IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of, TERESA GRIMSLEY-LaVERGNE Respondent, v. Mark A. LaVERGNE, Appellant.	No. 37731-4-II ORDER AMENDING OPINION AND DENYING APPELLANT'S MOTION TO RECONSIDER

Appellant has filed a motion asking the court to reconsider its part published opinion filed on July 7, 2010. Having considered the motion and supporting materials, the court now orders as follows:

(1) The first sentence on page 8 after the heading "Postdissolution Decree Property Distributions" is amended to read as follows:

> As part of Mark's assigned errors and arguments related to the October 2008 findings and the January 2009 judgment, he challenges several specific property distributions, including (1) property acquired after the signing of the CR 2A agreement but before the entering of the dissolution decree and (2) some property that he alleged did not exist until after the trial court entered the April 29, 2008 dissolution decree.

(2) In all other respects the motion for reconsideration is denied.

IT IS SO ORDERED.

DATED this _____ day of _____, 2010.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

VAN DEREN, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of TERESA GRIMSLEY-LaVERGNE, Respondent, and MARK A. LaVERGNE, Appellant.	No. 37731-4-II PART PUBLISHED OPINION

Quinn-Brintnall, J. — Mark LaVergne and Teresa Grimsley-LaVergne challenge the propriety of various orders entered by the trial court during dissolution proceedings that began in 2003. The threshold question we address in the published portion of this opinion is the enforceability of a CR 2A stipulation and agreement (CR 2A agreement). We note that the trial court should have required the parties to comply with former RCW 26.09.070 (1989) rather than accepting the CR 2A agreement. However, because each party moved to enforce the CR 2A agreement at different times during the proceedings, both parties have waived their right to appeal the enforceability of the CR 2A agreement,[1] and we affirm.

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[1] In the unpublished portion of the opinion, we address (1) the trial court's authority to enter findings and a judgment during this pending appeal, citing RAP 7.2(e); and (2) whether substantial evidence supports several findings. Because the entered findings and judgment did not prejudice the issues in this appeal, the trial court did not violate RAP 7.2(e) when it entered its order and judgment. The remaining challenges to factual findings supported by substantial evidence lack merit.

FACTS

Mark and Teresa[2] were married on October 1, 1994. During the marriage, they developed a successful multi-million dollar septic and plumbing business that they took turns managing. In 1997, the couple separated but reconciled in 1999. In January 2003, Teresa gave birth to twin boys, A.L. and L.L, one of whom had severe health problems for several years. On November 21, 2003, Teresa filed for a dissolution from Mark in Thurston County Superior Court. The couple formally separated the next day, on November 22, 2003.

On September 21, 2004, Mark, Teresa, and their attorneys attended a mediation with former King County Superior Court Commissioner Harry Slusher. The 11-hour mediation resulted in a partially typed but mostly scribbled document identified as a "CR 2A stipulation and agreement" signed by each party, the attorneys, and Slusher. The CR 2A agreement addressed many marriage dissolution issues including: (1) a parenting plan; (2) child support; (3) spousal maintenance; (4) extensive agreements on the distribution of personal property, real property, business property, and personal and business liabilities; and (5) ownership and management of the septic and plumbing business.

The CR 2A agreement is confusing; portions are interlineated, sections are crossed out, and some crossed-out sections have adjacent notes stating, "Back in."[3] Clerk's Papers (CP) at

[2] We use the parties' first names for clarity.

[3] Ultimately, pursuant to a binding arbitration clause, Slusher provided two separate decisions, one on November 26, 2004, and the other on April 9, 2008, settling disputes about the interpretation of portions of the CR 2A agreement.

489-90, 493.[4] The CR 2A agreement does clearly state, however, that "W will prepare final paperwork, incl. [the property settlement agreement]. W will do final presentation." CP at 491. And part of the typed portion of the CR 2A agreement provides,

> Each party agrees and stipulate[s] this is a full and complete agreement between the parties and is enforceable in court. Each party understands that even though final documents yet need to be prepared this stipulation and agreement is effective and binding upon execution and enforceable in court. ~~The parties stipulate and acknowledge that this agreement is fair and equitable.~~ (Back in).[5]

CP at 489.

