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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

IN RE THE MARRIAGE OF:

**SELISA HUMPHREY
Appellant**

V.

**LLOYD HUMPHREY, SR.
Respondent**

NO. 31336-1

APPELLANT'S REPLY BRIEF

**LOYD J. WILLAFORD
Attorney for Appellant
WEBSTER LAW OFFICE, PLLC
116 N. Main Street
Colville, WA 99114
(509) 685-2261
WSBA #42696**

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II. INTRODUCTION AND RELIEF REQUESTED

Appellant Selisa Humphrey requests that this Court reverse the trial court's rulings regarding the distribution of property, award of maintenance, and enforcement of an agreement between the parties. She asks the Court remand the matter for a redetermination of these issues based solely upon the evidence she produced at trial, striking all of Respondent Lloyd Humphrey's trial testimony and exhibits.

III. REPLY ARGUMENT

A. The trial court erred when it ruled that default was not an option as a sanction for flagrant discovery abuses.

As Appellant Selisa Humphrey (Selisa) pointed out in her opening brief, Respondent Lloyd Humphrey (Lloyd) engaged in extensive discovery abuse which prejudiced her ability to prepare for trial. *See* Appellant's Br. at 8-12. Contrary to Lloyd's argument in reply, a default would not have deprived Lloyd of due process. Lloyd was on notice of the requested relief and the possibility of default. In her initial petition, Selisa requested that the Court "Divide the property and liabilities of the parties." CP at 3. As part of discovery, Selisa repeatedly sought to ascertain the nature of property which was subject to the division. Lloyd thwarted this effort at every turn. Lloyd was placed on notice on September 22, 2011, that continued discovery violations would result in a default order and limits on his ability to present

evidence at trial. CP at 321. Despite this knowledge, Lloyd continued to thwart the discovery process and on July 16, 2012, the court again found Lloyd had violated the court orders related to discovery for conduct which occurred after the October 17, 2011 order. CP at 345. Despite all this, the trial court refused to grant Selisa's motion in limine to find Lloyd in default and to strike his responsive pleadings.

After hearing the bizarre and self-serving testimony of Lloyd at trial, the Court concluded that default was impractical and striking pleadings "would only further limit available evidence" CP at 481 (Finding of Fact C) Of course, the only reason evidence was limited was Lloyd's refusal to comply with Court orders. By allowing Lloyd to testify at trial and then taking his bizarre explanations as truthful, the court rewarded Lloyd's bad behavior.

Given the Court's finding that Lloyd willfully and repeatedly refused to obey court orders as to an accounting for guns (CP at 491), it was an abuse of discretion to accept his \$40,000 valuation of the guns at trial rather than the \$500,000 value which Lloyd had previously agreed with. VRP at 260. Lloyd's explanation that he had given the guns to his now dead grandson who sold them for \$37,000 was simply not credible. While appellate courts do not reweigh a trial court's determination of credibility, in the present case, the trial court was not saying that Lloyd's \$40,000 valuation was credible; it was merely using that figure because there was no other evidence of valuation. CP at 489. The reason there was no other valuation was Lloyd's refusal to supply an inventory of the guns.

Contrary to the trial court's reasoning, it had a perfectly viable option of proceeding to a default trial. Pursuant to CR 37(a) and CR 55(b)(2), the court could have simply taken testimony and evidence solely from Selisa and based its ruling on this evidence. On remand, this option is still available, this Court could simply instruct the trial court to disregard all evidence which Lloyd produced at trial and issue a ruling relying solely on evidence produced by Selisa. This remedy would correct the injustice the trial court worked by rewarding Lloyd's bad behavior.

B. No fair-minded rational person could have concluded the \$214,000 found wrapped in various dated envelopes was the same \$210,000 which was withdrawn from banks less than a week before.

"Factual findings are erroneous where not supported by substantial evidence in the record. Substantial evidence exists where there is a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Finch*, 137 Wn.2d 792, 856, 975 P.2d 967 (1999)(citations omitted).

