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NO. 308758-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

AARON MATTHEW SILK,

APPELLANT,

VS.

TERESA ANN BROADSWORD,

RESPONDENT.

BRIEF OF RESPONDENT TERESA ANN BROADSWORD

Julie Harrington, WSBA #20403
Attorney for Respondent
2824 E. 29th, #1B
Spokane, WA 99223
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I. STATEMENT OF THE CASE

In addition to the facts provided by the petitioner in his appellate brief, it should be noted that although Ms. Broadsword lived in the family home during the pendency of the dissolution, and Mr. Silk was ordered temporarily to pay the mortgage payments, Mr. Silk lived at the same parcel in a large 40 x 36 feet shop. This shop had 2 bedrooms and a bathroom. (RP 44, line 10 to RP 45 line 19).

In addition, it should be noted that Mr. Silk was not current with his payments as noted in trial. The petitioner failed to pay all of the mortgage payments, which was contrary to the terms of the temporary order, and was at the time of trial behind an undetermined amount. (CP 21). Petitioner stated that at the time of trial, he was behind on payments (RP 31, line 24). Further, he admitted to being late every month, and paying a late fee. (RP 42, lines 4-17).

Ms. Broadsword had only been working at Triumph Composites for approximately 4 months, since October 10th, 2011. (RP 188, line 22).

In addition, the parties actually met each other in 1994, dated for awhile, and then disappeared for a while, and started staying together weekends in January of 1997. He essentially moved in at that time. (RP 172, line 19-25, and RP 173, lines 1 – 8). By June of 1997 they had bought a home together. (RP 174, lines 7-8).

II. STANDARD OF REVIEW

The Standard of Review on appeal is abuse of discretion. The trial court's decision in a dissolution action will seldom be changed on appeal as such decisions are difficult at best. The courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served with finality. The spouse that challenges such decisions bears a heavy burden of showing a manifest abuse of discretion on the part of the trial court. The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion. In re Marriage of Landry, 103 Wn. 2d 807, 699 P.2d 214 (1985). In re Marriage of Bowen, 168 Wn. App. 581, 279 P.3d 885 (Div III, 2012).

III. ARGUMENT

1. As a matter of law, the Superior Court did not err in dividing Mr. Silk's Tier II Railroad Retirement earned for a period of time prior to the marriage.

Here, the court very clearly did not attempt to divide Tier I, but instead awarded such to Mr. Silk. With respect to Tier II, the benefits function as a private pension, and are contingent upon earnings and career service. Social Security Act, 42 U.S.C. sec 301-1397jj. Id. at 574. The "Divorced wife" clearly has the rights to eligibility for annuities as set forth in 45 U.S.C. sec 231a (c)(4). The federal law does not state that Tier II cannot be divided if during a Committed Intimate Relationship. Here, according to the trial court, the parties were together for 14 years. They were married for 6 and a half of those years, and in a Meretricious Relationship the other years they were together. (CP 19). The trial court held it would be inequitable to allow the petitioner to assert his separate property claim on such "community-like" assets that were acquired during this time. (CP 20). In the case of In re Marriage of Anderson, 134 Wn. App. 111, 138 P.3d 1118 (2006), it stated that 45

U.S.C. section 231m(b)(2) expressly permits the characterization of Tier II benefits as community property subject to distribution after divorce.

The trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion. In re Marriage of Rockwell, 141 Wn. App. 235, 170 P.3d 572 (2007), In re Marriage of Griswold, 112 Wn. App. 333, 48 P.3d 1018 (2002). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. In re Marriage of Muhammad, 153 Wn. 2d 795, 108 P.3d 779 (2005).

