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

IN RE THE MARRIAGE OF:

SELISA HUMPHREY
Appellant

V.

LLOYD HUMPHREY, SR.
Respondent

NO. 31336-1

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities .....Page 2

Assignment of Error .....Page 5

Statement of Case .....Page 6

Argument .....Page 16

TABLE OF AUTHORITIES

STATUTES AND COURT RULES

Superior Court Rule 2A.....27, 28, 29, 35, 36, 37

Superior Court Rule 37.....17

Superior Court Rule 55.....17, 18

Superior Court Rule 59.....35

Superior Court Rule 60.....36

RCW 2.24.050.....35

RCW 26.09.060.....31

RCW 26.09.080.....25

RCW 26.09.090.....25

STATE CASES

Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674 (2002).....16, 17, 19

Woodhead v. Disc. Waterbeds, Inc., 78 Wn.App. 125 (1995) *review denied* 128 Wn.2d 1008.....16, 17

Snohomish County v. Thorp Meats, 110 Wn.2d. 163 (1998).....17

Anderson v. Mohundro, 24 Wn.App. 569 (1979) *review denied* 93 Wn.2d. 1013 (1980).....17

Burnet v. Spokane Ambulance, 131 Wn.2d. 484 (1997).....17, 19

Sneidigar v. Hodderson, 53 Wn. App. 476 (1989) *aff'd in part, rev'd in part*, 114 Wn.2d 153 (1990).....17

In re Marriage of Kovacs, 121 Wn.2d 795, 854 P.2d 629 (1993).....20, 23

In re Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997).....20

In re Marriage of Nicholson, 17 Wn.App. 110, 561 P.2d 1116 (1977)....20

In Re Marriage of Konzen, 103 Wash.2d 470 (1985).....25

In re Marriage of Washburn, 101 Wn.2d. 168 (1984).....25

Morris v. Maks, 69 Wn.App. 865 (1993).....27, 28, 29

In Re the Marriage of Ferree, 71 Wn.App. 35 (1993).....27, 28

Graves v. P.J. Taggares Co., 25 Wash.App. 118, 605 P.2d 348, *affirmed,* 94 Wash.2d 298, 616 P.2d 1223 (1980).....28

Eddleman v. McGhan, 45 Wash.2d 430, 275 P.2d 729 (1954).....28, 29

Bryant v. Palmer Coking Coal Co., 67 Wash.App. 176, 834 P.2d 662 (1992) *review denied,* 120 Wash.2d 1027, 847 P.2d 480 (1993).....28, 29

Stottlemyre v. Reed, 35 Wash.App. 169, 665 P.2d 1383, *review denied,* 100 Wash.2d 1015 (1983).....28, 29

Gaskill v. Mercer Island, 19 Wash.App. 307, 576 P.2d 1318, *review denied,* 90 Wash.2d 1015 (1978).....28

Snyder v. Tompkins, 20 Wash.App. 167, 579 P.2d 994, *review denied,* 91 Wash.2d 1001 (1978).....29

Baird v. Baird, 6 Wash.App. 587, 494 P.2d 1387 (1972).....29, 33

DeLisle v. FMC Corp., 41 Wn. App. 596 (1985).....29

Riordan v. Commercial Travelers Mut. Ins., 11 Wn.App. 707 (1974).....30

Smyth v. Worldwide Movers Inc., 6 Wn.App. 176 (1971).....30

Lindsey v. Lindsey, 54 Wn.App. 834, 776 P.2d 172 (1989).....30

Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493 (2005).....31

Haller v. Wallis, 89 Wn.2d 539 (1978).....33

Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939 (1982).....33

In re Marriage of Curtis, 106 Wash. App. 191, 23 P.3d 13 (2001).....34

In re Marriage of Burkey, 36 Wash.App. 487, 675 P.2d 619 (1984).....34

Peste v. Peste, 1 Wash.App. 19, 459 P.2d 70 (1969).....34

Munroe v. Munroe, 27 Wash.2d 556, 178 P.2d 983 (1947).....34

In re Rabie's Estate 199 Wash. 207, 90 P.2d 1011 (1939).....35

Robertson v. Robertson, 113 Wash. App. 711, 54 P.3d 708 (2002).....36

State v. Mollichi, 132 Wash.2d 80, 936 P.2d 408 (1997).....36

NON-STATE CASES

SUPPLEMENTAL AUTHORITIES

John D. Calamari & Joseph M. Perillo, The Law Of Contracts (4th ed. 1998).....33

ASSIGNMENT OF ERROR

I. The Court erred by finding that default was not an available remedy for the Respondent's continued violations of discovery orders because there was no sum certain.

II. The Court erred by finding that the money found in the Respondent's home in August 11, 2010 was the same as the money withdrawn from the community bank accounts by the Respondent on August 2, 2010.

III. The Court erred by finding that the community property guns had a value of only $40,000.00.

IV. The Court erred in awarding the Appellant $800.00 per month in spousal maintenance.

V. The Court erred by reconsidering the agreed reimbursement to the Appellant contained in the Temporary Order entered June 30, 2011.

STATEMENT OF THE CASE

The parties met in the fall of 1977. CP at 013. The parties were married on March 1, 1993. CP at 335. The Appellant filed for legal separation on August 9, 2010 following reciprocal allegations from both parties of domestic violence. CP at 001. A criminal no contact order is currently in place protecting the Appellant from the Respondent based on Respondent's guilty plea for damage done to the Carter Street home in which the Appellant was residing following separation. CP at 465.

