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No. 72063-5
Whatcom County Superior Court No. 13-3-00205-1

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

In re the Marriage of:

GILLIAN K. HOPSON fka BEN-ARTZI,
Petitioner-Respondent,

v.

DR. ERIC N. BEN-ARTZI,
Respondent-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR WHATCOM COUNTY

The Honorable Deborra Garrett, Judge

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. REPLY ARGUMENT.....	1
A. HOPSON’S MOTION TO DISMISS SHOULD BE DENIED	1
B. THE TRIAL COURT DID NOT HAVE A SUFFICIENT BASIS TO RESTRICT DR. BEN-ARTZI FROM TAKING THE CHILDREN TO ISRAEL	3
C. THE TRIAL COURT MADE SEVERAL ERRORS IN DIVIDING THE POTENTIAL PROCEEDS FROM DR. BEN- ARTZI’S PENDING LAWSUITS.....	6
1. The Potential Award From The SEC was Not Subject to Division at all Because It is Not Property but Rather a Mere Expectancy	6
2. The Trial Court Failed to Take Into Account Dr. Ben-Artzi’s Post-Separation Efforts to Further The Litigation	8
D. IF THE TRIAL COURT INTENDED DR. BEN-ARTZI TO PAY FOR A LIFE INSURANCE POLICY IN FAVOR OF MS. HOPSON, THAT WOULD BE AN ABUSE OF DISCRETION	9
E. THE LARGE AWARDS OF MAINTENANCE AND ATTORNEY FEES CONTRIBUTED TO AN UNREASONABLE OVERALL FINANCIAL BURDEN ON DR. BEN-ARTZI	10
F. THE COURT SHOULD NOT ORDER DR. BEN-ARTZI TO PAY MS. HOPSON’S ATTORNEY FEES ON APPEAL	10
III. CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<i>City of Seattle v. Klein</i> , 161 Wn.2d 554, 166 P.3d 1149 (2007).....	1
<i>Estate of Duxbury</i> , 175 Wn. App. 151, 304 P.3d 480 (2013).....	6
<i>Katare v. Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012), <i>cert. denied</i> , 133 S.Ct. 889, 184 L.Ed.2d 661 (2013).....	3
<i>Pike v. Pike</i> , 24 Wn.2d 735, 167 P.2d 401 (1946).....	1, 2, 3
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	1
<i>State v. Hoa Van Tran</i> , 149 Wn. App. 144, 202 P.3d 969 (2009), <i>opinion after reinstatement of appeal</i> , 155 Wn. App. 1016 (2010).....	2

I.
INTRODUCTION

To avoid repetition, Dr. Ben-Artzi will not respond to Ms. Hopson's arguments when they are fully covered in the opening brief.

II.
REPLY ARGUMENT

A. MS. HOPSON'S MOTION TO DISMISS SHOULD BE DENIED

Ms. Hopson relies on *Pike v. Pike*, 24 Wn.2d 735, 167 P.2d 401 (1946), a 70-year-old case. In *Pike*, custody of the children was awarded to the father, but the mother absconded with the children and refused to reveal her whereabouts. The Supreme Court concluded that the appeal should be dismissed unless the mother returned the children to the father within a specified time.

The current validity of *Pike* is questionable because it relied on criminal cases holding that an appellant who absconds from the jurisdiction waives his right to appeal. *See id.* at 741-42. More recently the Washington Supreme Court has held that waiver can apply only if the criminal defendant was warned in advance that he could face that consequence. *See City of Seattle v. Klein*, 161 Wn.2d 554, 166 P.3d 1149 (2007); *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006); *State v. Hoa Van Tran*, 149 Wn. App. 144, 202 P.3d 969 (2009), *opinion after*

reinstatement of appeal, 155 Wn. App. 1016 (2010). Dr. Ben-Artzi received no such advance warning.

In any event, the facts of *Pike* are quite different from those presented here. Dr. Ben-Artzi did not abscond with the children. He has merely failed so far to pay the full financial obligations ordered by the Court. As Ms. Hopson notes, he did pay \$15,328.35 of the \$22,695.00 ordered as of July 11, 2014. CP 282.

