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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 302288

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

JUDY RUTH SWANSON,
Respondent.,

v.

CHESTER JAMES MORRISON
Appellant.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A) Standard of Review:

Under RAP 2.4 the appellate court will review the decision designated in the notice of appeal, which in this case was the entire decision to allow Judy Swanson a lien on the separate property of Chester Morrison and the denial of the Motion for Reconsideration.

Trial courts' decisions on the division of property are reviewed for abuse of discretion. *Pollock v. Pollock*, 7 Wn. App. 394, 399, 407, 499 P.2d 231 (1972); *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Foley*, 84 Wn. App. 839, 842-43, 846, 930 P.2d 929 (1997). Abuse of discretion is a decision based on untenable reasons or that is manifestly unreasonable. *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001).

B) Property Division Principles

1. The Trial Court Incorrectly Awarded Judy an

Equitable Lien on the Cattle:

Both Judy's argument and the determination of the Trial Court, rest upon a presumption that is not supported either by the facts of the case or by the relevant law: that there was an increase

in value of Chester's separate property; namely, the cattle and its operation.

It is true that, as a general rule, any increase in the value of separate property is presumed to be separate property. *In re Marriage of Elam*, 97 Wn.2d 811, 817; 650 P.2d 213, 216 (1982).

The Supreme Court of Washington adds that "This presumption may be rebutted by direct and positive evidence that the increase is attributable to community funds or labors." *Id.*

To be able to rebut the presumption that the increase in value to Chester's property belongs only to Chester, Judy had the burden of proof to establish that there was an increase to begin with. Only after establishing that, could the court entertain whether or not that increase belongs to Chester or to the community.

Judy did not satisfy her burden of proof. Her Reply Brief states that "The testimony at trial was that at separation Chester owned 4 bulls, 105 cows and 90 calves. No evidence was offered as to how many cattle Chester owned prior to the marriage." (Resp. Rep. Br. at 10) (Emphasis ours).

Without knowing the amount of cattle Chester owned prior to the marriage, there is no way to accurately calculate, or even know, if Chester's separate property increased in value.

Judy had the opportunity to attempt to establish value increase. During Chester's trial testimony, Judy's attorney asked him if he had the cattle operation books readily available at home and if he could produce them after lunch if so asked, to which Chester replied he could. (RP. 25-26) Despite that fact, Judy's attorney proceeded to conclude his Direct Examination and later presented his closing arguments without attempting to have Chester produce the business books at any point.

The only evidence presented at trial regarding the value of Chester's property comes from his own testimony. Chester testified and presented Tax returns demonstrating that his cattle business operated at a substantial loss. This was restated by the Trial Court in its Memorandum Decision (CP at 107-08).

Judy could not establish that Chester's cattle operation, deemed separate property by the trial court, had any increase in value whatsoever. Without establishing increase, the court could not legally determine the nature of a, for legal purposes, non-existent increase. Therefore, the Trial Court incorrectly awarded Judy an equitable lien on the cattle.

2. Impossibility and/or Impracticality:

Judy claims that no evidence was provided that established that the cattle were encumbered and that there was nothing to prevent Chester from selling the cattle or making monthly payments.

The fact is, however, that the Trial Court erroneously failed to rule on Tom Morrison's claim of ownership of half the cattle herd.

Tom Morrison's testimony was never contested at trial, and the Morrison brothers testified that the "Bar Z Bar (- Z -)" brand that identifies the cattle is owned by both. The Trial Judge himself accepted this as fact. (CP at 106).

The State of Washington recognizes a brand as "the personal property of the owner of record." RCW 16.57.090. "A healed brand of record on livestock shall be **prima facie evidence that the recorded owner of the brand has legal title to the livestock and is entitled to its possession.**" RCW 16.57.100. (Emphasis ours).

Whether or not Tom Morrison receives income or in any way takes part in the cattle operation is irrelevant as to his actual ownership and entitlement to possession of the livestock. The brothers had an oral agreement and the inscription of the brand

ratified said agreement and, according to State law, is evidence of legal title to both brothers.

Since Judy did not rebut the prima facie evidence of Tom Morrison's half ownership of the herd, that proposition must be accepted, and this would make it impossible to impose a lien in Judy Swanson's favor for half of the cattle herd without violating the Constitution of the State of Washington, which establishes that "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. Art. I, § 3.

