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JUN 23 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Cause No. 288901-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Judith Wendall Coram, Petitioner/Appellant,

v.

Robert Hugh Mair, Respondent/Cross Appellant

REPLY BRIEF OF CROSS APPELLANT
ROBER HUGH MAIR

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A. Assignments of Error Revisited: Coram makes much-a-do about little.

Mair's Assignment of Error were, admittedly, slightly deficient, per RAP 10.3 (a)(4), (g) and RAP 10.4 (c). The deficiencies, however, were immaterial, and not prejudicial to Coram. The errors and issues related to the errors were plainly stated and reference to the record was cited in the facts and argument sections of the brief. Even still, Mair provides on Reply, a revised Assignment of Error to addressing the original issue raised, as well as replying to Coram's response.

1. Mair's Opening Brief Assignment of Error States:

"Because the parties stipulated to and the evidence supports that the meretricious relationship had begun in September 1990, and the Black Lake property in Colville was purchased after the start of the meretricious relationship, the property is presumptively community like property, and the presumption was not overcome with clear and convincing evidence. The court erred in finding the Black Lake property was the separate property of Ms. Coram and the error was material to the property division.

2. Re-Stating those Assignment of Error explicitly following RAP 10.3 a(4), (g) and RAP 10.4 (c):

a. THE MAIN ERROR:

The court erred in finding the Black Lake property was the separate property of Ms. Coram. See such findings at CP 62, ln16 and CP 198 at 2(c) and CP 276 as follows:

“[The Black Lake Cabin] will remain the separate property of the wife, but there, again, the husband is to be credited for the \$10,000 in efforts toward improvements.” CP 62 ln 16-18.

“2. Black Lake Cabin . . . c. The overall value is \$185,000 and is the separate property of the wife.” Findings of Fact and Conclusions of Law, CP 198 and Amended Findings of Fact and Conclusions of Law, CP 276.

b. PERIPHERAL ISSUES RELATED TO THE MAIN ERROR, TWO OF WHICH ARE NOT ERROR:

First, The court found the duration of the relationship to be 18 years, from Sept. 1990 – January 2008. At CP 56 ln 12-16; CP 196 at section 2.5; and CP 274 at section 2.5. At no time during trial or afterwards has Ms. Coram objected to these findings.

And there was no evidence or argument provided that the meretricious relationship did not begin September or October 1990. *See e.g.* Attorney for Coram’s Oral Argument at 475 ln 8-11 explaining that the pensions should be divided equally from the time the court found a meretricious relationship to the time they separated, but see no further mention of the meretricious relationship throughout the

transcribed portion of Mr. DeHaven's oral argument. RP 465 ln 9– 487 ln 15. (Although not fatal either way, in fact, there was an un-recorded, and thus, un-transcribed section of the closing arguments where Mr. De Haven did stipulate to the meretricious relationship. See RP at 464, where the Oral Argument begins on the record at RP 464, due to an objection by counsel for Mair, rather than the beginning of Mr. De Haven's closing arguments.) *And See* Attorney for Mair's Oral Argument at 529 lns. 17-19, (explaining that the relationship, both meretricious and married, spanned from October 1990 – January 2008).

Second: Attorney for Mair specifically raised, at trial, the issue that the Cabin was and should be found to be community property. *See* Meretricious relationship discussion at RP 495 ln 16 – RP 501 ln 2 generally, with specifics as to the Cabin as community property at RP 500 ln 1-13; RP 501 ln 2; and RP 520 ln 5.

Mair also brought the mischaracterization of the Black Lake Property to the attention of the court in response to Coram's Motion for Reconsideration at CP 267 lns 6-14. Since, on reconsideration, the court reduced the cash judgment against Coram by \$24,938.85 and because Coram filed an appeal, all the reasons for Mair arguing on reconsideration that the division of property was fair and equitable, despite the mischaracterization of property, have evaporated. *See*

\$24,938.85 reduction in transfer following reconsideration by comparing CP 202 section 3.8 and CP 279 In section 3.8.

Third: Instead of applying a *presumption* of community property to the Black Lake Property, requiring the presumption to be overcome only with clear and convincing evidence of separate sourcing, the trial court applied an *assumption* that the Black Lake Property had always been the separate property of Ms. Coram, maybe by not recognizing it had been purchased during the meretricious relationship or maybe by not recognizing that a presumption applied that needed to be overcome with clear and convincing evidence.

Without disclosed analysis and without explanation, the court found: “[The Black Lake Cabin] will remain the separate property of the wife, but there, again, the husband is to be credited for the \$10,000 in efforts toward improvements.” CP 62 In 16-18.

“2. Black Lake Cabin . . . c. The overall value is \$185,000 and is the separate property of the wife.” Findings of Fact and Conclusions of Law, CP 198 and Amended Findings of Fact and Conclusions of Law, CP 276.

