DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 34064-3

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

Whitman County Superior Court Case No. 14-3-00042-3
The Honorable Steve Dixon
Superior Court Judge

APPELLANT'S OPENING BRIEF

In Re:

ELLEN DONEEN, PETITIONER

V.

JAMES DONEEN, RESPONDENT

Stenzel Law Office
Gary R. Stenzel, WSBA # 16974
Attorney for Appellant
1304 W. College Ave. LL
Spokane, Washington 99201
Stenz2193@comcast.net
(509) 327-2000

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I. FACTS

The Doneen's were an elderly couple who had been married since July 1969, for 45 years. RP 15. By anyone's standards this was an extremely long term marriage. Mr. Doneen was a farmer who received money from various sources related to some inherited farm land and work for local farmers. RP 23 lines 5-10, see also e.g. RP 82-84, 269-270 & 281. His land was and is prime dry land wheat ground in Whitman County and when all was said and done, totaled 235.41 acres. RP 187-189. Ms. Doneen worked for JC Penny's in Spokane and with Mr. Doneen for the farm. (RP 17-19, see also RP 73-74, 86-89 for example). Obviously her income from Penny's paid many bills and allowed Mr. Doneen to keep his farm land instead of having to sell it to make ends meet.

The "farm land" that was one of the primary subjects of the case came with a family farm home; the parties used this home for about half of their life together. RP 18-19, & 46. They also fixed that home up during their marriage. RP 98-99. Although the family home was part of the inherited farm land, the parties did express an opinion as to the value of the farm (however, Ms. Doneen's value was rejected by the court as she was neither an "owner" nor an appraiser). Mr. Doneen stated it was worth $50,000.00 (RP 248), which was later used by the court as its value. CP 069-079. No expert testified at trial as to the home's value. RP generally. There were also various items of personal property, some vehicles, a tractor, and a boat that was valued by testimony from Mr. Doneen. RP 199-200. There were no debts of this marriage. CP 069-079.

The parties also had a lot of different accounts, some of which were inherited from Mr. Doneen's parents and an aunt, Bernard. RP 102-103. Testimony elicited at trial indicated that there were accounts from American Equity, Ameriprise, Guggenheim, AG Edwards & Sons and a few more financial bases. RP 40-67, and 148-149.

Mr. Doneen testified that the "236" inherited acres had a value of $165,000.00. RP 190. However, the only expert on the valuation issue, the Whitman County head land appraiser, valued the land conservatively at between $2,000 and $3,000 an acre, with a midpoint of $2,500 an acre. RP 272-277. He also testified that similar land in the county was selling "like gangbusters" to big corporations at these values. *Id.*

At the close of argument and testimony, the judge took the matter under advisement and eventually sent out a written decision his ordered distribution of property and debts, without many findings. See CP 068-070. The first set of final papers was entered on the date of June 2nd, 2015. CP 076-079. Unfortunately, Mr. Doneen died of a heart attack on the date of June 9th, 2015. See CP 091-096. Ms. Doneen did not know about his death, and filed a Motion for Reconsideration as to the issues of maintenance and the disproportionate distribution of property, given the length of their marriage, on Monday June 11, 2015. CP 080-084. Then, although knowing about Mr. Doneen's death, his trial attorney filed a motion for reconsideration as well, also on the date of June 11, 2015. CP 085. Ms. Doneen objected to this motion since when it was filed, his attorney had no client, and did not request a substitution of the estate under CR 25. CP 097. Ms. Doneen's

objection came in the form of a motion to strike that motion for reconsideration See CP 097-098.