At the time of separation the Appellant was earning $600.00 in Social Security Income. CP at 044. At the time of separation the Respondent was earning over $2,800.00 in Social Security and VA disability income. CP at 066. At the time of separation the parties had over $300,000.00 in various bank accounts and over $200,000.00 in cash in the safe at the Boyd's property. CP at 207-251.

On or about September 9, 2010 the Respondent filed his declaration in response to the request for an ex parte restraining order and the Petitioner's motion for temporary orders. CP at 610. In his declaration the Respondent claimed only $2,800.00 in income per month. Further the Respondent indicates that the $214,000.00 removed from the safe in August is "all I have to secure a clean safe place to live..."

The Respondent goes on in his declaration to request that the court "Sheppard our money and to appreciate and understand that it is literally the only resource I have." Upon further discovery, it was determined that the Respondent received $2,800.00 in disability benefits and $706.00 per month in social security. CP at 173-174.

It was further discovered that nearly $100,000.00 remained in several American West bank accounts. CP at 221-232 Neither of this information was provided in the Respondent's declaration or his financial declaration both signed under penalty of perjury. CP at 610 and 066.

By temporary order entered on September 13, 2010 the Appellant was awarded $1,000.00 per month in spousal maintenance. CP at 077. On October 19, 2010 the Appellant filed a motion for contempt based on the Respondent's failure to pay maintenance. CP at 099-100. By an agreed order, the Respondent was found in contempt for failure to timely pay spousal maintenance. He was further found in contempt for writing the checks in the Petitioner's maiden name. CP at 112-116.

Following this order, the Respondent continued to not pay the spousal maintenance timely or in the correct form as ordered in the November 15, 2010 order on contempt. By agreed order, due the Respondent's continued failure to comply with the spousal maintenance award an agreed order was entered which had the spousal maintenance

being paid from the community funds held in the Respondent's attorney's trust account. The order further indicated that the Respondent was again in contempt for failure to comply with the spousal maintenance order. CP at 125-128.

On August 26, 2010, the Petitioner's first set of interrogatories and request for production of documents was served by mail on Mr. Humphrey's attorney. On February 3, 2011, counsel for the Appellant and the respondent held a CR26(i) conference. As a result of this conference the answers to interrogatories and request for production of documents were to be served on the Appellant's attorney by February 28, 2011. CP at 130-131.

On March 11, 2011 the Appellant filed a motion to compel as the answers to interrogatories had not been provided. CP at 130-131. By order of March 21, 2011 the Respondent was ordered to have complete answers to interrogatories and request for production of documents at Webster Law Office by 5:00 p.m. on April 22, 2011. The court further ordered a sanction of $100.00 per day the answers remain outstanding past April 22, 2011. The March 21, 2011 also ordered an initial walk through of the Boyd property to be accomplished by April 22, 2011. CP at 179.

The Respondent's answers to interrogatories and request for production of documents were served on Webster Law Office on April 20,

2011 but the answers were not signed by the Respondent. A second updated and signed answers to interrogatories and request for production of documents were served on Webster Law Office on April 28, 2011. CP at 198.

The answers provided by the Respondent were incomplete. A letter outlining the deficiencies was sent to Respondent's counsel on May 3, 2011. CP at 200-201. The letter requested that the outstanding discovery be provided to Webster Law Office by May 18, 2011. Another CR 26(i) conference was held on May 17, 2011. The outstanding discovery was to be delivered by May 18, 2011. CP at 198.

A second motion to compel was filed by the Appellant on May 18, 2011. CP at 197. On May 23, 2011 the court ordered that the outstanding discovery was to be provided by June 9, 2011. The Respondent was also assessed $3,000.00 in sanctions per the March 21, 2011 order to compel. CP at 274. No supplemented answers or outstanding documents were provided to Webster Law Office by June 9, 2011. No documentation showing compliance with obtaining records was provided by June 9, 2011. CP at 281.

On June 17, 2011 the Appellant filed a motion for sanctions given the continued outstanding discovery per the May 23, 2011 order. CP at 280. By order of June 30, 2011 the Respondent was assessed $2,700.00

in sanctions for his failure to comply with the May 23, 2011 order. The Respondent was again ordered to supplement any interrogatory deficiencies within 2 weeks of entry of the order. CP at 296-297.

The June 30, 2011 order also contained the parties' agreement, entered between counsel, that any and all of the sanctions, attorney fees and spousal maintenance payments paid by the Respondent were his separate obligation and such payments would be reimbursed in full to the Appellant. CP at 297. This agreement was outside of the court's order. CP at 530. Prior to this agreement being signed by Respondent's counsel, a letter accompanying the order was sent to Respondent's counsel outlining this new provision added to the order. CP at 551.

Another letter outlining deficiencies was sent to Respondent's counsel on June 28, 2011. This letter requested additional information to be provided by July 13, 2011. CP at 305. On July 26, 2011 the Appellant filed a motion and declaration for an order to show cause contempt for failure to comply with the June 30, 2011 order requiring supplemental answers within 2 weeks of the order. CP at 300.