2. As a matter of law, the Superior Court did not abuse its discretion in awarding Ms. Broadsword spousal maintenance .

Mr. Silk makes three arguments with respect to this issue. First, he claims that the Superior Court did not make specific findings of fact as to each of the statutory elements in RCW 26.09.090. However, he fails to mention that in the case of In re Marriage of Horner, 151 Wn.2d 884, 93 P.3 124 (2004) the court may enter either specific findings on each factor after substantial evidence is presented, or make oral articulation that it considered each factor. Here, substantial evidence was argued and presented by Ms. Broadsword considering the factors. She discussed her

job and what she earns, namely \$11.75 per hour. (RP 188, lines 8-25). Her current financial situation was discussed and her financial declaration was admitted as an exhibit. She admitted to living pay check to pay check. (RP 201, lines 13 – 15). Ms. Broadsword testified that she had financial need. (RP 226, lines 6 – 8). Ms. Broadsword testified to Mr. Silk's financial situation, and his ability to pay. (RP 227 lines 7 – 25, and 228, lines 1 – 7). Ms. Broadsword testified to her previous and current health issues. (RP 229, lines 23 – 25, RP 230, lines 1 – 25, 231, lines 1 – 22). Mr. Silk admitted that Ms. Broadsword has financial need. (RP 132, lines 10 – 13). Mr. Silk discussed his health problems and admitted they were not major. (RP 132, lines 16 – 21). The Superior Court articulated the factors and its reasoning in the Memorandum Opinion.

The petitioner's take home pay is more than twice as much as respondent's. They were together for approximately 14 years. The respondent's ability to work as a machine operator was limited by having and being the primary caregiver for their child and only recently was able to secure full time work with benefits without working out of the area. Petitioner has incurred a substantial amount of time, money and transportation costs in acquiring/hoarding various airplane parts, tools, machines, businesses (CP 23).

Also, the trial court considered the parties ages, specifically the fact that the wife is 7 years older than the husband. And the court took notice of

the current health problems for the parties. The trial court clearly considered the petitioner/husband's financial circumstances, and found that even after paying child support and daycare, his income exceeded his expenses. The Court also considered that the respondent/wife's expenses were greater than her net income and child support payments received. The court held that the respondent's costs to maintain another household will require continued financial assistance from the petitioner. (CP 23). The Court also ordered a delay on the start of the maintenance payments until after the respondent had vacated the home.

(CP 24).

The purpose of the spousal maintenance award was to allow the respondent the ability to maintain another household after she moved, for her and their child.

Second, Mr. Silk argues that Superior Court abused its discretion by considering or awarding spousal maintenance for years that were a Committed Intimate Relationship, instead of just for the years of marriage. Here, the Superior Court did not indicate that he was awarding the spousal maintenance based upon anything more than the years of marriage. The Court took numerous factors into

consideration as stated above, (CP 23 and 24). The award of maintenance is within the discretion of the trial court. In re Marriage of Bulicek, 59 Wn App. 630, 633, 800 P.2d 394 (1990). The trial court's discretion in this area is wide, Bulicek, at 634. The only limitation on the amount and duration of the maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just, Bulicek, at 633. Here, the trial court considered the relevant factors such as: the financial resources of each party, need and ability to pay, their ages, their health. (CP 23 and 24). The court also had the ability to consider dissipation of assets, see In re Marriage of Matthews, 70 Wn. App. 116 (1993). In our case, Ms. Broadsword testified that for the last several years Mr. Silk had earned at least \$70,000 per year, and yet they had acquired no savings. (RP 231 lines 23 -25, and 232, lines 1 – 9). She testified that he spent money on equipment, and airplane parts. (RP 232, lines 18 -25). He was going to build airplanes. (RP 233, lines 23 -25). He also admitted to buying a business for \$30,000, and that he later dissolved it. (RP 103, lines 14 – 25, RP 104, lines 1 - 9). He bought cars that he never fixed. (RP 234, lines 5 – 9). He never really fixed up anything. (RP 234, lines 18 -19).

Third, Mr. Silk argues that the Superior Court's award was more akin to an award of child support rather than spousal maintenance and for this reason it was improper. Interestingly Mr. Silk only argues that it was "improper," and not that there was a "abuse of discretion." This is because there was no abuse of discretion. According to Cleaver v. Cleaver, 10 Wn. App. 14, 516 P.2d 508 (1973), the Appellate Court found that the trial court had erred in establishing a permanent award of spousal maintenance and instead ordered that the maintenance "alimony" should cease when the youngest child became 18 years of age, page 21. Our trial court's findings are certainly within the parameters of the Clevenger court. Our trial court also provided that it would go to age 18 or graduates from high school, unless either party dies, the respondent remarries, or their respective financial situations dictate otherwise. (CP 23 and 24).

