

FILED

MAR 1 2005

COURT OF APPEALS
IN
STATE OF WASHINGTON
By _____

NO. 32791-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

TODD M. CHISM,

Petitioner/Appellant,

vs.

NICOLE C. CHISM,

Respondent/Respondent.

REPLY BRIEF APPELLANT TODD M. CHISM

Martin A. Peltram, WSBA #23681
Attorney for Appellant
900 North Maple Street, Suite 200
Spokane, WA 99201
(509) 624-4922

TABLE OF CONTENTS

A. RESTATEMENT OF ISSUE PRESENTED ON APPEAL. 1
B. ARGUMENT IN REPLY 2
C. CONCLUSION. 8

TABLE OF AUTHORITIES

Table of Cases

<u>Bering v. Share</u> , 106 Wn.2d 212, 721 P.2d 918 (1986)	3
<u>Berg v. Hudesman</u> , 115 Wn.2d 657, 801 P.2d 222 (1990)	5
<u>Brother's Intern. Corp. v. Nat'l Vacuum & Sewing Machine Stores, Inc.</u> , 9 Wn.App. 154, 510 P.2d 1162 (1973)	5
<u>Buyken v. Ertner</u> , 33 Wn.2d 334, 205 P.2d 628 (1949)	5
<u>Chatos v. Levas</u> , 14 Wn.2d 317, 128 P.2d 284 (1942)	4
<u>Christensen v. Grant Cy. Hosp. Distr. No. 1</u> , 152 Wn.2d 299, 96 P.3d 957 (2004)	7
<u>DePhillips v. Zolt Constr. Co.</u> , 136 Wn.2d 26, 959 P.2d 1104 (1998)	5
<u>Diversity Wood Recycling, Inc. v. Johnson</u> , 161 Wn.App. 891, 251 P.3d 908 (2011)	6, 7
<u>Eggert v. Vincent</u> , 44 Wn.App. 851, 723 P.2d 527 (1986), <u>review denied</u> , 107 Wn.2d 1034 (1987)	4
<u>Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP</u> , 161 Wn.2d 214, 164 P.3d 500 (2007)	7
<u>Garcia v. Wilson</u> , 63 Wn.App. 516, 820 P.2d 964 (1991)	6, 7
<u>Gordon v. Gordon</u> , 44 Wn.@d 222, 172 P.2d 210 (1946)	6
<u>Green Thumb, Inc. v. Tiegs</u> , 45 Wn.App. 672, 726 P.2d 1024 (1980)	3
<u>Hopper v. Hemphill</u> , 19 Wn.App. 334, 575 P.2d 746 (1978)	4
<u>In re Marriage of Spreen</u> , 107 Wn.App. 341, 28 P.3d 769 (2001)	3
<u>In re Marriage of Tang</u> , 57 Wn.App. 648, 789 P.2d 118 (1990)	6
<u>Lopez v. Reynoso</u> , 129 Wn.App. 165, 118 P.3d 398 (2005)	5
<u>Olmstead v. Department of Health</u> , 61 Wn.App. 888, 812 P.2d 527 (1986).	3

<u>Rushlight v. McLain</u> , 28 Wn.2d 189, 183 P.2d 62 (1947)	4
<u>Silverdale Hotel Assocs. v. Lomas & Nettleton Co.</u> , 36 Wn.App. 762, 677 P.2d 773 (1984).	4
<u>State v. Cloud</u> , 95 Wn.App. 606, 976 P.2d 649 (1999)	7
<u>State v. Robinson</u> , 79 Wn.App. 386, 902 P.2d 652 (1995)	6
<u>State v. Steen</u> , 164 Wn.App. 789, 265 P.3d 901 (2011)	2, 8
<u>State v. Ward</u> , 125 Wn.App. 138, 104 P.3d 61 (2005)	2, 8
<u>Walcker v. Benson and McLaughline, P.S.</u> , 79 Wn.App. 739, 904 P.2d 1176 (1995).	4

