

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

NO. 33243-8

FILED

DEC 14 2015

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

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IN RE:

DUANE COOK, RESPONDENT

AND

ELAINE COOK, APPELLANT

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BRIEF OF RESPONDENT

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## I. TABLE OF CASES AND RULES

### CASES

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## **II. STATEMENT OF THE CASE**

On July 25, 2014, a Decree of Dissolution was entered in the marriage of Duane Cook and Elaine Cook, Spokane County Cause No. 13-3-00783-3. (CP 14-35) Pursuant to the Decree of Dissolution, the parties were ordered to sell the family home at a price reflective of the appraised value of \$450,000.00. (CP 16-18) Provisions within the Decree dealt with the specifics of listing and marketing the home, as well as what to do if a dispute arose as to whether or not to accept an offer. (CP 16-18)

On August 8, 2014, the parties signed a listing agreement with realtor Brandi Graham-Snow. The home was listed at a price of \$469,900.00. (CP 36-37)

Subsequent to the listing of the home, the parties received an offer of \$450,000.00 from a bona fide purchaser. (CP 37) The offer was communicated to both parties by the realtor, per the terms of the Decree. (CP 37) Through the realtor, Mr. Cook attempted to negotiate a counter-offer of \$455,800.00, which was believed by the parties' realtor to be a reasonable price. (CP 37)

The parties' realtor testified that Ms. Cook would not sign the counter-offer, was not cooperative in the sales process and frustrated the

sales efforts.

On January 21, 2015, Mr. Cook filed a motion to require the sale of the real property, for sanctions and for fees. (CP 53-55) Ms. Cook responded by objecting to the sale of the home and to the submission of a counter-offer, alleging a violation of the Decree of Dissolution. (CP 82-85) Ms. Cook also sought the court's permission to purchase the home herself. (CP 82-85)

A hearing was held before the Honorable Julie McKay, Spokane County Superior Court Commissioner, on February 9, 2015. (CP 94-97) Commissioner McKay denied Mr. Cook's motion and entered an order allowing Ms. Cook to purchase the home. (CP 94-97)

Mr. Cook timely moved to revise the order of Commissioner McKay. (CP 98-99) On February 19, 2015, the Honorable Maryann Moreno, Spokane County Superior Court Judge revised the ruling of Commissioner McKay. (CP 116) Judge Moreno found that the Decree of Dissolution was clear concerning the sale of the home and that the Commissioner's ruling should be revised. Judge Moreno ordered Ms. Cook to sign the counter-offer in the amount of \$455,800.00 by Friday,

February 20, 2015 at 5:00 p.m. and ordered the sale of the home. (CP 116) Ms. Cook appealed.

### III. ARGUMENT

#### **The findings of the Court Commissioner are not considered on appeal.**

Where there was no live testimony before the Court Commissioner, the Superior Court Judge's subsequent review on revision is de novo. **In re Marriage of Dodd**, 120 Wn. App 638 (2004). The revision court has full jurisdiction over the case and is authorized to determine its own facts based on the record before the commissioner. **Dodd** at 644. "Where the Superior Court does not agree with the decision of the commissioner on revision, we review only the superior court order." **State v. Ramer**, 151 Wn.2d 106, 113 (2004). Once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's. **State v. Hoffman**, 115 Wn. App 91, 101 (2003).

In her opening brief, Ms. Cook repeatedly refers to the findings

and decisions of Commissioner McKay. Commissioner McKay's decision was revised by Judge Moreno. On revision, Judge Moreno had the declarations filed by both parties, including Ms. Cook's declaration alleging that Mr. Cook violated the terms of the Decree regarding a counter-offer. Judge Moreno's specific findings stated that the Decree of Dissolution was clear regarding the sale of the home and ordered the home sold. It is her findings and her decision, not the findings and decision of Commissioner McKay, that are considered on appeal. In making her ruling, Judge Moreno rejected the arguments and allegations of Ms. Cook.

**The standard of review is substantial evidence**

Where proceedings before a trial court turn on credibility determinations and findings such as bad faith, a substantial evidence standard of review is appropriate. **In re Marriage of Rideout**, 150 Wn.2d 337 (2003). Particularly in family law cases, trial judges who routinely hear family law matters are better equipped to make such credibility determinations. **Rideout** at 343. "Substantial evidence standard of review should be applied where competing documentary evidence has to be weighed and conflicts resolved" **Rideout** at 34. Substantial

evidence exists so long as a rational trier of fact would find the necessary facts were shown by a preponderance of the evidence. **Merriman v. Cokely**, 168 Wn.2d 627 (2010). Unchallenged findings of fact are considered verities on appeal. **Merriman** at 631.

In the present case, Ms. Cook argued that Mr. Cook had violated the terms of the Decree of Dissolution regarding the sale of the home. Mr. Cook presented documentary evidence that Ms. Cook was attempting to thwart the terms of the Decree regarding the sale of the home, in bad faith. The trial judge weighed the competing documentary evidence to resolve the conflict and revised the commissioner's ruling.

**The trial judge did not err regarding alleged violations of the husband**

Ms. Cook alleged that Mr. Cook violated the terms of the Decree of Dissolution and included her allegations in a declaration filed with the court. Mr. Cook filed a declaration from the parties' realtor regarding his compliance with the sale of the home and the lack of cooperation on the part of Ms. Cook. Mr. Cook filed his own declaration outlining his compliance with the Decree of Dissolution. Upon a review of the

documentary evidence submitted and after hearing the argument of counsel, the trial judge concluded that the Decree of Dissolution was clear and that the sale should proceed as requested by Mr. Cook.

