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No. 65262-1 I

**COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

In re the Marriage of Darren Gillespie,

Appellant/Petitioner,

and

Corinna Gillespie,

Respondent

BRIEF OF THE APPELLANT

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A. ASSIGNMENTS OF ERROR.

ASSIGNMENTS OF ERROR

1. The Arbitrator exceeded his authority by awarding the marital home to the Respondent, whereas the Property Settlement Agreement signed by the parties required it to be sold to a third party.

2. Judge James Doerty erred in confirming the arbitrator's award of the marital home to the Respondent when the Property Settlement Agreement signed by the parties required it to be sold to a third party.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Arbitrator exceed his authority by awarding the marital home to the Respondent, whereas the Property Settlement Agreement signed by the parties required it to be sold to a third party?

2. Did Judge James Doerty err in confirming the arbitrator's award of the marital home to the Respondent when the Property Settlement Agreement signed by the parties required it to be sold to a third party?

B. STATEMENT OF THE CASE.

The parties in this marital dissolution case are Darren Gillespie and Corinna Gillespie.

On August 21, 2008, during a settlement conference, the parties hereto entered into a CR2A agreement pursuant to their pending divorce, terms of which were subsequently incorporated into their Property Settlement Agreement executed on October 14, 2008. CP 192, 205. The said Property Settlement Agreement was incorporated by reference into the Decree of Dissolution entered in the parties' case on October 14, 2008. CP 220.

The parties' Property Settlement Agreement provided for the sale of the marital home. The agreement specifically states that the said property "...shall be listed and sold..." CP 206. The Property Settlement Agreement did not provide a minimum amount of time, nor a maximum, during which the house should be listed. The home is a five year old "show-piece" in the Newcastle area south of Bellevue, WA. CP 206.

The sale anticipated by the Property Settlement Agreement was to be of the conventional type. The Property Settlement Agreement mandated that the home would be listed for sale by the parties with a realtor and sold on the open market place. Provisions for Corinna's moving costs also were set forth in the Property Settlement Agreement.

No mention was made in the Property Settlement Agreement of any alternative to such a sale; no mention was made in the Property Settlement Agreement that the Gillespies' children's best interests required the home to be awarded to Corinna, whom the parties agreed in their Parenting Plan was the primary residential parent. CP 206 and 207.

Attorney Larry Besk was designated in the Gillespies' Property Settlement Agreement as the arbitrator for post-dissolution proceedings concerning the sale of their marital home. CP 207.

The house was listed and on the market from late 2008 through June 2009, a period of seven months. CP 225. It was listed during a period of time when not many homes were being sold locally due to the well-known financial disruptions at the time.

On November 3, 2009, Corinna, representing herself, sent a letter to Mr. Besk requesting, among other things, that the marital home be awarded to her. CP 225-227. In response, on November 11, 2009, Ted Billbe, Darren's former attorney, delivered to Mr. Besk a letter transmitting Darren's Arbitration Declaration. CP 229 to 235. In his Declaration, Darren objected to Corinna's request that Mr. Besk award the marital home to her on the basis that doing so would be a violation of the Property Settlement Agreement. CP 232. Further, Darren stated that he

was willing, in good faith, to enter into negotiations with Corinna in the hopes of reaching a mutually-beneficial agreement. CP 233.

Darren's offer was to negotiate, "outside any arbitration process." CP 233. Also, he stated that, "...absent any such written agreement to modify our PSA, the PSA remains in effect." CP 233. Please note that in his Declaration, Darren offered to negotiate a modification of the Property Settlement Agreement, but he did not set forth precisely what he was willing to negotiate.

The parties never signed any document which modified the terms of the Property Settlement Agreement concerning the sale of the home. Yet, despite this fact, in a letter dated November 18, 2009, Mr. Besk stated his belief that he could award the house to Corinna so long as she could refinance it and remove Darren's name from the title. Specifically, he stated that "I am to arbitrate any disagreements or disputes surrounding the *sale* of the home, and that includes any potential *sale* to Corinna." [emphasis supplied] CP 237. Notably, the parties did not sign an independent arbitration agreement, so the only authority in the case at the time was the Property Settlement Agreement.