This was error.

3. The Slight Deficiencies in Mair’s Assignments of Error are Immaterial.

Coram claims that because Mair's assignments of error were not perfected with citation and quotation to the erroneous trial court findings within the "Assignment of Error" section of the brief, that they are verities on appeal and Mr. Mair has waived his right to appeal. This claim is without merit.

The RAP's are to be liberally interpreted and applied in order to facilitate the determination of cases on their merits. RAP 1.2(a). Cases are not to be determined on the basis of non-compliance except in compelling circumstances and where justice demands. *Id.*

In *Delagrave v. Employment Security Dept.*, 127 Wn.App. 596, 111 P.3d 879 (Div. 3, 2005), Delagrave did not have an assignment of error section in his brief at all, but the court of appeals found that the issues were sufficiently argued and briefed anyway, that neither the court nor the opposing party were prejudiced nor inconvenienced by the failure to strictly comply with RAP 10.3, and the appellate court allowed the appeal issues to be considered on their merits.

Only where an appellant fails to raise an issue in both the assignments of error *and* fails to present argument on the issue or provide any legal citation, will an appellate court not consider the merits of that issue. See *Viereck v. Fibreboard Corp.*, 81 Wn.App. 579, 915 P.2d 581 (Div. 1, 1996)(citing *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)).

Compared to the permissible outer limits of compliance with RAP 10.3 and 10.4, Coram's raising of the issue of non-compliance is frivolous. Even in the Assignments of Error Section of his Opening Brief, Mair clearly provided Coram and the Appellate court the findings of fact error by the trial court and the related issues – that the court erred by finding the Black Lake Property was separate property of Ms. Coram, when the presumption of community property applied, since the property was acquired during the meretricious relationship and no clear and convincing evidence overcame that presumption.

Furthermore, throughout the recitation of relevant facts and the argument sections of his brief, Mair continuously referenced the record and legal authority related to the issues.

Coram's assertion that Mair waives his right to review of the findings of fact cited as error, due to the imperfection of compliance with RAP 10.3 and RAP 10.4 rings frivolously hollow.

B. Mair Raised the Mischaracterization Issue at the Trial Court.

Coram seems to also assert that Mair did not raise the issues below that he raises on appeal, and thus they are “verities on appeal” and he is precluded from raising the issue on appeal. Coram's assertion is not supported by the record. Coram was precluded from

arguing or inferring that the Black Lake Property was Coram's separate property, due to discovery sanctions. *See* RP 464 – RP 467 ln 19.

But Mair was not precluded from arguing the Black Lake Property was community property. RP 444 ln 24 – RP 489 ln 8. At trial, Mair did raise the community property character issue and did assert that the Black Lake Property was community property. *See* RP 495 ln 16 – RP 501 ln 2 generally, with specifics as to the Cabin as community property at RP 500 ln 1-13; RP 501 ln 2; and RP 520 ln 5. He also raised the issue, tangentially, in response to Reconsideration. *See* CP 267 lns 6-14.

Coram's assertions are also not supported by law. Although she cites to *Wilson v. Elwin*, 54 Wn.2d 196, 338 P.2d 762 (1959) and *State v. Ross*, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000), neither case is applicable here.

The 1959 case of *Wilson* references and relies upon 1959 appellate rules no longer in effect. Such are referenced as Rules on Appeal 42 and 43, RCW Vol. O. Furthermore, in *Wilson*, the appellant's fatal deficiency was not setting out the findings of fact errors anywhere in their brief. Here, in the body of his brief, Mair set out the findings of fact that are erroneous and precisely cited to the record for those findings. And in the Assignments of Error he identified the error and issues pertaining to the assignment of error.

State v. Ross, 141 Wn.2d 304, 4 P.3d 130 (2000), is also not applicable for Coram's position. The issue therein was three fold: that first, the so called denominated conclusions of law were actually findings, subject to the abuse of discretion standard; two, that certain findings were supported by substantial evidence and the other findings based on those findings, also, then, were supported by the evidence; and three, that Defendant had wholly failed to challenge the findings of fact in the appellate court, not that they had simply missed perfection for complete technical compliance with RAP 10.3. *Id.* at 309-10. Furthermore, becoming a verity on appeal only refers to unchallenged findings of fact – whether at the court of appeals or supreme court. *See e.g. Id.* at 309. Here, Mair has challenged the erroneous findings.

If anything, *State v. Ross*, 141 Wn.2d at 310-11 supports Mair's position, since Mair did set forth a concise statement of the error, together with issues pertaining to the assignments of error.

C. Substantial Evidendence Landed the Black Lake Property in the Community Property-like Presumption, and No Clear and Convincing Evidence Changed It from that Presumptive Character.