The court eventually heard the competing motions, denied the motion to strike and the wife's motion for reconsideration and partially granted the "Petitioner's" motion for reconsideration as outline in the new Decree on Reconsideration. CP 116-124. This final amended distribution was as follows:

Property to be awarded to Ms. Doneen:

1. 2006 Mazda - $3,325;
2. White truck - $1,200;
3. Dodge Lancer - $ $2,000;
4. US Bank account - $1,697;
5. Amer West account - $ 2,420;
6. MFS account - $4,034;
7. STCU account - $2,111;
8. Amer Equity account 021- $81,250;
9. STCU savings - $135;
10. Any pension or social security she earned;
11. Amer Equity account 976 - $225,000 of that account;
12. Loan to his daughter (unknown amount)

Pet. Final Total - $323,172

Property to be awarded to Mr. Doneen:

1. Tractor - $2,000;
2. 1970 International - $500;
3. GMC pickup - $1,500;
4. 1987 Plymouth - $500;
5. Horse trailer - $500;
6. Bailer - $200;
7. Shop tools & welder - $5,800;

8. Compressor/drill press - $250;
9. Boat - $24,000;
10. Thunderbird – unkown value;
11. Any pension or social security he earned;
12. All of US Bank accounts 4069 & 2477 to date of trial (no value determined);
13. Residence & farm land located in Whitman County, Washington (residence at $50,000, Shop at $25,000, acreage at $2,500 per acre);
14. Disc, nominal value;
15. Ameriprise account - $21,755;
16. First Invest. account - $6,299;
17. Guggenheim account - $14,928;
18. Wels Fargo account - $10,017;
19. Amer Eq account 976 - $20,578 ($245,578 minus $225,000 to wife);
20. Amer Eq account 972 - $72,694;
21. Amer Eq account 489 - any remaining balance;
22. Amer Eq account 682 - $7.964;
23. Amer Eq account 483 - $7,240;
24. Amer Eq account 642 - $2,353;
25. Amer Eq account 029 - $7,580.

Sub-Total Amt = $281,658 w/o land

Land = $588,525

Resp. Final Total - $870,183

Maintenance was also not ordered. See CP 116-124. The granting of the deceased Respondent's motion for reconsideration had a net effect on the Petitioner as follows: Mr. Doneen was awarded the Tractor ($2,000.00) and all of the amounts in the U.S. Bank accounts 4069 and 2477 as opposed to half in the original decree.

II. Assignments of Error[1]

It is the Appellant's contention that the Judge errored in the following manner:

1. By failing to leave both parties in a somewhat equal financial situation at the end of the case, even though they had an extremely long term marriage;
2. By failing to recognize that the deceased Respondent's trial attorney had no client when he filed the motion for reconsideration "on behalf of Mr. Doneen";
3. By failing to strike the Respondent's trial attorney's motion for reconsideration in the face of his filing that reconsideration motion two days after his client died, and there was no attempt to have the court sign even an ex-parte emergency order substituting Mr. Doneen's estate under CR25 before accepting the belated motion for reconsideration.
4. By exacerbating the disparate property division by granting reconsideration for the Respondent's estate's position;
5. By failing to outline in the Findings of Fact and Conclusions of Law the basis for such a disproportionate distribution, i.e. 27% Ms. Doneen versus 73% Mr. Doneen, even though the length of the marriage was very long term (46 years) and both parties had health problems;

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[1] The Appellant would have noted error regarding the issue of maintenance, however, given Respondent's death, that issue is moot.

6. By entering deficient Findings of Fact and Conclusions of Law regarding the property distribution and why it was ordered the way it was ordered.

III. Law and Argument

A. The case of *In re Marriage of Rockwell* and others stand for the proposition that any marriage over 25 years is a long term marriage and that the trial judge has an "ultimate duty" to put both parties in roughly equal financial positions for the rest of their lives in their decision.