In early August 2010, \$214,000 was discovered in Lloyd's safe after Selisa's counsel obtained access to Lloyd's home using a police escort. VRP at 93-94. This money was wrapped in various dated wrappers with dates ranging from 2003 to 2010. VRP at 91. The wrappers also contained specific dollar amounts written on the wrappers. *Id.*

Lloyd offered the incredible explanation that he had withdrawn the money from the bank the week before and then rewrapped it to confuse would be thieves. VRP at 252-253. He also admitted he intended to bury

the money VRP at 252. When pressed on this bizarre explanation, Lloyd admitted that there had been money in the safe prior to the August 2, 2010. *Id.* Selisa testified that Lloyd regularly updated her on the amount of money in the safe. VRP at 392. Lloyd told Selisa that there was \$170,000 in the safe in early 2010. *Id.* Selisa's testimony was much more consistent with the other facts of the case. In particular, Lloyd admitted that intended to bury the money. This leads to the inevitable conclusion that Lloyd had concealed the \$210,000 which he withdrew from bank accounts on August 2, 2010; the monies discovered in the safe were separate monies.

Again, no reasonable trier of fact could believe Lloyd's explanation for how and why the money was wrapped. Thus, the trial court abused its discretion in accepting Lloyd's explanation for the money in the safe. The net result was that Selisa was deprived her interest in \$210,000 in community assets.

C. The court erred in accepting Lloyd's \$40,000 for the gun collection when Lloyd willfully violated discovery orders related to the guns and changed his position on their valuation.

In vein similar to the missing cash, the trial court accepted Lloyd's \$40,000 valuation for a gun collection which Lloyd had previously valued at \$500,000. VRP at 260. This was after the court had affirmed its prior ruling that Lloyd would not be allowed to testify as to the value of personal property. VRP at 34. This personal property would necessarily include the guns.

Even if Lloyd's testimony regarding the a \$40,000 value for the guns

were admissible, which it was not, Lloyd's explanation that he had given the guns to his grandson out of love and that the grandson then sold the guns for a fraction of their value was simply not credible. Conveniently for Lloyd, his grandson passed away shortly after allegedly receiving the funds for the guns. VRP at 262. There were no other witnesses to the alleged gift. In addition, Lloyd was regularly seen with guns after the alleged gift and sale including at the early August 2010 visit where the \$214,000 in cash was discovered. VRP at 88 (Lloyd came to the door with a Thompson .45 handgun). Lloyd also possessed a 1911 A-1. VRP at 275.

The trial court found that Lloyd has willfully violated discovery orders related to the gun collection. CP at 491. However, the court also accepted Lloyd's bizarre story of what happened to the guns and awarded Selisa only \$40,000 for a gun collection that Lloyd himself had previously admitted was worth \$500,000. This was another error by the trial court which cost Selisa hundreds of thousands of dollars and which rewarded Lloyd for his obstructionist behavior.

D. The trial court erred when it failed to properly consider the statutory factors related to an award of maintenance.

A spousal maintenance "award that does not evidence a fair consideration of the statutory factors results from an abuse of discretion." *Spreen v. Spreen*, 107 Wn. App. 341, 349, 28 P.3d 769 (2001). In *Spreen*, the court considered factors other than statutory factors listed in RCW 26.09.090 in limiting a maintenance award. Similarly, in the present case,

while the trial court paid lip service to the RCW 26.09.090 factors, its ruling granting Selisa \$800 per month in maintenance was not a “fair consideration” of the statutory factors.

As Selisa pointed out in her opening brief, Lloyd received the bulk of the real property which was before the court. Appellant at Br. at 26 citing CP at 486-487. While the community property which the court found existed (not the \$210,000 in missing cash and the \$500,000 gun collection) was roughly split evenly, after the court’s maintenance award Selisa’s income remains one-half that of Lloyd despite the fact that the Court found that neither party can work due to disabilities and age, CP at 491. While Lloyd cites the Court’s recitation of his financial obligations as evidence that Court award was fair, this is merely one factor in determining maintenance. Given that the material the court relied upon was self-reported by Lloyd who has previously exaggerated his expenses. *see* VRP at 236-238, (exaggeration of the cost of wood in a prior financial declaration), the court should not have been given much weight to Lloyd’s declarations at all. Given these facts, the maintenance award was not supported by a “fair consideration” of the statutory factors and thus was an abuse of discretion.

