IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:	)	**No. 28045-4-III**
	)	
MARK RAYMON KRANCHES,	)	
	)	
Appellant,	)	
	)	**Division Three**
and	)	
	)	
PAMELA JEAN KRANCHES,	)	
	)	
Respondent.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Mark Kranches appeals the trial court's decision granting his ex-wife's CR 60(b) motion that set aside the property distribution plan approved in their dissolution proceeding. Although we agree with one of his arguments, we nonetheless affirm.

FACTS

After 22 years, Pamela and Mark Kranches filed to dissolve their marriage in 2007. Mark[1] retained counsel; Pamela did not. Mark produced a property distribution

plan; Pamela signed it. The trial court entered a dissolution decree on June 11, 2007 that incorporated the property distribution plan.

The plan awarded the family home, appraised at $208,000 in 2007, to Mark. It was subject to two mortgages totaling approximately $135,000. Pamela was awarded $15,000 as her share of the house equity. She was also awarded $60,000 of the couple's Washington Air National Guard savings plan valued at $130,000 shortly before the dissolution. Mark and Pamela were each awarded the entirety of their respective retirement plans, but the distribution did not list the value of those plans. Two older automobiles that carried no debt were awarded to Mark. Pamela was awarded a newer automobile that did carry debt.

Pamela voluntarily checked into a hospital for a psychiatric evaluation in early September 2008. She was diagnosed with "bipolar illness," "psychosis not otherwise specified," and "alcohol dependence." The doctor believed her judgment was impaired, but her cognition was "grossly intact." On September 4, 2008, the day she left the hospital, her attorney filed a CR 60(b) motion for relief from the property distribution order. The motion argued that Pamela was impaired by alcohol and psychological problems when she signed the property distribution agreement. She also alleged that she

[1] For convenience, we will refer to the parties by their first names.

was unaware of the value of Mark's pension and that the home equity had been misrepresented.

A commissioner denied the motion to vacate without prejudice to resubmitting it on the mental health issue. There had been no expert testimony concerning Pamela's mental health. The commissioner also determined there was no showing of fraud or other circumstances justifying relief.

Pamela moved to modify the ruling on October 31, 2008. She filed a second CR 60(b) motion on November 17, 2008. The superior court continued the revision motion pending the outcome of the second CR 60(b) motion. The commissioner ultimately determined that the second motion should be granted, ruling that good cause existed because of Pamela's "unsound mind" and a disparate settlement. Mark moved to revise that ruling and Pamela filed a cross-motion to revise.

The superior court judge upheld the second ruling in its entirety.[2] Mark moved to reconsider. The motion was denied. Mark then timely appealed to this court.

ANALYSIS

This appeal challenges both grounds for granting relief under CR 60(b). After discussing the standard of review and the rule, we will address both arguments.

[2] It does not appear that the court ever ruled on the first motion to revise.

This court reviews a CR 60(b) ruling for abuse of discretion. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Legal error also constitutes an abuse of discretion. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

In relevant part, CR 60(b) provides:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
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> . . . .
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> (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
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> . . . .
>
> (11) Any other reason justifying relief from the operation of the judgment.
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> The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

Unsound Mind. Mark argues that the trial court erred in applying CR 60(b)(2), contending that Pamela did not establish that she ever was of "unsound mind," let alone at the time of the property settlement. We agree.

The phrase "unsound mind" is not defined by this rule. It does, however, have a well settled meaning in Washington law. The phrase is used in the witness competency statute, RCW 5.60.050, and the concurrent witness competency rule, CrR 6.12(c). In construing both the statute and rule, *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982), stated:

> This court has said that "unsound mind," as used here, means total lack of comprehension or the inability to distinguish between right and wrong.

Accord State v. Wyse, 71 Wn.2d 434, 436, 429 P.2d 121 (1967) (equating "unsound mind" with "insanity").[3] If the definition of "unsound mind" in CR 60(b)(2) was to have a different meaning than in CrR 6.12(c), we believe the drafters would have included a definition.

There is no evidence in the record that Pamela ever suffered from a total lack of comprehension. Although she was diagnosed with psychiatric problems, she presented no evidence that those conditions deprived her of the ability to comprehend. We do not believe the evidence establishes she was of "unsound mind" for purposes of CR 60(b)(2).

There is a second reason that the argument fails. Pamela did not establish her

[3] The authority Pamela cites does not aid her. In construing a North Dakota tolling statute for persons who are "insane," the Eighth Circuit noted that North Dakota equated "insane" with "unsound mind." *Krein v. DBA Corp.*, 327 F.3d 723, 728 (8th Cir. 2003). Washington does the same. *Wyse*, 71 Wn.2d at 436.

alleged condition *at the time* she entered into the settlement agreement that she is now challenging. Instead, she presented evidence that her problems began during her youth and that she was a severe alcoholic when she signed the settlement. There was no attempt to tie her condition to the ability to comprehend and sign the agreement. Even if she had established she was of unsound mind in 2008 when seen by a psychiatrist, she still needed to show that condition existed when she entered into the settlement.

For both reasons, the court erred in finding that CR 60(b)(2) justified relief from judgment.