Although it is clearly understood that a trial judge has broad discretionary powers in a dissolution of marriage case (See *In re Marriage of White*, 105 Wn.App. 545, 549, 20 P.3d 481 (2001)); however, in a case involving a long term marriage of 25 years or more, the trial judge's discretion is much different than a shorter termed marriage, in such a case the judge where the judge is faced with a long-term marital dissolution matter he or she is directed to place both parties in roughly equal financial positions for the rest of their lives. *In re Marriage of Rockwell*, 141 Wn.App. 235, 170 P.3d 572 (Div. 1 2007); see also e.g. *Washington Family Law Deskbook*, § 32.3(3) at 17 (2d. ed. 2000); and *Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321 (1909); stand for the proposition that the court has an "ultimate duty to make a fair and equitable division under all the circumstances" when there is a long term marital dissolution matter before them. In addition, our courts have almost put this on a continuum in that the longer the marriage, the more the court should try and equalize their financial situations, especially if they are both unemployed and have health problems. Finally, when applying the *Rockwell* and *Sullivan*

standards, all property is before the court for distribution. *In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011).

In this case, there is no question that this was a "long term marriage" (45 years, see RP 4), both parties also had health problems. Ms. Doneen, had blood clots and could not even mow her lawn, nor work a job anymore. See RP 15, 53, & 106. Mr. Doneen had had heart attacks and was a cancer survivor, but thought he was "capable". See RP 173.

This case had what appears to be more separate property than community, although many of the alleged separate property accounts were in both names. See RP's generally. Nevertheless, Mr. Doneen was awarded $870,000+ in property value (conservatively), plus the home the parties had lived in for years and a lot of personal property of value, versus $323,000+ for Ms. Doneen, who was left without a home. CP 69-79. This extensively uneven financial distribution takes on a very telling perspective when the only land appraiser testified that the largest piece of property (which was awarded to Mr. Doneen) was easily sold for up to $3,000.00 an acre. When the highest value of this land and structures is added to the other cash and assets that the judge gave to Mr. Doneen, his total property would be worth just under 1 million dollars or $986,658.00.

The judge provided no reasoning for not attempting to "equalize" their financial situations, other than a hint that he gave Ms. Doneen cash from Mr. Doneen's "separate property" accounts. CP 068-070. He did not explain why their respective financial positions were not even attempted to be even roughly equalized. *Id.* It was as if the judge considered this as a probate or will contest

where Mr. Doneen was going to receive his separate property ground and property without even considering the impact on Ms. Doneen's future and past efforts to support this marriage during their 45 years together.

As indicated, now Ms. Doneen lost a home to live in she would have to use a lot of her cash for a place to live, while Mr. Doneen had little impact on his lifestyle.

Ms. Doneen feels that this distribution is an unfair distribution that did not by any stretch of the imagination meet the *Rockwell* case standards, under the facts of this case. This decision should be remanded to order a more equalized distribution of assets and cash.

B. When Mr. Doneen died his trial attorney was automatically without authority to act for his former deceased client.

When a party dies during a case, their current attorney is left without an individual to represent. *See e.g. Barker v. Mora,* 764 P.2d 1014, 52 Wn.App. 825 (Wash.App. Div. 1 1988). The court rule CR 25 deals with what to do when a party dies during a case and is very clear as to what needs to be done to keep the case alive. Section 1 of this court rule indicates that someone on behalf of the deceased's estate can file a motion to have the estate substituted for the deceased so that any motions can be filed. This was not done in this case and so the Respondent's trial attorney was without any authority to file anything on behalf of the deseased. *Id.*

Upon the death of Mr. Doneen this case was abated (unless a CR 25 order is entered). See *e.g. In re Gordon v. Hillman,* 109 Wash. 223, 232-33, 186 P. 651 (1919); and *Barker v. Mora,* 764 P.2d 1014, 52 Wn.App. 825 (Wash.App. Div. 1

1988) which said, "[at] common law, all actions pending abate upon the death of a necessary party. If the cause of action was one that did not survive, death finally ended the action; but if a cause of action was one that did survive, a new action by or against the personal representative of the deceased party was necessary to prosecute the remedy," obviously referring to CR25. *Id.* (emphasis added).