On September 21, 2004, after completing the mediation and signing the CR 2A agreement, Mark and Teresa spent the night at a Ramada Inn and had sexual relations. The parties dispute whether they had a conversation about abandoning the CR 2A agreement and reconciling. From the end of September 2004 until early July 2007, the parties lived together in their marital home and frequently slept in the same bed alongside their children. Also, during this same 33-month period, the parties agree that some portions of the CR 2A agreement were

[4] Although the portion of the record we cite in this opinion contains a complete copy of the CR 2A agreement, we note that several other parts of the record contain incomplete copies of the CR 2A agreement. That incomplete versions are included in the record is understandable considering that, in addition to the readability issues already mentioned, the handwritten portion of the CR 2A agreement contains multiple paragraphs labeled 4, 5, 6, 7, and 13 on separate pages such that the omission of certain pages might easily be overlooked.

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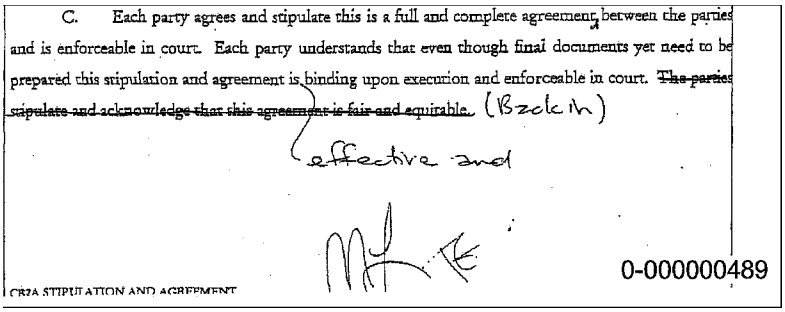
C. Each party agrees and stipulate this is a full and complete agreement between the parties and is enforceable in court. Each party understands that even though final documents yet need to be prepared this stipulation and agreement is binding upon execution and enforceable in court. ~~The parties stipulate and acknowledge that this agreement is fair and equitable.~~ (Back in) effective and

CR2A STIPULATION AND AGREEMENT

0-000000489

executed.

On June 20, 2007, after providing notice to the parties, Judge McPhee dismissed Teresa's 2003 dissolution petition without prejudice due to the parties' inactivity in pursuing it. Shortly thereafter, without notice to Mark, Teresa moved to vacate the dismissal and enforce the CR 2A agreement. Judge McPhee vacated the June 20, 2007 dismissal order and scheduled the case for a presentation of final orders pursuant to the CR 2A agreement.

On July 31, 2007, Thurston County Commissioner Schaller considered Mark's and Teresa's cross motions regarding the enforceability of the CR 2A agreement. Without referencing former RCW 26.09.070, a statute governing marriage separation agreements, the commissioner entered an order enforcing the CR 2A agreement. Mark filed a motion to reconsider. Except for revising its prior order by reserving any findings about whether the parties had reconciled, Commissioner Schaller declined to reconsider the ruling.

Thurston County Superior Court Judge Casey held a two-day trial in January 2008 to determine if the parties reconciled. On March 18, the trial court found that Mark and Teresa had not reconciled after signing the CR 2A agreement and upheld the enforceability of the CR 2A agreement. Mark filed a motion for discretionary review in this court, which our commissioner denied.

On April 29, the trial court entered a final decree of dissolution and findings of fact and conclusions of law, both of which incorporated the CR 2A agreement by reference. The trial court also entered a final parenting plan and a final order of child support. On May 20, Mark filed a notice of appeal of these final orders and the March 18, 2008 order.

