

FILED

MAR 17 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 327914-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of:

TODD M. CHISM,

Petitioner/Appellant,

vs.

NICOLE C. CHISM,

Respondent/Respondent.

BRIEF OF TODD M. CHISM

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A. ASSIGNMENTS OF ERROR

1. The Superior Court of Spokane County, state of Washington, erred in entering its oral decision on July 16, 2014, in cause no. 13-3-01607-7, wherein the court ignored and refused to properly rule on the precise issue presented by appellant, TODD M. CHISM, as to the inherent unenforceability of certain alleged "loans" made to the marital community by the wife's parents, Garry A. Will, Sr. and Shirley A. Will, as argued in "petitioner's trial brief" at pages 2 and 4 [CP 34-35], to the effect these so-called financial obligations, if any, constituted at best "demand notes" and were, therefore, time barred at the time of these divorce proceedings, and should thus not be taken into account in terms of the court's final disposition of community property and debt. [July 16, 2014 RP 10-12; Exh. R 104, R 112].

2. The Superior Court of Spokane County, state of Washington, likewise erred in entering its oral decision on July 16, 2014, in cause no. 13-3-01607-7, wherein the court took into account the parole evidence and testimony of Shirley A. Will

when entering its decision as to said "loans," notwithstanding the fact that the subject written agreements or putative financial obligations were fully integrated and unambiguous on their face. [July 16, 2014 RP 10-12; Exh. R 104, R 112].

3. The Superior Court of Spokane County, state of Washington, further erred in entering paragraph "2.10 Community Liabilities" of its section "II. Findings of Fact" as set forth in the court's August 22, 2014 "Findings of Fact and Conclusions of Law," in cause no. 13-3-01607-7, with respect to those findings the community liabilities included a

2. Personal loan from Garry and Shirley Will for home located at 5835 Walnut Springs Way, Nine Mile Falls, Stevens County, Washington, in the amount of \$160,000.00 [and a]

. . .

5. Personal loan from Garry and Shirley Will for South Hill lot, Spokane County Assessor parcel number 35262.0128, in the amount of \$60,961.00.

[CP 70; Exh. R 104 and R 112].

4. In addition, the Superior Court of Spokane County, state of Washington, erred in entering paragraph "2.21 Other Findings" of its section "II.

Findings of Fact" as set forth in its August 22, 2014 "Findings of Fact and Conclusions of Law," in cause no. 13-3-01607-7, with respect to its further, combined findings that:

8. The Wills loaned \$160,000.00 to the community in 2000 and there is a writing to evidence that loan.

9. This \$160,000.00 loan was used to purchase the Walnut Springs parcel that the family home was built on.

10. The Wills also loaned the community \$60,961.00 for the purchase of the South Hill lot.

11. The court found the testimony of Ms. Will to be very credible and pretty candid.

12. The Wills are getting ready for retirement, have about \$500,000.00 in their savings account to live on and are expecting to have this loan money repaid.

13. The Wills understandably did not demand earlier repayment on these two remaining loans as the parties and the grandchildren were going through significant financial hard times and emotional turmoil.

14. Both the South Hill lot loan and Walnut Springs loan are valid.

[CP 71-72; Exh. R 104 and R 112].

5. To the extent the foregoing "findings" are in error, the Superior Court of Spokane County, state of Washington, also erred in entering its

section "III. Conclusions of Law" as set forth in its August 22, 2014 "Findings of Fact and Conclusions of Law," in cause no. 13-3-01607-7. [CP 73-74].

6. The Superior Court of Spokane County, state of Washington, likewise erred in entering its paragraph 3.5, of its August 22, 2014 "Decree of Dissolution," in cause no. 13-3-01607-7, wherein the court reiterated its determination that the alleged financial obligations associated with subject or so-called "loans" made by the respondent's parents, Garry and Shirley Will, were valid and constituted "community liabilities" incurred by the parties, insofar as the liabilities to be paid by the wife included:

2. Personal loan from Garry and Shirley Wills for home located at 5835 Walnut Springs Way, Nine Mile Falls, Stevens County, Washington

. . .