Other Cases

<u>Finlayson v. Finlayson</u> , 874 P.2d 843 (Utah Ct.App. 1994).	7
<u>Wolfsen v. Smyth</u> , 223 F.2d 111 (9th Cir. 1955)	8

Court Rules

RAP 12.2	4, 6, 8
--------------------	---------

Statutes

RCW 4.16.040	4, 7
------------------------	------

A. RESTATEMENT OF ISSUE PRESENTED ON APPEAL

1. On page 5 of Respondent's Brief, Nicole C. Chism attempts to mis-direct this court as to the precise legal question posed in this case. She does so by both ignoring and failing to respond to the issue framed by the Appellant, Todd M. Chism, in his opening brief at pages 5 through 6. Instead, the Respondent chooses to address her own self-serving issues which are not dispositive of this appeal. In fact, Ms. Chism does not even attempt to address the governing law cited by Mr. Chism in support of his issue framed in this appeal.

Once again, that single controlling issue before this reviewing court on appeal is precisely:

1. Whether the determination of the Superior Court of Spokane County, state of Washington, that the subject "loans" [sic] at issue, and evidenced in trial court exhibit nos. 104 and 112, constituted in combination an enforceable debt of the marital community, is contrary to established Washington law, should not have been included in the Superior Court's division of property and debt; and said distribution of the same as currently established, divided and framed by said court is, therefore, subject to reversal and remand for revision on this appeal? [Assignments of Error Nos. 1 through 7, as set forth in Appellant's opening brief at pages 1 through 4].

Finally, for purposes of this reply, it should be noted there are consequences to a party's failure or neglect to respond to an issue raised in the appellant's opening brief. Under accepted appellate practice in this state, such

failure on Ms. Chism to address and respond to appellant's issue in this case should now be taken as a concession by respondent as to the merits of said issue on this appeal. See, State v. Ward, 125 Wn.App. 138, 143-44, 104 P.3d 61 (2005). This is particularly true since such concession is entirely consistent with the governing law as set forth in Appellant's opening brief at pages 12 through 20, concerning the fact that the so-called "loans" are, in fact, demand notes and time-barred and, also, Shirley A. Will, having been an active participant at trial, is accordingly collaterally estopped from claiming otherwise in terms of these appellate proceedings. See generally, State v. Steen, 164 Wn.App. 789, 804 n.10, 265 P.3d 901 (2011).

B. ARGUMENT IN REPLY

Contrary to Ms. Chism's misguided argument on pages 11 through 21 of Respondent's Brief, this is not simply a "factual appeal" which is governed only by substantial evidence rule alone. Rather, this is an appeal which ultimately entails legal principles associated with the issue whether the subject "loans" [sic], at this late juncture, are or are not enforceable as "demand notes" under Washington law.

Also on pages 23 through 24 of her Brief, Ms. Chism argues that since no formal objection was made before the trial court, Mr. Chism cannot now challenge the same. This argument flies in the face of accepted legal practice that, in a bench trial case, the parties have a right to expect the court to follow the law, regardless of objections, and not give credence or weight

to evidence which is inherently inadmissible. As outlined before, the Respondent, Ms. Chism, her mother, Ms. Will, and ultimately the Superior Court, took the position that the two [2] written documents [Exh. R 104 and R 112] evidencing a transfer of funds from Ms. Chism's parents to the marital couple constituted loans which were subject to enforcement and, therefore, constituted an existing community debt. Contrary to the challenged findings of fact of the Superior Court [see, Assignments of Error Nos. 1 through 3 in Appellant's opening brief, at pages 1 and 2], there is no evidence or proof whatsoever even beginning to suggest the subject "loans" [**sic**], or transfer of funds, are in any way enforceable and are not now time-barred.

Based upon the manner and wording of the written documents, as well as Ms. Will's parole testimony concerning the same, these two [2] separate transfers of funds could easily on their face be considered outright "gifts" rather than "loans." In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001); see also, Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986); Olmstead v. Department of Health, 61 Wn.App. 888, 893, 812 P.2d 527 (1986); Green Thumb, Inc. v. Tiegs, 45 Wn.App. 672, 676, 726 P.2d 1024 (1980).

