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Division III
State of Washington

Court of Appeals No. 32041-3-III
Benton County Superior Court Cause No. 10-3-01133-2

WASHINGTON STATE COURT OF APPEALS
DIVISION III

In re the Marriage of:

SURESH PHILIP,

Petitioner/Appellant,

vs.

JAYA PAULOUSE PHILIP,

Respondent.

APPELLANT'S REPLY BRIEF

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REVISED CODE OF WASHINGTON:

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RCW 26.16.030 8, 11

WASHINGTON STATE COURT RULES:

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STATUTES INVOLVED:

RCW 26.09.080

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.16.030

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife

or both, is community property. Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property, except:

(1) Neither person shall devise or bequeath by will more than one-half of the community property.

(2) Neither person shall give community property without the express or implied consent of the other.

(3) Neither person shall sell, convey, or encumber the community real property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners.

(4) Neither person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase.

(5) Neither person shall create a security interest other than a purchase money security interest as defined in *RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances, or a community mobile home unless the other spouse or other domestic partner joins in executing the security agreement or bill of sale, if any.

(6) Neither person shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses or both domestic partners participate in its management without the consent of the other: PROVIDED, That where only one spouse or one domestic partner participates in such management the participating spouse or participating domestic partner may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse or nonparticipating domestic partner.

COURT RULES INVOLVED:

RAP 2.5

Circumstances Which May Affect Scope of Review

(a) Errors Raised for First Time on Review. The appellate court may

refuse to review any claim of error which was not raised in the trial court. Howard, a party may raise the following claimed errors for the first time in the appellate court:

- (1) lack of trial court jurisdiction,
- (2) failure to establish facts upon which relief can be granted, and
- (3) manifest error affecting a constitutional right.

A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

RAP 18.9
Violation of Rules

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

I. INTRODUCTION

This entire appeal turns on whether this Court finds that the \$251,000.00 award to Ms. Philip should be characterized as a right of reimbursement, or as a just and equitable division of assets and debts. The circumstances under which Ms. Philip was awarded the \$251,000.00 evidenced the trial court's obvious intent to compensate her under reimbursement principles.

If a right of reimbursement is found, the question becomes whether the trial court erred in holding that the reimbursement belonged to Ms. Philip alone rather than the community. The trial court's statements plainly demonstrate that it felt legally obligated to reimburse Ms. Philip alone. The court did not believe Mr. Philip was entitled to a portion of the reimbursement. The trial court's misapplication of the right of reimbursement is the error of law that should be overturned on appeal.

Reversal is warranted in this case. This Court should either acknowledge Dr. Philip's one-half interest in the reimbursement and order that he receive credit for half the reimbursement (\$125,500.00), or alternatively, this matter should be remanded to the trial court with instructions that the reimbursement must be equitably divided between the parties.

II. ADDITIONAL RELEVANT FACTS

At the conclusion of his argument at trial, Dr. Philip provided the trial court with a demonstrative exhibit outlining his proposed distribution of debts and assets. *See RP dated May 23, 2014*, 161: 14-17. Dr. Philip's proposal included a distribution to Dr. Philip in the amount of \$115,000.00 and a credit to Ms. Philip in the amount of \$10,000.00. *See Id.* at 161: 12-18. This represented half the amount repaid towards Dr. Philip's education loan. The other half of the debt was not credited to the either party because it was argued that Dr. Philip had authority to use up to one-half of his interest in community funds to satisfy his separate debt. *RP dated May 23, 2013*, 164:23-25.

Under Dr. Philip's proposed distribution, he would take a \$115,000.00 credit on his side of the ledger as an advance on the property settlement, and he would pay Ms. Philip \$10,000.00 to account for the remaining balance. *See RP dated May 23, 2013*, 165-1-10. This would bring the parties to an equal split of the community debts and assets, but also compensate Ms. Philip for one-half of the community funds used to repay Dr. Philip's separate debt. *RP dated May 23, 2013*, 166:9-19. Dr. Philip did not argue that Ms. Philip's reciprocal benefit amounted to

\$10,000.00. Dr. Philip merely proposed a method by which the reimbursement would be divided.

