wants to sell the house more than I do because that stops the maintenance. CP 166.

Mr. Bogart's counsel filed a supplemental memorandum six days before the new hearing date. For the first time, he asserted that the court did not have jurisdiction under *In re: Bobbitt*, 135 Wn. App. 8, 144 P.3d 306 (2006). CP 158.

The second hearing proceeded on May 17, 2010. Judge Lohrmann heard the arguments and observed:

But I think these new issues that are raised about Mr. Bogart's, frankly, his honesty, and Ms. Sheperd's credibility are serious concerns. I can't believe it. And I understand Mr. McAdams's client's outrage. RP 41.

He denied the motion to vacate the decree of February 12, and further stated:

I have no hesitation at all in finding Mr. Bogart in contempt, order that it be listed by a neutral realtor. And if there is any double commission that's going to be paid, that's going to be Mr. Bogart's problem and his responsibility. RP 41.

A further motion was before the court on July 7, 2010, asking that Mr. Bogart be found in contempt of court for failure to

pay his spousal maintenance for the months of May and June, 2010. CP 182. The court expressed its surprise that it had not signed and filed the order that was submitted by Ms. Bristow's counsel as a result of its oral decision on May 17, 2010. The court then signed the Order re: Contempt and CR 60 Motion at the hearing. RP 44 and CP 198 - 200. There was discussion of the recent discovery that Mr. Bogart had sold equipment and not applied the proceeds to the liens. RP 46. Further discovered was the fact that Mr. Bogart had an interest in an entity called "Marathon," which had not been disclosed at time of trial, nor the dividends received since trial. RP 47 – 48.

The court then found Mr. Bogart in contempt for not paying spousal maintenance and further awarded attorney fees. RP 57.

Mr. Bogart timely appealed the Order Re: Contempt and CR 60 Motion entered July 7, 2010. CP 207 - 211.

Another motion was filed July 29, 2010. This motion requested that Mr. Bogart sign the listing agreement and that he be ordered to pay attorney fees on appeal. RP 275 – 288. An Order re: Signature on Listing Agreement, Attorney Fees at Trial Level, and Attorney Fees on Appeal was signed August 19, 2010.

RP 341 and 342. Mr. Bogart timely appealed from the entry of that order. RP 343 – 346.

#### **IV. ARGUMENTS**

##### **A. STANDARD OF REVIEW**

The decision to vacate a judgment under CR 60 is a matter of trial court discretion. *Jones v. Home Care of Wash., Inc.*, 152 Wn. App. 674, 679, 216 P.3d 1106 (2009), *review denied* 169 Wn. 2d 1002 (2010). A trial court's power to vacate judgments is not a means for the court to correct alleged errors of law. *Bjurstrom v. Campell*, 27 Wn. App. 449, 451, 618 P.2d 533 (1980) (citing *In re: Ellern*, 23 Wn. 2d 219, 222, 160 P.2d 639 (1945); *In re Estate of Jones*, 116 Wn. 424, 428, 199 P. 734 (1921)). A trial court's decision will not be disturbed unless it was manifestly unreasonable, or was based on untenable grounds or untenable reasons. *In re: Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

##### **B. WASHINGTON DOES ALLOW THE COURT TO ORDER SALE OF REAL PROPERTY**

Mr. Bogart argues that the trial court lacked jurisdiction to order sale of the real property and thus did not have subject matter jurisdiction. He cites *Marriage of Bobbitt*, 135 Wn. App. 8,

144 P.3d 306 (206). He thus argues that the trial court had a nondiscretionary duty to vacate the order.

In citing *Bobbitt*, Mr. Bogart fails to recognize the conflicts and uncertainty of Washington law on the issue of what authority a trial court has to order sale of real property. Washington Family Law Deskbook, Vol. II, § 32.5 (2) states that a trial court may order the parties to sell their properties and distribute the proceeds to one or both. It cites *Murphy v. Murphy*, 44 Wn. 2d 737, 270 P.2d 808 (1954); *Hokamp v. Hokamp*, 32 Wn. 2d 593, 203 P.2d 357 (1949); and *In re: Marriage of Sedlock*, 69 Wn. App. 484, 849 P.2d 1243, *review denied*, 122 Wn. 2d 1014 (1993).

19 Wash. Practice § 26.22 further states:

The Supreme Court has not been consistent in its approach to ordering the sale of property in a decree. In three cases it has upheld the decree sale, but in three others it has disapproved of ordering the sale. However, two of the later cases are distinguishable and the third is dictum.

It cites *Murphy, supra, Hokamp, supra, Sedlock, supra* and *Shay vs. Shay*, 33 Wn. 2d 408, 205 P.2d 901 (1949).