Further, unlike the appellant in *Pike*, Dr. Ben-Artzi has not been out of touch with Ms. Hopson or with the Court. In his declaration of July 22, 2014, he explained that he was still out of work and could not make full payments. CP 301-304. “I am actively looking for a job with compensation in a range which will allow me to make the full monthly payments of nearly \$5000.” CP 302. In a declaration filed on November 24, 2014, he confirmed that he had “found an excellent job in Israel.” He stated: “I will separately file my Israeli address under seal with the Court once the move is complete. I have not abandoned my children, nor am I in hiding.” Supp. CP¹ ____ (Dkt. 245 at p. 2, Responsive Declaration of Eric Ben-Artzi filed November 24, 2014). As the *Pike* Court noted, an appeal should not be dismissed merely because the appellant is in contempt of the

¹ A supplemental designation of clerk’s papers is being filed with the Whatcom County Superior Court.

trial court's orders. *Id.* at 741, discussing *Vosburg v. Vosburg*, 131 Cal. 628, 63 P. 1009 (1901).

Further, the procedures set out in *Pike* have not been followed here. In *Pike* the respondent first obtained an order to show cause why the appeal should not be dismissed. No such order has been sought in this case.

B. THE TRIAL COURT DID NOT HAVE A SUFFICIENT BASIS TO RESTRICT DR. BEN-ARTZI FROM TAKING THE CHILDREN TO ISRAEL

Ms. Hopson cites *Katare v. Katare*, 175 Wn.2d 23, 283 P.3d 546 (2012), *cert. denied*, 133 S.Ct. 889, 184 L.Ed.2d 661 (2013), for the proposition that certain “risk factors” related to abduction can be considered by the trial court. In that case, however, an expert witness analyzed various factors appropriate to that case, and reached a conclusion from them. The Supreme Court did not suggest that a trial court could decide for itself how to identify and evaluate risk factors. *Id.* at 38-42.

Ms. Hopson cites as “findings of fact” various statements in paragraph 3.8 of the Findings of Fact and Conclusions of Law (CP 225-26). That paragraph includes both findings and conclusions without specifying which are which. That the father is a “flight risk with the children” is not a finding of historical fact but rather a legal conclusion. The same is true of the statement that Dr. Ben-Artzi would “likely violate

any court order to permit travel.” RP 110. These legal conclusions are reviewed de novo.

Ms. Hopson quotes a portion of her testimony that, after she relocated to Ohio, Dr. Ben-Artzi began “repeatedly disrupting the children’s schedule and school.” RP 110.² But she gave no example other than August 2, 2013, the day after Dr. Ben-Artzi arrived in Ohio. She stated that he insisted on taking the children out of day care/summer camp to be with him. He had trouble convincing the school staff to give him the children because Ms. Hopson had not provided any information to the school about him. RP 110-11.

At trial, Ms. Hopson’s lawyer stated that the temporary parenting plan signed on July 26, 2013, prohibited residential time on that day. Supp. CP ___ (Dkt. 48 at p. 1, Temporary Parenting Plan filed July 26, 2013). But that document applied only to residential time beginning on September 1. The only prior ruling regarding residential time was contained in the order granting relocation. It stated that “the Mother’s Proposed Parenting Plan is in the children’s best interest and should be

² Hopson also cites to RP 82 and 83 for that quote, but there is nothing about that issue at those pages.

approved.” CP 36.³ That plan, which was never formally adopted, assumed that Dr. Ben-Artzi would continue to reside in Washington. “Therefore there is no regular schedule.” Supp. CP ____ (Dkt. 14 at para. 3.1, Proposed Parenting Plan filed May 1, 2013). The plan did provide for the parties to have visitation with the children when they were in the other’s state, as long as reasonable notice was given. Supp. CP ____, Dkt. 14 at 3.4. Under the circumstances, Dr. Ben-Artzi was not being “dishonest” when he said there was no plan in place on August 2, 2013. It was not at all clear that the courts had made provisions for residential time in Ohio prior to September. Notably, he did not attempt to pick up the children when he arrived on August 1, but rather on Friday, August 2. That complied with the spirit of Ms. Hopson’s proposed parenting plan, as well as the plan to go into effect in September, because both plans provided that Dr. Ben-Artzi could pick up the children on Fridays. At worst, there was a lack of communication regarding when Dr. Ben-Artzi would arrive in Ohio.

