

No. 68103-6-I

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

In re the Marriage of

LISA R. PASCALE  
Respondent

and

MICHAEL J. PASCALE  
Appellant

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STATE OF WASHINGTON  
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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Despite the wife's attempt to evade the arbitration requirement by recharacterizing the issue as one involving merely enforcement of a CR 2A, the issue in this case remains the parties' dispute about what the final orders should reflect as their agreement regarding maintenance. This dispute is expressly subject to arbitration. Even if it were not, their dispute would be encompassed by the other, broad provision of the arbitration clause. The trial court erred by holding otherwise, contrary to Washington law and contrary to Washington policy favoring arbitration. The wife should be held to her agreement to arbitrate.

## II. STATEMENT OF ISSUES IN REPLY

1. This is a dispute over how to draft the final orders so that they reflect the parties' CR 2A agreement.
2. This dispute must be resolved by mandatory arbitration prior to any enforcement action.
3. Even if this were a dispute over what maintenance provision to enforce, it would still be subject to mandatory arbitration.
4. The husband should receive his attorney fees, particularly as the wife grossly misstates his income.

### III. ARGUMENT IN REPLY

#### A. THIS APPEAL CONCERNS ONLY THE ARBITRABILITY OF THE PARTIES' DISPUTE REGARDING MAINTENANCE.

The wife's brief repeatedly strays from the subject of this appeal. In particular, she invites this Court to engage in the kind of fact-finding the parties decided to avoid when they went to mediation. Despite the narrow issue decided by the trial court and appealed here, the wife continues to allege various factual claims, including that the husband failed to disclose relevant information and that his income is higher. See, e.g., Br. Respondent, at 18. The husband disputed her claims. CP 419-426, 643-644, 1072. No factual findings were made on these issues.

Furthermore, the trial court rejected the wife's efforts to inject into this proceeding issues related to vacation time and lawsuits involving the husband (Br. Respondent, at 18 n. 6) when it granted his motion to strike. CP 419-426, 726. Thus, these matters are not even part of the record on appeal. See *Falk v. Rose*, 18 Wn.2d 333, 335, 139 P.2d 634 (1943) (matters stricken because not timely filed cannot be considered by the appellate court); accord, 71 C.J.S. Pleading § 752 ("After a pleading or defense has been stricken it ceases to be part of the record; and, while other issues

may remain for disposition, the case is terminated as far as the stricken material is concerned.”). Accordingly, these matters should not even be mentioned, let alone used again to insinuate wrongdoing on the husband’s part.

Moreover, because the arbitration clause broadly encompasses issues related to any other dispute (form or substance) and to issues “not discussed,” the wife’s effort to litigate the facts in this forum is misplaced and unfair. There was no trial in this case, so there is no record adequate to review the wife’s factual allegations. Rather, the parties here chose to resolve their factual issues through mediation and arbitration. The wife should not be allowed unilaterally to shift forums when it pleases her, or to argue the husband’s alleged faults and wrongdoings in this proceeding. See Br. Respondent, at 17-21.

For what it’s worth, it bears observing that the husband conceded a great deal in mediation, including by settling the wife’s claims regarding “negatively productive conduct.” CP 1098; see, also Br. Respondent, at 3; CP 1060 (a separate sum “[t]o settle all aspects of this case, including but not limited to W’s claim of H’s negatively productive conduct[.]”). Because this issue was settled, and not part of the wife’s challenge, it is simply off the menu.

Nevertheless, because the wife argues it, it should be noted that the husband did not agree with her characterization, he merely settled any claims based on it. Indeed, under Washington law, his medical condition is not the kind of “negatively productive conduct” a trial court could hold against him. See, e.g., *In re Marriage of Steadman*, 63 Wn. App. 523, 528, 821 P.2d 59 (1991) (considering “gross fiscal improvidence, the squandering of marital assets or... the deliberate and unnecessary incurring of tax liabilities.”); *In re Marriage of Clark*, 13 Wn. App. 805, 806-07, 538 P.2d 145 (1975) (considering the husband’s almost complete lack of contribution to the community); *In re Marriage of Wallace*, 111 Wn. App. 697, 707-709, 45 P.3d 1131 (2002) (considering a husband’s repeated and intentional waste of community assets, his purported gift of them to others, and his fraudulent concealment of assets and financial transactions); *In re Marriage of Nicholson*, 17 Wn. App. 117, 561 P.2d 1116 (1977) (court could consider that husband concealed assets); *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989) (maintenance not excessive given that husband had transferred community assets to third party).