Courts have the broad power and authority to enforce their divorce decrees. *Palmer v. Palmer*, 42 Wn. 2d. 715, 716-717, 258 P.2d 475 (1953), *Arneson v. Arneson*, 38 Wn. 2d 99, 100, 227

P.2d 1016 (1951). Clearly, Judge Zagelow anticipated and intended prompt resolution and payment of Ms. Bristow's judgments and mortgages by Mr. Bogart either borrowing the funds or selling the real properties. Judge Zagelow mandated by necessity such borrowing or sale by imposing 12% interest and spousal maintenance of \$1,250 per month. The end result was that Mr. Bogart was accruing interest and maintenance of \$3,750 per month.

Mr. Bogart, instead, pursued a course of lies, deceit, and theft, all with the apparent assistance of his realtors. The courts need the power and authority to stop those in dissolution proceedings who appear to be motivated in their actions by hatred, selfishness, and/or the apparent belief that they can ignore court orders with impunity. If courts have the power to order sale of real property pre-decree, why should the courts not have the same power post-decree. Courts often find themselves in a situation of attempting to give one party the opportunity to retain real property. In *Shay, supra*, the court gave Mr. *Shay* ninety days to work out a plan to keep the real property by borrowing money to pay off Mrs. *Shay*, or, if not, to sell the property and pay

off Mrs. *Shay*. *Shay*, at 414. The Supreme Court approved the decree. Judge Zagelow had the same intentions.

*Ameson v. Arneson*, *supra*, at page 102, stated that the court “. . . has practically unlimited power over the property, when exercised to the rights of the parties and their children.” Mr. *Weber*, in 19 Wash. Practice § 26.22, makes similar suggestions that the court has inherent jurisdiction to provide for the support of the family and, if it has inherent jurisdiction, it matters not that it has no specific statutory authority. He cites *Graf v. Graf*, 201 New Jersey, Super. 240, 505, A. 2d 207, 210 (1985). Mr. *Weber* also noted the sale of property without the expense and delay of foreclosure is a more practical remedy. 19 Wash. Practice § 26.22, Footnote 3.

It should be further noted that *Bobbitt* is distinguishable. *Bobbitt* recognizes that there is the authority to consent to sale, where it states:

“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.” See *Bobbitt* at page 15. (underlined for emphasis)

Here, Mr. Bogart and his attorney repeatedly stated that Mr. Bogart was willing to sell the property, he listed the property, and objected only to the court's requirement of a neutral realtor.

Mr. Bogart, on the one hand, consented to the sale of the real property and yet, with the other hand, belatedly argued that the court had no authority to order the sale of the real property. He cannot have it both ways. With his consent, the court's order amounts solely to an order to appoint a neutral realtor. Once he consented and listed the property, the court certainly had the authority to direct that effort. As with Mr. Bogart's other dishonesties, he was again attempting to game the system. Mr. Bogart's consent and listing, when coupled with his intransigence and the court's inherent power to provide support for an elderly disabled spouse, provided sufficient reason for the court to do substantial justice and give equitable relief.

**C. THE TRIAL COURT'S DECISION ON SUBJECT MATTER JURISDICTION PRECLUDES MR. BOGART FROM RE-LITIGATING THE ISSUE**

Restatement (Second) of Judgments § 1 (1982) sets forth the requisites of a valid judgment:

A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action, as stated in § 11, and

(1) The party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or

(2) Adequate notice has been afforded the party, as stated in § 2, and the court has territorial jurisdiction of the action, as stated in §§ 4 to 9.

Section 11 of the Restatement defines subject matter jurisdiction:

A judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action.

Courts do not lose subject matter jurisdiction by erroneously interpreting the law. *Marley v. Department of Labor & Indus.*, 125 Wn. 2d 533, 539, 886 P.2d 189 (1994).

In *In re: Marriage of Furrow*, 115 Wn. App. 661, 63 P.3d 821 (2003), Division I, was confronted with an appeal of a CR 60(b)(5) motion to vacate an order terminating a mother's parental rights. The mother alleged that the trial court had no authority under Chapter 26.09 RCW to terminate parental rights in the course of a marital dissolution or post decree modification action. The appellate court agreed. They did not, however, agree that the order was thus void under CR 60(b)(5). The *Furrow* court made the point that subject matter jurisdiction is a matter of constitutional original jurisdiction, which the court has in family law

cases, and statutory jurisdiction. *Furrow, supra*, at 668, 669. The appellate court in *Furrow* thus ruled that, although the trial court made a mistake of law, the order was not rendered void. *Furrow*, at 669. See also *Marriage of Wilson*, 117 Wn. App. 40, 49, 68 P.3d 1121 (2003), which held that a court's failure to operate within a statutory framework at best renders the order voidable, not void.

