

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of	)	No. 66856-1-I
CHRISTOPHER ANDREW HEATH,	)	
	)	DIVISION ONE
Respondent,	)	
	)	
and	)	UNPUBLISHED OPINION
	)	
BARBARA JEAN HEATH, nka	)	
BARBARA JEAN Latham,	)	
	)	
Appellant.	)	FILED: September 17, 2012

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Schindler, J. — Barbara Latham challenges the order enforcing the terms of a dissolution decree, the order denying her motion to compel an accounting of the retirement and pension funds of her former spouse Christopher Heath and awarding attorney fees for intransigence. The court found that Latham failed to comply with the terms of the dissolution decree, failed to cooperate in efforts to resolve the remaining property distribution issues, and violated CR 11 by filing the motion to compel an accounting. We affirm.

FACTS

Christopher Heath and Barbara Latham<sup>1</sup> were married in 1983. On February 28, 2005, the court entered a decree of dissolution of the marriage. The decree directed the parties to divide the family home and Heath's 401K pension and retirement

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<sup>1</sup> Formerly Barbara Heath.

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accounts "55/45, with 55% going to [Latham]." To implement the distribution, the decree states:

The parties shall draft appropriate Qualified Domestic Relation Orders to accomplish these distributions. Wife's attorney shall prepare the appropriate orders.

In May 2008, Heath quitclaimed his interest in the family home so that Latham could sell the house. Latham sold the house in August 2008. Latham did not inform Heath that she had sold the house or distribute his share of the net sales proceeds of \$269,091. Latham used the proceeds from the sale to purchase a new house.

On May 1, 2009, Heath moved to enforce the distribution provisions of the decree. In June 2009, counsel for Latham provided Heath with proposed retirement account transfer orders. Heath could not agree to the proposed orders until after he received information about the sale of the house. Heath did not discover details about the house sale until after he moved to compel disclosure of the sale information on July 6, 2009. After Heath filed a renewed motion to compel disclosure, Latham provided Heath with the closing statement for the sale in September 2009. The trial court granted Heath's motion for sanctions. In the September 22, 2009 sanctions order, the court found that Latham did not respond to Heath's earlier discovery requests and that she had no credible excuse for the delay in providing the closing statement. The court concluded that Latham's actions constituted intransigence and awarded Heath \$1,888 in attorney fees.

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After the parties were unable reach agreement on distribution of the house sale proceeds and the retirement accounts, Heath renewed his motion to enforce the decree. The motion to enforce the decree was noted for hearing without oral argument on November 29, 2010. In support of the motion, Heath submitted a declaration from a certified public accountant (CPA), Louise Green. Green calculated the amount Heath needed to transfer to Latham to satisfy the distribution provisions of the decree. The calculations were based on offsetting Heath's share of the house sale proceeds from Latham's interest in the retirement accounts.

The trial court granted Latham's motion for a continuance to prepare a response. Latham filed a motion for an accounting of Heath's retirement accounts. Latham claimed Heath had improperly withdrawn funds from the retirement accounts to purchase a new house. The motion for an accounting was scheduled to be heard without oral argument on December 8, 2010.

On January 26, 2011, the trial court denied Latham's motion for an accounting. The court found that the attorney's representations about the improper withdrawal of funds from Heath's retirement accounts were baseless and "the unrebutted evidence before the court demonstrates that this assertion is flat out wrong." The court also found that Latham's attorney misrepresented the facts about the delay in providing the necessary orders to carry out the distributions specified in the decree. The court concluded that the motion was interposed to cause unnecessary delay and increase

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the cost of the litigation.

Respondent's counsel was ordered to prepare the orders in question when the decree was entered in 2005. There is no evidence before the court that any effort was made to enter the necessary orders until 2009.

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This motion was brought only in response to and in retaliation for Petitioner filing his motion to Enforce Decree.

The court awarded Heath \$1,235 for attorney fees under CR 11.

On the same date, the trial court granted Heath's motion to enforce the decree. In its order, the court summarized the post-dissolution history of the case, finding that Heath had acted diligently to settle the matter or protect his interests and that "Latham and her attorney have frustrated [Heath's] effort to resolve this matter and have stalled and refused to do what they were required to do by the Decree." The court exercised its equitable authority to impose a remedy:

