

FILED

MAY 14 2012

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.

BRIEF OF APPELLANT

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I. Introduction

Mr. Morrison's position in a brief summary is as follows: The Superior Court erred in finding that Petitioner in the divorce, Judy Swanson, was entitled to a lien against Mr. Morrison's separate property, his cattle. Mr. Morrison had an adequate defense. Due to the issues that Mr. Morrison presented, Mr. Morrison clearly showed that the cattle were his separate property, which the court agreed with, but concluded that the Judy Swanson had maintained the home during the marriage and was entitled to a lien against the herd, which was in error.

II. Assignments of Error

Assignments of Error

1. Kittitas County Superior Court erred in entering the order on the trial heard June 24, 2011, granting Judy Swanson's request for a lien against the separate property of Chester Morrison.

Issues Pertaining to Assignments of Error

Judy Swanson sought an order against Mr. Morrison, the Respondent in the original matter, for for a lien against his separate property. The order, which was signed on July 5, 2011 states that

Judy Swanson will be awarded \$55,375.00 due to the fact that Judy Swanson kept the family home during the course of the marriage. Did the Court error in finding that Judy Swanson was entitled to a lien against the separate property of Chester Morrison when Chester Morrison clearly presented testimony which would excuse and/or limit any lien that should have been placed against his property and did Judy Swanson meet her burden and if so, were there damages? (Assignment of Error 1.)

III. STATEMENT OF THE CASE

A Superior Court bench trial which began on June 24, 2011 (CP pg 100-103). A Judgment was entered for the Petitioner Judy Ruth Swanson on July 5, 2011 (CP pg 105-109). The relief granted in that Judgment was based on the Respondent, Chester Morrison having 105 bred cows worth \$850 per cow, or \$89,250.00, 90 calves worth \$250 each or \$22,500.00, and 4 bulls worth \$1,000.00 each or \$4,000.00. A total value of respondent's cattle herd in July 2010 the court set at \$111,750.00 (CP pg 108). The Court found that the efforts of Judy Swanson freed up Chester Morrison to build up and/or maintain his cattle herd and that the only practical way to reimburse Judy Swanson is to award her one-half of the value of

the herd, or \$55,375.00 (CP pg 108). Chester Morrison, in the matter filed a Motion for Reconsideration on July 15, 2011 (CP pg 110-134). The Court did not find in Mr. Morrison's favor. (CP pg 162-169). Chester Morrison filed a Notice of Appeal with the Division III Appeals Court (CP pg 170-179).

IV. ARGUMENT

A) Scope 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.

We review a trial court's decisions on the division of property 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) Impossibility and/or Impracticality:

The doctrines of impossibility and/or impracticality have also been used in domestic Court. Where one party gets on order for the sale of a home, or a judgment against the other, the Court has held that where one party's actions were frustrated by the other party's deliberate actions, resulting in a loss of the property in question, compliance with the property settlement agreement, and decree then became impossible; as did its enforcement. *Mickens v. Mickens*, 62 Wn.2d 876, 880 (1963). In this case, Mr. Morrison's only income is that of his cattle. The Court found that the cattle were in fact Mr. Morrison's separate property but did not rule if Mr. Morrison's brother, Tom, owned half of the cattle herd. Tom Morrison testified that he in fact was a partner in the cattle operation and owned half of the herd. (RP pg 49-50, lines 24-10). Mr. Tom Morrison's testimony was not contested. Further, it would make it impossible to grant a lien in a cattle herd and not take into consideration other ownership in the herd. Mr. Morrison and his brother Tom Morrison also testified and the Court noted in the Memorandum Decision that the brand which is on the cattle is owned by the brothers. The Bar Z Bar is owned by Chet Morrison and Tom Morrison. Branding is a legal form of ownership and again shows that Tom Morrison owns half of the cattle herd making

it impossible to find a lien in Judy Swanson's favor for half of the cattle herd.

Judy Swanson also garnished the bank account of Chester Morrison which did not allow Mr. Morrison enough funds to comply with the Court Order. The garnishment left Mr. Morrison with very little funds and he was barely able to maintain himself, let alone a herd of cattle.

Impossibility is a material issue to enforcement of a decree or Court order. In this case, impossibility and/or impracticality was not considered by the Court, and this case should be sent back for those issues to be considered. The relevant circumstances have drastically changed since the Court first entered the Judgment in this matter. Mr. Morrison has had garnishments filed against him by the Judy Swanson. Mr. Morrison does not have the economic feasibility to feed and maintain the cattle if the garnishments continue. The Court ordered a lien against half the value of the cattle herd when there is uncontested testimony that half of the cattle herd is owned by Tom Morrison making this case clearly fall under the doctrines of impossibility and/or impracticality.