III. STANDARD OF REVIEW

Ms. Philip incorrectly states the standard of review that should be applied to this appeal is manifest abuse of discretion. *Brief of Appellant* at 5. There is no dispute that a trial court has broad discretion to make a just and equitable division of assets and debts. *See* RCW 26.09.080; *Miracle v. Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984) (citing *Baker v. Baker*, 80 Wn.2d 736, 498 P.2d 315 (1972)). It is also undisputed that a trial court's division of marital property is reviewed for manifest abuse of discretion. *In Re Marriage of Craft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992); *In Re Marriage of Wright*, 78 Wash. App. 230, 234, 896 P.2d 735 (1995). However, Dr. Philip does not appeal the distribution of marital assets and debts. He appeals the right of reimbursement awarded to Ms. Philip. Manifest abuse of discretion need not be found.

A trial court's award of a right of reimbursement is reviewed only for abuse of discretion. *Miracle*, 101 Wn.2d at 139. Ms. Philip acknowledges that this is the proper standard for review. *Brief of Respondent* at 15. Therefore, that is the standard that must be applied in the present case.

IV. LEGAL ARGUMENT

Ms. Philip misconstrues the events at trial to re-frame the issues on appeal. She contends her reimbursement of \$251,000.00 was nothing more than an unequal distribution of debts and assets. *Brief of Respondent* at 6, 17. Her mischaracterizations are an attempt to encourage this Court to apply a heightened standard of review and attribute her award to the discretion of the trial court.

Ms. Philip completely side steps any meaningful analysis of the law pertaining to the right of reimbursement. She does not refute that the right of reimbursement should have been awarded to the community, not just to her. She does not deny that she received a reciprocal benefit from Dr. Philip's education loans. Instead, she claims the trial court did not manifestly abuse its discretion by failing to give Dr. Philip any credit for the reimbursement and that the trial court's failure to find a reciprocal benefit does not support reversal. Her response misses the crux of this appeal. What is at issue is the trial court's decision to award Ms. Philip the \$251,000.00 reimbursement and to deny Dr. Philip any portion of the reimbursement at all. Ms. Philip does not get to skip over the error in law and claim the ultimate distribution would have been the same.

Finally, Ms. Philip claims Dr. Philip's appeal should be denied based on the doctrines of waiver and invited error. *Id.* Again, her arguments misconstrue the events at the trial court in the hopes of avoiding reversal on a technicality. None of her arguments have merit when viewed in light of what actually occurred at trial and under Washington law. They should be ignored.

A. THE BASIC PREMISE OF MS. PHILIP'S POSITION IS FLAWED BECAUSE DR. PHILIP'S EDUCATIONAL DEBT DID NOT EXIST AT THE TIME OF TRIAL.

Ms. Philip argues that her award of \$251,000.00 was nothing more than an unequal distribution of assets and debts. *Brief of Respondent* at 6, 17. Her position is flawed from inception because there was no "debt" to distribute.

Washington courts are charged with dividing the debts and assets in a dissolution. RCW 26.09.080. Much like an asset that does not exist at the time of trial, the court does not have the ability to divide or assign a debt that does not exist at the time of trial. *See White v. White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). Here, Dr. Philip's educational debt did not exist at the time of trial because the promissory notes were paid and cancelled. Ms. Philip cannot, therefore, claim Dr. Philip's educational loan was a debt before the court subject to division. The role of the trial

court is to decide what impact, if any, the satisfaction of Dr. Philip's repayment will have on the distribution of debts and assets. In this case, the court chose to give Ms. Philip a right of reimbursement.

A trial court certainly has the ability to consider a spouse's unusually significant contributions to (or wasting of) assets when dividing the parties' assets. *White*, 105 Wn. App. at 551. However, as addressed in more detail below, that is not the situation that occurred in this case.