Restatement (Second) of Judgments § 12 (1982) provides:

When a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

- (1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
- (2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
- (3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

Decisions on subject matter jurisdiction can occur either when the issue is raised and so decided or when no objection to subject

matter jurisdiction is made and the court proceeds to judgment on the merits. Here, it was a bit of both. The court did raise the issue of subject matter jurisdiction and did decide it, though no objection to subject matter jurisdiction was made on the issue of the authority of the court to order sale of the real property, only on the issue of the court requiring a neutral realtor.

In either case, Mr. Bogart submitted to the court's authority and raised only belatedly, and only as to the authority to appoint a realtor, his objection. The *Marley* court is quoted at page 541 as follows:

As the Restatement warns, classifying an error of law as a 'jurisdictional' issue

Transforms it into one that may be raised belatedly, and thus permits its assertion by a litigant who failed to raise it at an earlier stage in the litigation. The classification of a matter as one of jurisdiction is thus a pathway of escape from the rigors of the rules of res judicata. By the same token it opens the way to making judgment vulnerable to delayed attack for a variety of irregularities that perhaps better ought to be sealed in a judgment.

Restatement (Second) of Judgments § 12, cmt. b (1982).

Mr. Bogart's counsel asserts the applicability of *Marriage of Bobbitt, supra*. In doing so, he fails to recognize that *Bobbitt* can

be distinguished for a number of different reasons as previously argued, but most importantly for the reason that *Bobbitt* was a timely appeal from an order to sell real property, whereas Mr. Bogart's appeal is from an order denying his CR 60 Motion seeking to set aside a previous Order Re: Sale of Real Property that was not timely appealed. Mr. Bogart is thus precluded from arguing voidness on his CR 60 Motion by reasons of issue preclusion and policy reasons based on finality. The Standard of Review is thus abuse of discretion. There was no abuse of discretion.

#### **D. ATTORNEY FEES**

RCW 26.09.140 provides for an award of attorney fees both at trial and upon appeal. Such an award of attorney fees under a statute or contract is a matter of trial court discretion, which will not be disturbed absent a clear showing of an abuse of discretion. *Fluke Capital and Mgmt. Servis. v. Richmond*, 106 Wn. 2d 614, 625, 724 P.2d 356 (1986). It is also well settled that a trial court may consider additional fees caused by a party's intransigence. *In re: Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120. Intransigence requires no showing of financial

resources of the spouse seeking the award. *In re: Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

Here, there is no doubt that Mr. Bogart's intentional wrongful actions have made these proceedings unduly difficult and costly to Ms. Bristow. There is also no question about Ms. Bristow's need. She attempts to survive on social security of \$530 per month, with her savings depleted. CP 188. Her monthly expenses are a modest \$1,645 per month. Despite her plight, Mr. Bogart continues to deny her both the income and assets that she was awarded.

Attorney fees awarded by the trial court should be affirmed. The attorney fees awarded under RAP 7.2 (d) should be confirmed (CP 342). The court should award attorney fees and terms on this appeal.

## **V. SUMMARY**

Mr. Bogart weaves his web with strands of lies, deceit, theft, and a narcissistic belief that he has the right to ignore orders of the court. He denies Ms. Bristow the maintenance ordered. He refuses to pay the attorney fees ordered and yet appears to have sufficient income to continue litigation ad nauseam. His counsel asserts that the trial court has no authority to order sale of the

property, coupled with their claims that the liens and mortgages have no due date. And, all the while, Mr. Bogart sells substantial property in his apparent belief that he can beat the liens and mortgages without applying the proceeds to the liens and mortgages.

This court should find that the trial court had authority to order a neutral realtor, preferably because that authority is implicit in the court's jurisdiction or, at least, because of Mr. Bogart's contemptuous behavior and/or consent. The court at the very least should hold that Mr. Bogart is precluded from raising the issue by reasons of issue preclusion and policy reasons based on finality. The court should award attorney fees and costs.

Respectfully submitted this 17th day of March, 2011.

  
RONALD K. McADAMS, WSBA 4071  
Attorney for Petitioner/Respondent

**VI. CERTIFICATE OF MAILING**

I, Ronald K. McAdams, certify that on the 17 day of March, 2011, I served upon Respondent a copy of the RESPONSE OF FRANCES J. BOGART TO 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 respondent's co-counsel at the following addresses:

Christopher M. Constantine  
Of Counsel, Inc., P.S.  
P.O. Box 7125  
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Michael S. Mitchell  
Attorney at Law  
129 West Main  
Walla Walla, WA 99362-2817

Dated this 17 day of March, 2011, at Walla Walla, Washington.

  
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RONALD K. McADAMS, WSBA #4071