The Respondent was found in contempt by order entered on August 16, 2011. CP at 308-311. As a means to purge his contempt the Respondent was ordered to hire, at his expense, a personal property appraiser/auctioneer/estate sale or guardian to inventory and value all

property located in the Boyds, WA home and on the surrounding property by September 22, 2011. CP at 311. The Respondent was further ordered to fully and completely respond to all other interrogatory deficiencies and request for production deficiencies by August 29, 2011. CP at 311.

At the review hearing on the contempt order entered August 16, 2011 the Respondent was again found in contempt for failure to comply with the August 16, 2011 order. The contempt order entered on September 22, 2011 again ordered as conditions of purging contempt that Mr. Humphrey hire, at his expense, a personal property appraiser to inventory and value all the property located in the Boyds, WA home and surrounding property. This inventory was ordered to be accomplished by October 17, 2011. CP at 318-323.

In addition Mr. Humphrey's was ordered to fully and completely respond to the request for production of his VA medical records and his American Express credit card statements by October 17, 2011. This order also placed Mr. Humphrey on notice that his failure to complete all requirements of purging his contempt as outlined in this order, the court shall either strike the entirety of the Respondent's responsive pleadings and find him in default or shall enter an order restricting the Respondent's ability to present evidence at the time of trial. CP at 320-321.

A review of the September 22, 2011 contempt order was set for October 17, 2011. Again the Respondent failed to comply with the purge conditions of the contempt order. By order of October 19, 2011 the Respondent is precluded from providing any values on personal property at the time of trial. The Respondent was required to provide a specific list of his firearms. CP at 329-330.

The Appellant was granted one day on the Boyds, WA property to inventory said property. The Respondent was ordered not to be present. CP at 329-330. The inventory ordered on October 19, 2011 took place on March 8, 2012. CP at 338-339.

Prior to the inventory beginning, the Respondent's attorney contacted Mr. Webster to inform him that he and the Appellant could not come to the property yet because the Respondent was refusing to leave the property. Mr. Webster and the Appellant waited approximately 15 minutes. After 15 minutes, Mr. Webster informed Ms. Costello that he would be calling the Ferry County Sheriff's for an assist. Ms. Costello relayed this information to Mr. Humphrey while Mr. Webster was still on the phone.

Mr. Webster heard Mr. Humphrey respond, "If the Police come there's gonna be a shoot out." Approximately 15 minutes later, Ms. Costello contacted Mr. Webster to inform him that Mr. Humphrey's was

leaving the property. Mr. Webster and Ms. Humphrey were waiting at Boyd's Junction which is across the highway from Mr. Humphrey's driveway. Mr. Humphrey's pulled up in a vehicle at Boyd's Junction. Mr. Humphrey exited the vehicle and placed his hand under his jacket where there was clearly a gun.

Mr. Humphrey was approximately 10 feet away from Mr. Webster and Ms. Humphrey. No one spoke to Mr. Humphrey but simply got into their vehicle to leave. While Mr. Webster was moving to get into his vehicle, Mr. Humphrey continued to keep his hand under his jacket and continued to stare him down.

Ms. Humphrey and Mr. Webster then proceeded in their vehicles to the property to conduct the inventory. Mr. Humphrey then got into his vehicle and followed Ms. Humphrey and Mr. Webster to the property. Mr. Webster called 911 due to Mr. Humphrey's threatening behavior, possession of a gun and his decision to follow them back to the property. The Ferry County Sherriff's deputy arrived and Mr. Humphrey was arrested that day. CP at 339.

Following the arrest of Mr. Humphrey the inventory was finally allowed to begin. No keys to the multiple vehicles were provided and certain areas of the home and property were locked and access was denied. CP at 340. On June 28, 2012 the Appellant, through counsel, filed a

motion for discovery sanctions requesting that the Respondent be found in default for his continued violations of the discovery orders. CP at 338. The Commissioner reserved determination of discovery sanctions and the Appellant's request for default to the trial court. The court did find that Mr. Humphrey did violate the court's October 17, 2011. CP at 345.

Trial was held on August 1, 3 and 10, 2012 before the Honorable Allen C. Neilson. Verbatim Report (VR) at 1-618. The Appellant filed a motions in limine which were addressed prior to trial. CP at 346. The court reserved ruling on the Appellant's request for a default due to the Respondent's continued discovery violations. VR at 32, line 25 – 33, line 1. The court granted the Appellant's request for the court to re-affirm the Commissioner's rulings which including outstanding attorney fee awards and sanctions awarded to the Appellant and the provision ordering a full reimbursement to the Appellant of community funds used by the Respondent for separate debt obligation. VR at 34, line 7-23. The Respondent, through counsel, made no objections to the court granting the Appellant's request to re-affirm the Commissioner's orders. VR at 34, line 22.

Trial concluded on August 10, 2012. VR at 618. The court ruled on the reserved issue of default, finding that default was not practical because there was no sum certain. VR at 593, line 1-5. The court ordered

a distribution of separate and community real property. VR at 604-607. The court ordered the bank accounts to be split between the parties. VR at 615, line 23 – 616, line 4. The court ordered the Respondent to pay the Appellant $40,000.00 as interest in the community firearms. VR at 611, line 22-25. The court ordered the outstanding sanctions and attorney fees from the Commissioner's orders to be paid to the Appellant. VR at 615, line 24-25, - 616, line 1-2. The court reaffirmed the reimbursement to the Appellant and an additional award of $10,000.00 in attorney fees. VR at 616, line 5-24. The court further divided the parties' personal property and order remaining vehicles/boats/trailers to be salvaged and sold. VR at 602-603 and 604.. The Appellant was awarded $800.00 per month in spousal maintenance and a protection order. VR at 600, line 8-9, and CP at 449-453.