C) Unjust Enrichment:

Ultimately, the petitioner should have no claim to a lien whatsoever on the herd. The testimony that the petitioner paid taxes on separate property, or that she allowed Mr. Morrison to reside with her rent-free, should not be a basis for an equitable lien. Moreover, the court's decision is incorrect in stating that Ms. Swanson paid for utilities at their residence, as evidenced by checks written by Mr. Morrison for said utilities. Mr. Morrison also continues to pay \$2,000 each year for Ms. Swanson's health insurance.

It may be true that Ms. Swanson contributed to the betterment of the cattle, but she certainly realized benefit herself over the years. During the marriage the couple filed taxes jointly, and Ms. Swanson was able to write off losses that resulted from the cattle from her own income taxes.

If the court determines that there is to be a lien on the cattle, the amount awarded to the petitioner should be recalculated. If the decision to award Ms. Swanson a percentage of the value of the herd is based on reimbursement for time and effort she put in to the betterment of the herd, the court should inquire as to exactly how much she put in, and reimburse her that amount. If nothing else, because the cattle were inherited by both Mr. Morrison and his

brother, Ms. Swanson's lien on the herd should not be one half, but rather one quarter minus any benefit Judy Swanson saw from the cattle herd.

As the decision stands, Ms. Swanson stands to be unjustly enriched by being awarded half the value of the herd. On the other hand, Mr. Morrison does not have the ability to pay half. The equal distribution of separate assets will crush him financially.

In his decision, Judge Cooper cited Ms. Swanson's "effort throughout the marriage to provide a home for the parties at which respondent could reside rent-free" as reason for granting the petitioner an equitable lien against the respondent's separate property. (Memorandum of July 5, 2011 Decision pg 4 CP Pg 108). Previous case law, however, states that this is not grounds for granting an equitable lien. In re the marriage of *Marshall v. Baggs*, Ms. Marshall requested a credit against community assets for the reasonable rental value of her Mercer Island residence. The trial court rejected the request, however, finding that there was 'no evidence that the parties contemplated any payments by the community or by Mr. Baggs to Ms. Marshall for his occupancy of the residence during the marriage.' *Marshall v. Baggs*, 86 Wn.App. 878, 881 (1997).

The Court of Appeals of Washington, Division 1, agreed with the decision of the trial court. Washington courts have further held that an equitable lien may be claimed by the community for improvements upon the separate property of a spouse to the extent only that COMMUNITY FUNDS ARE INVESTED. *Pekola v. Strand*, 25 Wn.2d 98, 168 P.2d 407 (1946). There is no blanket right to reimbursement when one spouse owns separate property, the court must "do equity." RCW 26.09.080; *Baker v. Baker* 80 Wn.2d 736, 498 P.2d 315 (1972). The trial court must take into account all the circumstances in deciding whether a right to reimbursement has arisen. The trial court MAY impose an equitable lien to protect the reimbursement right when the circumstances require it. *Id.* It is up to the Court's discretion whether an equitable lien is needed. *Id.* Similarly, there is no indication that there was ever any discussion about Mr. Morrison making rent payments to Ms. Swanson, however, Mr. Morrison paid for utilities, paid for groceries, paid for other community needs and Mr. Morrison gives Ms. Swanson \$2000.00 per year for her health insurance, and therefore there is not reason to grant Ms. Swanson an equitable lien on separate property (RP pg 43 lines 5-9).

In another part of his decision, Judge Cooper determined that Ms. Swanson was entitled to an equitable lien because she “paid for the utilities, cable and phone.” (Memorandum of Decision Pg. 2 CP pg 106). While it is true that she did pay the cable bills, it was Mr. Morrison who paid utility and phone bills. The testimony during the trial was that Mr. Morrison paid for utilities except for one week when he was out of town when the bills arrived, and Ms. Swanson paid them. (RP Pg 29-30 lines 25-3) There are copies of checks dating from 2006 and beyond which show that Mr. Morrison made regular payments to Puget Sound Energy and Fair Point Communications. Additionally, Mr. Morrison continues to pay \$2,000 every year for Ms. Swanson’s health insurance. The incorrect assumption that Ms. Swanson paid utility bills should not be justification for an equitable lien on the cattle herd.

