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COURT OF APPEALS DIVISION I OF THE STATE OF
WASHINGTON

In re:
JOHN MORAN,
Appellant,
and
MICHELLE DRESS,
Respondent

COURT OF APPEALS CASE NO.:
62823-2-1
SUPERIOR COURT CASE
NO.: 07-3-00829-6 KNT
APPELLANT'S BRIEF

John Moran II
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STATE OF WASHINGTON
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Pro Se Appellant/Petitioner

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INTRODUCTION

The Appellant, John Moran, appearing pro se, asks this Court to reverse the trial court's November 19, 2008 order on motion for instructions and its December 5, 2008 order denying his motion for reconsideration. The Appellant asks that the trial court's order be reversed because the order improperly modified the property division of the parties' Decree of Dissolution without meeting the criteria for re-opening a judgment. Further, the November 19, 2008 order did not meet the requirements set out by RCW 26.09.170(1) for modifying a property division, thereby resulting in judicial abuse of discretion, and must be reversed accordingly.

PROCEDURAL HISTORY

The parties entered a decree for dissolution on July 7, 2008. (CP 136). Following numerous hearings on contempt charges, Commissioner Hillman requested that Respondent file a Motion for Instructions to the trial court seeking a ruling on how to divide proceeds being held in trust and other issues. CP 132 . Commissioner Hillman requested that Judge Doerty provide instructions on how to distribute the funds held in trust and designated by the Arbitrator for division of property. CP 132. The instructions were required to move forward in a contempt hearing. Submitted attached to Respondent's motion was a copy of the arbitration

award dated March 12, 2008 and the two supplemental memorandum awards dated March 27, 2008 and April 1, 2008.

On November 19, 2008, Judge Doerty issued orders after a hearing was held without oral argument. Orders were issued on the same day. CP 132. The orders went beyond the scope of the request made by Commissioner Hillman.

On November 26, 2008, Appellant John Moran, appearing pro se, filed a Motion for Reconsideration. CP 176. On December 5, 2008, the trial court denied Appellant's Motion to Reconsider without explanation. CP 184. The Appellant, John Moran, seeks review of the entire Order on the Motion for Instructions entered on November 19, 2008.

STATEMENT OF THE CASE

As a result of the order on motion for instructions entered November 19, 2008, the court ordered a redistribution of the parties' assets previously ordered in the Decree of Dissolution. CP 136. The Respondent was awarded all of her 401(k) (Appellant previously had been awarded a 50% share in the community interest), the Respondent was awarded all funds in trust, the Respondent was awarded the funds from the October 3, 2008 hearing as "property"; the Respondent was allowed to file separate tax returns for the tax years 2006 and 2007 and claim the children as tax exemptions; and a judgment for family support be entered against

the Petitioner/Appellant in the amount of \$57,727.54, effectively increasing Respondent's stake in the community portion for two of these assets. CP 132.

The Petitioner/Appellant timely filed a motion for reconsideration of the November 19, 2008 order, signed by Judge Doerty. CP 176. This motion was denied on December 5, 2008. CP 184. Petitioner filed his pro se motion based on the error that the November 19, 2009 order had improperly modified the Decree of Dissolution and the earlier arbitration ruling of John Curry dated March 12, 2008. CP 136. Although the Petitioner did not specifically state the civil rule, a reading of the motion materials shows that Petitioner/appellant based his motion on the fact it was an error of law (CR 59(a)(8)) and that substantial justice had not been done as a result of this order. (CR59(a)(9)).

ASSIGNMENT OF ERROR

1. The trial court erred when it issued its Order on Motion for Instructions on November 19, 2008 and redistributed property awarded in the Divorce Decree, resulting in a substantial increase in Respondent's portion and effectively modifying the court's July 8, 2008 Decree of Dissolution.

2. The trial court erred when it relied upon Respondent's Motion for Instructions, and ordered a redistribution of assets contravening RCW 26.09.170(1).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the trial court's November 19, 2008 Order on Motion for Instructions an abuse of discretion because it effectively modified the same trial court's previously issued Decree of Dissolution, thereby contravening RCW 26.09.170(1) specific prohibition against modifications of property distributions.
2. Did the trial court err when it relied upon Respondent's analysis for redistributing property resulting in an unfair redistribution of property and modifying the Decree of Dissolution.

STANDARD OF REVIEW

Generally, the appellate court reviews a clarification of a dissolution decree de novo, but review a modification of the decree for abuse of discretion. *See Stokes v. Polley*, 145 Wash.2d 341, 346, 37 P.3d 1211 (2001). A clarification merely defines the rights and obligations that the trial court already gave to the parties in their dissolution decree. *In re Marriage of Christel*, 101 Wash.App. 13, 22, 1 P.3d 600 (2000). In contrast, a modification extends or reduces those rights and

responsibilities. *Christel*, 101 Wash.App. at 22, 1 P.3d 600 (citing *In re Marriage of Rivard*, 75 Wash.2d 415, 418, 451 P.2d 677 (1969)).