E. The trial court erred when it failed to enforce its prior order which represented a binding agreement between the parties.

Both the trial court and Lloyd miscited *Lindsey v. Lindsey*, 54 Wn. App. 834, 776 P.2d 172, (1989) for the proposition that trial courts are not

bound by temporary orders. This is not only not an accurate reflection of the law, it is directly contradicted by *Lindsey* itself. While it is true that trial courts can *modify* temporary orders for good cause, *see e.g.* RCW 26.09.070, in *Lindsey*, the court held that arrearages under a pre-trial child support order must be enforced as a judgment upon request unless specific facts or equitable considerations weighed in favor of non-issuance of the judgment. *Lindsey*, 54 Wn. App. at 836-837. In essence the *Lindsey* court was saying that the trial court was bound by its pre-trial support order, not that it could ignore it at will as the trial court did with the June 11, 2011 order in this case.

In any event, the trial court and Lloyd mischaracterized the June 30, 2011 order (CP at 296-299) as a “temporary order.” This order required the trial court to order Lloyd to reimburse Selisa for any obligations for attorney’s fees and separate obligations paid for from community funds. The order says nothing about it being temporary; it was a final agreed determination of what would happen with regard to Lloyd’s obligations post-trial. The trial court did not have the power to modify this order absent a timely showing of good cause pursuant to CR 60. No such timely showing occurred.

The fact that neither Lloyd nor the trial court fully comprehended the effect of the June 30, 2011 order on the trial court’s final decree is not grounds to vacate the June 30, 2011 order. Lloyd’s motion for reconsideration of this order more than a year later was untimely. See CR 60(b). The trial court’s ruling on reconsideration stated that had the court been aware of its prior ruling regarding reimbursement, the court would have

adjusted the property distribution accordingly. CP at 572. But the trial court was aware of the order; it was brought to the court's attention at the beginning of trial, VRP at 34, and at the conclusion of trial, VRP at 616. In both instances, the trial court reaffirmed the reimbursement order.

While trial court apparently later regretted its property distribution, Lloyd did not seek to reconsider the property distribution. *See* CP at 528-540. And the trial court did not give the parties the CR 60(d) required notice that it might exercise its power sua sponte to reconsider the distribution. Finally, Lloyd did not appeal the property distribution. Thus, the distribution is the law of the case and the June 30, 2011 order regarding reimbursement must be enforced. Failure to enforce this ruling will work a substantial injustice to Selisa who relied on this order in proceeding to trial.

III. CONCLUSION

For the reasons given in her opening brief and the reasons given above, Appellant Selisa Humphrey requests that this Court reverse the trial Court's rulings on property distribution, maintenance, and enforcement of the agreed order. On remand, the trial court should be instructed to strike all of Respondent Lloyd Humphrey's trial testimony and exhibits as a sanction for his discovery abuse.

Respectfully Submitted this 3rd of December, 2013.

By:


LOYD J. WILLAFORD, #42696
Attorney for Petitioner/Appellant

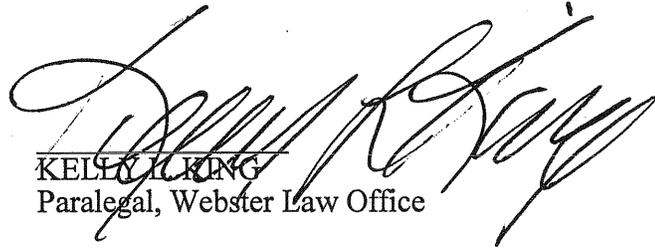
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 3rd day of December, 2013, she served a copy of the Appellant's Brief by First Class Mail to the persons hereinafter named at the places of address stated below which is the last known address.

ATTORNEY FOR RESPONDENT

Brett Billingsley
609 E 40th AVE
Spokane, WA 99203



KELLY L. KING
Paralegal, Webster Law Office