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NO. 34165-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS A. OLSON, Appellant,

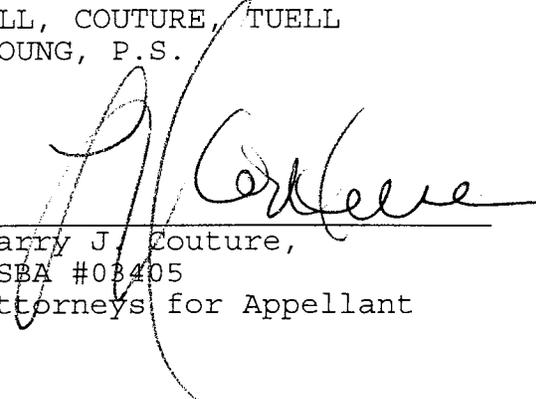
vs.

SANDRA LYNN KRAUSE-OLSON, Respondent

OPENING BRIEF OF APPELLANT THOMAS A. OLSON

TUELL, COUTURE, TUELL
& YOUNG, P.S.

By


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I. ASSIGNMENTS OF ERROR

Assignment #1. The trial court erred in imposing terms for the trial subpoena served in this case;

Assignment #2. The trial court erred in awarding attorney fees to the Petitioner for trial.

Assignment #3. The trial court abused its discretion in determining that each party should be awarded a portion of the value of the Neomedia stock.

Assignment #4. The trial court abused its discretion and there was no substantial evidence to find that Mr. Olson had \$16,000 of household goods in his possession or that he should pay \$8,000 for items purchased by Sandra Krause-Olson several months after the date of separation of the parties.

II. STATEMENT OF THE CASE

On August 14, 1999 the parties to this action were married. (RP 52). When they married Sandra Kraus-Olson was a school teacher holding a Masters Degree (RP 59) and Tom Olson was a trooper with the Washington State Patrol who was promoted to Sergeant in 2000 or 2001 (RP

56). The parties separated at the end of June, 2004 (RP 52, CP 59) and at the time of trial Ms. Krause-Olson was working in the Snohomish School District for a salary of \$49,000.00 a year. (RP 60). At the time the parties separated she was employed with the Franklin Pierce School District and had a salary of \$58,000.00 and was offered a contract renewal, which she turned down in order to go to Snohomish County. (RP 161-162) The parties had no children (CP 60) and separated just short of 5 years after marriage.

When the parties were married, as in all marriages, there was a division of responsibility between partners. Mr. Olson took care of the finances, paid the bills and made various investments for the parties and did most of the yard work and maintenance of the property (RP 53). Ms. Krause-Olson handled the house cleaning, cooked and was more domestically involved (RP 53).

Even though Mr. Olson handled the finances it was clear that Ms. Krause-Olson was included

in the purchases and had complete access to all financial documents while they were together.

(RP 176)

After telling Ms. Krause-Olson that he wanted a dissolution the parties separated with Ms. Krause-Olson taking whatever she wanted from the home. Indeed, even after moving into an apartment Ms. Krause-Olson would periodically return to the family home and remove items she wanted.

When she moved she bought furniture and paid for deposits on utilities. In all, she spent about \$8,000.00 and still has either the furnishings or the returned deposits, having subsequently moved from the Pierce County area to the Snohomish County area in order to work.

Mr. Olson attempted to increase the family income by purchasing various items with the intent to invest. He bought stock in a company known as Neomedia. This stock was sold in early 2004 and there was a gain of about \$12,000. Ms. Krause-Olson denied knowledge of what happened with this money but Mr. Olson clearly testified

that the money was spent to purchase \$10,000 of stock in Quatophonic and the balance was used for other community purposes. Nonetheless, the court awarded the non-existent stock value to each party but required to Mr. Olson to pay \$6,000 to Ms. Krause-Olson (RP 456).