Disparate Settlement. The trial court also found that CR 60(b)(11), the catch-all provision, justified relief due to the settlement being disparate. Although reasonable minds could differ on this topic—and the commissioner said it was a very close call[4]—we believe that tenable grounds exist in the record to support this determination.

Preliminarily, Mark challenges the trial court's consideration of the CR 60(b)(11) claim. He argues that the catch-all provision is inapplicable and that the commissioner's initial ruling had already disposed of the issue. We will address each argument in turn.

It is well understood that subsection (b)(11) does not apply when other provisions of the rule do apply to the same facts. *E.g.*, *In re Marriage of Furrow*, 115 Wn. App.

[4] The commissioner indicated he was granting relief "by the narrowest of margins." Clerk's Papers at 186.

661, 673, 63 P.3d 821 (2003). The provision applies to extraordinary circumstances outside of the court's actions. *Id*. at 673-674. Mark notes that the commissioner rejected Pamela's arguments under other provisions of CR 60(b). He thus contends that her (b)(11) argument could not be entertained because those other provisions were applicable. We disagree.

Just because other provisions were unsuccessfully argued does not mean that subsection (b)(11) cannot be invoked. It is when other provisions do not apply that (b)(11) is potentially applicable. Here, the commissioner found several other sections of the rule inapplicable. However, none of those sections apply to the situation of a disparate settlement where one party did not have counsel. That issue was appropriately left to consideration under the catch-all provision.

He also argues that because the commissioner rejected the CR 60(b)(11) argument in the first CR 60(b) motion, Pamela's remedy was to pursue revision of that ruling and the commissioner could not consider that topic again when the second motion was filed. Again, we disagree. The short answer to the argument is that the commissioner did consider the argument. Because the commissioner previously had rejected the argument, he was under no compulsion to hear the topic again. However, we are aware of no authority that prohibits the commissioner from hearing the matter once again.

Mark apparently likens the first ruling to some form of *res judicata*. However, the initial commissioner's ruling had been the subject of a motion to revise, which effectively prevented it from becoming a final order. At the time the second CR 60(b) motion was heard, the first motion was still pending revision by a judge. It was not then a final order and the commissioner was not required to accord it finality.

For both reasons, the commissioner was permitted, although not required, to consider the second CR 60(b) motion.

As to the merits of the claim, we believe the trial court could find that the settlement was disparate. When parties to a dissolution action enter into a property settlement agreement, it is binding on a court unless it "was unfair at the time of its execution." RCW 26.09.070(3). This court has interpreted that command as requiring courts to look at (1) whether full disclosure was made concerning the amount, character, and value of the property, and (2) whether the agreement was entered into voluntarily on independent advice with full knowledge by the spouse. *In re Marriage of Cohn*, 18 Wn. App. 502, 506, 569 P.2d 79 (1977) (citing *In re Marriage of Hadley*, 88 Wn.2d 649, 654, 565 P.2d 790 (1977)); *accord Shaffer v. Shaffer*, 47 Wn. App. 189, 194, 733 P.2d 1013, *review denied*, 108 Wn.2d 1024 (1987).

The commissioner was well aware that Mark had an attorney when the settlement

and dissolution were entered, but Pamela did not. The absence of independent counsel for Pamela left this settlement vulnerable under *Cohn*. Because of the absence of counsel, the trial court was then free to look at the settlement to see if was unfair or not. On its face, the settlement does raise questions. While the retirement savings account was valued at $130,000, Pamela received just $60,000. That discrepancy is explained by Mark's affidavit that the couple owed that account more than $5,000 and he was planning to pay the outstanding $6,000 orthodontia debt owed by the community. Thus, the handling of the retirement savings account appears to have resulted in an even distribution when considering those debts.

However, the house is an entirely different issue. Mark's own affidavit established that a 2007 appraisal valued the house at $208,000 while the combined mortgages were about $135,000. This left $73,000 in potential equity, but Pamela received just $15,000 of that amount. On its face, this is a significant disparity that may well have caused the commissioner concern. That disparity is coupled with the fact that the pensions were unvalued, which raises questions about whether Pamela knew the actual values of those pensions when she entered into the agreement and whether they were truly equal in value.[5]

[5] Mark had more than 20 years of service in his pension, while Pamela had just two years of service in her pension. This time of service disparity also suggests that

These are tenable grounds for finding the settlement unfair at the time of its execution. When considered in conjunction with the factual issues involving Pamela's alcoholism and possible mental health problems, the need to understand the property discrepancy becomes even stronger. Accordingly, we cannot say that the trial court abused its discretion in setting aside the property agreement.

This is not to say that Pamela will necessarily benefit from the reopening of the settlement. Mark has supported the couple's two college-aged children and explained that the house needed repairs, reducing its appraised valuation. These are all factors for the trial court to weigh when it considers an appropriate property settlement. By affirming the trial court, we do not suggest that Mark's arguments are improper or unavailing. We simply hold that the record supplies tenable bases for the court ruling as it did when it decided to reopen the settlement. Neither that ruling nor this appeal settles the merits of the dispute.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

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valuation of the pensions was important to adjudging the fairness of the settlement.

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.