Ms. Cook specifically alleged that the Decree of Dissolution was violated because Mr. Cook moved the court to enforce the sale to what Ms. Cook claimed was Mr. Cook's "friend and co-worker". The Decree of Dissolution required the listing of the home and its subsequent sale. Neither party requested any provisions prohibiting offers from individuals known to either party. Further, the parties' joint realtor described the individual making the offer as a bona fide purchaser. Even if the allegation made by Ms. Cook is true, an offer from a bona fide purchaser known to one or more of the parties would not be a violation of the Decree. Substantial evidence supported the conclusion that there was no violation in this regard.

Ms. Cook alleged that offers were not communicated to her by the parties' realtor. The parties' realtor, Ms. Brandi Graham-Snow, filed a declaration stating that she did in fact communicate the offer to purchase the home to Ms. Cook. She further declared that Ms. Cook was

uncooperative and attempting to frustrate the sale of the home.

Substantial evidence supported the conclusion that there was no violation in this regard.

Ms. Cook alleged that Mr. Cook's counter-offer was too low and therefore a violation of the Decree of Dissolution. In the Decree of Dissolution, both parties acknowledged the fair market value of the home was \$450,000.00. The counter-offer exceeded what both parties acknowledged as the fair market value. The parties' realtor testified that the counter-offer, and the favorable terms, were reasonable. Substantial evidence supported the conclusion that there was no violation in this regard.

Ms. Cook alleged that the realtor had breached the listing agreement. Ms. Brandi Graham-Snow declared that she had appropriately listed the home and even went so far as to assist in cleaning up the home prior to putting it on the market. She further declared that she communicated with both parties regarding the home and that she negotiated a favorable sale. Substantial evidence supported the conclusion that there was no violation in this regard.

The alleged violations were also considered by the court in the

context of Ms. Cook's express desire to purchase the home herself. In her declaration in response to Mr. Cook's motion to enforce the sale, Ms. Cook declared that she would like to purchase the home and expressed her opinion that forcing the sale of the home was unfair to her.

After reviewing the pleadings regarding the allegations above, the trial court granted Mr. Cook's motion and ordered the sale of the home. The trial court's decision was based on substantial evidence.

**The trial judge did not err regarding "the law of the case"**

It is undisputed that the Decree of Dissolution reflects "the law of the case" as neither party appealed that order. It is also undisputed that the process as outlined in the Decree of Dissolution was clear and specific. As both parties agree it was not ambiguous, no interpretation of the terms was required.

As set forth above, Ms. Cook alleged that Mr. Cook violated the terms of the Decree of Dissolution and therefore "the law of the case". She had an opportunity to make that argument in full, as discussed above regarding her alleged violations. Mr. Cook presented his declaration, the declaration of the realtor and the documents signed by the parties

regarding the sale of the home. After considering the documentary evidence and after weighing the credibility of the parties, the trial judge determined the Decree of Dissolution was clear and should be enforced by the granting of Mr. Cook's motion. Evidence considered included the realtor's declaration regarding efforts she made to sell the home, the realtor's declaration regarding Ms. Cook's efforts to frustrate the sale, Ms. Cook's desire to keep the home, the fair market value agreed to by the parties in the Decree of Dissolution, the terms of the Decree and Mr. Cook's declaration regarding his attempts to complete the sale. Substantial evidence supported the trial court's finding that the Decree was clear and substantial evidence supported the trial court's conclusion that Mr. Cook's motion should be granted.

**The trial judge did not err by enforcing the Decree of Dissolution**

In their respective briefs, both parties acknowledge the Decree of Dissolution is in fact "the law of the case" and that the provisions in the Decree are clear. Given that neither party challenges the validity of the Decree or its terms, the trial judge could not have erred by enforcing the Decree of Dissolution.

**The trial judge did not err by revising the Commissioner's ruling**

As discussed above, the trial judge had full jurisdiction over the case to determine the facts based on the record before the court commissioner.

**V. ATTORNEY FEES AND COSTS**

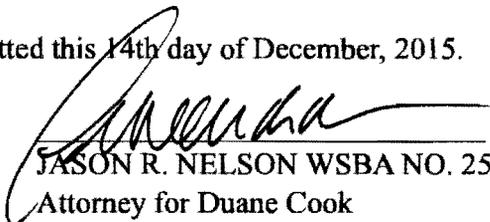
Mr. Cook requests that Ms. Cook be ordered to pay his attorney fees and costs in responding to this matter on appeal. Respectfully, there was no basis for an appeal of the trial court's decision as no error was made. Mr. Cook has incurred substantial time and expense in enforcing the parties' agreement as set forth in the Decree of Dissolution and in enforcing the decision of the trial court.

**VI. CONCLUSION**

Substantial evidence supports the trial court's findings and rulings in this matter. The trial court did not err in its ruling regarding Ms. Cook's allegations of violations of the Decree. The trial court did not violate the "law of the case". The trial court did not err by revising the

commissioner's ruling and enforcing the valid Decree of Dissolution. Mr. Cook requests that the appeal be denied and that he be awarded attorney fees and costs.

Respectfully submitted this 14th day of December, 2015.

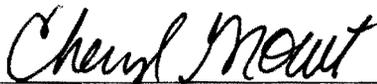


JASON R. NELSON WSBA NO. 25107  
Attorney for Duane Cook

**DECLARATION OF SERVICE**

I, Cheryl Growt, under penalty of perjury pursuant to the laws of the State of Washington, declare that on the 14th day of December 2015, I sent via legal messenger a copy of this document to attorney Gary Stenzel, 1304 West College Ave, Spokane, WA99201-2006 and I sent via legal messenger a copy of this document to attorney Keith Briggs of Axtell, Briggs & Freebourn, PLLC, 621 West Mallon Ave, Suite 509, Spokane, WA 99201-2181.

Signed at Spokane, Washington on this 14th day of December, 2015.

  
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CHERYL GROWT, Legal Assistant