

FILED
NOV 16 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 28845-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RODNEY S. LIGHT

APPELLANT

v.

ROBYN B. LIGHT

RESPONDENT

APPELLANT'S BRIEF ON APPEAL

Robert G. Velikanje, WSBA #22317
Attorney for Appellant

Law Office of Robert G. Velikanje
132 N. 1st Ave
Yakima, WA 98902
Telephone (509) 573-4900

FILED
NOV 16 2016
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 28845-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RODNEY S. LIGHT

APPELLANT

v.

ROBYN B. LIGHT

RESPONDENT

APPELLANT'S BRIEF ON APPEAL

Robert G. Velikanje, WSBA #22317
Attorney for Appellant

Law Office of Robert G. Velikanje
132 N. 1st Ave
Yakima, WA 98902
Telephone (509) 573-4900

TABLE OF CONTENTS

	Page No.
I. Assignments of Error.....	1
1. The trial court erred in awarding an equalizing lien to wife.....	1
2. The trial court erred in characterizing husband’s sick leave.....	1
Issues Pertaining to Assignments of Error	1
II. Statement of the Case	2
2.1 Background	2
2.2 Statement of Facts	4
III. Legal Argument	6
3.1 Standard of Review	6
Equitable lien award	8
Husband’s Sick Leave Account	11
III. Conclusion	13

TABLE OF AUTHORITIES

Table of Cases	Page No.
<u>Marriage of Davidson</u> , 112 Wn.App.251, 48 P.3d 358 (2002)	8
<u>Marriage of Griswold</u> , 112 Wn.App. 333, 48 P.3d 1018 (2002)	7, 8
<u>Marriage of Hurd</u> , 69 Wn.App. 38, 848 P.2d 185 (1993)	6
<u>Marriage of Marzetta</u> , 129 Wn.App. 607, 120 P.3d 75 (2005)	6
<u>In re Marriage of Pea</u> , 17 Wn.App. 728, 566 P.2d 212 (1977)	7
<u>Marriage of Rockwell</u> , 141 Wn. App. 235, 170 P.3d 572 (2007).....	7 ,10
<u>Marriage of Skarbek</u> , 100 Wn.App. 444, 997 P.2d 447 (2000)	6, 13
<u>Sullivan and Sullivan</u> , 52 Wash 160, 100 P. 321 (1909)	10
<u>In re Marriage of White</u> , 105 Wn.App. 545, 20 P.3d 481 (2001)	9

Table of Statutes

R.C.W. 26.09.080	8
------------------------	---

Other Authorities

Washington Family Law Deskbook sec. 32.3(3), (2 nd ed. 2006)	10
---	----

I. ASSIGNMENTS OF ERROR

Error #1: The trial court erred in granting the wife an equitable lien in the amount of \$65,000, culminating in a disproportionate award to her of nearly 60% of the total assets, an award even wife had not requested at trial.

Error #2: The trial court erred in concluding that husband's accrued sick leave was all community property for purposes of division.

Issues Pertaining to Assignments of Error

Issue #1: Whether the trial court abused its discretion in granting such disproportionate relief when the wife was not requesting an equalizing lien and husband was never put on notice or given the ability to respond to such relief granted.

Issue #2: Whether the trial court abused its discretion in dividing the total amount of husband's accumulated sick leave benefits without characterizing those benefits that existed prior to marriage as husband's separate property and then not accounting for the fact that the value to husband was only a four to one conversion if he were to convert them to cash value.

II. STATEMENT OF THE CASE

2.1 Background: The parties to this dissolution commenced the action as unrepresented parties, attempting to work out an amicable solution to the property and debt issues they were facing. In fact, they both acknowledged at trial that each other was acting in a fair manner, with respect to the other. RP 76, and had divided most all assets. The largest dispute they faced was valuation of two residences and a fair division of those assets. Wife put forth a position throughout that she had a separate interest in the residences. Her position was tenuous at best. No proof was ever provided as to amounts claimed and no documentation was

ever provided to reflect such a claim. Negotiations broke down as the parties could not agree on house values and wife would not release her separate property interest claim. The parties proceeded to trial.

At trial, wife testified that upon marriage, “what was mine was his and what was his was mine”. RP 102. She could trace none of the separate interest and provided no evidence to support her position. Eventually, the court concluded that she could not prove or trace a separate interest in any property. In the event she could prevail on those issues, husband had a similar request for separate contributions that almost mirrored the value of wife’s claim. He had an inheritance as well as a work related partial permanent disability award that were spent on the community. Wife even agreed he should get credit for his separate property contribution if she got hers recognized by the court. RP 105.