Mr. Olson was in the process of perhaps starting a company to provide security for a mining operation which was to occur in Peru, the Machu Pichu project. Over the course of time Mr. Olson spoke to some family members about this venture and candidly answered their questions about the investment that he and Ms. Krause-Olson were making. He also put these friends and family members in contact with a principle in the company who apparently sold them stock interests in Machu Pichu. In some instances the money was funneled through Mr. Olson. (RP 289-292; 293-296)

After the separation of the parties someone notified the State of Washington of the above and a complaint was filed by the State Securities Department claiming that Mr. Olson

engaged in the sale of stocks without a license. A claim for monies was pending at the time of the dissolution in the sum of \$30,000. If there is any monetary penalty determined to be owed the entire amount was ordered to be paid by Mr. Olson without any offset for the risks that had occurred (RP 448).

Various trips were taken to Peru in an effort to obtain what would have been a very lucrative return on their investment (RP 290-291, 292-294). Unfortunately, those efforts had not borne fruit at the time of the dissolution. All debt associated with this venture was allocated to Mr. Olson. However, large community debts were incurred in an effort to improve their economic future.

Prior to trial a motion to suppress discovery was made and granted by the trial court. Requested fees for that motion were denied by the trial court (CP 3-8). Mr. Olson's attorney then issued a trial subpoena duces tecum to Ms. Krause-Olson requiring that she bring documents to trial. A pretrial motion was

held to suppress this subpoena duces tecum and that motion was granted with terms (CP 55-57). The terms included all attorney fees for the previously denied fees as well as for suppression of the trial subpoena.

Trial was commenced and the indication was that it would take about 2 days. Unfortunately, while the trial took a little over two court days there were numerous delays caused by the trial court taking other matters and halting testimony early on one day in order to prepare for her motion calendar. When the trial was concluded and the parties returned for presentment a request for attorney fees was made by Ms. Krause-Olson which included the waiting time both parties endured because of the delays caused by the court. Additionally, there was no showing that there was any need for fees or that Ms. Krause-Olson was unable to provide for her own fees from her own resources. While there was an allegation by Ms. Krause-Olson's attorney of intransigence on the part of Mr. Olson there is no evidence of such intransigence and, more

importantly, no finding of such conduct on Mr. Olson's part.

III. ARGUMENTS OF LAW.

A) The Division of Property and Allocation of Debt were unreasonable and arbitrary.

It is acknowledged that the Court of Appeals will not overturn a trial court's award and allocation of assets and debt unless the same is arbitrary and unreasonable, provided there is substantial evidence to warrant the award. " Trial court findings of fact that are supported by substantial evidence will be upheld. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). When the evidence at trial is clearly one way it is respectfully contended that a trial court award which ignores that evidence is unreasonable and arbitrary. Factually, the following is clearly established by testimony: Ms. Krause-Olson had access to all of the marital property of the parties after the separation and it was her choice and not a necessity that she purchase new furniture (RP 165-168; RP 312). In fact, from June 20th until sometime after the 24th of August Ms. Krause-Olson

had access to the house and was allowed to take anything that she chose to remove. It was unnecessary for her to purchase new items when she moved to Snohomish County. (RP 165-168). Included in her post physical separation expenditure of \$8,000 were amounts for deposits for utilities and the like. (RP 168-169). The amount of these deposits were never revealed but were uniquely in the possession of the wife. To award her the \$8,000 against Mr. Olson is unreasonable and outside the evidence, especially when it is remembered that she retained the assets purchased with the money and no offset for value was established.

The court determined that the value of household goods in the home attributable to the husband was \$16,000 and yet there was no evidence that anywhere near that amount of value was present. In fact, the wife testified that she had no idea of the value and the husband placed the value at around \$3,000 (RP 313). It was an abuse of discretion to allocate \$16,000 of value to the husband based upon the testimony.