This action is between Chester Morrison and Judy Swanson; Tom Morrison is not a party. To impose a lien on the totality of the cattle herd is to deprive Tom Morrison of his property (half of the cattle herd) without due process of law.

Therefore, the Trial Court incorrectly awarded Judy an equitable lien on the cattle.

3. Unjust Enrichment:

Respondent argues that we do not cite any legal authority in support of our arguments. Pages 7-8 and 10-11 of our original Brief, however, contain enough citations and legal authority supporting the issues presented for review there.

As for respondent's other argument, Judy claims that "Chester performed work which increased the value of the cattle business" (Resp. Rep. Br. at 15). Again, there is no evidence that the cattle operation increased in value; or even that the herd increased in size. Judy never provided evidence at trial of that allegation, even when there was opportunity to do so. To impose a lien on the cattle unjustly enriches Judy at the expense of Chester because an increase in value was never established. Not only that, Judy would also be unjustly enriched at the expense of Tom Morrison, who legally owns half of the herd.

"Unjust Enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of **fairness and justice require it**. See *Baillie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991) ("Unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another.")" *Young v. Young*, 164 Wn.2d 477, 484 (2008). (Emphasis Ours).

To impose a lien on the cattle is to unjustly enrich Judy at the expense of both Chester and Tom Morrison. Therefore, the Trial Court incorrectly awarded Judy an equitable lien on the cattle.

4. Separation Contract:

Judy argues that the fact that she took legal action to include the cattle in the Separation Contract is evidence of the Contract's lack of ambiguity (Resp. Rep. Br. at 17). This argument is vulnerable to logic.

People take legal action for meritorious reasons, just as they do for frivolous reasons. Commencing a legal action cannot be taken as evidence of the clarity of a contract clause; otherwise all clauses could be deemed unambiguous and enforceable on the mere fact that legal action was taken to declare them so.

Furthermore, the contract itself did not factor into the Trial Court's decision to impose a lien on the cattle in favor of Judy. Although the Trial Court ratified the Separation Contract, in its Memorandum Decision, the court stated that: "**The only issue** the court determined it needed to decide is whether petitioner should be entitled to any right of reimbursement for the community effort she put into enabling respondent to maintain his separate property insofar as the cattle operation is concerned." (CP at 108).

The Court, therefore, did not take into account Article V of the Separation Contract (CP at 13) when deciding to impose a lien on the cattle, and thus, the validity of Article was not at issue.

Even if the Trial Court had based its decision to impose a lien on Article V of the Separation Contract, it would have been an erroneous decision, because Tom Morrison, as owner of half of the cattle, would be deprived of his property without due process of law, in violation of Wash. Const. Art. I, § 3.

As the Supreme Court of Washington stated in *Hederman v. George*: “It is a general rule that where the contract grows immediately out of, and is connected with, an illegal act, a court of justice will not lend its aid to enforce it. *Armstrong v. Toler*, 24 U.S. 115, 6 L. Ed. 468, 11 Wheat. 258. Where a plaintiff, to make a case, must rely upon the illegal contract itself, he cannot recover. The law will aid neither party to an illegal agreement, but will leave the parties where it finds them. *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404. **A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforcible.**” *Hederman*, 35 Wn.2d 357, 361-62 (1949) (Emphasis Ours).

Article V of the Separation Contract is not illegal on its face. However, it is illegal in its application if used to deprive Tom Morrison of his property rights without due process of law.

Therefore, including the cattle in the Separation Contract rendered Article V illegal and unenforceable.

II. CONCLUSION

For the foregoing reasons, Mr. Morrison respectfully submits that (1) the Trial Court incorrectly awarded Judy Swanson an equitable lien on the cattle, because: (a) Judy Swanson failed to establish increase in value of the separate property, which precluded any determination of the disposition of the cattle; (b) the Trial Court deprived Tom Morrison of his share of the property without due process of law, in violation of the Constitution; 3) the Trial Court did not take into consideration that Judy Swanson would be unjustly enriched at the expense of Chester and Tom Morrison, and; 4) the Trial Court failed to rule that Article V of the Separation Contract constituted an illegal clause insofar as it deprived Tom Morrison of his share of the property without due process of law, in violation of the Constitution. Mr. Morrison therefore respectfully requests that the case should be remanded to the Superior Court for further proceedings on the issues stated above.

RESPECTFULLY SUBMITTED this 13th day of July, 2012.



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