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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 338274

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

LEE L. MACKESSY,

Appellant,

v.

RICHARD J. ALLINGER,

Respondent.

REPLY BRIEF OF APPELLANT

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I. STANDARD OF REVIEW

Respondent incorrectly informs the Court of the Standard of Review on this case. Respondent blanketly states that Appellant has the burden to demonstrate that the trial court manifestly abused its discretion. However, when the appellate court reviews a trial court's conclusions of law, it reviews the trial court's decisions de novo. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880 (2003). Appellant's appeal is largely based upon the trial court's incorrect application of Washington Law and its conclusions.

Appellant disputes only two findings of facts in this appeal which are found under Assignment of Error [2] wherein Appellant argues the Court's finding that the parties' previous legal representation disclosed and discussed the military retirement although both parties testified previous counsel did not, and the Court's finding that Respondent Allinger was still burdened by substantial debt taken in the 1998 dissolution despite evidence that the entirety of Respondent's unsecured debt taken in the dissolution was discharged in a bankruptcy just two years later. Furthermore, findings of facts are reviewed under the substantial evidence standard, not abuse of discretion. Respondent failed to respond or rebut any of Appellant's arguments relating to Assignment of Error [2].

It is important to note that neither party is disputing the Court's finding that Allinger's military retirement was not mentioned in any of the divorce documents and was not included in the final divorce documents. RP 153,13:25.

The remaining issues raised by Appellant are issues of law and to be reviewed under the de novo standard. The burden of proving the trial court abused its discretion is not applicable in this appeal.

II. ARGUMENT

A. Respondent Allinger's Argument that the Military Retirement was included in the "Everything Already Taken" provision is immaterial and irrelevant.

The trial court found that Respondent Allinger's military retirement was not mentioned or distributed in the parties' divorce in 1998. Respondent's argument that it was distributed under the provision "everything already taken" is moot as the trial court made a finding that it was not included in the provision nor in the dissolution. RP 153, 13:16. This finding is not being appealed or disputed. As the military retirement was not included in the dissolution and the divorce decree, it was not before the court and was undistributed by the court.

Further, there is no evidence to support the conclusion that it was included in "everything." Mackessy had left the military two years prior to the divorce with no intent to return so she could raise the parties' children.

There would be no military retirement for Mackessy as the parties knew her career in the military was over.

Additionally, the divorce decree is completely void of any mirrored language or catchall provisions for Mackessy that would support the argument that both parties agreed and contracted to each take their own military points at the time of the dissolution.

Therefore, all of Respondent's arguments from his brief stating that the military retirement was divided, which is the majority of his argument, is completely moot and irrelevant to this appeal as the trial court explicitly found that the military retirement was not included in divorce decree and therefore could not have divided and distributed by the Court.

B. Washington Law is clear that when a court does not dispose of community property in a dissolution decree, rights to such undistributed property vests in the spouses as tenants in common by operation of law.

It is undisputed that a portion of Allinger's military retirement is community property. The points accrued during the time of marriage are community property and Respondent has not disputed this fact or attempted to overcome the presumption.

The parties and the trial court all agreed that neither party believed Respondent's military retirement had any value at the time of the

dissolution. Therefore, the parties failed to include and distribute the military retirement in the dissolution.

Wherefore, under Washington Law, the rule is well settled that community property of the spouses not disposed of by a divorce decree vests equally in the parties as tenants in common. Pittman v. Pittman, 64 Wn.2d 735, 737 (1964). Once the trial court found that the military retirement was not included and not a part of the dissolution and divorce decree, as an operation of law the parties' rights immediately vested in the undistributed portion of military retirement as tenants in common.

It was an error of law by the trial court to conclude *both* that the military retirement was not included in the dissolution and that Mackessy had walked away from her rights to the retirement as her rights in the military retirement vested immediately as an operation of law. Once the trial court found the military retirement was neither mentioned nor distributed by the dissolution decree, the trial court had no other option than to allocate and determine the rights of the tenants in common through Mackessy partition action.[1]

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[1] Arguably, this is why Respondent Allinger is still attempting to argue the moot point that the military retirement was included in the "everything already taken" provision despite the Court's finding that the military retirement was not included in the dissolution because Washington Law is clear that if it is not distributed in the dissolution, the parties' rights vest by operation of law.

Respondent Allinger continues to remind the Court that Mackessy was not defrauded or ignorant to the existence of the military retirement at the time of the dissolution. However, this is yet again a red herring and an incorrect statement and application of Washington Law. The Washington Supreme Court unequivocally held that "**the reason why the court did not dispose of the community property in the divorce proceeding is immaterial.**" Olsen v. Roberts, 42 Wn.2d 862, 865 (1953) (emphasis added). It is immaterial whether the asset was disclosed or undisclosed. *Id.* The only material issue is whether or not the court disposed of the community property in the divorce proceeding. *Id.* In this case, the trial court found that the community property portion of Allinger's military retirement *was not disposed of* in the divorce proceedings. Wherefore, the parties' vested rights must be partitioned.

C. Respondent failed to address the Trial Court's improper application of legal defenses.

Petitioner Mackessy argues a third assignment of error by the trial court when it ruled that the defenses of waiver, laches, and promissory estoppel applied despite insufficient evidence at trial. Mackessy's argument has gone uncontested. Application of such defenses carry a high

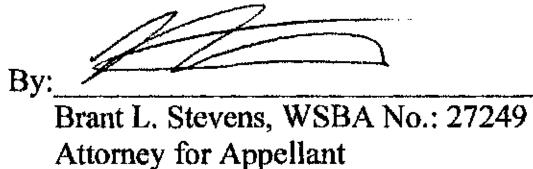
and arduous burden. Respondent Allinger failed to meet this high burden and provide sufficient evidence for the defenses to apply. [2]

Wherefore, as stated above, because the trial court found the military retirement was not included in the dissolution, the court must partition the property as no equitable defenses are applicable in this case.

III. CONCLUSION

Wherefore, Mackessy respectfully requests that the appellate court reverse the trial court's decision and grant Mackessy's Petition for Partition. Further, Mackessy respectfully requests this court to partition and award Mackessy an undisputed 17.5% separate proprty interest in Respondent's military retirement.

Respectfully Submitted this 7th day of July, 2016.



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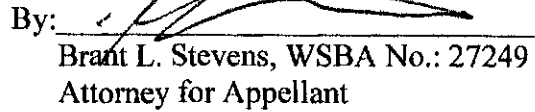
[2] In fact, Respondent and his counsel audaciously relied on the self-titled "smell test" defense rather than provide sufficient facts for the trial court to support the application of any equitable defenses. This "smell test" defense was nothing but a smoke screen in an attempt to cover up the fact that there was insufficient evidence presented at trial that met the high burden required by law for the equitable defenses of waiver, laches, and promissory estoppel to apply.

CERTIFICATE OF SERVICE

I, Brant L. Stevens, hereby certify that on July 7th, 2016, the following was personally served and true and exact copy of the foregoing Reply Brief to:

[X] Spencer Harrington
Harrington Law Office, PLLC
Attorney for Respondent Allinger
Spokane, WA 99201



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