Ms. Hopson did testify that Dr. Ben-Artzi canceled some visits with the children. Her own attorney, however, conceded that Dr. Ben-

³ The order also made some special provisions for the children to spend time with their father shortly before the mother’s move to Ohio. CP 37. That Dr. Ben-Artzi timely returned the children to Ms. Hopson, despite his strong objection to relocation, shows that he is not inclined to keep the children away from their mother.

Artzi “has been seeing the boys pretty much on schedule.” RP 29-30. In any event, a failure to exercise parenting time hardly suggests an inclination to deprive the children of their residential time with the mother.

As noted in the opening brief, Dr. Ben-Artzi has not disputed – either in his written testimony at trial or in this appeal – the amount of residential time awarded to him. His only concern is with financial issues.

C. THE TRIAL COURT MADE SEVERAL ERRORS IN DIVIDING THE POTENTIAL PROCEEDS FROM DR. BEN-ARTZI’S PENDING LAWSUITS

1. The Potential Award From The SEC was Not Subject to Division at all Because It is Not Property but Rather a Mere Expectancy

In the opening brief, appellant explained that a potential whistleblower award from the SEC is not subject to division because it is a mere expectancy rather than a property right. *See* Opening Brief at 11-14. Hopson argues that *Estate of Duxbury*, 175 Wn. App. 151, 304 P.3d 480 (2013), is to the contrary, but in fact that case did not address the issue at all. *Duxbury* involved a potential qui tam award under the federal False Claims Act (FCA). *Id.* at 155. The issue was whether the decedent’s property right accrued when he first learned of the false claim (prior to marriage) or when he filed a qui tam lawsuit (after marriage). *Id.* at 156. Neither side suggested that the potential award was a mere expectancy. “Here, the parties do not dispute that Mark’s qui tam action is a property

interest that is subject to distribution as separate or community property.”

Id. at 161-62.

That is not surprising because an FCA proceeding is quite different from an SEC whistleblower action. Under the FCA, a private person may file a qui tam suit as the “relator” or “informer.” If the federal government intervenes, the relator continues as a party to the action. If the federal government declines to intervene, the private party may continue the suit on his own. If the suit is successful, the relator is automatically entitled to a percentage of the proceeds recovered. *Id.* at 166-67. The federal courts have characterized the qui tam provisions as an enforceable contract between the government and the relator. *Id.* at 167-68. Thus, the relator has a property right, although it is contingent on the success of the litigation.

In an SEC whistleblower action, however, the informant is entitled to nothing unless the SEC, in its sole discretion, decides to impose sanctions of at least \$1 million on a financial institution, and determines that the informant provided “original information.” The informant cannot file his own suit against the financial institution and cannot sue the SEC for declining to impose sanctions. *See* Opening Brief at 13, 21. Thus, the informant has no property right at all unless and until the SEC chooses to take the necessary steps.

The other cases cited by Hopson on this issue establish only that a contingent future interest, such as the potential proceeds from a lawsuit, may be divisible property. But in all those cases, the party had an enforceable, legal right to the property as long as certain conditions were met. Here, Dr. Ben-Artzi's possibility of an award is based solely on the whim of the SEC. It is therefore a mere expectancy. Dr. Ben-Artzi concedes, however, that his OSHA claim for wrongful termination is a contingent future interest which can be divided in a dissolution. *See* Opening Brief at 14-19.