The Appellant filed a motion for reconsideration requesting the court reconsider the amount of the spousal maintenance award, awarding the spousal maintenance in a lump sum and securing the Appellant's interest in the spousal maintenance with a deed of trust on the Respondent's property. CP at 449. The Respondent filed a motion for reconsideration requesting that the court reconsider the award of $10,000.00 in attorney fees and reconsider the reimbursement as outlined in the June 30, 2011 order. CP at 527-528. The court heard argument on

October 16, 2012 and issued written findings and conclusions on November 15, 2012. CP at 569-574. The court denied the Appellant's motions for reconsideration, denied the Respondent's motion for reconsideration on the issue of the $10,000.00 in attorney fees and granted the Respondent's motion for reconsideration regarding the reimbursement as outlined in the June 30, 2011 order. CP at 573. The Appellant's timely appeal followed. CP at 575.

ARGUMENT

I. THE COURT ERRED BY FINDING THAT DEFAULT WAS NOT AN AVAILABLE REMEDY FOR THE RESPONDENT'S CONTINUED VIOLATIONS OF DISCOVERY ORDERS BECAUSE THERE WAS NO SUM CERTAIN.

The law is well settled in this state concerning dismissal of a complaint as a sanction for discovery abuse. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686 (2002). "Under CR 41(b), a trial court has the authority to dismiss an action for noncompliance with a court order or court rules." *Woodhead v. Disc. Waterbeds, Inc.,* 78 Wn.App. 125, 129 (1995) *review denied* 128 Wn.2d

1008 (citing *Snohomish County v. Thorp Meats,* 110 Wn.2d. 163, 166 (1998)). "[I]t is the general policy of Washington courts not to resort to dismissal lightly." *Woodhead* at 129-30 (citing *Anderson v. Mohundro*, 24 Wn.App. 569, 575 (1979) *review denied* 93 Wn.2d. 1013 (1980). When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. *Burnet v. Spokane Ambulance*, 131 Wn.2d. 484, 494 (1997) (citing *Sneidigar v. Hodderson*, 53 Wn. App. 476, 487 (1989) *aff'd in part, rev'd in part*, 114 Wn.2d 153 (1990)). A party's disregard of a court order without reasonable excuse or justification is deemed willful. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d at 686-87 (citing *Woodhead,* 78 Wn.App. at 130.)

The trial court erroneously based his decision to deny the request for a default as a sanction under CR37 because there was not a sum certain and as such the court determined that default was "simply not available to me as a practical matter." VR at 593, line 1-5. Court rule 55 address defaults and judgments. CR55(b)(2) specifically address a situation where

default is granted and there is no sum certain. "[T]he court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are required under this subsection." CR55(b)(2).

The court dismissed the sanction of default option outright this was an err. As the court finds after dismissing default as an option, that the "[i]f this case suffers from anything it is lack of evidence, not too much." VR at 593, line 7-8. While the trial court makes this statement when addressing an alternate sanction of striking exhibits, it applies directly to the factors outlined in *Burnett, supra.* This goes directly to the Appellant's ability to prepare for trial and goes directly towards the court's findings on the bank accounts and firearms issues addressed below. The court then goes on to discuss the many other discovery sanctions already imposed on the Respondent. VR at 594, line 5-10. The trial court then moves on to discuss intransigence and awards $10,000.00 in attorney fees to the Appellant. VR at 595, line 1-4.

However, upon reconsideration the trial court makes clear in its hearings, findings of fact and conclusions of law and ruling on motion for reconsideration that the award of $10,000.00 was based on the Appellant's need and the Respondent's ability to pay; and based on his intransigence. CP at 571. In effect, the court did not order any sanctions for the

Respondent's continued violations of discovery orders.

"[S]anctions imposed by a trial court is a matter of judicial discretion to be exercised in light of the particular circumstances, but that the sanctions imposed should be proportional to the nature of the discovery violation and the surrounding circumstances." *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d. at 694 (citing *Burnet*, 131 Wn.2d at 495-98). It is abundantly clear that the Respondent has willfully and deliberately violated the discovery orders in this case. VR at 33, line 15-19. He has done so on multiple occasions resulting in sanctions, contempt and limitations in presenting evidence. CP at 179, 274, 296, 308, and 329. His failure to comply with the discovery orders, as well as, his evasive and incomplete interrogatory answers did in fact prejudice the Appellant's ability to prepare for trial. See VR at 608, line 9-13, VR at 611, line 18 – 612, line 2 (firearms); VR at 612 -613 (monies).

While the trial court did address that the Respondent has been previously sanctions for his prior violations, there were multiple violations that continued to not be addressed. The Respondent's appearance at the last inventory which resulted in his arrest was not addressed. The court did not address the Respondent's refusal during deposition to correct obviously incorrect answers to interrogatories. Such denial of any

sanction was err given the pervasive and continued violations of the discovery orders and the resulting prejudice to the Appellant.

II. THE COURT ERRED BY FINDING THAT THE MONEY FOUND IN THE RESPONDENT'S HOME IN AUGUST 11, 2010 WAS THE SAME AS THE MONEY WITHDRAWN FROM THE COMMUNITY BANK ACCOUNTS BY THE RESPONDENT ON AUGUST 2, 2010.

