

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
Case No. 72459-2-1**

In Re the Marriage of:

JOHN PHILLIP HALL,
Appellant/Petitioner,

And

DIANE HALL aka VAN NATTER,
Respondent/Respondent.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by not enforcing express term of decree requiring respondent's assistance to promptly execute any documents or to provide any other reasonable assistance in effectuating transfer of property or other terms of the decree.
2. The trial court erred by requiring that appellant/petitioner demonstrate a likelihood of success in efforts to modify or refinance loan prior to compelling respondent's assistance with such efforts.
3. The trial court erred by making contradictory findings regarding appellant's diligence in pursuing loan modification and/or refinance and in determining whether respondent was prejudiced by those actions.

II. ISSUES

1. Did the trial court properly exercise its discretion by not enforcing terms of decree requiring respondent's assistance to facilitate property transfer?
2. Did the trial court err in its conclusion of law that the appellant/petitioner demonstrate a likelihood of success in efforts to refinance or modify property loan before compelling respondent's assistance with such efforts?
3. Did the trial court properly exercise its discretion in making contradictory findings of fact regarding petitioner's diligence in his efforts to refinance and/or modify loan and in determining whether respondent was prejudiced thereby?

III. STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Dissolution of the parties' marriage was finalized January 3, 2014, with entry of an agreed decree. CP 174-187. Per the terms of the decree, appellant/petitioner John Hall received title to a condominium in Edmonds, Washington. CP 180. The parties agreed to allow Mr. Hall six months to remove the respondent from any obligations relating to the property. CP 180. Mr. Hall promptly commenced efforts to refinance and/or modify the loan on the property, retaining an attorney, James Jameson, to submit an application for modification under the Washington State Foreclosure Fairness Act (FFA). CP 129, 155-158. At the FFA mediation held April 14, 2014, with the lender/beneficiary, Mr. Hall and his then-attorney were advised, despite recent amendment at RCW 61.24.165(6), requiring a spouse in Mr. Hall's position to be treated as a borrower, that the named borrower, Ms. Hall, must be present or provide authorization to Mr. Hall to seek modification. CP 129, 155-158. At the lender/beneficiary's request, the mediation was terminated without consideration of the financial merits of Mr. Hall's application. CP 129, 155-158.

Paragraph 3.6 of the agreed decree provides in part that "each party shall promptly execute any documents or provide any reasonable

assistance necessary to effectuate the transfer of property or other terms of this Decree." CP 176. On several occasions in the months after the mediation, Mr. Hall, his attorney Jameson, his subsequent attorney Greg Davies, and his current attorney all requested the assistance of Ms. Hall through her attorney to facilitate the loan modification and/or refinance process. CP 124, 127, 195-196, 206-209. Neither a limited power of attorney nor any other assistance was ever provided by the respondent. CP 123-133.

B. STATEMENT OF PROCEDURE

Due to the respondent Ms. Hall's failure to provide the assistance requested under the terms of the decree, appellant/petitioner Mr. Hall filed a motion to compel her assistance, which was noted for hearing July 22, 2014. At the hearing, the Court denied Mr. Hall's request for a power of attorney, appointment of a special master and other relief sought to enforce the decree. CP 179-180. The Court also found that Mr. Hall diligently pursued modification efforts on his own. RP 15:5-9. Additionally, the Court indicated that information or proof demonstrating the likely success of a modification should have been provided despite a finding that the respondent had not been prejudiced. RP 15:19-25, 16:1-6.

Appellant/petitioner then filed a motion for a revision of the Commissioner's Order, which was heard August 15, 2014. CP 1,7, 112-117. The Court entered an order denying the motion for revision with findings that the appellant/petitioner was not diligent in his efforts to refinance the property and that the respondent had been prejudiced. CP 1, 7. Notice of appeal was filed September 12, 2014.

IV. ARGUMENT

A. Enforcement of Decree.

In reviewing a trial court's ruling concerning property division in a marital dissolution context, the standard of review is abuse of discretion. *In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992), *aff'd*, 119 Wn.2d 438 (1992); *In re Marriage of Foley*, 84 Wn.App. 839, 842-43, 846, 930 P.2d 929 (1997). Insofar as an appellant's effort to enforce terms of a decree may be viewed as a request for specific performance, it can also be reviewed under an abuse of discretion standard. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203, 221 n. 10, 242 P.3d 1 (2010).

Given the plain language of the decree requiring parties to "promptly execute any documents or provide any reasonable

assistance necessary to effectuate the transfer of property or other terms of this Decree," and extensive evidence in the record of Mr. Hall's timely efforts to modify and/or refinance the loan out of the respondent's name in addition to the multiple requests for her assistance to facilitate that process, it can be reasonably concluded that the respondent Ms. Hall violated the express terms of the agreed decree requiring her to assist with effectuating terms of the decree and transfer of property. CP 124, 127, 176, 195-196, 206-209. In fact virtually all of the documentary evidence in the record would seem to support that conclusion. As such, it can also be reasonably inferred that the trial court's orders denying the petitioner's motions to compel and for revision evidence manifest abuse of discretion and this matter should be remanded to compel the respondent's assistance in effecting the express agreement of the parties contained in the decree.