Here, by contrast, Michael provided the sole financial support for the family, which allowed them to live a very

comfortable life, despite his medical condition. Importantly, it is a medical condition, not “gross fiscal improvidence.” CP 1071.

Perhaps the parties did not accumulate a great deal of wealth, as the wife complains (see, e.g., Br. Respondent, at 15), but that is not the purpose of marriage. In any case, on this limited record, we cannot know whether the husband’s medical condition contributed to the parties’ fiscal circumstances any more than the wife’s alleged excessive spending. See, e.g., CP 1074.

The point is, these parties did not go to trial and this Court is not in the position of reviewing factual findings for substantial evidence. Likewise, the wife waived her right to argue whether the maintenance award was equitable when she agreed that it was. CP 1041. Her arguments to the contrary at this point are misplaced. Br. Respondent, at 19-20.

Similarly, the wife’s arguments that the agreement is unenforceable because there was no “meeting of the minds” is not before this Court. The trial court did not reach this issue. CP 724. Nor is there any basis to revoke the CR 2A, as the wife urges this Court to do, because the parties’ agreement requires arbitration and the wife simply did not challenge the validity of the arbitration clause. See Br. Appellant, at 9-11 (discussing RCW 7.04A.060(1)).

Simply, there is no basis for this Court to reach out and abrogate the parties' agreement on the wife's say so.

Arbitration is a good thing because it resolves disputes efficiently and finally, with particular benefits in family law cases. To derive this benefit, the wife must live by the terms to which she agreed. One of those terms, the arbitration clause, is the issue on appeal.

**B. THE PARTIES DISPUTED THE DRAFTING OF THE MAINTENANCE PROVISION IN THE FINAL ORDERS, WHICH IS A DISPUTE EXPRESSLY SUBJECT TO MANDATORY ARBITRATION.**

In her brief, the wife tries to avoid arbitration by mis-framing the problem presented to the trial court. She claims the "controversy" was enforcement of the CR 2A Agreement. Br. Respondent, at 9. However, in her trial motion, she more accurately acknowledged "a dispute has arisen in that the wife contends that the Agreement requires the husband to pay spousal support for eight years and the husband contends, through counsel, that he is only required to pay spousal support for four years." CP 9. Thus, the husband does not need to "manufacture a 'dispute,'" as the wife now argues. Br. Respondent, at 13. Rather, as she earlier conceded, the parties dispute how the final documents

should read, as further evidenced by the different versions they proposed. CP 722, 1070.

The CR 2A expressly provides for this contingency, to-wit: “Any disputes in the drafting of the final documents ... shall be submitted to Harry R. Slusher for binding arbitration. (RCW 7.04A).” CP 1042. As the wife seems to concede, this “controversy” is subject to the arbitration. Br. Respondent, at 9.

Even if that were not so plain and simple, the arbitration clause would apply nevertheless, since it is much broader than the wife claims on appeal. Br. Respondent, at 9. In addition to disputes over drafting of the final documents, the CR 2A subjects to arbitration “[a]ny disputes in ... any other aspect of this agreement (form or substance), or any issue not discussed ...” CP 1042. This provision surely encompasses a disagreement over the substance of the maintenance provision, and a great deal more.

The wife tries to characterize the arbitration provision as narrow, and compares it to the clause in *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 113-114, 163 P.3d 807 (2007). But this is a poor comparison. The arbitration agreement in *Nelson* explicitly did not “encompass disputes about the validity, enforceability, or scope of the agreement as a whole ... [or] of the

arbitration clause in particular.” *Id.* at 114. By contrast, here, the arbitration agreement specifically encompasses the dispute about drafting the final documents and broadly encompasses “any disputes” about “any other aspect of this agreement (form or substance), ...” CP 1042.