Even assuming, arguendo, the written documents themselves could somehow be construed as "loans," the indisputable facts, including but not limited to the wording of Exh. 104 and 112, established there was no deadline for any arguable repayment of the same. Thus, the written documents or "loans" [**sic**] constitute at best "demand notes" under long-established

Washington contract law. Accordingly, the six-year [6] statute of limitations began to run from the date of execution of the written documents associated with such perceived "loans." Walcker v. Benson and McLaughline, P.S., 79 Wn.App. 739, 741-42, 904 P.2d 1176 (1995); see also, Rushlight v. McLain, 28 Wn.2d 189, 198, 183 P.2d 62 (1947); Chatos v. Levas, 14 Wn.2d 317, 321, 128 P.2d 284 (1942); Hopper v. Hemphill, 19 Wn.App. 334, 338, 575 P.2d 746 (1978); RCW 4.16.040. Simply put, any obligation associated with Exh. 104 and 112 were time-barred when the Superior Court chose to treat them as an existing community debt in its marital distribution of debt and property. Hence, the Superior Court's conclusions of law, as well as the Court's final decree of dissolution, are irrefutably in error and subject to reversal as contemplated under RAP 12.2 and as spelled out in Appellant's Assignments of Error Nos. 4 through 6. See, Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), review denied, 107 Wn.2d 1034 (1987); Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 766, 677 P.2d 773 (1984).

1. The trial court clearly violated the parole evidence rule.

On pages 22 through 23 of her responsive brief, Ms. Chism claims that, in reality, "it is debatable as to whether there was any parole evidence offered." The record speaks for itself. In this vein, it should once again be noted that the challenged ruling of the trial court was clearly based upon the parole evidence and testimony of Ms. Will. [July 7 and 8, 2014, RP 220-50]. Suffice it to say, a fully integrated agreement is a final expression of all the

terms of the agreement between the parties. DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 32, 959 P.2d 1104 (1998). It is the long-standing rule in Washington that, in terms of a written agreement to which the parties have contracted, evidence of a contemporaneous or prior oral agreement contradicting or altering the terms of the writing is prohibited and inadmissible. Buyken v. Ertner, 33 Wn.2d 334, 345, 205 P.2d 628 (1949); Brother's Intern. Corp. v. Nat'l Vacuum & Sewing Machine Stores, Inc., 9 Wn.App. 154, 159, 510 P.2d 1162 (1973).

Parole evidence such as Ms. Will's trial testimony should not have been considered by the Superior Court in the first instance so as to create an ambiguity as to enforceability of the agreement where none exists. Id.; see also, Berg v. Hudesman, 115 Wn.2d 657, 670, 801 P.2d 222 (1990); Lopez v. Reynoso, 129 Wn.App. 165, 176, 118 P.3d 398 (2005). Here, any putative "ambiguity" which might be said to exist rests solely upon the limited issue whether subject amounts were outright "gifts" or, at the very most, "demand notes." Ms. Will's testimony had no bearing whatsoever on that particular, unrelated issue. Hence, once again, her testimony was clearly barred as parole testimony and should not have been considered by the trial court. Id.

2. The challenged decision of the trial court violated the statute of limitations governing demand notes.

Next, and to the extent that there was any level of discretion involved in this case concerning the enforceability of said "loans," it is abundantly clear the Superior Court manifestly abused its discretion when the court acted

on untenable grounds and for untenable reasons, as well as erroneously interpreted and ignored the governing statute of limitations associated with the enforceability of demand notes. See general, Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995). At a minimum, the court's accepting and considering the parole evidence and testimony of Ms. Will when reaching its decision constituted such error in terms of the court's ignoring and failure to follow the law. Thus, for this additional reason, reversal and remand is required by the authority granted this court under RAP 12.2.

3. Under the doctrine of collateral estoppel, the putative creditors are now bound by the outcome of these proceedings insofar as the Wills were involved first hand and in privity to these trial proceedings.