"A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

It is proper for the trial court to take concealment of assets into account when distributing property in a dissolution action. See *In re Marriage of Nicholson*, 17 Wn.App. 110, 561 P.2d 1116 (1977). Here, the

Respondent testified at trial that he was in fact in the course of hiding assets. VR at 252, line 13-15. Not only did the Respondent testify that he was going to bury money, but further testified that he was in the process of re-wrapping funds for the purpose of confusing and "safeguarding" his funds. VR at 252-255.

The court in fact pointed out in its oral findings that the Respondent was caught in the act of hiding the money. VR at 613, line 19-22. The trial court went on to state that "I don't doubt for a minute that Ms. Humphrey is telling the truth here,". Given the trial court's belief that the Appellant in fact saw large amounts of cash in the safe prior to separation while at the same time knew that over $250,000.00 remained in the parties' bank accounts, the court's finding that is consistent with the the Respondent's explanation was an err.

The evidence and testimony offered at trial weigh in favor of a finding that the money found in the safe on August 11, 2010 was not the same funds which were withdrawn from the bank on August 2, 2010. Mr. Webster, prior attorney for Ms. Humphrey, testified that the day the money was removed from the Respondent's home that the Respondent continually stated "There's $160,000 in there and it better all be counted and there better not be any missing." VR at 93, line 2-10. The Respondent later that day signed a statement indicating that $214,000.00

was found in the safe that day but he believed there was only $160,000.00. VR at 93, line 22 – 94, line 8.

The ex parte restraining order was issued based on the Appellant's statement in her declaration filed with her request for the order that approximately $175,000 was in the safe at the Boyds property home. CP at 014. The Appellant testified to seeing the money in the fire box prior to separation. VR at 393. Appellant further testified to seeing the money in wrappers and envelopes similar to those found on August 11, 2010. VR at 394, line 9-11. The Appellant further testified that the Respondent would provide an update on the amounts of cash kept at the home. VR at 392, line 13-20. These amounts varied from $100,000 to $170,000. VR at 392, line 15-20.

The trial court's belief in the Appellant's statements coupled with the repeated discovery violations and the court's finding that the Respondent was in fact going to try to hide these assets weighs in favor of the Appellant. Since the trial court's own findings do not support its conclusion, its ruling is based on untenable grounds.

III. THE COURT ERRED BY FINDING THAT THE COMMUNITY PROPERTY GUNS HAD A VALUE OF ONLY $40,000.00.

"A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Here, the court erred by finding that the community guns had a value of $40,000.00 because the evidence presented at court does not support the courts findings. The trial court determined the value of the guns for purposes of division of property at $40,000 based on the court's belief that this is what the guns sold for. VR at 611, line 18-22.

The Respondent testified that he gave away his guns to his grandson. VR at 260, line 1-8. The Respondent further testified that he believed his grandson sold them for $37,000. VR at 261, line 18-19. The Respondent further testified that he had no proof of him selling those firearms. VR at 261, line 20-21. The grandson's mother also testified that she was not present when the firearms were allegedly sold. VR at 540, line 15-16. The mother also testified that the grandson didn't sell all of the firearms given. VR at 523, line 25 – 524, line 1. The Respondent testified that the collection had a value between $100,000 and $500,000. VR at 261, line 14-16.

The Appellant testified to seeing the collection in 2009, which was after the guns were allegedly sold. VR at 398, line 3-8. The Appellant testified that the Respondent would once or twice a year inventory the gun collection. VR at 396, line 21-23. Similar to the amount of money kept in the safe, the Respondent would provide the Appellant with a running tally of the value of the gun collection. VR at 396, line 10-16. The last figure given to the Appellant was $100,000. VR at 396, line 16.

The only evidence presented to the court was testimony of the parties. No credible or reliable evidence was presented to the court that supports the courts finding that the guns were sold for $40,000. There was no receipts or eye witness testimony that such sale occurred. In fact, the testimony supported that the entire collection was not sold. (Erica Woods testimony, VR at 523, line 25 – 524, line 1). Further testimony by both parties was consistent and indicated that the collection was valued between $100,000 and $500,000. As the evidence does not support the court's findings, the courts conclusion was based on untenable grounds.

IV. <u>THE COURT ERRED IN AWARDING THE APPELLANT $800.00 PER MONTH IN SPOUSAL MAINTENANCE.</u>

RCW 26.09.080 clearly dictates that all property, both separate and community property, are before the court, and dictates that the court make a "just and equitable" disposition. The character of the property is a relevant factor which must be considered, but is not controlling. *In Re Marriage of Konzen*, 103 Wash.2d 470 (1985). The use of maintenance gives the court an opportunity to balance assets (and thus standard of living) that cannot be divided otherwise.

Under the extremely flexible provisions of RCW 26.09.090, a demonstrated capacity of self-support does not automatically preclude an award of maintenance. *In re Marriage of Washburn*, 101 Wn.2d. 168, 178 (1984). Indeed, the ability of the spouse seeking maintenance to meet his or her needs independently is only *one* factor to be considered. RCW 26.09.090(1)(a). *Id.* at 178-79. The duration of the marriage and the standard of living established during the marriage must also be considered, making it clear that maintenance is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time. *Id.*, RCW 26.09.090(1)(c), RCW 26.09.090(1)(d).