The same circumstance prevails as it relates to the non-existent stock in Neomedia. The undisputed testimony is that this stock was sold months before the separation (RP 128) and the money received was used to purchase other stock and for family purposes. A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. (*Thomas*)

Prior to trial additional discovery was attempted by Mr. Olson, through his attorney. Ms. Krause-Olson objected and sought a protective order prohibiting the discovery and a hearing was held. The court, after considering declarations, the file and arguments entered an order granting the protective order but denying attorney fees. (CP 39)

In preparation for trial Mr. Olson, again through his attorney, filed a trial subpoena duces tecum (RP 10) requesting that the Petitioner bring certain documents with her if trial was held. By pretrial motion Ms. Krause-Olson requested that the subpoena be stricken and she be awarded fees. The motion was granted (even though subsequent

statements by the trial judge questioned the failure of certain documents that were requested in the subpoena from being introduced at trial) and attorney fees were awarded to Ms. Krause-Olson. These fees included the previously denied fees. (CP 53). While the admission of evidence is within the discretion of the trial court it is contended that sanctions are inappropriate where the evidence sought was legitimately requested and bore specifically on issues at trial. Hence, to impose the terms to begin with was error but to include attorney fees for matters that had previously been heard and fees denied is an abuse of discretion.

B.) ATTORNEY FEES FOR TRIAL SHOULD NOT BE AWARDED:

RCW 26.09.140 governs the award of attorney fees for trial in domestic cases.

It is an abuse of discretion for a court to award attorney fees to a party who has the ability to pay. *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997)

Further, the trial court must indicate on the record the method used to calculate the award of attorney fees. *Foley*, supra.

In this case the court never articulated the method used to determine the fees, never made a finding as

to why fees were appropriate and never considered the factors in determining need and ability to pay. However, a quick look at the award of property clearly shows that the parties received about the same value of property (without considering debt which was heavily given to the husband), both parties were employed and capable of earning substantial income, that the Petitioner had taken a new job after the separation of the parties at a significantly lesser pay and was more than able to pay her own attorney fees. Simply put, there is no justification for the award of attorney fees to the wife in this case.

Even if there was a claim of intransigence there is no evidence of such conduct. In April there was a determination that Mr. Olson failed to answer interrogatories promptly and terms were imposed and paid (CP 8). The next time a matter came to court was the motion for a protective order which resulted in no fees (CP 39). It is not intransigence not to be able to settle cases,

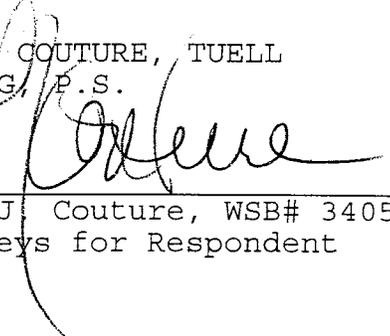
especially where the parties have different ideas as to values and the manner they think items should be distributed.

IV. CONCLUSIONS

It is respectfully submitted that this matter should be remanded with instructions to delete the requirement for the payment of attorney fees and terms and to recalculate the values of property by deleting from consideration the Neomedia stock, elimination of the requirement that Mr. Olson pay \$8,000 for property that the wife bought and currently owns and to reset the value of the household goods awarded to Mr. Olson at \$3,000, the only evidence presented to the court with actual values.

DATED at Tacoma, Washington, this 14th day of July, 2006, and respectfully submitted.

TUELL, COUTURE, TUELL
& YOUNG, P.S.

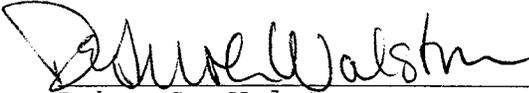
By 
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CERTIFICATE OF SERVICE

Debra L. Walston, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 14th day of July, 2006, I sent a true and correct copy of the following document: Opening Brief Of Appellant Thomas A. Olson, via ABC-Legal Services, to the attorneys for Sandra Lynn Krause-Olson:

Csilla Muhl
Joseph Rehberger
Attorney at Law
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, WA 98402

Signed at Tacoma, Washington, on the 14th day of July, 2006.


Debra L. Walston

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