

69114-7

69114-7

RECEIVED
COURT OF APPEALS
DIVISION ONE

DEC 17 2012

NO. 691147

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

IN RE THE MARRIAGE OF
KEVIN BRUCE HENDRICKSON

Respondent-Appellant

v.

JONA HENDRICKSON

Petitioner-Appellees

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. William L. Downing)

**OPENING BRIEF OF APPELLANT
KEVIN BRUCE HENDRICKSON**

Tamara M. Chin
(WSBA No. 23062)
Law Offices of Tamara Chin
16824 44th Avenue West, #200
Lynnwood, WA 98037
Telephone: (425) 774-7500

Attorney for Respondent-Appellant Kevin Bruce Hendrickson

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
I. ASSIGNMENT OF ERROR.....	5
II. ISSUE PRESENTED.....	5
III. STATEMENT OF THE CASE.....	5
IV. STANDARD OF REVIEW.....	6
V. ARGUMENT.....	7
VI. CONCLUSION.....	16

TABLE OF AUTHORITIES
Table of Cases

Cases

Agnew v. Lacey Co-Ply,
33 Wn.App 283, 654 P.2d 712 (1982).....*passim*

Balmer v. Norton,
82 Wn. App. 116, 915 P.2d 544 (1996).....116, 121

Berg v. Hudesman,
115 Wn.2d 657, 667, 801 P.2d 222 (1990).....667

Chavez v. Chavez,
80 Wn. App. 423, 909 P.2d 314.....435

Donald v. State Farm Fire & Cas. Co.,
119 Wn.2d 724, 730-31, 837 P.2d 1000 (1992).....730-731

Farmers Ins. Co. v. Miller,
87 Wn.2d 70, 549 P.2d 9 (1976).....*passim*

Haller v. Wallis,
89 Wn.2s 539, 544,573 P.2d 1302 (1978).....544

Hadley v. Cowan,
60 Wn. App. 433, 804 P.2d 1271 (1991).....*passim*

In re Marriage of Gimlett,
95 Wn. 2d 699, 704-05, 629 P.2d 450 (1981).....704-705

In re Marriage of Greenlee,
65 Wn. app. 703, 710, 829 P.2d 1120.....710

In re Marriage of McCausland,
129 Wn. App. 390, 402, 118 P.3d 944 (2005).....*passim*

In re Marriage of Thompson,
97 Wn. App. 873 (Div I, 1999).....*passim*

<i>Kruger v. Kruger</i> , 37 Wn. App. 329, 331, 679 P.2d 961 (1984).....	331
<i>Lopez v. Reynoso</i> , 129 Wn. App. 165 (Div. III, 2005).....	
<i>Rivard v. Rivard</i> , 75 Wn.2d 415, 418, 451 P.2d 677 (1969).....	418
<i>Teufel Constr. Co. v. American Arbitration Ass'n</i> , 3 Wn. App. 24, 472 P. 2d 572 (1970).....	<i>passim</i>
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 621 P.2d 1279 (1980) (<i>Section 8</i>).....	<i>passim</i>

I. ASSIGNMENT OF ERROR

The trial court erred by modifying the property settlement agreement, a contract of the parties, by extending the within 90 days provision to arbitrate.

II. ISSUE PRESENTED

Did the Trial Court err by modifying the contract of the parties, the Property Settlement Agreement, which is merged into the Decree, to extend authority to arbitrator to arbitrate past the 90 day deadline stated by the Property Settlement Agreement?

III. STATEMENT OF THE CASE

Appellant Kevin Hendrickson and Appellee Jona Hendrickson marriage ended in July 2009. It was hotly contested. The parties mediated (Lawrence Besk as mediator) and negotiated a settlement in February of 2010. In March 2011, the parties produced a "bones bare" settlement pursuant to Civil Rule 2(A), whereby they agreed to arbitration by Lawrence Besk. Arbitration was conducted on November 1, 2011 on the Property Settlement Agreement, which produced final documents. Section VIII of the Property Settlement Agreement stated the outstanding issues to be arbitrated within 90 days of entries of final documents. The parties

agreed at the November 1, 2011 arbitration to the 90 day term and immediately incorporated into the documents. In addition, Mr. Best ruled that all proceeds (approximately \$300,000.00) from the sale of the business and Mr. Hendrickson's \$22,400 tax refund be held until the final arbitration, which was to be held within 90 days. The parties failed to arbitrate 90 days after the entry of the documents.