2. The Trial Court Failed to Take Into Account Dr. Ben-Artzi's Post-Separation Efforts to Further The Litigation

Ms. Hopson does not dispute that post-separation efforts to further the litigation are entitled to reimbursement. She maintains, however, that the trial court properly rejected such reimbursement because there was insufficient proof of those efforts. In fact, in his written testimony, Dr. Ben-Artzi discussed those efforts at length. *See* Opening Brief at 21-23. Further, Ms. Hopson herself testified that Dr. Ben-Artzi was focused on his litigation to a fault. RP 76-82.

Ms. Hopson's true complaint is that Dr. Ben-Artzi failed to provide sufficient details of his efforts. But that is no reason to deprive him of his right to reimbursement. After all, he will not receive any reimbursement

at the conclusion of the litigation without proof of his efforts and expenditures. If he fails to provide sufficient proof at that stage, the superior court would be justified in denying reimbursement.

Ms. Hopson speculates that the trial court denied reimbursement as a form of discovery sanction, but she does not cite to any such ruling by the trial court and undersigned counsel cannot find any.

D. IF THE TRIAL COURT INTENDED DR. BEN-ARTZI TO PAY FOR A LIFE INSURANCE POLICY IN FAVOR OF MS. HOPSON, THAT WOULD BE AN ABUSE OF DISCRETION

Ms. Hopson maintains that the trial court ordered Dr. Ben-Artzi to pay for a life insurance policy with Ms. Hopson as the beneficiary. While there is such language in one paragraph of the Findings of Fact and Conclusions of Law, the next paragraph states that Ms. Hopson must pay the premiums. The decree of dissolution also states that the policy is at Ms. Hopson's expense. *See* Opening Brief at 31-32.

It appears that that the trial court intended to place the burden of payment on Ms. Hopson since the Court repeated that twice in two different documents. But even if the Court intended that Dr. Ben-Artzi should pay, this Court should find such a ruling to be an abuse of discretion in view of the many other burdens placed on him. In the alternative, this Court should remand to the trial judge for clarification.

E. THE LARGE AWARDS OF MAINTENANCE AND ATTORNEY FEES CONTRIBUTED TO AN UNREASONABLE OVERALL FINANCIAL BURDEN ON DR. BEN-ARTZI

Ms. Hopson addresses the maintenance award on its own. But Dr. Ben-Artzi's argument was based on the cumulative effect of numerous, crushing financial burdens placed on him.

F. THE COURT SHOULD NOT ORDER DR. BEN-ARTZI TO PAY MS. HOPSON'S ATTORNEY FEES ON APPEAL

Ms. Hopson maintains that Dr. Ben-Artzi should pay her legal fees on appeal because he has the ability to pay. As the briefing shows, however, Dr. Ben-Artzi has been out of work until very recently, and he already owes an astronomical amount in view of the trial court's harsh rulings.

Ms. Hopson also seeks fees based on Dr. Ben-Artzi's "intransigence" on appeal. The Court should find, however, that the appeal issues are well taken. A considerable amount of money is at issue regarding the SEC and OSHA actions, and the trial court's division of the potential proceeds favors Ms. Hopson on nearly every issue. Further, the appeal is hardly frivolous since it raises issues of first impression. These include the proper characterization of an award for punitive damages and whether an award from the SEC is a contingent future interest or a mere expectancy. Ms. Hopson's own expert conceded that both issues were of

first impression. CP 124-126. Regarding the SEC matter, the best he could offer Ms. Hopson was that “it would not stretch the imagination to describe it as a contingent future interest in property” rather than an expectation. CP 126. With potentially millions of dollars at stake it is not unreasonable to seek an appellate ruling on these pure issues of law.

Dr. Ben-Artzi might not have appealed some of the other rulings if they were the only matters at issue. But there is an efficiency in raising them once the process of an appeal is already under way. Clearly, Dr. Ben-Artzi is not taking a “kitchen sink” approach since he has not appealed the parenting plan at all.

III. CONCLUSION

Based on the foregoing argument, this Court should reverse the trial court and remand for further proceedings.

DATED this 17th day of December, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served one copy of this brief by email on the following:

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