B. Trial Court's Requirement that Appellant/Petitioner Demonstrate Likelihood of Success in Obtaining a Loan Modification or Refinance Is an Unfounded Conclusion of Law.

Conclusions of law are subject to *de novo* review by the appellate court. *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). At the initial hearing in this matter, the Commissioner

posited that information or additional evidence demonstrating the likely success of a modification should have been provided. RP 15:19-25, 16:1-6. While the Court references the Net Present Value (NPV) calculation, it would seem to be misreading the intent of the statute at RCW 61.24.163(14)(c), which can provide a defense to foreclosure if a lender/beneficiary is not willing to reasonably negotiate a modification in view of anticipated net recovery at foreclosure. The Court provided no further legal foundation or indication of what documentation could be provided to satisfy this requirement prior to the actual mediation itself, and appellant/petitioner has been unable to identify any other support for such a conclusion or requirement.

Given the clear legislative intent underpinning the FFA and its amendments to provide homeowner relief in foreclosure and dissolution contexts, such a narrow reading of the law and its application to the facts at issue would not seem to support public policy objectives. In fact, recent case law provides support for a more expansive and even retroactive application of the FFA to further the ends of justice. *Watson v. Northwest Trustee Services, Inc.*, 180 Wn.App 8, 13, 321 P.3d 262, (Div. 1 2014).

Given the absence of any apparent requirement for the appellant/petitioner to provide the Court additional evidence of the likelihood of success before being allowed to pursue the FFA mediation process, this matter should be remanded to allow Mr. Hall the opportunity to actually have the opportunity for his application for loan modification to finally receive a fair, independent, and complete evaluation through the legislatively mandated process which he has been denied to date. The lower Court's peremptory determination of the merits of Mr. Hall's financial application would appear to continue to deny him the opportunity to exercise his right to a fair mediation process. RCW 61.24.163.

C. Contradictory Findings of Commissioner and Court on Revision Merit Appellate Review and Remand.

In reviewing a trial court's ruling concerning property division in a marital dissolution context, the standard of review is abuse of discretion. *In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992), *aff'd*, 119 Wn.2d 438 (1992); *In re Marriage of Foley*, 84 Wn.App. 839, 842-43, 846, 930 P.2d 929 (1997). A trial court abuses its discretion when the ruling is "manifestly

unreasonable or based upon untenable grounds or reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

At first hearing in this matter, the Court found that Mr. Hall had diligently pursued modification/refinance efforts per the terms of the decree. RP 15:5-9. Additionally, the Court found that the respondent would not be prejudiced if additional time were given to further pursue loan modification and/or refinance. RP 16:1-6.

Conversely, at the subsequent hearing on the motion for revision of the Commissioner’s Order, the Court entered an order denying the motion with minute findings that the appellant/petitioner was not diligent in his efforts to refinance the property and that the respondent had been prejudiced. CP 1, 7.

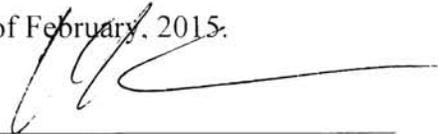
Given such widely divergent and inconsistent findings of fact by the trial court, it can be reasonably concluded that discretion was not properly or evenly applied in this matter. At bottom, however, the fundamental issue is not whether the respondent was or would be prejudiced by an extension of time to allow modification and/or refinance efforts to unfold or whether Mr. Hall can demonstrate the financial merits of his loan modification application beforehand to the satisfaction of the

Court, the real issues are whether the parties abided in good faith by the affirmative obligation to provide each other assistance to effect the terms of the agreed decree and whether the appellant/petitioner will be afforded the opportunity to fairly seek a loan modification. It should be clear from the record that the respondent had a duty to assist Mr. Hall and that she did not, when asked, provide that assistance. For that reason, this matter should be remanded to the trial court with instruction to effect the parties' original intent to divide their property.

V. CONCLUSION

For these reasons, this matter should be remanded to the trial court with instruction to effect the parties' original intent to divide their property, specifically compelling the respondent's assistance as necessary in loan modification and/or refinance efforts.

Respectfully submitted this 2nd day of February, 2015.



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10 Petitioner,

11 and

12 DIANE ELIZABETH HALL aka VAN
13 NATTER,

14 Respondent.

No. 72459-2-1
(Superior Court No. 13-3-00822-1)

DECLARATION OF SERVICE

15 I, Christopher Kerl, hereby declare that on the 2nd day of February, 2014, I
16 caused a true and correct copy of the following:

17 1. Appellant's Brief;

18 to be served on the following:

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DATED this 2nd day of February, 2015.


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