On August 5, while the appeal was pending, the trial court held a hearing to set a second

evidentiary hearing. Citing RAP 7.2,[6] Mark filed a motion in this court challenging the trial court's authority to hold the second evidentiary hearing.[7] Before this court ruled on Mark's RAP 7.2 motion, and before the trial court conducted the scheduled hearing, Mark filed a motion and memorandum in the trial court asking that it enforce the CR 2A agreement.[8] On August 18, our commissioner ruled that the trial court had authority to conduct an evidentiary hearing but that it must seek permission before entering any modification orders.

The trial court held an evidentiary hearing on August 21 and 22 and, on October 28, it entered a "Second Amended Findings of Fact and Conclusions of Law Supporting Judgment Enforcing Decree." Mark filed a motion for reconsideration, arguing that the trial court (1) had exceeded its jurisdiction under RAP 7.2(e) by modifying the dissolution decree's property distribution; and (2) erred by distributing property that did not exist on April 29, 2008, when it entered the final dissolution decree. The trial court denied Mark's motion to reconsider. On

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[6] RAP 7.2 states in relevant part,

> (e) . . . The trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision.

[7] Mark prematurely filed his RAP 7.2 challenge to the trial court's authority. RAP 7.2 does not preclude holding a hearing, only the entry of an order that would affect an issue accepted by this court for review. The trial court had authority to hold the hearing, issue an oral ruling, and prepare an order in accord with its oral ruling. RAP 7.2 requires only that the trial court obtain permission from this court before entering an order that will alter the issues pending appeal.

[8] During argument before this court, Mark suggested that he never filed a motion requesting that the trial court enforce the CR 2A agreement. Mark's enforcement motion, filed on August 15, 2008, is at CP 1056-57 of the record on appeal.

January 20, 2009, the trial court entered its final "Judgment on Findings of Fact and Conclusions of Law." Mark appeals the October 28, 2008 order, the trial court's denial of his motion for reconsideration, and the January 20, 2009 final judgment.

ANALYSIS

CR 2A Enforceability

In this appeal, Mark argues, as he did at the January 2008 hearing, that he and Teresa reconciled after signing the CR 2A agreement and that their reconciliation voided the CR 2A agreement. Because both parties lack standing to challenge the enforceability of the CR 2A agreement, we affirm.

The record presented for our review is abysmal. The CR 2A agreement is scrawled with a felt-tipped pen and interlineated. In addition, sentences and whole paragraphs are crossed out and some are then noted, "Back in." CP at 489-90, 493. In spite of the obvious challenges involved in even reading the scribbled document, the parties both signed the CR 2A agreement which contains a stipulation and acknowledgement that the agreement is fair and equitable. It is undisputed that Mark and Teresa executed some portions of the CR 2A agreement. For example, Teresa began buying Mark's share of the couple's business by making a down payment of $602,000, Mark received several of the promised $10,000 monthly salary payments from the couple's business, and Mark and Teresa started filing separate tax returns. Moreover, the record reflects that, although they did so at different times, Mark and Teresa each asked the trial court to enforce the CR 2A agreement. Accordingly, neither party has standing to argue that he or she is aggrieved by the trial court's enforcement of the CR 2A agreement and the entry of the final dissolution decree.[9]

As we noted earlier, the trial court should have required the parties to comply with former RCW 26.09.070. The legislature expressly designed this statute to address the enforceability of parties' predissolution agreements. *See generally* former RCW 26.09.070. Moreover, former RCW 26.09.070 mandates that a predissolution separation contract be in writing and any terms of a parties' predissolution separation contract (except for parenting plans and child support) be incorporated into a decree of dissolution unless (1) the parties mutually intended to revoke the agreement or (2) the trial court finds the agreement was "unfair at the time of its execution." Former RCW 26.09.070(1), (4), (5), (8). Neither the trial court nor the parties addressed the statute.