3.The Superior Court did not err or abuse its discretion by ordering a property equalization payment.

As per the Memorandum Opinion, the trial court made an award of cash to Ms. Broadsword in the sum of \$7,500, in lieu of the real property being awarded to Mr. Silk, the possible dissipation of marital assets by

him, and the personal property remaining on the site being awarded to Mr. Silk. (CP 24). The court held that the net price received for the non household goods left on the property would probably not exceed \$10,000. Ms. Broadsword had testified that she felt that with a well advertised auction they could bring in \$40,000 for the sale of the items on the property. This included the laser cutter, testified by Mr. Silk that it had been purchased for \$6,800. (RP 107 lines 3-10). The Court also stated that there was some value to Mr. Silk for being awarded the real property, in that he did not have to pay to purchase a replacement home or incur costs to move. (CP 24).

Mr. Silk argues that values were not set forth by Ms. Broadsword. However, to the best of her ability Ms. Broadsword suggested a total value, and provided pages and pages of photographs as exhibits as to the property items purchased by Mr. Silk. Each of these pages were reviewed, identified and testified to by both of the parties in trial. Neither party paid to have the items appraised. Mr. Silk admitted that he did not have the property evaluated or appraised for trial. (RP 74, lines 18-20). He testified that he didn't want to spend the \$1,000 bucks or better to have somebody come do that. (RP 75 lines 2-3). Ms.

Broadsword testified that she could not afford an appraisal. (RP 188, lines 3 – 7). Mr. Silk admitted that there were other tools and other things locked in shops, in the shed, in the trailer. (RP 99, lines 4-9). He testified that there was a table saw. (RP 109, lines 4 -5). He admitted to having a Craftsman band saw, and a planer. (RP 109, lines 18 -22). He admitted to having an Hitachi miter saw. (RP 110, lines 3 -4). He admitted to having molds and schematics. (RP 110, lines 14 -15). He admitted that he still had a table saw at his mother's garage, that he had forgot about. (RP 110, lines 16 21). He also stated that there is a compressor in the house that he forgot about it. (RP 114, lines 22- 25). He admitted that he has registers, an electronic component for tattoo machines. (RP 111, lines 14 - 19). And that he had never bothered to provide the court or respondent with photos. (RP 99, lines 12 -14). He admitted that he never provided us with a list of tools. (RP 79, lines 5 -8). He then admitted that he did not have evidence as to the values of such property. He didn't keep the receipts. (RP 102, lines 19 – 25, RP 103, lines 1-3). He said his memory is not good. (RP page 30, line 4)

A court is not required to make findings in regard to every item of evidence introduced in a case, but it is necessary that it make findings of fact concerning all of the ultimate facts and material issues. Wold vs.

Wold, 7 Wn. App. 872, 503 P.2d 118 (1972). In our case, the trial court listened to testimony by both parties, and made a drive by of the property in Spokane before making his ruling. The court thereby made a just and equitable division of the property. In Wold, the court held that an appellate court is reluctant to substitute its valuation of property for that made by the trial court, and should only do so when inequity and injustice are apparent and an abuse of discretion is manifest, page 876.

4. The Superior Court did not abuse its discretion in awarding attorney fees and costs to Ms. Broadsword.

The Memorandum Opinion was the final decision of the court considering all issues. The court specifically stated in the Memorandum Opinion, (CP 24), that the Respondent/Ms. Broadsword, did not have sufficient resources to pay her own attorneys fees and costs. The court also stated that in spite of petitioner's decision to represent himself, his income would have been sufficient to retain his own counsel. The court went on to outline all of the various information that Mr. Silk failed to produce to the respondent's attorney and to the court. His lack of providing evidence required the respondent's attorney to obtain such information at a significant cost and expense. (CP 24). Mr. Silk's

own testimony showed that he failed to produce retirement information. (RP 19, lines 4 – 11). He also did not provide bank account information. (RP 21, lines 20 – 25). He stated that he got off work too late to get to the bank. (RP 22 lines 1 – 11). He did not provide mortgage information. (RP 27, lines 13 – 20). He did not provide any information concerning his Vanguard account, or even bother to reference it in the deposition. (RP page 36, lines 7 – 20). He did not provide his unemployment documentation when it was subpoenaed. (RP 63, lines 5 – 22). Specifically, the Court described his behavior as “intransigence”. (CP 24). As per the Decree of Dissolution, the Memorandum Opinion filed May 5th, 2012 was adopted as findings as to the full details of the court’s ruling.