B. DR. PHILIP PROPERLY CHARACTERIZED THE COURT'S \$251,000.00 AWARD TO MS. PHILIP AS A RIGHT OF REIMBURSEMENT.

Ms. Philip argues that "[t]he record does not support Dr. Philip's claim that the trial court imposed an equitable lien based on a right of reimbursement." *Brief of Respondent* at 6. In support of her argument, Ms. Philip contends that the absence of any specific reference to an "equitable lien" or "right of reimbursement" is sufficient proof that no such reimbursement was ever intended. *Brief of Respondent* at 6. She wants this Court to believe the award was nothing more than a disproportionate division of assets. *Id.* at 7-8. This argument ignores the obvious posture of this case when the court's ruling was rendered.

First, Ms. Philip does not cite any authority for the proposition that a trial court must use the term "equitable lien" or "right of reimbursement"

for such a thing to exist. While the absence of those terms *might* suggest that the court did not intend to award a right of reimbursement; that alone is not dispositive. The Court should strongly consider the events that occurred at trial which support a finding of a right of reimbursement.

The trial court “compensated” Ms. Philip for the entire \$251,000.00 used to satisfy Dr. Philip’s educational loans:

[W]hat I am going to do is award the Vanguard account to her [Ms. Philip] then she gets no judgment against him and she is compensated for the two-hundred and fifty thousand that was paid of community assets that was paid to his parents.

RP dated May 24, 2013, at 215:14-18. While the term “reimbursement” was never used, it was clear the court awarded Ms. Philip the entire Vanguard account as reimbursement. The court simply used the word “compensated” instead of “reimbursed.” It is a distinction without a difference. The fact that the term “right of reimbursement” was not used does not change the intent of what the trial court was trying to accomplish. Thus, the award should be characterized as a right of reimbursement.

Ms. Philip places far too much reliance on *In re Marriage of White*, 105 Wn. App. 545, 20 P.3d 481 (2001). *White* does not abolish the trial court’s authority to create an equitable lien or award a right of reimbursement. It merely reaffirms the trial courts broad discretion to distribute assets and debts. *See White*, 105 Wn. App. 554. To accept Ms.

Philip's broad interpretation of *White* would essentially make an equitable lien and/or right of reimbursement inapplicable in most, if not every, dissolution case. This Court should not accept such an expansive interpretation of *White* and acknowledge a trial courts authority to order a right of reimbursement without using express terms.

Even if this Court does consider the decision in *White*, that case is distinguishable. In *White*, Ms. White used her separate property inheritance to pay off community debt (mortgage and auto loan). *Id.* at 552. It was largely undisputed that the funds used to pay off the Whites' debt were Ms. White's separate property. *See Id.* at 547. The trial court ordered the White's home and automobile to be sold. *Id.* at 548. Ms. White recouped the exact amount of her separate property contributions and thereafter the net proceeds from the sale of these items were split equally between the parties. *Id.* That case is nothing like this one.

Dr. Philip used community funds to satisfy his separate debt. Dr. Philip and Ms. Philip both had an interest in those funds under Washington community property law. *See* RCW 26.16.030. Unlike in *White*, the question in this case is how much community money was Dr. Philip entitled to use to satisfy his separate debt and how much is Ms. Philip entitled to be reimbursed for. The characterization of property in

this case versus the characterization of property in *White* completely changes the community property analysis.

Here, the trial court believed that it *had* to reimburse Ms. Philip alone for the money used to repay Dr. Philip's educational debt under reimbursement principles. Even if the decision to award a right of reimbursement was appropriate, the court abused its discretion by misapplying community property law and reimbursing Ms. Philip for the entire \$251,000.00.

C. MS. PHILIP DOES NOT DISPUTE THAT THE RIGHT OF REIMBURSEMENT BELONGED TO THE COMMUNITY.

On appeal, Dr. Philip argues the trial court abused its discretion by holding that Ms. Philip was entitled to reimbursement rather than the community. *Brief of Appellant* at 21-22 (citing *Connell v. Francisco*, 127 Wn.2d 339, 351, 898 P.2d 831 (1995)). Ms. Philip does not refute this argument.