Another asset in dispute was the inclusion of husband’s sick leave he has accumulated prior to marriage and during marriage. It was not contested that he had an accumulation of sick leave benefits at marriage. Husband even provided a statement of

the accumulated benefits at marriage, the amount of which was not disputed. RP 143. His testimony was uncontroverted that Yakima County policy is to cash out any sick leave request on a four to one conversion rate. In other words, if he asked for a cash out of some sick leave, for every day he cashed in he would lose four accumulated days worth in his account. RP 11. He even testified as to his belief of the value of the community portion of the sick leave in the event the court was to include that asset in the final division of property. RP 11. His conclusion was that he had approximately 800 hours at the time of marriage and 1200 at the time of separation. Using his hourly rate and the amount of hours accumulated during the term of the community, husband came up with a value of \$5000 as community and provided unrebutted testimony to that effect. RP 11. The court concluded that husband's sick leave account was valued at \$53,012, and should be included in the total asset division at that value, without any ruling on the separate character portion of the asset. Finding of Facts and Conclusions of Law at page 3.

2.2 Statement of Facts: The parties were married on August 5,

1995 and separated on May 2, 2007, a marriage of eleven years and nine months. It is noteworthy that the court characterized this marriage as a “longer term marriage” in the Findings of Fact at page 7, line 12, and even commented that it was a marriage of “a decade and a half” in its ruling RP 3-4. Mr. Rodney Light was born May 1, 1960, and was 49 at the time of trial. Mrs. Robyn Light was born October 2, 1950, and had just turned 59 at the time of trial.

Both parties were employed at the time of trial. Wife was receiving a County retirement that was in pay status. She was receiving the largest rate it could pay out at as the parties purchased additional credits for her in order to allow the largest payment possible upon her election to retire early. RP 29. She was grossing at least \$6,500 a month from her employment and retirement benefits. She also had some additional income from teaching at the college level, operating a private investigative business and was available for hire on the guardian ad litem registry in Yakima County, but had not made any efforts to market her skills and training in that field at the time of trial.

Husband was employed as a captain with the Yakima Police Department. He was grossing approximately \$9,200 per month. Husband

had accumulated about 750 to 800 hours of sick leave at the time of marriage. He had an accumulated balance of sick leave hours at the time of separation of 1100 to 1200. He estimated the community accumulation to be about 400 to 500 hours.

III. LEGAL ARGUMENT

3.1 Standard of Review:

The court's classification of property as separate or community is a question of law. Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). Consequently review is *de novo*. Marriage of Marzetta, 129 Wn. App. 607, 120 P.3d 75 (2005). When the trial court has incorrectly characterized the parties' property, remand is required only if:

- (1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and
- (2) it is not clear that had the court properly characterized the property it would have divided it in the same way. In re Marriage of Hurd, 69 Wn.App. 38, 55, 848 P.2d 185 (1993).

However, factual findings upon which the court's characterization is based may be reversed only if they are not supported by substantial evidence. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. Marriage of Griswold, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002).

In weighing the statutory factors for accomplishing a "just and equitable" distribution of marital property, the trial court has broad discretion and its decision will be reversed only if there is a manifest abuse of discretion. Marriage of Rockwell, 141 Wn. App. 235, 242-243, 170 P3d 572 (2007). A manifest abuse of discretion occurs when the discretion was exercise on untenable grounds. *Id.*, at 243. If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. *Id.*, citing In re Marriage of Pea, 17 Wn.App. 728, 731, 566 P.2d 212 (1977).

Furthermore, the law favors characterization of property as community property unless there is clearly no question of its

separate character. Marriage of Davison, 112 Wn. App. 251, 258, 48 P.3d 358 (2002).

Assets acquired during the marriage are presumed to be community property. This presumption may be rebutted by showing the assets were acquired as separate property. Griswold, at 339.

Equitable lien award:

The trial court's distribution of property in a dissolution action is guided by statute, which requires that the court consider multiple factors in reaching an equitable conclusion. These factors include (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of property is to become effective. RCW 26.09.080.

In the instant case it is argued that it is not an equitable division to award wife a lien that she was not even seeking. As an aside, it appears that the court may have intended to award husband his ICMA retirement account as it did in the spread sheet and then award wife one-half of that account by way of the \$65,000 lien. This argument is presented because the ICMA account is roughly twice the value of the lien awarded. Quite honestly, if that was the court's intention, the

ruling is punitive in nature. It would be much more beneficial for husband to simply divide the retirement account by way of a QDRO (Qualified Domestic Relations Order) and avoid the interest tacked on to the lien award and further avoid the penalties of having to borrow against or cash out his ICMA account to provide wife with her award. In other words, the court's award of a lien to wife makes no sense as she could easily have been awarded half of the ICMA account and the intended percentage result of the trial court would have been the same.

It is understood that the court is not required to divide community property equally. In re Marriage of White, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). The real issue in the case at hand is the weight applied to the length of marriage. It is tenuous at best to characterize an eleven year marriage as "long term" and then massage the findings to "longer term". Maybe in today's day and age that has become common place as far as marriages lasting, but it does not change the well established case law in Washington as to what the statute refers to when speaking of the "duration of the marriage."