4. Personal loan from Garry and Shirley Wills for South Hill lot, Spokane County Assessor parcel number 35262.0128

[CP 80; Exh. R 104 and R 112].

7. Finally, and in light of those errors identified and assigned in the forgoing assignments

of errors nos. 1 through 6, the Superior Court of Spokane County, state of Washington, erred in entering its paragraph 3.3, of its August 22, 2014 "Decree of Dissolution," in cause no. 13-3-01607-7, wherein the court improperly awarded the wife outright, as her separate property, the

1. Residence located at 5835 Walnut Springs Way, Nine Mile Falls, Stevens County, Washington [and]

. . .

3. South Hill lot, Spokane County Assessor parcel number 35262.0128

[CP 79; Exh. R 104 and R 112].

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the determination of Superior Court of Spokane County, State of Washington, that the subject "loans" at issue, and evidenced in trial court exhibits 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].

C. STATEMENT OF THE CASE

This matter concerns the indisputable failure of the Superior Court to undertake a proper assessment, evaluation, and ultimately a legal ruling as to the enforceability, or lack thereof, of certain alleged "loans" made to the CHISM marital community by the respondent's parents, Garry A. Will and Shirley A. Will, in terms of whether said "loans" (1) were in fact loans rather than gifts, (2) whether said "loans," if they can be described as such, were at the time of the dissolution time-barred and unenforceable under controlling Washington law governing such form of liabilities or demand notes, (3) whether said "loans" did not, as a result, constitute any existing, enforceable debt or liability of any kind which can now be attributable to the marital community in these proceedings, and accordingly (4) whether said "loans" should not have been factored in or taken into account by the Superior Court when

the court reached and entered its distribution of property and debt between the parties.

The operative facts are simple, direct and can be summarized as follows: The parties were married on August 17, 1996. [CP 69]. They separated on July 9, 2013, when Mr. CHISM served and filed a summons and petition for dissolution of marriage in the Superior Court of Spokane County, state of Washington, under cause no. 13-3-01607-7. [CP 1-6].

Trial was held before Maryann C. Moreno, Judge of Superior Court of Spokane County, state of Washington. [July 7 and 8, 2014 RP et seq.] During the proceedings, Mr. CHISM challenged the enforceability of the putative "loans" made by the respondent's parents on the basis of the running of the six [6] year statute of limitations. [CP 33-37]. He accordingly argued that these alleged liabilities should not be taken into account in terms of a fair, just and equitable distribution of assets and debts. [Id.].

In this regard, the Superior Court heard the parole evidence and trial court testimony of

Shirley A. Will, Ms. CHISM's mother, in opposition to Mr. CHISM's stated contention that the subject transfer of funds, or so-called "loans" should not be taken into account in terms of an equitable distribution of community property and debt. [July 7 and 8, 2014 RP 222-50]. While the trial judge initially hesitated to make any ruling on the issue of enforceability of the subject transfer of funds, ultimately the court decided to include the amount of these alleged debts or liabilities when rendering a decision as to the final distribution of property and debt. [July 16, 2014 RP 10-12]. Rather than reaching what Mr. CHISM perceived would have been an unfair and unjust distribution of the Walnut Road and South Hill properties traceable to the parental "loans," the Superior Court awarded both properties to the respondent, NICOLE C. CHISM, as well as the putative, albeit unenforceable, liabilities associated therewith. [CP 79-80].

On appeal, it remains Mr. CHISM's legal position that the so-called "loans" are unenforceable and amount to no recognizable debt whatsoever, have no value at all since they cannot

be legally enforced by the respondent's parents, and should not, therefore, have been taken into account by the Superior Court. For this reason, appellant now prays on this appeal that Superior Court's decision, final judgment, and decree of dissolution [CP 75-81] be reversed with direction that the subject "loans" be removed from any and all consideration in terms of a fair and just distribution on remand.