In a marriage dissolution, disposition of the property is governed by RCW 26.09.170 (1973) which states, the trial court may modify the decree “respecting maintenance or support,” but provisions as to property dispositions “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.” See *In re Marriage of Michael*, 188 P.3d 529 (2008).

A trial court’s considerable discretion in making a property division will not be disturbed on appeal absent a manifest abuse of that discretion. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97, *Cert. Denied*, 473 U.S. 906, 87 L. Ed. 2d 654, 105 S. Ct. 3530 (1985). A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons. It is one that no reasonable person would have made. *In re Marriage of Rink*, 18 Wn. App. 549, 554, 571 P.2d 210 (1977).

A party may challenge the Superior Court’s decisions to deny a reconsideration motion as an abuse of discretion. “We review a trial court’s decision to deny a reconsideration motion for an abuse of discretion.” *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).

ARGUMENT

1. The trial court erred when it issued its Order on Motion for Instructions on November 19, 2008, resulting in redistributing property, substantially increasing the respondent's share, and effectively modifying the court's July 8, 2008 Decree of Dissolution.
 - a. *The trial court's order on the motion for instructions constitutes a modification of the Divorce Decree.*

The trial court erred by The trial court erred when it entered the November 19, 2008 Order on Motion for Instructions. The effect of the trial court's order was that the Decree of Dissolution dated July 8, 2008 was effectively modified resulting in a substantial increase in the property distribution awarded to the respondent. The court's action went beyond the mere clarification requested by Commissioner Hillman.

Commissioner Hillman requested that that Respondent's counsel prepare a motion for clarification on how to distribute the undistributed and contested proceeds in trust. (CP 28). A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment. *Kern v. Kern*, 28 Wn.2d 617, 619, 183 P.2d 811 (1947).

This court has determined that while a clarification of the property distribution in a Divorce Decree is proper, a modification of the property

distribution is outside the scope of judicial power and constitutes an abuse of discretion. “A clarification merely defines the rights and obligations that the trial court already gave to the parties in their dissolution decree.” *In re Marriage of Christel*, 101 Wash.App. 13, 22, 1 P.3d 600 (2000). In contrast, a modification extends or reduces those rights and responsibilities. *Christel*, 101 Wash.App. at 22, 1 P.3d 600 (citing *In re Marriage of Rivard*, 75 Wash.2d 415, 418, 451 P.2d 677 (1969)).

In this matter, the trial court effectively increased Respondent’s share of the property distribution by awarding the Respondent the aforementioned increases in property distribution. The trial court followed the request for relief in Respondent’s motion which was flawed in its valuation of property and analysis. First, Respondent provided a speculated figure as to the value of the Montana property in question. Throughout the litigation, Respondent has claimed the value of the Montana property has ranged from \$1.3 million down to \$300,000. For purposes of this motion, the motion relied upon by the trial judge, the figure used was \$300,000. The actual sale price of the Montana property was only \$226,000..By using the Respondent’s best guess as to the true value of the Montana property, the trial court unfairly awarded Respondent an increase in her property distribution equal to the difference between the actual sales figure and Respondent’s speculated.

The effect of relying on the speculated value versus the true selling price results in an increase of over \$74,000 of property distribution in favor of the Respondent. Increasing the Respondent's share of the property distribution by \$74,000 is unreasonable and based upon untenable grounds.

b. The time to question the value of the Montana property figure had passed as the Respondent had knowledge to the extent and value of the estate, and waited over three years before alleging Appellant defrauded her.

Furthermore, the use of Respondent's valuation to determine property distribution is invalid. In the case of Ferry v. Ferry, 9 Wash. 239, 37 P. 431 (1894), the Washington State Supreme Court found that a wife was liable to know the value of the family home, when she was awarded a portion of the value in the Decree of Dissolution. The wife alleged in her appeal that for the purpose of defrauding her out of her due portion of the property Respondent, who alone had knowledge of the extent and value of the estate, refused to make known of what the property consisted, and falsely represented it to be of only one-fifth its actual value.