As Mr. Besk was prepared to award the marital home to Corinna, Darren felt pressured to respond as though an award of the home to one of

the parties would be allowable under the Property Settlement Agreement despite his own objection that such an award was not allowable.

Naturally, Darren, like so many other litigants who would be bound by a proper arbitration award, did not want to alienate Mr. Besk, who had so much power and control over the issue. Moreover, the court could infer that it was not clear to Darren that he had any option, other than to proceed as if Mr. Besk had the authority to award the house to Corinna, despite his objection. Mr. Besk's decision was an interim decision, not subject to being vacated or otherwise appealed at the time.

As ignoring the arbitrator's decision would serve no purpose, and appealing it was not yet an option, Darren had no practical alternative, other than to proceed as though Mr. Besk's decision was the law of the case. However, Darren never revoked his objection to Mr. Besk's usurpation of the directive of the parties that the marital home be sold to a third party as set forth in their Property Settlement Agreement.

Therefore, on December 2, 2010, Darren prepared a proposal requesting that the Mr. Besk allow the parties to bid on the property. CP 259.

On December 18, 2009, Mr. Besk issued his decision that Corinna be "awarded" the marital home. (His decision also addressed other issues not now in dispute.) CP 265, 266.

In his December 18, 2009 decision, Mr. Besk referred to the relief he ordered as an “award,” while in his letter of November 3, 2009, he referred to a possible “sale.” The change in terminology reflects the difference between what relief he was authorized by the Property Settlement Agreement to order (a “sale”) and the relief he actually ordered (an award), which violated the Property Settlement Agreement.

Although Mr. Billbe never sent a notice of intent to withdraw as Darren’s attorney, Darren represented himself in this case subsequent to Mr. Besk’s November 18, 2009 decision letter. This fact is reflected in correspondence between the Mr. Besk and the parties. For example on December 2, 2009, Darren sent a letter pertaining to the arbitration directly to Mr. Besk. CP 259. Also, Mr. Besk’s arbitration decision letter, dated December 18, 2009, was addressed directly to Darren. CP 265. Clearly, Mr. Besk understood that Darren was not represented at the time.

Corinna’s former attorney, Virginia Amis, filed her Motion to Confirm Arbitration Award to be heard on February 11, 2010, and served it on Ted Billbe, Darren’s former attorney. However, as Mr. Billbe stated in a letter to Ms. Amis dated February 3, 2010, he did not represent Darren at the time, he was not authorized to accept service of documents on Darren’s behalf, and Darren was unavailable as he was traveling in Asia. Mr. Billbe asked Ms. Amis to continue the hearing to a date which would

allow Darren to respond to her motion. CP 134 to139. Ms. Amis did not honor Mr. Billbe's request.

The fact that Darren would be outside the county at the time of the hearing was made known to Corinna via an email sent to her by Darren on December 26, 2009. CP 377, 383.

The court entered a default order confirming the arbitration award on February 11, 2010. On March 3, 2010, Corinna recorded a Quit Claim Deed signed by her and a Special Master appointed by the court which divested Darren of his interest in the marital home. CP 278, 298. That same day, Corinna also recorded a Quit Claim Deed giving Stephen J. Paoletti, her live-in boyfriend, a joint-tenancy interest in the property. CP 296. Mr. Paoletti's involvement in the award/"sale" of the marital home to Corinna was never mentioned by her in any of the arbitration materials she submitted to Mr. Besk.

On March 22, 2010, Judge James Doerty entered an order denying Darren's motion to vacate Mr. Besk's arbitration decision. CP 391, 392.

C. SUMMARY OF ARGUMENT

The issue central issue in this case is whether, when parties have agreed to sell their marital home on the open market in a Property Settlement Agreement, have they implicitly agreed that one of them can

ask that the Property Settlement Agreement be modified, unilaterally, if it has not been sold in seven months? Darren contends that the answer to this questions is no.