Since this final arbitration failed to materialize, counsel for Mr. Hendrickson sent a letter asking Mr. Besk to recuse himself as arbitrator. Mr. Besk responded he would not do so and stated that he did not lose authority to arbitrate the issues "just because we have gone past the 90 days."

A motion was brought before the trial court, arguing that the arbitrator had acted beyond the scope of his authority by not adhering by the 90 day provision. Subsequently, the trial court found in favor of the arbitrator, ruling that he had not acted beyond his authority and furthermore, granted more time beyond the 90 days to arbitrate [CP 6, lines 18-21].

IV. STANDARD OF REVIEW

Questions of law are subject to de novo review by the appellate court. *In re Marriage of Thompson*, 97 Wn. App. 873 (Div I, 1999) citing *Donald v.*

State Farm Fire & Cas. Co., 119 Wn.2d 724, 730-31, 837 P.2d 1000 (1992).

Since the Court has not stated a proper basis to its order to modify the Property Settlement Agreement, then it is reasonable that the Court intended, at best, an interpretation of the Property Settlement Agreement, which has merged into the Decree by incorporation. Such interpretation "of a dissolution decree is a question of law". *Chavez v. Chavez, 80 Wn. App. 423, 435, 909 P.2d 314.*

IV. ARGUMENT

I. The Court erred by modifying the Contract of the Parties, the Property Settlement Agreement.

A. INTRODUCTION.

Common law has long-held that a trial court does not have the authority to modify the terms of a contract, absent grounds justified by a recognized legal ground such as ant of consent, fraud, collusion, misrepresentation, or mutual mistake. *Balmer v. Norton, 82 Wn. App. 116, 915 P.2d 544 (1996)*. The Balmer Court held that a "security agreement was a contract freely bargained for; once final judgment was entered the superior court's authority to reform the agreement was limited to legally cognizable grounds.." *Balmer, 121.*

Similarly, here a decree and the incorporated Property Settlement Agreement were entered by agreement of the parties as their final orders. Additionally, in *Balmer* the court held "Final judgments entered by stipulation of consent are contractual in nature and are not subject to modification unless the stipulated agreement was obtained by want of consent, fraud, collusion, mutual mistake, etc." *Ibid.*, 116, citing *Haller v. Wallis*, 89 Wn.2s 539, 544, 573 P.2d 1302 (1978) (citing 3 *Edward Tuttle, A Treatise of the Law of Judgments* §1352, at 2776-77 (5th ed. rev. 1925)). See also *Hadley v. Cowan*, 60 Wn. App. 433, 804 P.2d 1271 (1991).

In the case at bar, the Court has made no conclusive findings regarding the need and its own authority to modify the terms of the parties' contract, the Property Settlement Agreement, under the law of Washington State. Yet, the Court has seen fit to modify the Property Settlement Agreement by extending the period of time for arbitration beyond its 90 day term to an indefinite time period. This 90 day period, a material term, has been reformed by the Court. The Court has entered this order without reasons or appropriate terms, upon which the parties may rely to conclude their case.

B. COURTS DIFFERENTIATE BETWEEN INTERPRETATION AND
MODIFICATION

An ambiguous decree requires interpretation. The reviewing court seeks to ascertain the intention of the court that entered it by using the general rules of construction applicable to statutes and contracts. *In re Marriage of Thompson*, 97 Wn. App. 873 (Div I, 1999). See also *In re Marriage of Gimlett*, 95 Wn. 2d 699, 704-05, 629 P.2d 450 (1981); *Kruger v. Kruger*, 37 Wn. App. 329, 331, 679 P.2d 961 (1984).

The Thompson Court differentiated between the meaning of interpreting an ambiguous decree and modifying a decree by stating:

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*, 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 *Hendrickson*, the Court has modified the decree by changing language of the contract to read that "on-going jurisdiction of arbitrator [Lawrence Besk is now] beyond 90 days from date of entry of the final

documents," rather than the actual language of the contract (at page 14, line 18-19) stating, "all issues identified above will be arbitrated by Lawrence Besk within ninety (90) days of entry of the final documents."