Further, the argument for attorneys fees was well explained by Ms. Broadsword . She set forth the amount she had spent to date, specifically \$5,121 (RP 224, lines 18-19). And she explained that she had not been working so she had to borrow the initial retainer of \$2,000. (RP 224 line 23-25). She explained that she had borrowed the retainer from her adult son Craig Broadsword, and that she was paying him back at \$100.00 per month. (RP 225, lines 1-11). Ms. Broadsword explained

that she had financial need per her financial declaration, and that she was requesting \$5,000 for attorneys fees. (RP 226, lines 1-8). She also testified concerning Mr. Silk's expenses, and actual income, and that he had the ability to pay for her attorneys fees. (RP 227, lines 1-25, and RP 228, lines 1-7).

Mr. Silk argues that the parties have the same financial position after he pays child support, maintenance and the equalization payment to Ms. Broadsword. He fails to acknowledge that from the money Ms. Broadsword receives she provides nearly all of the financial support for their son by having him the majority of time. And she pays her nephew, the daycare provider, \$100.00 every week for watching their son while she is working. (RP 186 lines 2 - 16). She testified that she was living pay check to pay check. (RP 201, lines 13 & 14).

IV. REQUEST FOR ATTORNEY'S FEES

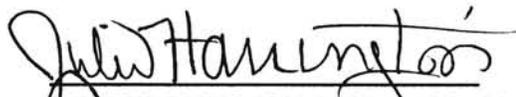
Regarding this appeal, Ms. Broadsword did not have funds to pay her attorney for a new retainer, and Mr. Silk did pay Mr. Cossey a retainer. Therefore, an additional \$4,000 has been added to Ms. Broadsword's outstanding balance. Further, from the original trial, Ms. Broadsword has been making monthly payments to her attorney on the

outstanding balance. The award of \$5,000 for attorney's fees to Ms. Broadsword has not been paid by Mr. Silk. The original award should be upheld, in that it was a fair and reasonable decision. At this time, Mr. Silk has the ability to assist with additional attorney's fees for Ms. Broadsword. Based upon her current financial circumstances, specifically need, (see updated financial declaration), and Mr. Silk's ability to pay, the additional \$4,000 should be reduced to a judgment against Mr. Silk. Mr. Silk's request for fees should be denied. He has the ability to pay for his own attorney.

V. CONCLUSION

For the reasons set forth above, the Respondent respectfully request that the decision and order of the Superior Court of the State of Washington, for the County of Lincoln, be upheld, and the request for an appeal be denied. It is further asked that the respondent's request for attorney's fees be granted.

Respectfully submitted this 1st day of May, 2013.


JULIE HARRINGTON, WSBA # 20403
Attorney for TERESA BROADSWORD

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington, that on this date declarant personally filed the original and one copy of the document entitled: **BRIEF OF TERESA ANN BROADSWORD** at:

Court of Appeals of the State of Washington, Division III
Clerk of the Court
N. Cedar Street
Spokane, WA 99201

AND

That on this date declarant placed in the mails of the United States Postal Service a properly stamped and addressed envelope containing a true and correct copy of: **BRIEF OF RESPONDENT TERESA ANN BROADSWORD** directed by first class mail to Counsel for Appellant, namely:

Robert Cossey
902 N. Monroe
Spokane, WA 99201

Teresa Ann Broadsword
P.O. Box 7595
Spokane, WA 99207

DATED this 22 day of May, 2013.


JULIE HARRINGTON
RESPONDENT'S ATTORNEY