D. STANDARD OF REVIEW

Arbitrability of an issue is review de novo. Tjart v. Smith Barney, Inc., 107 Wn.App. 885, 893, 28 P.3d 823, 827; 86 Fair Empl. Prac. Cas. (BNA), 1134, 2001 WL 902191 (Div I, 2001) citing Kamaya Co. v. American Property Consultants, Ltd., 91 Wn.App. 703, 713, 959 P.2d 1140 (Div I, 1998), rev. denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

Issues of statutory interpretation are a question of law and thus reviewed de novo. Hartson P'ship v. Goodwin, 99 Wn.App. 227, 231, 991 P.2d 1211, 1213, 2000 WL 100314 (Div I, 2000) citing State v. Martin, 137 Wn.2d 774, 788, 975 P.2d 1020 (1999).

E. ARGUMENT.

1. Mr. Besk erred by exceeding the authority granted to him in the Property Settlement Agreement, by which the parties agreed to arbitrate any disputes concerning the sale of the marital home, where the agreement provided that the parties were to sell the marital home to a third party and the arbitrator decided to award the home to Corinna, instead.

An arbitrator's powers are defined and limited by the parties' agreement to arbitrate, and an arbitration award must not exceed the powers established by agreement. Boyd v. Davis 75 Wn.App. 23, 876 P.2d 478, (1994) reconsideration denied, review granted 125 Wn.2d 1014, 890 P.2d 19, affirmed 127 Wn.2d 256, 897 P.2d 1239.

RCW 7.04A.230, the statute concerning vacations of arbitration awards, states as follows:

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was:

(i) Evident partiality by an arbitrator appointed as a neutral;

(ii) Corruption by an arbitrator; or

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(d) An arbitrator exceeded the arbitrator's powers;

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising

the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or

(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

....

(3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (1)(c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in RCW 7.04A.190(2) for an award.

(4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

RCW 7.04A.230(1) governs the superior court's power to vacate an arbitration award. To determine whether an issue was presented to the arbitrator, we consider the face of the award in light of the arbitration agreement, the demand, and any documents reflecting the charge to the arbitrator. Hanson v. Shim, 87 Wn.App. 538, 546, 943 P.2d 322 (1997), review denied, 134 Wn.2d 1017, 958 P.2d 313 (1998).

As the moving party herein, Darren bears the burden of proof. Lindon Commodities, Inc. v. Bambino Bean Co., 57 Wn.App. 813, 816, 790 P.2d 228 (1990). Washington courts confer substantial finality on

arbitrators' decisions rendered according to the parties' contract and chapter 7.04A RCW. Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1988). Judicial scrutiny does not include reviewing an arbitrator's decision on the merits. Barnett v. Hicks, 119 Wn.2d 151, 157, 829 P.2d 1087, 1090, 1992 WL 110883 (1992).

The grounds for vacation must appear on the face of the award. Westmark Props., Inc. v. McGuire, 53 Wn.App. 400, 402, 766 P.2d 1146 (1989). A statement of reasons for the award is not part of the award.” Westmark at 403.

To vacate an award under RCW 7.04A.230(1)(d), the face of the award must show the adoption of an erroneous rule or mistake in applying the law. Lindon, 57 Wn.App. at 816, 790 P.2d 228. In other words, an error of law must appear on the face of the award. Westmark, at 403.

The court in Woodley v. Safeco Ins. Co., 84 Wn.App. 653, 661, 929 P.2d 1150 (Div. 1, 1997) held as follows as to the issue:

Where the face of the award is unclear, however, the court can review the arbitration agreement, the arbitration demand, and any formal charge to the arbitrator. See, ML Park Place Corp. v. Hedreen, 71 Wn.App. 727, 739, 862 P.2d 602 (1993), rev. denied, 124 Wn.2d 1005, 877 P.2d 1288 (1994); ACF Prop. Mgmt., Inc. v. Chaussee, 69 Wn.App. 913, 919-20, 850 P.2d 1387, rev. denied, 122 Wn.2d 1019, 863 P.2d 1353

(1993); see Boyd at 260. This review does not invade the province of the arbitrators to decide the merits of the issues, and so is not an improper penetration of the arbitration process. See Westmark at 402.

The award of the marital home to Corinna is the facial error which Darren must prove. The Property Settlement Agreement entered into by the Gillespies did not permit the house to be awarded to either one of them; it could only be sold.