Coram complains that Mair offered no evidence at trial to suggest that the land could be characterized as being community-like in nature. Mair did not need to provide any specific evidence at trial about where the funds came from to purchase the property, Coram, herself, had provided

sufficient evidence for the court to determine the property's character as community. See RP 182 – 184. Mair and Coram both provided testimony of their meretricious relationship beginning in September 1990. Mair's testimony at RP 373 ln 2 – 374 ln 9; Coram's testimony at e.g. RP 51 ln 5-20. And Ms. Coram admitted to be cohabiting with Mr. Mair at the time of purchase of the Black Lake property. CP 182 ln 19-24. Mair participated in the inspecting, choosing and planning regarding the Black Lake property. Mair testimony at RP 388 ln 21 – RP 389 ln 12. Mair was not required to provide specific evidence at trial regarding the character of the Black Lake property once the meretricious portion of the relationship was established to have begun in September 1990, and the presumption then applied. Because neither Coram nor Mair objected to or raised the issue of the meretricious relationship starting at any time other than September 1990, that fact is a verity on appeal. Coram's lack of specific testimony and proof of the separate property nature of her savings and credit which were used to purchase the Black Lake Property, juxtaposed against the presumption of community property was sufficient proof.

Since the Black Lake property was purchased during the meretricious portion of the relationship, the property was presumptively community-like. *Borgi*, 167 Wn.2d at 484. The character of property is determined at the time of purchase. *In re Estate of Borgi*, 167 Wn.2d 480, 219 P.3d 932 (Nov. 2009) as corrected (March, 2010).

As a matter of law, property acquired during a meretricious relationship is presumed to be community-like property. *In re Marriage of Soltero v. Wimer*, 159 Wn.2d 428, 434 and n.3, 150 P.3d 552 (2007). The presumption applies, no matter how title is held. *See Borghi*, 167 Wn.2d at 483-488; *Dean v. Lehman*, 143 Wn.2d 12, 19, 18 P.3d 523 (2001).

It was Ms. Coram's burden to overcome the presumption and show it was purchased with non-community-like funds. The burden of rebutting the presumption is on the party challenging the asset's community property status. *Dean v. Lehman*, 143 Wn.2d at 19-20. The burden can only be overcome by clear and convincing proof that the transaction falls within a separate property exception. *Id.* at 20; *Estate of Madsen v. Comm'r*, 97 Wn.2d 792, 796, 650 P.2d 196 (1982), overruled in part on other grounds by *Aetna Life Ins. v. Wadsworth*, 102 Wn.2d 652, 659-60, 689 P.2d 46 (1984). The burden of clear and convincing evidence is not met by a mere self-serving statement of the spouse declaring it was purchased with their separate funds, even if they can show that separate funds were available for the purpose. *Pollock v. Pollock*, 7 Wn.App. 394, 499 P.2d 231 (1972); *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950).

Coram did not clearly overcome the burden at all. She only testified and provided documents showing that the down payment of

the property was \$700, that at closing she supplied another \$6521,80 from a loan at the credit union, and the seller carried the note at \$25,000 with payments at \$227/month. RP 183 ln 5 – RP 184 ln.4.

She provided no documents and not even any testimony that the character of the \$700 down payment was separately sourced, such as earned income prior to September 1990 or gifted to her. She claimed only that it was from her savings account. RP 183 ln 17-21. Coram and Mair never had a joint bank account. RP 60 ln 15-19. The parties were both employed from the time they began cohabiting through the time they purchased the Black Lake Property, and Coram usually made at least twice as much income as Mair during this time. See RP 286 ln 21-23; RP 297 ln 3-21; RP 246 ln 5 – RP 248 ln 4. The court must reason that Ms. Mair's earnings all were deposited into accounts in her sole name. Obviously, since Coram was well employed with both primary and secondary employment, a mere \$700 of savings in existence nearly two years after the start of the meretricious relationship are not clearly separate property to have then clearly sourced the purchase of the Black Lake property with separate funds. As a matter of law, the \$700 presumably came from her employment and savings during the nearly two years old relationship, at the time of the purchase since there was no clear and convincing evidence , or any evidence at all, that it was separately sourced.

Presumptions within family law matters are true presumptions, and in the absence of evidence sufficient to rebut an applicable presumption, the court must determine the character of property according to the weight of the presumption. *Borgi*, 167 Wn.2d at 483-84.

Though Ms. Coram may consider all of her income as her separate character income throughout the relationship, see. e.g. RP 188 ln. 17-22, RP 257 ln 14-22; RP 291 ln. 19-25, as a matter of law, it is not. “Income acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage. Therefore, all property acquired during a meretricious relationship is presumed to be owned by both parties.” *Soltero v. Wimer*, 159 Wn.2d 428, 434 n.3, 150 P.3d 552 (2007)(citing *Connell*, 127 Wn.2d at 351, 898 P.2d 831.)