The agreed contract language of the parties setting the final arbitration to 90 days after the entry of the final documents was the date actually agreed by the parties. This language is unambiguous and not subject to a recognized legal ground, such as want of consent, fraud, collusion, misrepresentation, or mutual mistake. Therefore, the Court has no authority by law to modify the agreement of the parties and must adhere to the contract as written.

While, it may be argued that the Court merely clarified the Property Settlement Agreement by "spelling out" the Arbitrator's authority as to "interpretation, implementation and enforcement" of any issue of the Property Settlement Agreement, the term "within 90 days" has no ambiguity at all. (See *Property Settlement Agreement, Sections IIIIV and X.*) The term is not abstract in its definition but clear on its face and requires no interpretation. Nor, is the term "within 90 days" in conflict with any other clause of the Property Settlement Agreement granting authority to the Arbitrator. Counsel and the Arbitrator may argue that Section X bestows limitless, timeless authority to the Arbitrator because it states no terms regarding date or time. However, the contract read as a

whole, as constructed by both parties and the Arbitrator designates by agreement a date and time for the arbitration to be accomplished by Mr. Besk. As a term agreed upon by the parties and entered by the court as an order, it cannot simply be ignored as a meaningless term, especially when a party has relied on the right and requested enforcement, as in the respondent's case brought before the trial court.

C. THE ARBITRATOR MUST ALSO FOLLOW THE LANGUAGE OF THE CONTRACT AS WRITTEN AND HAS NO AUTHORITY TO ARBITRATE THE LANGUAGE OF THE CONTRACT ALREADY DECIDED AND AGREED UPON BY THE PARTIES.

A term that has already been decided by the parties by agreement is not arbitrable.

If a term that has "already been decided by the parties by agreement, it was not arbitrable. To hold otherwise would require us to ignore the express language of a contract, something that courts may not do. *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980). A court may not create a contract for parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties. *Wagner v.*

Wagner, Supra; Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 549 P.2d 9 (1976).

Here, the 'within 90 day' provision was decided and agreed upon by the parties of the contract. Since the term has already been decided by the parties, it is no arbitrable. Thus, the Arbitrator had no authority to arbitrate the "within 90 day" provision.

Furthermore, if a dispute is not arbitrable, the arbitrators have no power to resolve it. *Agnew v. Lacey Co-Ply, 33 Wn.App 283, 654 P.2d 712 (1982), citing Teufel Constr. Co. v. American Arbitration Ass'n, 3 Wn. App. 24, 472 P. 2d 572 (1970).*

While the Arbitrator may argue that the Property Settlement Agreement authorizes him to "arbitrate all disputes surrounding the interpretation, implementation and enforcement of the PSA" (See Declaration of Lawrence Besk, page 5, line 8-10). No language of the Property Settlement Agreement gives the Arbitrator the authority to change the expressed language of the agreement between the parties, which he, too, signs off upon.

Mr. Besk, as Arbitrator of this case, arbitrated the issue and resolved it by changing the contract to extend his own authority past the 90 days. According to the Agnew Court, Mr. Besk exceeded his authority to arbitrate.

Moreover, the Court recognized that the language of the contract required modification in order for the Arbitrator to be able to enforce his arbitration ruling. By modifying it to conform with the Arbitrator's decision, which contradicts the holding in Agnew. The trial court gave Mr. Besk more authority the contract bestows by the agreement of the parties.

As evidence of their intent, both attorneys for the respective parties, drafted Property Settlement Agreement, Section X, paragraph 10.8, "Modification", which states:

No modification or waiver of any of the terms of this Agreement shall be valid as between the parties unless stated herein or by writing and executed with the same formalities as this Agreement; and no waiver of any breach or default hereunder shall be deemed a waiver of any subsequent breach or default of the same or similar nature no matter how made or how often recurring.

The clauses, executed by the parties, is an integration clause, stating that the parties intended the written contract to be the final and unambiguous expression of their agreement. It expressly states that no waiver of any breach...shall be deemed a waiver of any subsequent breach...no matter how made or how often recurring.