In his pre-arbitration letter dated November 18, 2009, Mr. Besk indicated that he was considering changing “the rules of the game.” Specifically, he contemplated ordering Darren and Corinna to "sell" their interest in the home to Corinna . Of course this is an absurd result and violates the terms of the Property Settlement Agreement. In taking this approach, Mr. Besk attempted to forge a wholly new definition of the word, “sale,” as generally understood and as specifically used in the parties’ Property Settlement Agreement. As noted above, Mr. Besk reverted to use of the word “award” in his December 18, 2009 decision.

Mr. Besk ignored the requirements set forth in the Property Settlement Agreement as to the sale of the home. In doing so, he ignored the rules set forth in the Property Settlement Agreement that a sale take place. Rather, he awarded the house to Corinna and gave Darren nothing in exchange.

There was no “charge” to Mr. Besk giving him authority to award the house to Corinna. Corinna was residing in the house with the couple’s children when the arbitration took place. Mr. Besk stated that “it would be best to avoid the disruption in the children’s lives that would be caused by a move.” CP 265. Possibly, Mr. Besk’s concern for the continuity of the parties’ children’s lives affected his better judgment. But, the parties already anticipated that the children would have to move. They did not agree that Mr. Besk could substitute his judgment for theirs.

Mr. Besk would have been within his authority to arbitrate a dispute pertaining to the sale of the house to a third party, if such a dispute had arisen. That was not the case here. In effect, Mr. Besk changed the terms of the Property Settlement Agreement so as to award the property to Corinna.

There is no arbitration agreement outside of the cited terms in the Property Settlement Agreement. As for a “formal charge” to Mr. Besk, the parties never agreed in writing to change the “rules of the game” from a sale of the home to a third party to an award of the home to one of them.

2. Judge James Doerty erred in confirming the arbitrator’s award of the marital home to the Respondent.

The facts that Darren was not represented last February, and that he would be out of the country at that time, were established above. The

court would be permitted to infer bad faith on Corinna's part due to the timing of the motion she filed.

Since Darren was not represented, nor present, Judge Doerty entered, by default, the Order and Judgment Confirming Arbitration Award and Order Appointing and Directing Special Master to Release Interest in Real Property. CP 156 to 160.

On April 16, 2010, Judge Doerty heard Darren's Motion to Vacate Arbitration Award. Judge Doerty should have granted Darren's motion pursuant to RCW 7.04A.230 (d). However, without entering any findings of fact, Judge Doerty entered an order denying Darren's motion and set forth sanctions totaling \$2,741. CP 391, 392.

F. CONCLUSION.

The appellate court should enter an order with the following relief:

1. Vacate Judge Doerty's Order Confirming Arbitration Award entered February 11, 2010;
2. Vacate Judge Doerty's Order Appointing and Directing Special Master to Release Interest in Real Estate entered February 11, 2010;
3. Reverse Judge Doerty's Order Denying Motion to Vacate Arbitration Award dated March 22, 2010;
4. Enter an order declaring that all Quit Claim Deeds signed pursuant to Mr. Besk's December 18, 2009 Arbitration Decision are null and void. Specifically, the following Quit Claim Deeds should be declared null and void:

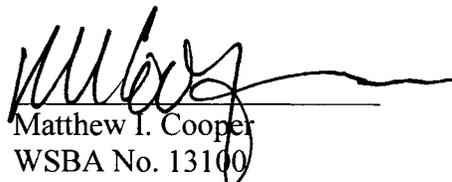
- a. The Quit Claim Deed signed by Corinna and the Special Master recorded on March 3, 2010; and
 - b. The Quit Claim Deed signed by Corinna quitting her claim on the marital home to herself and Stephen J. Paoletti as joint tenants recorded on March 3, 2010.
5. Order the parties' marital home to be sold on the open market in accordance with, and pursuant to, the parties' Property Settlement Agreement.
 6. Enter a Judgment against Corinna payable to Darren in the amount of \$5,501, representing judgments in this case incorrectly awarded to, and collected by, Corinna.

(The court awarded Corinna \$2,760 in its Order Appointing and Directing Special Master to Release Interest in Real Estate entered February 11, 2010, and \$2,741 in its Order Denying Motion to Vacate Arbitration Award dated March 22, 2010.)

7. Corinna should pay Darren's legal fees pursuant to RAP 18.4.

Dated September 24, 2010

Respectfully submitted,



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