In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. WASHINGTON FAMILY LAW DESKBOOK §

32.3(3), at 32-17 (2d ed. 2006); see also Sullivan v. Sullivan, 52 Wash. 160, 164, 100 P. 321 (1909) (finding that for a marriage lasting over 25 years, "after [which] a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property, . . . the ultimate duty of the court is to make a fair and equitable division under all the circumstances"). The longer the marriage, the more likely a court will make a disproportionate distribution of the community property. In re Marriage of Rockwell, 141 Wn. App. 235; 170 P. 3d 572 (2007).

In the instant case of a marriage shy of twelve years in length, a wife that is gainfully employed, has no health issues, affirmatively gave up any request for maintenance and was going to receive a substantial estate in the final Decree, it was not appropriate for the court to make such a disproportionate division. The court even stretched when it characterized the marriage as "longer term" in length. Findings of Fact at page 7 line 12.

Husband and his counsel were not provided with any argument that wife was seeking an equitable lien of any type. In fact, even through closing arguments, wife simply wanted to be reimbursed for her separate contributions to the residences that admittedly she could

not trace and had no intention to maintain a separate interest in throughout the marriage. Being awarded a separate property interest in real estate is wholly different than characterizing all property as community and then being granted an equalizing lien for equitable reasons. To say that the court has broad discretion in dissolution proceedings does not mean that the trial court can substitute its position for that of the parties. At least the court should not stray from the boundaries that the parties have established in their legal arguments during litigation, to do so destroys our system of justice, the due process of notice in a “notice pleading state” and otherwise undermines the credibility of the court. If the parties have no expectation of what the other wants because the court will substitute its judgment anyway, what type of system of justice do we have?

Husband’s sick leave account:

In the instant case, the husband has clearly provided testimony as to the amount of sick leave benefits accumulated by him as of the date of marriage and a statement from that time frame. In addition, he provided testimony that any “cash in” of the sick leave account had to be four dollars cashed in for every dollar he received. It was inappropriate for the trial court to utilize the entire account value on the

date of separation and ignore and fail to characterize the separate nature of the pre-marriage contributions. The court used the account value of \$53,012, as compared to the husband's value of \$5,000 as representing the community portion to be divided. The court did not characterize any of the pre-marriage contributions as separate. Pre-marriage contributions were substantial and not de minimus in the final division. They were clearly traced by the husband and it was even uncontested by counsel for wife that the amount they were seeking to divide was the community portion "that was accrued during marriage". RP 143, lines 10- 16. The court used a simple spread sheet to calculate the totals of both parties assets awarded to them. Included in the husband's side was \$53,012 for sick leave accumulations.

It is argued that this was a manifest abuse of discretion. The amount should have been the community portion only of \$5,000. By reducing that portion in husband's column, the award to wife is significantly higher than the roughly 60% she was already awarded. Even if the trial court's position is to be taken at face value that husband has the benefit of using them in the course of employment and therefore they should be valued at a dollar for dollar exchange rate, this only results in a value to the community of approximately \$22,500 (\$45 per hour x 500

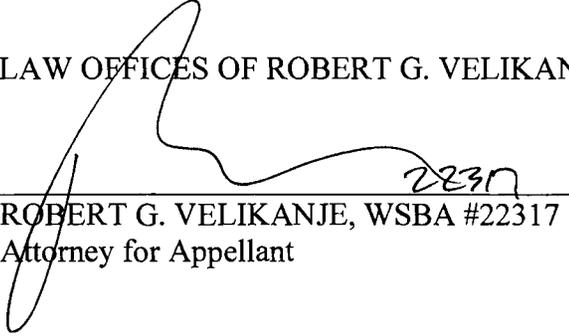
hours). It is argued that the trial court was aiming for a percentage division of the assets in the 60/40 range as was commented throughout the ruling of the court. In such an instance, it is not clear that had the court properly characterized the sick leave account it would have divided the property in the same way. "Remand is required when it appears the trial court's division of property was dictated by a mischaracterization of the separate or community nature of the property." Marriage of Skarbek, 100 Wn.App. 444, 450, 997 P.2d 447 (2000).

IV. CONCLUSION

It is respectfully submitted to this court that the trial judge in the instant dissolution action abused his discretion in making a disproportionate award to wife by granting her an equalizing lien. Furthermore, the court committed error in his characterization of husband's sick leave accumulations as all community property. This matter should be remanded for further proceedings at the trial court level.

Respectfully submitted this 12th day of November, 2010.

LAW OFFICES OF ROBERT G. VELIKANJE



22317
ROBERT G. VELIKANJE, WSBA #22317
Attorney for Appellant