C. Since no CR25 order substituting the estate for Mr. Doneen in this case was entered on Monday June 11, 2016, there was no party to file the reconsideration motion that day, therefore, it could not be considered timely under the rules and, since the entire case abated upon his death, and the final decree was entered after his death, the amended decree was of no affect.

CR 59 requires that a motion for reconsideration be filed on or before 10 days have expired since the date of entry of the final orders. Section (b) states:

> (b) **Time for Motion; Contents of Motion.** A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

The filing of a Motion for Reconsideration is to be done within 10 days after the final orders are entered. Since Mr. Doneen no longer was alive, no one but his estate could file such a motion pursuant to CR 25. As indicated earlier, this required a order to be entered allowing the substitution of the estate in, within that time frame. Such a motion likely would not have been objected to even if it was done by phone long distance. (See CP records generally) However, this was not

done in a timely manner; therefore, the Respondent's trial attorney was without authority to unilaterally file this reconsideration motion.

Case law on Rule 59 motions is very specific and if the proper procedure is not followed there is no basis for the motion, since strict compliance is required. For example, filing a Motion for Reconsideration based simply on the date of a memorandum opinion early does not trigger the 10 days' requirement. *See e.g. In re Marriage of Tahat,* 334 P.3d 1131, 182 Wn.App. 655 (Wash.App. Div. 3 2014).

The next question is whether or not the Respondent's trial attorney, having a signed declaration by his former client, gave his attornrey the right to file his declaration with a motion on the 11th. The answer to this question is no, since on the 11th, the attorney had no client to file this motion for and had no authority to do so. Therefore, this motion for reconsideration was ineffective to accomplish what they had originally intended, and should never have been allowed by the court. Since the entire reconsideration motion granted only what Mr. Doneen's trial attorney argued in their motion for reconsideration, all of those decree modifications should be stricken and have not been ordered.

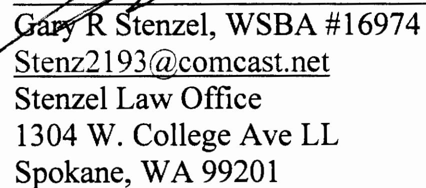
IV. Conclusion

This was a long term marriage of 45 years. They acquired over 1.3 million dollars in land, property and cash, not counting social security benefits. The court gave Ms. Doneen about 25% of this property, leaving her without a place to live, ill health, and only enough money to possibly buy a new house. While the husband Mr. Doneen received over 75% of the property which included liquid assets, a large expensive boat, 235.41 acres of prime Whitman County wheat land worth as much

as $700,000.00, and which was highly marketable, along with a lot of cash and the home the family occupied for half of their marriage.

Ms. Doneen requests that the court rectify this decision and order a more equal division to place the parties on substantially the same economic plane for the rest of their lives. Additionally, the Appellant asks the court to vacate any orders entered granting any reconsideration motion filed by Mr. Doneen's trial attorney, allegedly for him, since he died two days before that reconsideration was filed, and no CR25 order was entered allowing that motion to be timely filed.

Respectfully submitted on this 17th day of August 2016 by:

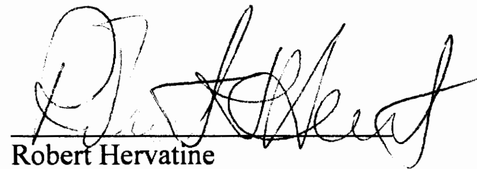


Gary R Stenzel, WSBA #16974
Stenz2193@comcast.net
Stenzel Law Office
1304 W. College Ave LL
Spokane, WA 99201

Declaration of Mailing

I, Robert Hervatine, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on August 17, 2016, a copy of this opening brief was delivered by mail to the office of Mathew Purcell, Purcell Law, 2001 N. Columbia Center Blvd., Richland, WA 99352-4847.

Dated this 17th day of August 2016.



Robert Hervatine