She responds by arguing that the trial court did not manifestly abuse its discretion by failing to equally divide the reimbursement. *Brief of Respondent* at 16-18. Not only is this an attempt to improperly classify this claim under a higher standard of review, but her argument misses the entire point.

The trial court erred because it engaged in an improper legal analysis. It felt *obligated* to reimburse Ms. Philip for the entire amount and to deny Dr. Philip any credit. Ms. Philip cannot ignore the fact that the trial court misapplied the legal analysis and assume the results would have been the same under an unequal distribution theory.

If the court had ruled that the \$251,000.00 reimbursement belonged to the community *and then* decided to award the entire amount to Ms. Philip, Dr. Philip's position on appeal would be different. However, that is not what happened. This Court should reverse the error committed by the trial court and find that Dr. Philip was entitled to one-half of the reimbursement (\$125,500.00). At the very least, this case should be remanded to the trial court with instruction that the reimbursement belongs to the community and the Court should divide the reimbursement in a just and equitable manner.

D. DR. PHILIP'S APPEAL SHOULD BE GRANTED ON THE MERITS.

Ms. Philip blindly contends that the court did not abuse its discretion in awarding a right of reimbursement. *Brief of Respondent* at 14. Ms. Philip does not even attempt to address Dr. Philip's argument that the law was misapplied. Ms. Philip does not refute that she received a reciprocal benefit from Dr. Philip's educational loan. Rather, she argues

that the court did not abuse its discretion by failing to award a right of reimbursement to the community rather than just her.

E. DR. PHILIP'S APPEAL SHOULD NOT BE DENIED ON GROUNDS OF WAIVER OR INVITED ERROR.

Ms. Philip contends that most, if not all, of Dr. Philip's appeal should be denied on grounds of either waiver and/or invited error. *Brief of Respondent* at 8. Dr. Philip did not waive any arguments for appeal, but concedes that the doctrine of invited error precludes his assignment of error related to RCW 26.16.030. That argument, and that argument only, is abandoned on appeal. All of Dr. Philip's remaining arguments have been, or will be addressed below.

As a general rule, an appellate court *may* refuse to review any claim of error which was not raised at the trial court. RAP 2.5(a) (italics added). The use of the term "may" means the rule is discretionary, not absolute. *Id.*; *State v. Ford*, 137 Wn.2d 472, 454, 973 P.2d 452 (1999). The rule never operates as an absolute bar to review. *Ford*, 137 Wn.2d at 454.

RAP 2.5(a) is intended to afford the trial court an opportunity to consider and rule on relevant authority, and correct errors. *Washburn v. Beatt Equipment*, 120 Wn.2d 246, 291, 840 P.2d 860 (1992); *Smith v.*

Shannon, 100 Wn.2d 26, 37, 666 P.2d 351. As pointed out in *Stork v. International Bazaar, Inc.*, 54 Wn. App. 274, 281, 774 P.2d 22 (1989):

The same rationale requires parties to inform a court acting as the trier of fact of the rules of law they wish the court to apply. While a party has the right to assume that the trial court knows and will properly apply the law, this does not excuse failure to seek correction of an error once the complaining party is aware of it.

(quoting *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979)).

At the conclusion of Dr. Philip's argument at trial, he gave the trial court an opportunity to consider each of his legal arguments that are subject to this appeal. Dr. Philip argued that part of the community funds used to repay his parents was his by virtue of community property laws. *RP dated May 23, 2013* at 164:21-23. Dr. Philip also argued that Ms. Philip received a reciprocal benefit from the satisfaction of his educational loans. *Id.* at 165: 13-16; *Id.* at 166:2-8. All of Dr. Philip's arguments on appeal fit within the scope and purpose of RAP 2.5(a) because the court was able to consider each of his legal theories and they should be considered by this Court.

Additionally, Dr. Philip objected to the court's decision to award a right of reimbursement immediately:

Mr. Telquist: Your honor, did you, isn't one-half of that community, the two-hundred and fifty thousand dollars, I did argue that one-half, it is Doctor Suresh's by community property law. So you're giving her the entire two-fifty?

The Court: It's all his separate debt.