Following trial, the Respondent received significantly more in separate property holdings than the Appellant. The Respondent was awarded $132,465.00 in separate real property holdings. The Appellant

was awarded only $44,525 in separate real property holdings. Additionally, the Respondent was likewise awarded a greater amount of the community real property holdings. The Respondent received $27,000.00 in community real property and the Appellant received $17,000.00 in community real property. CP at 486-487.

After an equalization payment and the split of the community property accounts, the division of community property between the parties was equal. However, the monthly income of the parties' remain significantly disparate. The Respondent receives $3,529.00 per month in income from Social Security and VA disability. The Petitioner receives $617.00 per month in income from Social Security Disability. CP at 484.

The Trial Court's award of $800.00 per month maintenance reduces the Respondent's income to $2,729.00 and increases the Appellant's income to only $1,417.00. CP at 484. This results in the Respondent's monthly income of nearly double the Appellant's.

The Appellant is disabled and unable to work. She is only 58 years old and as such her need for continued maintenance is necessary. The parties were married for over 20 years and in a meretricious relationship for 26 years. Given the length of the relationship, the unequal property division, the health of the Appellant and the incomes of the parties, the

award of $800.00 per month in spousal maintenance falls short of the statues and case law's dictate of "just and equitable."

V. THE COURT ERRED BY RECONSIDERING THE AGREED REIMBURSEMENT TO THE APPELLANT CONTAINED IN THE TEMPORARY ORDER ENTERED JUNE 30, 2011.

Under Washington law, settlement agreements are governed by the general principles of contract law. *Morris v. Maks*, 69 Wn.App. 865, 868 (1993). To determine whether an informal writing is enforceable and binding, the courts consider three specific aspects. (l) The subject matter has been agreed upon; (2) The terms are all stated in the informal writings; and (3) The parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Morris* at 869. All three factors are clearly met in this case.

A Washington trial court's authority to enforce a settlement agreement between parties is governed by CR 2A. *Morris* at 868. The premise behind CR 2A is to preclude enforcement of a disputed settlement agreement not made in writing or put on the record. *In Re the Marriage of Ferree*, 71 Wn.App. 35, 40 (1993). However, courts have held that where an agreement has been reduced to writing, it is enforceable under 2A. Id.

By its terms, CR 2A applies only to agreements that satisfy two elements. *In re Marriage of Ferree*, 71 Wash. App. 35, 39-40, 856 P.2d 706, 708-09 (1993). First, the agreement, hereafter called a settlement agreement, must be made by parties or attorneys "in respect to the proceedings in a cause". *Id.* Second, "the purport" of the agreement must be disputed. *Graves v. P.J. Taggares Co.,* 25 Wash.App. 118, 122, 605 P.2d 348, *affirmed,* 94 Wash.2d 298, 616 P.2d 1223 (1980); *see Eddleman v. McGhan,* 45 Wash.2d 430, 432, 275 P.2d 729 (1954); *Bryant v. Palmer Coking Coal Co.,* 67 Wash.App. 176, 179, 834 P.2d 662 (1992), *review denied,* 120 Wash.2d 1027, 847 P.2d 480 (1993).

When these elements are met, CR 2A supplements but does not supplant the common law of contracts. *Morris v. Maks,* 69 Wash.App. 865, 868, 850 P.2d 1357 (1993); *Stottlemyre v. Reed,* 35 Wash.App. 169, 171, 665 P.2d 1383, *review denied,* 100 Wash.2d 1015 (1983); *see Gaskill v. Mercer Island,* 19 Wash.App. 307, 316, 576 P.2d 1318, *review denied,* 90 Wash.2d 1015 (1978). It precludes enforcement of a disputed settlement agreement not made in writing or put on the record, whether or not common law requirements are met. *Eddleman v. McGhan,* 45 Wash.2d at 432, 275 P.2d 729 (predecessor rule); *Bryant v. Palmer Coking Coal Co.,* 67 Wash.App. at 176, 834 P.2d 662; *Gaskill v. Mercer Island,* 19 Wash.App. at 316, 576 P.2d 1318. However, it does not affect an

agreement made in writing, *Morris v. Maks, supra,* or put on the record. *Snyder v. Tompkins,* 20 Wash.App. 167, 579 P.2d 994, *review denied,* 91 Wash.2d 1001 (1978); *Baird v. Baird,* 6 Wash.App. 587, 494 P.2d 1387 (1972).

The purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle or narrow a cause of action; indeed, the compromise of litigation is to be encouraged. *Eddleman v. McGhan,* 45 Wash.2d at 432, 275 P.2d 729; *Bryant v. Palmer Coking Coal Co.,* 67 Wash.App. at 179, 834 P.2d 662; *Snyder v. Tompkins,* 20 Wash.App. at 173, 579 P.2d 994. In fact, "the law favors the private settlement of disputes and is inclined to view them with finality." *Stottlemyre v. Reed,* 35 Wash.App. 169, 173, 665 P.2d 1383 (1983) (citation omitted). In this case the parties have reduced their agreement to a writing and it is absolutely enforceable as a result.

Stipulations must be read into the record or be in writing and signed by counsel for each side. Accordingly, the courts have held that stipulations conforming to statutory requirements are binding unless fraud, mistake, misunderstanding, or lack of jurisdiction is shown. *DeLisle v. FMC Corp.*, 41 Wn. App. 596 (1985).