If the court decides to maintain its ruling that the petitioner is entitled to reimbursement for her work to improve the separate property, the amount of that lien should be reconsidered. She should not be entitled to half.

The court concluded that “because petitioner’s efforts freed up respondent to build up and/or maintain his cattle herd, the only practical way by which to reimburse petitioner her part of the

community effort in maintaining respondent's separate property is to award her one-half the value of the herd." Previous courts, however, have determined that even though "RCW 26.08.110 requires a Just and equitable distribution of the property...This does not entail an equal division thereof." *Friedlander v. Friedlander* 80 Wn.2d 293, 305 (1972), citing *Ovens v. Ovens*, 61 Wash.2d 6, 376 P.2d 839. In other words, even if Ms. Swanson is entitled to some portion of the value of the herd, it is not necessarily one-half the total value.

Instead, as the Supreme Court of Washington held in *Friedlander v. Friedlander*, "...the trial court should also consider other factors. First, the court must consider the necessities of the wife and the financial ability of the husband. Then, it should take into account the age of the parties, their health, physical condition, education, their employment history...as well as their future earning prospects." 80 Wn.2d 293, 305 (1972).

Mr. Morrison is seventy-one years old and does not have the financial wherewithal to pay half the value of his herd, let alone his entire herd, which is what this lien would encompass as he owns half of the total herd. Nor should he have to, according to the Supreme Court.

If the court determines that Ms. Swanson is indeed entitled to reimbursement for her time and efforts, then the court should make an effort to determine the value of those efforts. As the trial court found in *In re the Marriage of Harshman*, —and as appellate court upheld—“the marital community is entitled to reimbursement for the increased value resulting from an investment of ‘community services or funds.’” 18 Wash. App. 116, 567, 578 (1977). If Ms. Swanson is entitled to anything concerning the separate property of Mr. Morrison, it should only be the value of what she invested into the separate property. The court should make an inquiry into exactly how much Ms. Swanson contributed when determining what should be awarded her. The court should not arbitrarily award her half the value of the herd. *Id.*

At the very least, because the cattle are owned jointly between Mr. Morrison and his brother, Mr. Morrison’s share is only half the herd in the first place. Accordingly, the most that Ms. Swanson should be awarded—if anything at all—is one quarter the value.

Ms. Swanson stands to be unjustly enriched by the court’s decision, by receiving more in return than she put into improving

the herd. The court should reconsider whether she has any lien on the herd at all, and if so, how much should be awarded.

D) Separate Property Agreements

The parties in this matter both agree that Judy Swanson had her attorney draft a separate property agreement which they both signed. (RP pg 2 lines 1-5). The separation agreement does not discuss the cattle. The parties married in 1987, Mr. Morrison already owned cattle that he had inherited at the time of the marriage and it is not disputed that the cattle were separate property at the time of the marriage. (RP pg 2 lines 8-10). The funds were not comingled and the property was decided to be separate by the Court. (RP pg 65 lines 22-25). Mr. Tom Morrison testified that the Morrison family had owned cattle for over 100 years and that testimony was reinforced by the testimony of Mrs. Morrison. (RP pg 50 lines 5-10) and pg 55 lines 13-17). The separation agreement does not discuss the cattle, an asset that both parties clearly knew about and an asset that Mr. Morrison works with everyday. Clearly the parties did not feel that the cattle needed to be in the separation agreement and this is not an oversight. Mr. Morrison testified that he didn't think that the cattle needed to be in the separation agreement and there were many

things that were left out. (RP pg 32 lines 2-25). It is clear from the parties actions and way of life throughout their marriage that the cattle were separate property and were kept separate. Mr. Morrison maintained his herd and kept approximately the same number of animals throughout the marriage, with no increase and no increase in value.

The separation agreement does not mention the cattle because they were clearly separate property with a brand that belonged only to Chester Morrison and Tom Morrison and no one else. Due to the fact that the were not comingled and Judy Swanson had no interest in the herd, it was not necessary for Judy Swanson's attorney to include them when he drafted the separation agreement.

V. CONCLUSION

For the foregoing reasons, Mr. Morrison respectfully submits that (1) the court improperly determined that Judy Swanson was entitled to a lien for half of the value of the separate property, more specifically the cattle herd; (2) the court did not take into consideration Mr. Morrisons defense of impossibility and/or impracticality; and 3) the court did not factor the unjust enrichment that would be granted to Judy Swanson. 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 26th day of April, 2012.



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