Affirmed.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

RAP 7.2(e) Jurisdictional Challenge

Mark also appeals the trial court's October 28, 2008 second amended findings of fact and conclusions of law and the January 20, 2009 final judgment, arguing that the trial court exceeded its jurisdiction by modifying an order accepted for review by this court without complying with RAP 7.2(e). We discern no error.

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[9] We do not address the merits of the reconciliation issue because the trial court found on disputed evidence that the parties had not reconciled. *Fox v. Fox*, 49 Wn.2d 897, 898, 307 P.2d 1062 (1957) (stating that, on appeal, findings of a trial court made on conflicting evidence are not disturbed so long as they are supported by the record). The parties' testimonies conflict and their briefing continues the factual disputes that they have been waging for more than six years. Nevertheless, as to these disputed facts, substantial evidence supports the trial court's findings.

RAP 7.2(e) provides that if the trial court makes a determination that "will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." Whether a trial court violates RAP 7.2(e) turns on whether the subsequently entered order or judgment affects the outcome of any issues accepted for review. *State ex rel. Shafer v. Bloomer*, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999).

In his first appeal, Mark assigned errors only to the March 18, 2008 order. Specifically, Mark assigned errors related to whether the parties reconciled and/or abrogated the CR 2A agreement. The trial court's October 28, 2008 second amended findings of fact and conclusions of law and the January 20, 2009 final judgment address only property distribution questions that remained to be resolved under the CR 2A agreement. The question of specific property distributions, which the trial court addressed in its subsequent orders, is separate from the question of the enforceability of the CR 2A agreement. Accordingly, the trial court did not violate RAP 7.2(e) when it filed its subsequent orders because it did not need this court's permission to enter orders on issues that we had not accepted for appellate review.

Postdissolution Decree Property Distributions

As part of Mark's assigned errors and arguments related to the October 2008 findings and the January 2009 judgment, he challenges several specific property distributions, including some property that he alleged did not exist until after the trial court entered the April 29, 2008 dissolution decree. However, our review of the record reveals that, in Mark's August 15, 2008 motion to enforce the CR 2A agreement, he specifically pleaded the agreement as a basis for relief related to many of the property distribution issues he raises on appeal. Accordingly, these issues

do not merit further review.[10]

We turn now to Mark's three specific property distribution challenges that he raises for the first time on appeal, regarding the boat launch, his 2004 tax return expenses, and health care expenses for the couple's children. Our review of the August 2008 trial transcripts reveals that Mark did not object below when the trial court distributed these properties and that he did not object to the admission of evidence offered for the trial court's consideration in resolving these property distribution issues. Accordingly, Mark has failed to preserve the issues for review. RAP 2.5(a).

Finally, Mark challenges the trial court's amended findings relating to (1) the fair market value of the Pacific Avenue property, (2) the Second Avenue property rental income allegedly owed him, and (3) a $12,337 award to Teresa for the business's real property taxes that he contends were Teresa's personal tax expenses. The trial court heard extensive conflicting testimony on these issues from witnesses presented by both parties. We defer to the trier of fact for credibility determinations and when disputed evidence must be weighed and conflicting testimony resolved. *In re Marriage of Rideout*, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003); *see Fox v. Fox*, 49 Wn.2d 897, 898, 307 P.2d 1062 (1957). Applying this standard to the record on appeal reveals substantial evidence supporting the trial court's findings on these matters.

Attorney Fees

Only Teresa requests attorney fees on appeal in compliance with RAP 18.1(b), citing RCW 26.09.140. Although Teresa asserts a financial strain related to these divorce proceedings,

[10] We note that the parties hold any community property not disposed of in the court's rulings, orders, and judgments, as tenants in common. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 203, 580 P.2d 617 (1978); *Pittman v. Pittman*, 64 Wn.2d 735, 737, 393 P.2d 957 (1964).

she has filed no financial declaration or any documentation supporting her financial need. Accordingly, we deny Teresa's request for attorney fees on appeal.

Affirmed.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

VAN DEREN, J.