Neither the former wife nor her attorney acted to enforce the Decree completely—let alone at the values set out in it. Given the circumstances, it is inequitable for Mr. Heath to have to make a distribution out of his two retirement funds at the values set out in the Decree. Indeed, other than stating the "values" of these funds when the Decree was entered, there is nothing in the Decree that requires these funds (or the house) to be divided at those values. Under the circumstances, and as a clarification of the Decree, the distributions should be determined from the actual sales figures from the house sale, and current values of Mr. Heath's retirement funds. As shown by the accompanying Declaration of Louise Green, CPA, when all of this is taken into consideration, Mr. Heath owes Ms. Latham \$6,119.59, which he proposes should be transferred to her by a distribution of that amount from his Schwab account as final satisfaction of all obligations of paragraph 7 in Exhibit C to the Decree.<sup>[2]</sup>

The court adopted Green's calculations and ordered Heath to pay Latham the proposed amount, subject to a setoff for all outstanding attorney fees and costs. Based on Latham's continued intransigence, the court also awarded Heath the attorney fees

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<sup>2</sup> (Footnote omitted.)

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and costs incurred to finalize the decree. The court denied Latham's motion for reconsideration on February 23, 2011.

## ANALYSIS

### Standard of Review

Latham asserts that the trial court proceedings "were essentially a summary judgment" and this court should therefore review the challenged orders de novo. She has not provided any legal argument or citation to relevant authority to support this bare allegation, and nothing in the record supports such a characterization.

Generally, an appellate court reviews a trial court decision de novo if it is based solely on affidavits and other documentary evidence, and the trial court does not make credibility determinations. In re Marriage of Rideout, 150 Wn.2d 337, 350, 77 P.3d 1174 (2003). But where, as here, the trial court's decision rests on a lengthy and complex record and necessarily requires an assessment of the credibility of conflicting assertions, the substantial evidence standard is appropriate. Dolan v. King County, 172 Wn.2d 299, 311, 258 P.3d 20 (2011); Rideout, 150 Wn.2d at 351.

Accordingly, we determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. Rideout, 150 Wn.2d at 352. We continue to review legal conclusions and questions of law de novo. Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The court in this case also exercised its broad discretion to grant equitable

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relief in a dissolution proceeding. We review the trial court's choice of remedy for an abuse of discretion. In re Marriage of Farmer, 172 Wn.2d 616, 624, 259 P.3d 256 (2011).

#### Latham's Obligation to Prepare Distribution Orders

Latham contends the trial court erred in construing the dissolution decree to mean that she was solely responsible for preparing the distribution orders. The dissolution decree states, in pertinent part:

The parties shall draft appropriate Qualified Domestic Relation Orders to accomplish these distributions. Wife's attorney shall prepare the appropriate orders.

Latham argues that the dissolution decree imposed the obligation to draft orders on both parties. But Latham fails to address the effect of the second sentence: "Wife's attorney shall prepare the appropriate orders." Even if the first sentence imposed the ultimate responsibility for accomplishing the distribution on both parties, the second sentence clearly and unambiguously imposed the responsibility to prepare the orders on Latham's attorney.

#### Latham's Proposed Distribution Orders

Latham next contends the court erred in determining that she failed to prepare the appropriate distribution orders. Latham asserts that even if she had the sole responsibility to draft the distribution orders, she satisfied that obligation by submitting draft orders to opposing counsel in June 2009. Latham complains that Heath did not

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provide “input” on the proposed orders until he moved to enforce the decree in October 2010.

But Latham’s proposed orders addressed only the distribution of Heath’s retirement and pension accounts. As she did throughout most of the court proceedings, Latham ignores the provision in the decree requiring her to transfer Heath’s share of the house proceeds. Latham’s claim that she was “in full compliance with the terms of the Decree” is flatly belied by the record. Substantial evidence supports the trial court’s findings that Latham inexcusably delayed providing Heath with the closing statement for the sale of the house and failed to cooperate with his proposals to resolve all outstanding issues.

#### Evidentiary Hearing

Latham contends the court erred in failing to order an evidentiary hearing. Latham asserts there were “far too many factual issues.” The trial court has discretion to determine whether an evidentiary hearing is necessary, even where it must assess the credibility of competing declarations. See Rideout, 150 Wn.2d at 351-52. Latham has failed to demonstrate any abuse of discretion.

Latham claims the court did not allow her to submit an expert opinion disputing Green’s financial calculations, denied her requests for discovery, and failed to consider the contribution of her new spouse to the value of the house she sold or the intransigence of Heath and his attorneys.



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In support of his motion to enforce the decree, Heath submitted the declaration of CPA Louise Green. The declaration set forth in detail the underlying assumptions and financial calculations for Heath's proposed distribution. Green's calculations were attached as an exhibit to the order enforcing the decree.

