

No. 71413-9-I

COURT OF APPEALS,
OF THE STATE OF WASHINGTON
DIVISION ONE

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DIVISION ONE
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ROBIN MARILEE HITZ, Respondent

v.

ERIC JAMES HITZ, Appellant

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON WHATCOM COUNTY
NO: 10-3-00638-9

REPLY BRIEF OF APPELLANT

T. REINHARD G. WOLFF
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TABLE OF AUTHORITIES

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Washington Supreme Court

State ex ret Mauerman v. Sup'r Ct., 127 Wash. 101,219 Pac. 862 (1923)....2, 3, 4
Harbor Enterprises, Inc. v. Gmyonsson, 116 Wn.2d 283, 1991).....3, 4
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Washington Statutes

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AFFIDAVIT OF PREJUDICE AS A MATTER
OF RIGHT UNDER RCW 4.12.040

Respondent fails to address appellants argument that Eric Hitz is entitled to file an RCW 4.12.040 Affidavit of Prejudice against Judge Uhrig as a matter of right under upon the remand of the matter from US Bankruptcy court for a clarification of the divorce decree.

Any motion filed after Eric Hitz declared bankruptcy is a new proceeding by definition because he no longer has an interest in the property distribution of his dissolution decree. The Trustee in Bankruptcy is the party who now speaks for Eric Hitz former interest. All Mr. Hitz wants is a new life. With regard to any wrong that Eric stands accused of, he has a right to have that matter heard by a judge other than Judge Uhrig.

Mr. Hitz timely filed a statutory Affidavit of Prejudice well before Judge Uhrig made any discretionary ruling on the remand. As a matter of fact, the Superior Court failed to follow the proper procedure

after Appellant filed his RCW 4.12.040 affidavit. The statute clearly states that;

... In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court.

This statutory procedure was not followed by the Whatcom Superior Court. Instead Judge Uhrig reassumed jurisdiction over the case and treated the Affidavit of Prejudice as a motion involving some kind of discretion instead of a matter of right. Judge Uhrig denied the Affidavit of Prejudice that was filed, denied the motion and denied the motion for reconsideration. Not only was this an erroneous legal ruling by Judge Uhrig, but it also shows his bias and prejudice. Eric Hitz was statutorily entitled to have a judge other than Judge Uhrig hear the case when it was remanded for clarification.

In the case of case of State ex rel Maueman v. Superior Court 44 Wn.2d 828, 271 P.2d 435 (1954) our Washington's Supreme Court ruled that the provisions of an affidavit of prejudice apply to a modification of a divorce decree. For Purposes of RCW 4.12.040

there is no distinction between a modification of a decree of divorce to the interpretation of a decree of divorce. Both involve a re-visitation of the decree which can be heard by any judge.

It would be an error to argue that Judge Uhrig's pre bankruptcy rulings in the case constitute a discretionary ruling on the case. For one thing, the issues are different this time around. Mr. Hitz just wants a new life. He no longer has any interest on any nature in the property being argued about. Secondly, there is a new party involved in the case on remand and that is the Trustee in Bankruptcy who is conspicuous by his absence. .

The holding in Maueman was quoted favorably in Harbor Enterprises, Inc. v. Gunnar Gudjonsson 116 Wash.2d 283, 803 P.2d 798, Wash., January 24, (1991) where the Supreme Court summarized the holding as follows

In Maueman the judge had heard a divorce action. Nine months later a petition for modification of custody came before the same judge. The wife filed an affidavit alleging the trial court harbored actual prejudice against her attorney. That was denied as untimely because it

came after trial on the merits, 9 months earlier. The wife then filed an affidavit for change as a matter of right. It was denied. The Supreme Court issued a writ of mandamus holding that the modification was a new proceeding and that the party was entitled to a change of judge. As to timeliness the court said: "There can be no successful claim of laches, unreasonable delay, or untimely action, upon this sequence of events." State ex rel Maueman at 832.

As in Maueman, Appellant here contends that the remand from US Bankruptcy Court back to the Superior Court is a new proceeding involving new issues and new parties and thus giving Eric Hitz the right to file the statutory affidavit of prejudice under RCW 4.12.040.

**WAIVER DOES NOT EXTEND TO INCLUDE
AN ABUSE OF DISCRETION.**

Eric Weight's waiver of Judge Uhrig's offer to voluntarily remove himself from the case in the middle of the dissolution trial when an officer of Pacific Bank was called to testify' does not extend to include abuse of discretion. Appellant had a constitutional right to a fair trial by a fair judge and he never waived that right. It is a given that Judge

Uhrig believed he could be fair and impartial. That hope or belief evaporated when at the end of the trial Judge Uhrig ordered that the community business debt to the Bank of the Pacific be paid from the proceeds of the sale of the Hitz's family home, even though Bank of the Pacific had no security interest in the home, was not a party to the case and was pursuing other litigation in Whatcom Superior Court to improve its security position.