Finally, it should once more be observed that, although Shirley A. Will was not a "formal" party to these divorce proceedings, she was clearly an active participant and in privity with her daughter, the Respondent herein. Thus, Ms. Will and the marital community composed of herself and her husband, Garry A. Will, are now legally bound under Washington law in terms of the ultimate outcome in this case on appeal. In other words, they are precluded from raising the enforceability, or challenging the unenforceability, of the subject notes in any future or separate civil proceeding. Diversity Wood Recycling, Inc. v. Johnson, 161 Wn.App. 891, 905, 251 P.3d 908 (2011); Garcia v. Wilson, 63 Wn.App. 516, 520-21, 820 P.2d 964 (1991). In essence, the decision of this court will put to final rest the issue of

enforceability as to all parties and to all claims associated therewith. Id. Simply put, the long-standing doctrine of collateral estoppel precludes litigating the same issue of un-enforceability in any subsequent litigation. Christensen v. Grant Cy. Hosp. Distr. No. 1, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004).

Said doctrine applies to those in privity with the actual parties to a proceeding, such as Ms. Will and her husband. See, Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP, 161 Wn.2d 214, 224, 164 P.3d 500 (2007). Application of the doctrine of collateral estoppel can be applied to a witness, and those in privity with her, under the corresponding doctrine of "virtual representation." See, Diversity Wood Recycling, Inc. at 905; State v. Cloud, 95 Wn.App. 606, 614, 976 P.2d 649 (1999); Garcia, at 520-21.

In light of the facts and circumstances of this case supporting collateral estoppel and issue of preclusion as against the putative creditors, the Wills, there is no legal reason or factual basis upon which the subject "loans" [sic] can now be deemed enforceable in terms of these divorce proceedings under the applicable statute of limitations, RCW 4.16.040, which governs the subject demand notes [Exh. R 104, R 112].

In sum, this is not a situation where Respondent's mother, Ms. Will, was not in privity with the parties to this litigation, and the trial court could legitimately side-step the un-enforceability issue of the subject "loans." Compare, Finlayson v. Finlayson, 874 P.2d 843, 848-49 (Utah Ct.App. 1994);

and Wolfsen v. Smyth, 223 F.2d 111, 113-14 (9th Cir. 1955) (where the putative creditor or claiming party was neither a party, nor in privity with a party, to the proceedings involved).

In other words, there is simply no legal obstacle to disposing of the issue of un-enforceability on this appeal. Id. Curiously enough, Ms. Chism has chosen not to address in her brief either this issue or the corresponding issue of Exhibit Nos. 104 and 112 being "demand notes" as indicated above in Part A. This failure or neglect on her part should now be taken as a concession on this appeal as to the merits of these two [2] legal matters. See, State v. Ward, 125 Wn.App. 138, 143-44, 104 P.3d 61 (2005); see also, State v. Steen, 164 Wn.App. 789, 804 n.10, 265 P.3d 901 (2011).

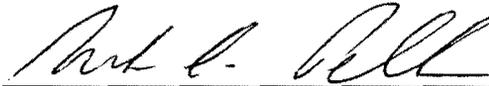
C. CONCLUSION

Based upon the foregoing points and authorities, the Appellant, Todd M. Chism, once more respectfully requests that, in accordance with the authority of this Court under Rule 12.2 of the Washington Rules of Appellate Procedure [RAP], the challenged decisions of the Superior Court of Spokane County, state of Washington, be reversed on this appeal and, further, this matter be remanded to the Superior Court for additional proceedings, with specific direction and instruction to said trial court, that the subject "loans" [Exh. R 104, R 112] which were provided the martial community by the Respondent's parents during the course of the marriage, (1) are now time-barred, non-existent and unenforceable under Washington law, (2) do not

therefore constitute a debt of any kind so as to be taken into account in terms of the underlying marital dissolution proceedings, and (3) should, therefore, not be factored in, or taken into account, when the Superior Court undertakes to revise and fairly distribute the parties' property rights, including all remaining community debts and assets.

DATED this 16th day of June, 2015.

Respectfully submitted:



MARTIN A. PELTRAM, WSBA# 23681
Attorney for Appellant Todd M. Chism