It also cannot be argued that the agreement was not signed by the parties. A written stipulation signed by counsel on both sides is binding

on the parties and the court. *Riordan v. Commercial Travelers Mut. Ins.*, 11 Wn.App. 707 (1974). In fact, stipulations and agreements of counsel are viewed with good favor unless some good, contrary reason is shown. *Smyth v. Worldwide Movers Inc.*, 6 Wn.App. 176 (1971).

Here, the agreement was not only reduced to writing and signed by both counsel but was incorporated as part of a formal order signed and entered with the court. This agreement was approved and affirmed by the Court Commissioner when she signed the Temporary Order on June 30, 2011. CP at 297.

Since the agreement was memorialized within a Temporary Order the trial court erroneously relies on *Lindsey v. Lindsey*, 54 Wn.App. 834, ___, 776 P.2d 172 (1989) for the proposition that the court is not bound by temporary orders. The court in *Lindsey* was tasked with determining whether the trial court could refuse to put a judgment for past due child support from a temporary order of support into the final order without good cause. *Lindsey* at 835. The *Lindsey* Court ruled that upon request, the obligee parent is entitled to a judgment for past support "unless the court the trial court makes a specific finding of fact stating that the support arrearage was properly considered in the property division, or that establishes a recognized basis for equitable relief." *Id.* At 836-837.

Similar to past due child support, which becomes a judgment as

they fall due, the agreement made between counsel became enforceable upon the signing by both counsel. While RCW 26.09.060(10) does not bind the trial court to a temporary order, the agreement between the parties was a settlement offer and should properly be looked at in terms of CR2A and contract law.

Counsel for the Respondent argued that she did not understand the intent or outcome of the agreement. VP at 640 – 641. However, where there is a written contract, Washington courts have determined intent by focusing on the objective manifestations of agreement. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005). We give words their ordinary, usual, and popular meaning unless the entirety of the agreement evidences a contrary intent. *Id.* at 504. If relevant for determining mutual intent, surrounding circumstances and other extrinsic evidence may be used to determine the meaning of specific words and terms used, <u>but not to show an intention independent of the instrument or to vary, contradict, or modify the written word</u>. *Id.* at 503 (emphasis added).

The provision at issue could not be more clear in its language and intent. CP at 297. The June 30, 2011 order stated:

> "Any and all sanctions, attorney fees and spousal maintenance payments paid with the community funds held in the respondent's

> attorney's trust account shall be deemed the respondent's sole and separate debt obligation. Any and all amounts paid on the respondent's sole and separate debt obligation shall be reimbursed in full to the petitioner at the time of trial. Both parties and the Court shall be bound to grant the petitioner full reimbursement of the community funds used to pay the respondent's separate debt obligations."

A part of the Appellant's motions in limine the Appellant requested that the court re-affirm the Commissioner's prior court orders, such as outstanding sanctions and attorney fees to be paid at the time of trial, the discovery sanction that did not allow the Respondent to present any evidence or testimony on the value of personal property and the June 30, 2011 provision which required full reimbursement to the Appellant. CP at 346; VR at 34, line 7-23. Counsel for the Appellant specified the June 30, 2011 provision in her oral argument to the court on the Appellant's motions in limine. VR at 34, line 7-21. Again following the trial court's ruling, Counsel for the Appellant verbally stated the content of the June 30, 2011 order. VR at 616, line. 11-24.

Mr. Humphrey is estopped from arguing that his attorney misunderstood and he should be relieved from the contract. Once a party has designated an attorney to represent him or her, the court and the other parties to an action are entitled to rely upon that authority. *Haller v. Wallis*, 89 Wn.2d 539, 547 (1978). "[A] party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding." John D. Calamari & Joseph M. Perillo, *The Law Of Contracts* , 376 (4th ed. 1998); see also *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 943-44 (1982).

The Trial Court further relies on *Baird v. Baird*, 6 Wn.App. 587, ____, 494 P.2d 1387 (1972) for the proposition that "[a] trial court has the discretion to relieve a party from a stipulation when relief is necessary to prevent injustice and the granting of relief would not place the adverse party at a disadvantage." CP at 572. However, the court provides no finding that the provision serves an injustice or that granting the relief does not place the Appellant at a disadvantage other than simply stating that it does. CP at 572. The trial court simply states that he did not read the order prior to affirming the prior court order or misunderstood the Appellant's position. CP at 571. However, this finding is not consistent with the premise of *Baird*.

Absent fraud, overreaching, or collusion, the courts will not set aside a property settlement agreement. *In re Marriage of Curtis*, 106 Wash. App. 191, 194, 23 P.3d 13, 15 (2001). A simple showing of disparity in the division of property is not enough. *In re Marriage of Burkey,* 36 Wash.App. 487, 489-90, 675 P.2d 619 (1984). The overall fairness of a settlement is not an adequate ground to vacate a final decree. *Curtis*, at 106 198, 23 P.3d 13, 17 (2001). "To permit collateral attacks upon divorce proceedings without any more than a showing of a disparity in the award, would open a Pandora's Box, affecting subsequent marriages, real property titles and future business endeavors of both spouses." *Burkey,* 36 Wash.App. at 489, 675 P.2d 619 (citing *Peste v. Peste,* 1 Wash.App. 19, 25, 459 P.2d 70 (1969)).