By favoring Bank of the Pacific, Judge Uhrig abused his discretion and such conduct was not agreed to in the waiver. Eric Hitz's attorney, Eric Weight revoked the waiver when on April 10, 2012 he wrote a letter to Judge Uhrig asking that the Judge remove himself from further consideration of matters involving Bank of the Pacific because of the judges ties to the Bank of the Pacific. It was around this time that Judge Uhrig also reconsidered his offer to remove himself from the case.

A waiver is the known relinquishment of a right. The Supreme Court gave the following definition of waiver in the case of Jones v. Best, 134 Wn.2d 232, 950 P.2d (1998) when it said that waiver

A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors. *Centr waiver al Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989); *Wagner*, 95 Wn.2d at 102. The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver. *Rhodes v. Gould*, 19 Wn. App. 437, 441, 576 P. 2d 914, review denied, 90 Wn.2d 1026 (1978). at page 242

Implied in the waiver of Judge Uhrig's offer to remove himself from the case during the trial was the belief of all parties, including the Judge himself that Judge Uhrig would not be unduly swayed by issues involving the Bank of the Pacific. Any semblance of fairness and impartiality evaporated at the end of the bench trial when Judge Uhrig made his decision and ordered that the Bank of the Pacific be paid from the sale of the Hitz family residence even though the bank had no

legal interest in the property and was not a party to the proceedings. When Judge Uhrig unilaterally awarded Eric Hitz's personal funds from the sale of his home be paid to Bank of the Pacific he was acting in the best interest of the Bank of the Pacific. Eric Hitz's position is that Judge Uhrig's ruling in favor of Bank of the Pacific was the result of the bias and that Judge Uhrig abused his discretion when he ruled in favor of the Bank of the Pacific.

Our Supreme Court has defined what constitutes an "abuse of discretion" in the case of *Mayer v. Sto Indus., Inc.* 156 Wn.2d 677 (2006) There the court said;

An abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortgage* , 15 Wn. App. at 229 . A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.' " *State v. Rohrich* , 149 Wn.2d 647 , 654, 71 P.3d 638 (2003) (quoting *State v. Lewis* , 115 Wn.2d 294 , 298-99, 797 P.2d 1141 (1990)). 156 Wn2d at 677

Judge Uhrig's award to the Bank of the Pacific of money from the sale of the Hitz family residence is manifestly unsupported facts. The Bank of the Pacific had no security interest in the property, and the proceeds had been ordered by the court decree to be split by the Hitz's on a 50/50 basis.

Judge Uhrig's decision applied the wrong legal standard when he ordered that the proceeds from the sale of the Hitz residence be applied in a manner other than that specified in the previous order of the court, that is the decree of divorce which awarded Eric Hitz one half of the net proceeds from the sale of the house. There was no Bank of the Pacific involved in the house proceeds till Judge Uhrig took it upon himself to see to it that his bank got its money.

Judge Uhrig's decision is "manifestly unreasonable" by any legal standard and may account for the judge's adamant refusal to remove himself from the case after he abused his discretion by improperly favoring Bank of the Pacific.

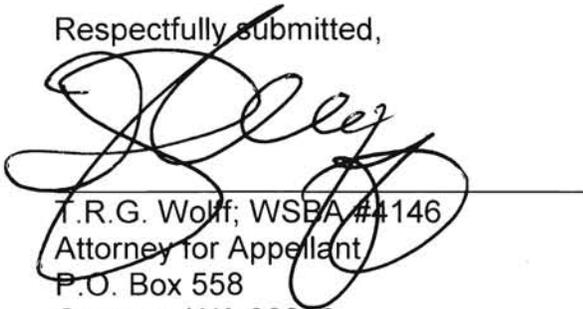
CONCLUSION

Based on the forgoing Appellant asks this court to find that Judge Uhrig was not impartial and the motion for his recusal should have been granted and its denial is reversed.

Alternatively Appellant asks this court to rule that the RCW 4.12.040 Affidavit of Prejudice file by Eric Hiltz was timely and that it was error for the court to not assign another judge to the case.

DATED this 20th day of October, 2014,

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T.R.G. Wolf", is written over a horizontal line. The signature is stylized and cursive.

T.R.G. Wolf; WSBA #4146
Attorney for Appellant
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Conway, WA 98238
Phone: 360 445-5512

PROOF OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On October 20, 2014 at approximately 11:59 a.m., I served the forgoing REPLY BRIEF OF APPELLANT upon the Karen D. Moore of Brewe Layman, the attorney for the Respondent, by leaving a copy of said document with her receptionist at 3525 Colby Ave #333, Everett, WA 98201

Executed in Conway, Skagit County, Washington this 20TH day of October 2014.


T.R.G. Wolff

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