In the case at bar, the wife alleges that the Appellant misrepresented the value of the Montana property, and undersold the property. Respondent claims that the couple's share of the property was

worth \$300,000. Respondent claimed that the Appellant improperly sold the property for \$220,000 or \$62,834 (after clearing the couple's debts to their partners). In Ferry v. Ferry, the court ruled that the entry of the decree could have been postponed until a valuation could have been made, if necessary, since it was her decree and she controlled the entry of it. When the opportunity for discovering the fraud is presented, it must be made use of promptly. Appellant in Ferry says that she did not discover the falsity of Respondent's representations until December 10, 1892; but the fraud, if any, was consummated and the action accrued October 21, 1889, when the decree was entered. The misrepresentation of value was mere opinion (Parker v. Moulton, 114 Mass. 99; 2 Kent, Com. 485), all reliance upon which was in appellant's own wrong when she became aware of the property items. Ferry v. Ferry, 9 Wash. 239; 37 P. 431 (1894).

Here, the Respondent has stated numerous times that she thought the property was worth at least \$300,000. However, the Respondent knew that that the value of the property was uncertain, as the arbitrator ruled that "the community owns an undivided 1/3 interest in the Montana property. The value of this property is fluid and as such I cannot assign a specific value to the property. As such, I hereby award a 1/2 interest in the undivided one third of the Montana property to each party. The

community's interest shall be sold as soon as possible and the parties shall make a good faith effort to sell the property." The arbitrator made his decision on March 12, 2008. The Decree for Dissolution, dated July 7, 2008, incorporated the terms of the arbitrator's ruling, including that the value of the property was variable. CP 136. The Decree of Dissolution stated that the parties "shall own petitioner's interest as a one half interest each, subject to the terms and conditions contained in the Arbitrator's Rulings attached as Exhibit 1." CP 136.

Three years and more were allowed to elapse, and then after the whole of the property decreed to her had been sold or mortgaged and the proceeds spent, this proceeding is commenced; but we think the statute, as well as equity, does not sanction the disturbance of the decree and the consequent conveyances after so long a delay. *Id.* In the case at bar, the decree could have been postponed until after the Montana property had been appraised and valued. The arbitration awards of John Curry, dated March 12, March 27, and April 1, 2008, all stipulate that the value of the Montana property was to be split between the parties equally. However, no set value amount was given for the property in the arbitration award. Rather the arbitrator decided (and the Decree of Dissolution confirmed) that the Montana property was valuation was variable. The Respondent did not appeal the Decree of Dissolution; rather she enjoyed the fruits

from the document, as she received the Kent property, her Bank of California retirement account, Bank of America CD, DA Davidson CD, Bank of America savings account, and three vehicles. The Respondent waited over 8 months until she requested that the Courts modify the property division. This request for modification of the property division was in addition to the monies in the trust account (as required by the court ordered clarification in the October 3, 2008 order).

Frurthermore, the Respondent's belief that the share of the property was \$300,000 was unfounded in fact, as the property had not been appraised or otherwise valued throughout the course of the litigation.

On May 14, 2008, the Appellant signed over his claim in the property (Appellant had by now defaulted in the debt) to the remaining partners in the Montana property. The Decree of Dissolution stated that the mortgage on the Montana Property would be paid from the proceeds from the sale of community share of the property. As the Declaration of Kurt Kosek shows, the "sale" of the Montana property was not a sale in the traditional sense. Rather it was the dissolution of a partnership, due to a partner routinely defaulting on his partnership obligations. The defaults resulted in a debt of \$21,900.00 in 2007 above the mortgage obligations already owed to the partnership. The partnership (as a whole) had been trying to sell the property continuously since they had purchased the

property in 2002. As stated by Mr. Kosek, the partners did not receive any offers to purchase the property during the past 8 years. Therefore, when the partnership was unable to continue to cover the defaults by the appellant (and the respondent), and as the partnership was not receiving any offers on the property (even before the dissolution proceedings) the remaining two partners decided that it was best to buy-out the Appellant, rather than risk the financial health of the partnership.

[E]ven though a decree is void, a party who procures such a decree or consents to it is estopped to question its validity where [the party] has obtained a benefit therefrom, or has concurrently invoked the court's jurisdiction in order to gain affirmative relief." Markowski, 50 Wn. App. at 638."Parties are barred from such conduct, not because the judgment obtained is conclusive as an adjudication, but for the reason that such a practice cannot be tolerated." Svatonsky v. Svatonky, 63 Wn.2d 902, 905, 389 P.2d 663 (1964) (citation omitted). (cited in Ghebreghiorghis v. Dept. of labor & Indus., 92 Wash. App. 567, 962 P.2d 829 (1998).

In that case, Ghebreghiorghis invoked the superior court's jurisdiction when she petitioned the court for a dissolution decree. Moreover, she obtained the affirmative relief that she sought, i.e., the superior court granted her petition for dissolution. Therefore, she is estopped from now challenging the validity of the dissolution decree. Id.