Additionally, although Coram did not raise the issue, it should also be noted that property acquired, subject to a real estate contract, is acquired when the obligation was undertaken. *Borgi*, 167 Wn.2d at 484. And, there is also a presumption that a loan taken out during the community like relationship is also community in nature. See *In re Marriage of Schweitzer*, 81 Wn.App. 589, 597, 915 P.2d 575, (1996) (citing *In re Marriage of Hurd*, 69 Wn.App. 38, 54-55, 848 P.2d 185 (1993), *review denied*, 122 Wn.2d 1020, 863 P.2d 1353 (1993)).

In the court's decision, the cabin was never bifurcated from the property.

In summary, because no evidence established that the \$700 for the down payment on the Black Lake Property was earned prior to the beginning of the meretricious relationship, or that it came from any separate property source, or that the loan for the Black Lake Property was not for the benefit of the community, Coram did not provide clear and satisfactory proof that the funds used to purchase the Black Lake Property were separate property.

D. Substantial Evidence Assigns a Presumptive Character to Property, but only Clear and Convincing Evidence can Change the Presumption.

Coram attempts to persuade and misguide the court, claiming that only substantial evidence is required to support the character of property, set forth in a finding of fact. Coram Response Brief at 4-5. And, that there was substantial evidence to prove the Black Lake Property was Ms. Coram's separate property – to the point that there “was no question surrounding the separate character of this real estate.” *Id.* Only if there were no applicable presumptions that Coram needed to overcome, would she be correct.

Coram is incorrect to claim there is no question surrounding the separate character of the real estate, citing to *In re Marriage of Brewer*, 137 Wn.2d 756, 766-67, 976 P.2d 102 (1999) as support. The issue in

Brewer, factually, is far different than the case at bar, as it discusses the character of disability proceeds received after the marriage, not real estate purchased during the equity portion of the relationship where a presumption applies to its character. But, the law in *Brewer* supports Mair's position. Specifically, "[Wa supreme court] has favored characterizing property as community instead of as separate property unless there is clearly no question of its character." *Brewer*, 137 Wn.2d at 766-67 (citing *Chase v. Chase*, 74 Wn.2d 253, 257, 444 P.2d 145 (1968) resolving doubts between finding separate or community property, in favor of community status.")

The other cases Coram cites, seeking support for her "only substantial evidence is needed" theory, like Coram, do not address the character presumptions. *Green Thumb, Inc.* addresses the standard of review for factual determinations for a question of jurisdiction. *Green Thumb, Inc. v. Tiegs*, 45 Wn.App. 672, 726 P.2d 1024 (1986) (allowing the court as trier of fact to resolve conflicting evidence and argument – supported by substantial evidence to persuade a fair-minded person of the truth of that finding - regarding jurisdiction.). And *Olmstead v. Dept of Health*, 61 Wn.App. 888, 893, 812 P.2d 527 (1986) discusses the substantial evidence standard of review for determining findings of facts in an administrative proceeding.

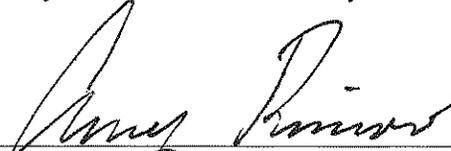
As noted by Mair in his standard of review section of his opening brief, the standard of review for findings of fact to overcome a presumption is clear and convincing evidence. *Berol v. Berol*, 37 Wn.2d 380, 381-82, 223 P.2d 1055 (1950). While the facts needed to support the characterization without a presumption to overcome, can merely be substantial evidence. *In re Marriage of Skarbek*, 100 Wn.App. 444, 447, 997 P.2d 447 (2000). Coram fails to address or even acknowledge that difference.

Coram also miss-cites to the record claiming that the court found no factual basis for Mr. Mair's claim to the Black Lake land at RP 487. That is Coram's counsel asserting opinions during closing arguments at RP 487. *See* Coram's Reply Brief at 4 and 5.

E. In Conclusion, Remand is Necessary

When the Black Lake Property is community-like property, and the trial court found it to be the wife's separate property, the trial court exercised its discretion in dividing property using the wrong reasons, and the record does not show whether the trial court would distribute the parties' property differently using the correct characterization. *See In re Marriage of White*, 105 Wn.App. 545, 554, 20 P.3d 481 (2001). Therefore, remand is necessary for the court to review and equitably divide the property, using the correct characterization of the Black Lake Property.

Respectfully Submitted this 23th day of June 2011,

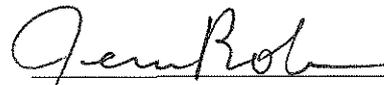


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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 23 day of June, 2011, the within document described as REPLY BRIEF OF CROSS APPELLANT ROBERT HUGH MAIR was delivered to the following persons in the manner indicated:

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