Simply, the wife misses the point when she continues to argue the CR 2A is enforceable. Even common sense dictates the terms must be understood to be enforced. And, plainly, if the terms are disputed, as they are here, where the parties cannot agree on how the final documents should read, the parties must submit that dispute to arbitration with Harry Slusher.

**C. THE COURT SHOULD HAVE ENFORCED THE AGREEMENT BY SUBMITTING TO ARBITRATION.**

The wife also argues that it is for the trial court to decide whether a matter is arbitrable. Br. Respondent, at 8-9. That authority is not contested here. Rather, the husband claims on appeal that the trial court decided this issue incorrectly. As the authority cited by the wife confirms, this question is reviewed *de novo* by this Court. Br. Respondent, at 8, citing *Davis v. Gen. Dynamics Land Sys.*, 152 Wn. App. 715, 718, 217 P.3d 1191 (2009).

*Davis* further reminds us how greatly Washington policy favors arbitration of disputes. As the court observed, “[i]f we can fairly say that the parties’ arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration.” *Davis*, 152 Wn. App. at 718. The arbitration agreement at issue here easily clears this hurdle. In fact, it cannot be fairly said that it does *not* cover the present dispute. It plainly does. The trial court simply erred by holding the dispute was not arbitrable.

The wife also argues the court did not abuse its discretion by enforcing the agreement in the way she requested. Br. Respondent, at 12. As discussed above, this puts the cart before the horse, since the meaning of the agreement first needed to be arbitrated. Indeed, if the abuse of discretion standard applied here, it would mean the trial court abused its discretion by not enforcing the arbitration clause.

#### D. ATTORNEY FEES AND HUSBAND’S INCOME.

On the issue of attorney fees, the wife tries to put words in the trial court’s mouth, as when she claims the court “recognized that the husband was intransigent.” Br. Respondent, at 22. The court said nothing about intransigence. In Washington, the court must make findings regarding the basis for attorney fees. Parties

are not allowed to read the court's mind. The trial court's finding that Lisa's motion was warranted by the facts and the law does not satisfy the requirement. The trial court is merely restating what CR 11 requires of all pleadings. This is not a basis for an award of fees.

Moreover, the claim of intransigence rings hollow against the backdrop of the actual history of this case. It should be recalled that these parties settled all of their disputes, but one, by negotiation. Indeed, this case has been resolved (from filing to final orders) in record time! Where is the intransigence? The husband has taken up on appeal a reasonable disagreement about the meaning of a provision in the CR 2A related to maintenance, specifically, whether the parties agreed to a total maintenance award in favor of the wife of \$830,000 or \$374,000, a significant difference. He has a constitutional right to this appeal, and, a meritorious argument to make on appeal. There is absolutely nothing intransigent about this effort, and Lisa's claim to the contrary is completely meritless. If anything, the wife's efforts to evade arbitration, after expressly agreeing to arbitrate, is intransigent.

Another reason the wife should not receive her fees is that the parties agreed as part of their settlement that they would each bear their own attorney fees and costs, except for a \$2,500 award to the wife. Presumably, this represents a tacit acknowledgement that the wife, with income and child support of \$11,100 monthly, is well able to pay her own fees.

The wife also received property in the dissolution and is a highly trained professional who could re-enter a vibrant profession. Simply because the husband makes more money than Lisa does not render her financially needy, by any definition, let alone the understanding of "need" contemplated by the statute. See Weber, 20 *Wash. Pract.* § 40.2 (the purpose of the statute is "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage"). The wife is at no risk of being deprived of her day in court.

Nor is the husband so much better able to pay her fees, especially given that Lisa exaggerates his income, by at least \$72,000 annually, by focusing on several high-earning months, rather than annualizing his income. Nor does her figure account for costs and taxes. This is bad math and misleading. In fact, the

husband's net take home is in the same ballpark as the wife's, after accounting for maintenance and child support and other costs.

#### IV. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, Michael Pascale respectfully asks that the trial court's order be vacated and the matter remanded with an order to submit to arbitration the dispute regarding maintenance and to revisit the issue of CR 11 sanctions against the wife.

Dated this 28th day of June 2012.

RESPECTFULLY SUBMITTED,



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