On appeal, Latham does not challenge Green's calculations or any specific aspect of the court's distribution provisions. Although Latham maintains that she disputed Green's calculations, she has not identified any admissible evidence in the record to support this claim. See RAP 10.3(a)(6) (argument in brief should contain references to relevant parts of the record). Moreover, the record shows that despite the court granting Latham's request for a continuance to permit her expert to review Green's calculations, Latham's attorney did not comply with the rules to admit that testimony.

Paragraph 9 of Declaration of Simmerly, and Paragraph 6 of Ex. A is hearsay and provided without foundation, and shall not be considered by the Court. Scowcroft's opinion has not been properly placed before the Court, and has not been considered.

Latham's repeated assertions that the court prevented her from submitting an expert opinion are meritless.<sup>3</sup>

#### Motion to Compel Accounting

Latham contends the court erred by denying her motion to compel an accounting of Heath's retirement and pension accounts. But Latham provides no meaningful legal

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<sup>3</sup> Further, Latham's assertions that the court should have considered the contributions of her new spouse and Heath's intransigence are unsupported by any argument.

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argument or citation to authority to support this claim. The contention therefore merits no further consideration. See Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”).

### CR 11 Sanctions

Latham contends the court erred in finding that her motion to compel an accounting violated CR 11. Latham asserts the court failed to specify the sanctionable conduct and that Heath never denied her allegations of an improper withdrawal from the retirement account.

Under CR 11, the court may impose sanctions if pleadings are filed for an improper purpose or without a basis in law or fact. The court must enter findings explicitly identifying the legal basis for the sanctions and the sanctionable conduct. Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). We review the trial court’s CR 11 ruling for an abuse of discretion. Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

The court found that Latham’s motion to compel was not well grounded in fact or warranted by existing law and was interposed for the improper purpose of causing unnecessary delay and increasing the cost of litigation. The court expressly noted that counsel’s allegation of an improper withdrawal from the retirement accounts was made without any basis and “flat out wrong.” The court further found that Latham’s counsel

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had misrepresented or omitted material facts about the delay in finalizing the distribution, that counsel was well aware the motion to compel was unnecessary because the relevant documents were discoverable, and that counsel had filed the motion in retaliation for Heath's motion to enforce the decree. Latham has never presented a shred of evidence to support her allegation of an improper withdrawal. And contrary to her claims on appeal, Heath repeatedly denied the allegations.

The record supports the court's findings that the motion to compel was baseless and interposed for an improper purpose. The trial court did not abuse its discretion in finding a CR 11 violation and imposing sanctions.

#### Attorney Fee Award

Latham contends the trial court erred in awarding attorney fees for her intransigence. Latham denies acting in bad faith and maintains that Heath resisted her efforts to resolve the distribution issues.

The court has discretion in a dissolution proceeding to award attorney fees when one party's intransigence causes the other party to incur additional legal services. In re Marriage of Foley, 84 Wn. App. 839, 846, 930 P.2d 929 (1997). Intransigent conduct includes obstructionist behavior, repetitive or unnecessary motions, and attempts to make the proceeding unduly difficult with increased legal costs. In re Marriage of Greenlee, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

Here, the record supports the court's determination that Latham unreasonably

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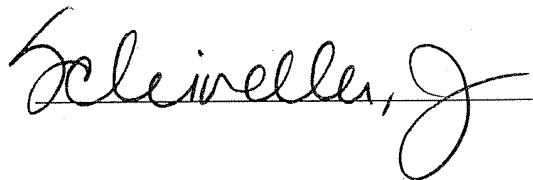
delayed complying with her obligation under the dissolution decree, resisted Heath's reasonable efforts to obtain information about the house sale and resolve the outstanding issues, and filed a baseless motion to compel an accounting of Heath's retirement and pension accounts. The court did not abuse its discretion in awarding attorney fees for Latham's intransigence.

Attorney Fees on Appeal

Heath requests an award of attorney fees on appeal based on Latham's "fraudulent and intransigent behavior in this appeal." A party's intransigence in the trial court may support an award of attorney fees on appeal. In re Marriage of Wallace, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002) (citing In re Marriage of Mattson, 95 Wn. App. 592, 606, 976 P.2d 157 (1999)). But contrary to the repeated assertions in Heath's briefs, the trial court did not find that Latham's conduct amounted to fraud. Nor has Heath identified any intransigent or fraudulent conduct in filing the appeal. Under the circumstances, we decline to award attorney fees for intransigence on appeal.

In the alternative, Heath requests attorney fees based on the financial circumstances of the parties. See RCW 26.09.140. Based on our review of Heath's financial declaration, we decline the request.

Affirmed.

A handwritten signature in black ink, appearing to read "Schweitzer, J.", written over a horizontal line.

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WE CONCUR:

*Speckman, A.W.*

*Appelwick, J.*