While the court maintains the ability to affirm, modify or deny a property settlement agreement between the parties in a dissolution proceeding, *Munroe v. Munroe*, 27 Wash.2d 556, 178 P.2d 983 (1947), as outlined in *In re Marriage of Curtis* and *In re Marriage of Burkey*, more than just an unfair division of the property is necessary to deny a validly entered agreement which was reduced to writing and signed by both attorneys.

There is no finding of fraud, collusion or overreaching to justify the denial of a validly entered property settlement agreement. Nor was

there any finding of fraud, mistake, misunderstanding or lack of jurisdiction as required by CR2A. While the court has the discretion to deny the settlement agreement it is clear from contract law, case law and the statutes that more than simply believing that the agreement was unfair is necessary.

This is especially true when both parties are adequately represented by counsel. The Appellant relied on the signature and consent of the Respondent's attorney when she signed the temporary order which encompassed the parties' agreement. While Respondent's counsel argued that she did not understand the effect of the language of the agreement, this is not reason to set aside the valid and binding agreement.

Further, the stipulated agreement was already affirmed by the Court Commissioner when it was signed and filed as part of the June 30, 2011 temporary order. CP at 297. This order was never reconsidered or revised. As such, the order of the Court Commissioner became the order of the trial court. RCW 2.24.050. Order of court commissioner which is neither taken before superior court for revision nor appealed from, becomes final adjudication. *In re Rabie's Estate* 199 Wash. 207, 90 P.2d 1011 (1939).

The request for a reconsideration of the June 30, 2011 order must also be denied as it was untimely. CR 59; RCW 2.24.050. RCW 2.24.050

also clearly and unambiguously provides that a party who fails to act within the 10 days must seek relief from the appellate court. *Robertson v. Robertson*, 113 Wash. App. 711, 714, 54 P.3d 708, 710 (2002); See also *State v. Mollichi,* 132 Wash.2d 80, 93, 936 P.2d 408 (1997).

The proper procedure for the Respondent was to seek to vacate the order under CR60. However, even under this rule the Respondent was untimely as the order was entered over a year prior to the court's entry of the decree of dissolution. CR60. It should further be noted that Respondent's counsel did not object to the court affirming the lower court's order. VR at 34, line 22. This was following Appellant's counsel's explanation of the contents of the June 30, 2011 order. VR at 34, line 7-21. When final orders were provided to Respondent's counsel with the reimbursement outlined in the June 30, 2011 order, again there was no objection and the decree was signed by Respondent's counsel again agreeing to the provision as outlined in the June 30, 2011 order. CP at 440; CP at 477.

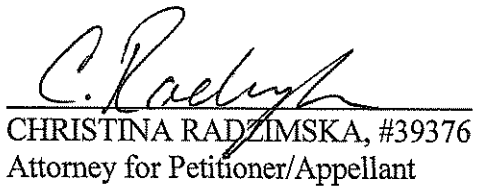
The trial court erred in reconsidering and revoking the property settlement agreement contained in the June 30, 2011 order. The agreement was in compliance with CR2A and contract law. There was no finding of fraud, overreaching, or collusion which would allow the agreement contained in the decree of dissolution to be vacated. There was

no finding of fraud, mistake, misunderstanding or lack of jurisdiction which would make the agreement invalid under CR2A. Unfairness in the result of an agreement reached between counsel is not reason enough to deny the Appellant the benefit of that bargain when it complies with all requirements of CR2A, contract law and no findings have been made that would support the revocation of the agreement.

CONCLUSION

Based on the foregoing the Appellant respectfully requests that the court reverse the trial court's ruling and remand the case for findings consist with this Court opinion.

Respectfully Submitted:

By: 
CHRISTINA RADZIMSKA, #39376
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 15th day of March, 2013, she served a copy of the Appellant's Brief by First Class Mail to the persons hereinafter named at the places of address stated below which is the last known address.

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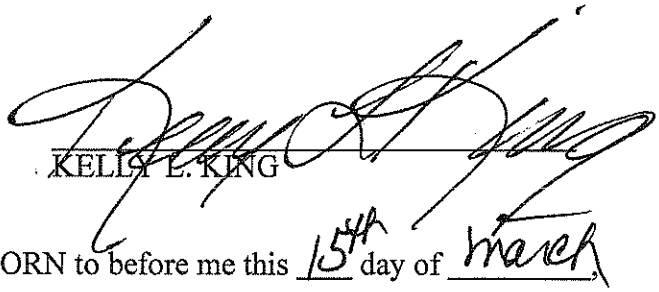
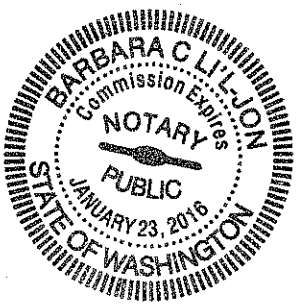
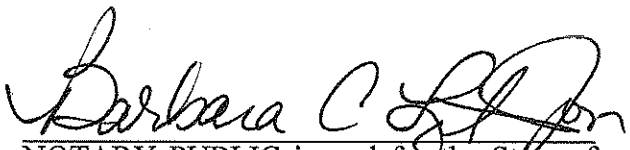


KELISI L. KING

SUBSCRIBED AND SWORN to before me this 15th day of March, 2013.





NOTARY PUBLIC in and for the State of Washington, residing in Colville
My Commission Expires: 1-23-16