Hence, neither party's conduct can constitute a waiver for any breach of the expressed contract executed by the parties and incorporated

into their Decree. *Lopez v. Reynoso*, 129 Wn. App. 165 (Div. III, 2005). By agreement of the parties, it cannot be argued that either party waived breach of contract by conduct. Thus, the Arbitrator cannot argue that the breach does not exist by the Appellant's conduct to participate in arbitrations after he was told by the Arbitrator on March 12th (only a few days after the 90th day had elapsed) that the 90 day clause was meaningless.

Moreover, the parties have relied on no other documents (with the exception of the CR2(A) to which the Property Settlement Agreement is derived) to show their intent as to the Property Settlement Agreement, nor have the Arbitrator or the attorneys relied upon other documents. Mr. Besk has regularly stated that he "cannot re-write the agreement of the parties". This is true; yet he has re-written the agreement of the parties by changing the date to which he has authority to arbitrate.

Although, it may be argued that "Extrinsic evidence may be used whether or not the contract language is ambiguous. [*Citing Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).] However, extrinsic evidence may not be used to establish a party's unilateral or subjective intent as to the meaning of a contract word or term; to show an intention independent of the instrument; or to vary, contradict, or modify the written word. [*Citing Seventh-Day Adventists at 495.*] *In re Marriage*

of McCausland, 129 Wn. App. 390, 402, 118 P.3d 944 (2005), reversed on grounds, 159 Wn.2d 607, 152 P.3d 1013 (2007).

The agreement to arbitrate the final issues within the 90 days period was not a thoughtless and arbitrary date for the parties. It was set because it was a reasonable time to complete it. The appellant relied on this date for this matter to be completed in order to resolve lingering separate property issues, begin to re-build his estate and to end the on-going stress which has adversely affected his health issues.

The decision of the parties to set the "within 90 days" contract term also took into consideration the parties' need for cash to live on. The proceed from the parties' sale of their business, about \$300,000 and the appellant's \$22,400 tax refund (taken by the wife surreptitiously by depositing it directly into her personal bank account) are being withheld from the parties pending the arbitration stated by Section VIII of the Property Settlement Agreement. It was contemplated by the parties, at the time of the agreement, that these funds would be available for their living expenses. As illustrated by prior documentation and the Arbitrator, both parties are in need of funds to live on.

V. CONCLUSION

The trial court does not have the authority to modify the agreement of the parties which has already been decided and agreed upon by the parties. Furthermore, the Arbitrator does not have the authority to arbitrate a modification of the term "within 90 days" for the Arbitrator to arbitrate the issues enumerated by Section VIII of the Property Settlement Agreement. There is no ambiguity within the contract language; the language is clear on its face. Neither is there any extrinsic evidence as the parties intended full integration of the Property Settlement Agreement.

Thus this Court of Appeals should reverse the trial court's order and remand the issue to trial for post dissolution remedies to close this issue once and for all.

RESPECTFULLY SUBMITTED this 17th day of December, 2012.

LAW OFFICES OF TAMARA CHIN

Signed electronically per GR30
By: Tamara M. Chin
TAMARA M. CHIN WSBA#23062
Attorney for Appellant Kevin
Hendrickson

NO. 691147

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

IN RE THE MARRIAGE OF
KEVIN BRUCE HENDRICKSON

Respondent-Appellant

v.

JONA HENDRICKSON

Petitioner-Appellees

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. William L. Downing)

**DECLARATION OF SERVICE OF
APPELLANT HENDRICKSON'S OPENING BRIEF**

Tamara M. Chin
(WSBA No. 23062)
Law Offices of Tamara Chin
16824 44th Avenue West, #200
Lynnwood, WA 98037
Telephone: (425) 774-7500

Attorney for Respondent-Appellant Kevin Bruce Hendrickson

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2012, I caused to be served and a true and correct copy of the foregoing document **Brief of Appellant** as set forth below:

Gail Wahrenberger

Attorney
Stokes Lawrence, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101-2393
Tel.: (206) 626-6000
Fax: (206) 464-1496

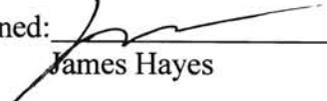
- Via First Class Mail
- Via Hand-Delivery
- Via email to:

Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

- Via First Class Mail
- Via Hand-Delivery
- Via Facsimile to:

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of December, 2012, at Seattle, Washington

Signed: 
James Hayes