A clarification of a dissolution decree explicitly spells out those rights and obligations that were previously granted, whereas a modification of a dissolution decree extends or reduces the rights and obligations as originally intended in the decree. In re Marriage of Thompson, 97 Wn. App. 873, 878, 980 P.2d 1287 (1999);

Holding that the trial court merely clarified the divorce decree in ordering that the husband's payments satisfied the original award of the joint securities account, that the trial court improperly modified the decree by reducing the principal amount of the property equalization note and relieving the husband of the obligation to pay the wife for the full value of the separate account, and that the wife had not been intransigent, the court reverses the enforcement order and the sanctions order and remands the case for enforcement of the original decree and consideration of the wife's request for sanctions. Id.

A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment. RCW 26.09.170(1); Kern v. Kern, 28 Wn.2d 617, 619, 183 P.2d 811 (1947). An ambiguous decree may be clarified, but not modified. RCW 26.09.170(1); In re Marriage of Greenlee, 65 Wn. App. 703, 710, 829 P.2d 1120, review denied, 120 Wn.2d 1002 (1992). A decree is modified when rights given to one party are extended *beyond the scope*

originally intended, or reduced. A clarification, on the other hand, is merely a definition of rights already given, spelling them out more completely if necessary. Rivard v. Rivard, 75 Wn.2d 415, 418, 451 P.2d 677 (1969).

In Thompson, the court also ordered that the husband's payment of \$6,054 satisfied the award of in regards to the separate securities account. This was a modification, because it gave the wife less value than she was entitled to under the decree. The court's original findings valued the separate account at \$25,890 at the time of separation. Between separation and trial the husband withdrew and spent more than \$12,000 for his own purposes. What remained of the account, according to the court's unchallenged finding of October 14, 1997, was valued at \$12,973 as of March 31, 1997. Clearly, the husband's check for \$6,054 did not satisfy this award.

In the case before the bar, the court ordered the parties should “own petitioner’s interest as a one half interest each, subject to the terms and conditions contained in the Arbitrator’s Rulings attached as Exhibit .” Here, the Respondent asked that the court modify the Decree of Dissolution when she asked that receive more than half the proceeds from the sale of the Montana property. The Respondent did not ask for a clarification of the decree, as she did not ask that the amount of the sale be

entered in lieu of the half interest language. In addition to the proceeds from the sale of the home, the Respondent asked that the decree be *further* modified, when she asked for a redistribution of the community assets.

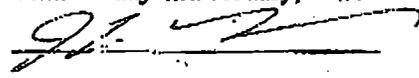
Respondent asked that she receive her entire 401(k) retirement account, the entirety of the amounts being held in trust by her attorney, and a judgment for \$57,727.54. The judgment and the monies from the trust account equaled the net amount received from the sale of the Montana property, not the one-half interest Respondent/wife was awarded in the Decree of Dissolution. Therefore, the November 19, 2008 "Order for instructions" was in fact, an improper modification of the Decree of Dissolution entered by the court, as it doubled the amount of property awarded to the Respondent in regards to the Montana property and the 401(k) retirement account.

CONCLUSION

Therefore, the Appellant asks that Court reverse the order of November 19, 2008, as the lower court improperly modified the Decree of Dissolution when it reallocated the property distribution and awarded the Respondent all of her 401(k) retirement account, all of the monies then

currently held in trust, and an additional judgment for \$57,727.54. The lower court did not clarify the property distribution by entering numerical values for the property awarded to each party; rather it modified the distribution, contrary to case law. Therefore, the lower court's order cannot be upheld and the appellant asks that the court reverse the lower court's decision.

Dated this 1st day of February, 2010


John Moran II

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

In re the Marriage of:

JOHN MORAN,

Appellant,

and

MICHELLE DRESS,

Respondent

Case No.: 62823-2-1

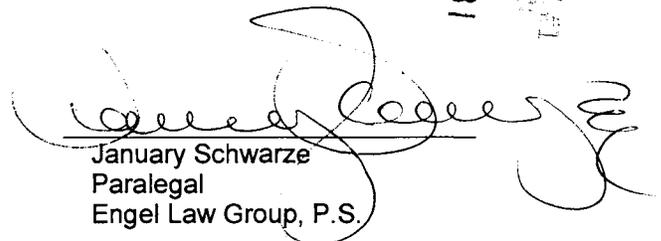
Superior Court Cause #: 07-3-00829-6
KNT

DECLARATION OF MAILING

I, January Schwarze, caused a copy of the **Appellant's Brief** to:

Respondent's attorney, **David Kontos**, at his place of business: **124 4th
Ave S, Suite 210, Kent, WA 98032-5867** via regular mail, postage paid
on, February 22, 2010

Dated this 22nd day of February, 2010


January Schwarze
Paralegal
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