Mr. Telquist: I understand but he used community funds of which he owns one half. I just want to make sure I'm clear.

RP dated May 24, 2013, at 215:19-216:3. Counsel for Dr. Philip objected a second time on almost identical grounds:

Mr. Telquist: I just, my too [sic] forecast your honor, I don't think the analysis is correct, I think he can use his portion of the community to pay his separate debt, one-half he is entitled to.

RP dated May 24, 2013, at 218: 1-5. Ms. Philip completely ignores these facts in making her argument of waiver.

In sum, Dr. Philip placed his argument and legal theories before the court on three separate occasions. He argued his theory of the case in closing, and objected to the court's ruling on two separate occasions. The court chose not to correct its error and now Dr. Philip has appealed. Thus, Dr. Philip has even satisfied the standard set forth in *Stork*. It is completely disingenuous for Ms. Philip to argue otherwise.

F. MS. PHILIP'S REQUEST FOR ATTORNEY FEES SHOULD BE DENIED.

Ms. Philip has requested attorney fees and costs under RAP 18.9(a) on the ground that Dr. Philip's appeal is frivolous. This argument is without merit and must be denied, as Dr. Philip's appeal is supported by applicable law and relevant facts.

As stated by Ms. Philip, an appeal is frivolous if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). The record should be examined as a whole, and doubts should be resolved in favor of the appellant. *Id.* at 692.

Dr. Philip has assigned error to two issues that are ripe for appellate review and are in not in any way frivolous or advanced in bad faith. The issues of whether the trial court erred in granting the community and right of reimbursement and whether Ms. Philip should have been awarded the entire \$251,000.00 sum are both debatable and merit reversal under the law and facts presented by Dr. Philip.

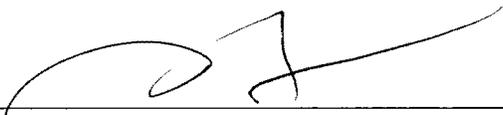
After examining the record as a whole, this Court must agree that Dr. Philip has presented appealable issues supported by law and fact and any doubt as to whether Dr. Philip advanced this appeal frivolously must be resolved in his favor. However, there is no basis for a finding of a frivolous appeal and Ms. Philip's request for attorney's fees must be denied.

V. CONCLUSION

Based on the foregoing analysis, the trial court's decision to award Ms. Philip \$251,000.00 must be reversed and remanded. This Court must find that the trial court erred in holding that Ms. Philip alone was entitled to a right of reimbursement. At the very least, this matter should be remanded to the trial court with instructions that the reimbursement belongs to the community and should be divided equitably.

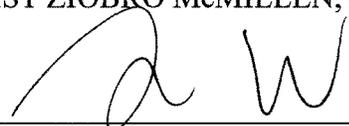
DATED this 12th day of June, 2014.

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WASHINGTON STATE COURT OF APPEALS
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SURESH PHILIP,

Petitioner/Appellant,

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JAYA PAULOUSE PHILIP,

Respondent.

DECLARATION OF FILING AND SERVICE

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DECLARATION OF FILING AND SERVICE

I, Amber Peters, am over the age of eighteen and am competent to testify as to the facts contained in this Declaration.

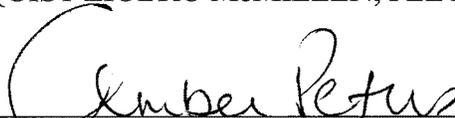
1. On June 12, 2014, I electronically filed with the Washington State Court of Appeals, Division III the Appellant's Reply Brief and this Declaration of Filing and Service.

2. On June 12, 2014, I hand delivered a packet addressed to Benjamin Dow, Dow Law Firm, 1060 Jadwin Avenue, Suite 125, Richland, Washington, 99352-3531, containing a true and correct copy of the Appellant's Response to Brief of Respondent and this Declaration of Filing and Service.

Respectfully submitted this 12th day of June, 2014.

TELQUIST ZIOBRO McMILLEN, PLLC

By: _____



AMBER PETERS,

*Legal Assistant to George E. Telquist &
Richard D. Whaley*