D. STANDARD OF REVIEW

The issue framed in Part B above concerning the Superior Court's erroneous reasoning, or lack thereof, as to the court's treatment of the subject "loans" of parents of the respondent, NICOLE C. CHISM, encompass the following standards of review insofar as this appeal entail a combination of (1) issues of fact, (2) mixed issues of law and fact, (3) issues of law, and (4) issues concerning the abuse of discretion by the trial court. Errors of fact are reviewed in terms of whether there is substantial evidence in the underlying record to support the same. Thorndike v. Hesperian Orchards,

Inc., 54 Wn.2d 570, 343 P.2d 103 (1959). Substantial evidence, involving a ruling on modification of maintenance, only exists when there is evidence of a sufficient quantum to persuade a fair-minded person of the truth of the declared premise set forth in a finding of fact. 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). Hence, mere speculation, conjecture, and supposition on the part of the trier of fact will not support a factual determination by the trial court. Id.

In contract, mixed questions of law and fact are considered both in terms of a quantitative determination of substantial evidence as to the latter and, as to the legal aspects of such issue, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). In essence, such issue is considered both in terms of a quantitative determination of substantial evidence

as well as to the legal aspects entailed. Id.; see also, In re Marriage of Foran, 67 Wn.App. 242, 251, 834 P.2d 1081 (1992); Horrace, at 392. In other words, review is treated as a mixed question of fact and law and, thus, reviewed de novo. Id. However, even if the findings of the Superior Court can be said to be supported by substantial evidence, the issue remains whether such factual determinations support the court's application of governing law and as well as the court's ultimate decision and judgment. 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). If they do not, then reversal is fully warranted and proper. Id.

Finally, in terms of any aspect of review associated with exercise of discretion by the trial court, the governing standard is a manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The trial court will be deemed to have so abused its discretion when the court acted on untenable grounds or for untenable

reasons, or has erroneously interpreted, applied or ignored the governing law. 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). In other words, a factual determination which is not based upon substantial evidence, or misapplication of the law, constitutes an abuse of discretion warranting reversal on appeal. Id.; see also, In re Spreen, at 346.

E. ARGUMENT

As outlined above, the respondent, NICOLE C. CHISM, her mother, Shirley A. 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, Assignment of Error Nos. 1 through 3], there is no substantial, factual evidence

whatsoever in the record suggesting the subject "loans," 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, and 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, that the written documents could somehow be construed as "loans," the indisputable facts, including but not limited to the wording of Exh. 104 and 112 established at trial, make clear there was no deadline for any arguable repayment of the same. Consequently, the written documents or "loans" constitute at best demand notes under long-established Washington case 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.

Thus, at the time of the filing of the dissolution in this case, the two [2] subject loans were time-barred and constituted no enforceable debt against the marital community. Id. 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 violated the parole evidence rule. It should first 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). While the respondent and Ms. Will might choose to argue that parties to a written agreement have a right to enter into an agreement which is partly oral and partly in writing, there is nothing to suggest that this was, in fact, the situation in the present case notwithstanding any bald claim to the contrary. Once more, 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 may not be considered 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, 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 is any level of discretion involved in this case concerning the enforceability of said "loans," it is abundantly clear the trial court manifestly

abused its discretion when the court acted on untenable grounds and for untenable reasons, as well as erroneously interpreting and ignoring the governing statute of limitations associated with the enforceability of demand notes. See generally, 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 the parole evidence and testimony of Ms. Will when reaching its decision constituted such error in terms of ignoring the law. Thus, for this additional reason, reversal and remand are required 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 privity to these trial proceedings. Finally, it should 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, and 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 un-enforceability, 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 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).

The 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 preclusion as against the putative creditors, the Wills, there is no legal reason or factual basis upon which the subject "loans" 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 and the trial court could thus sidestep the un-enforceability of the subject "loans." Compare, Finlayson v. Finlayson, 874 P.2d 843, 848-49 (Utah Ct.App. 1994); Wolfson 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 no legal obstacle to disposing of the issue of unenforceability in this case. Id.

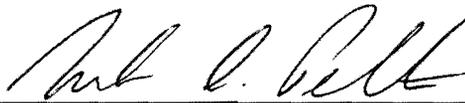
F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, TODD M. CHISM, respectfully requests that, in accordance with the authority of this court under RAP 12.2, 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 to the marital 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 2nd day of MARCH, 2015.

Respectfully submitted:



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