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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

**TODD M. CHISM,
Appellant**

V.

**NICOLE C. CHISM,
Respondent**

NO. 327914-III

RESPONDENT'S BRIEF

**DAVID J. CROUSE
Attorney for Respondent
W. 422 Riverside, Suite 920
Spokane, WA. 99201
(509) 624-1380
WSBA #22978**

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ISSUES PRESENTED

- I. Was there substantial evidence to support the trial court's conclusion that two valid loans existed between Gary and Shirley and the marital community of Todd and Nicole Chism?

- II. Was the Court entitled to consider parol evidence and what is the effect of the Appellant's failure to object to said parol evidence at the time of trial?

STATEMENT OF THE CASE

The parties were married on August 16, 1996 and have two children RP 10-11; RP 9. At the time of marriage, Todd Chism was a firefighter employed by the City of Spokane. RP 60. On time off from the fire department, Todd Chism also historically purchased houses, repaired them, and sold them. RP 60; RP 61-62.

Nicole Chism has a college degree and was a certified teacher. RP 7; RP 10. She was engaged in substitute teaching shortly after the marriage of the parties but ceased working in this career given the parties agreement for her to stay home and raise their children. RP 7; RP 10; RP 11; RP 79, lines 3-15. However, she also worked extensively with her husband in purchasing, repairing and flipping homes, both in physical labor and keeping the books. RP 11; RP 47; RP 62.

Over the course of their marriage, Todd and Nicole Chism took loans from Garry and Shirley Will, who are the parents of Nicole Chism. RP 23; RP 229, lines 11-21. They used these loans to finance the purchase of their real estate endeavors and when the respective real property sold, Todd and Nicole Chism promptly repaid these real estate loans to the Wills. RP 23-24; RP 229 lines 11-21; RP 244 lines 16-24; RP 246, line 5. The parties previously had the funds necessary to promptly repay the Wills for

any loans taken. RP 23-24.

In 2008, the Washington State Patrol (WSP) arrested Todd Chism on child pornography charges (later proven to be entirely false). RP 246, line 21. Todd Chism was suspended from his firefighting employment without pay and the parties suffered serious financial distress. RP 246 line 22; RP 247, line 5. Both Todd and Nicole Chism suffered serious personal harm as a result of the actions of the WSP. RP 247 line 21 to RP 248 line 5.

At the time of the WSP investigation, there were two pending real estate loans made by Garry and Shirley Will to Todd and Nicole Chism. RP 226, line 3. The first loan was made on October 28, 2000 in the amount of \$160,000.00 with regard to a 4 acre parcel, parcel no. 5809608. R104; RP 22. This 4 acre parcel was originally owned by Garry and Shirley Will who paid \$250,000.00 for the 11 acre parcel from which it was segregated. RP 21; RP 227 lines 2-11.

Todd and Nicole Chism desired to build a home on this 4 acre parcel. RP 21; RP 227. They initially planned to pay back the Wills with the sale of their existing residence. RP 21; RP 228, line 25. They could not get a building permit because the land was not in their names. RP 21. The Wills quit claimed the 4 acre parcel to the Chisms and all parties entered into the written agreement to repay the Wills \$160,000.00 when the

4 acre parcel (and the home to be built) was sold. RP 21; Ex. R104.

This loan document was signed by all parties: Garry Will, Shirley Will, Todd Chism and Nicole Chism. RP 22; Ex. R104. The wife testified that this was a loan agreement and not a gift. RP 22; RP 23. Mr. Chism inferred that some payments had been made on the loan and did not characterize it as a gift. RP 74 lines 14-18 .

The second loan was made by the Wills to the Chisms on November 22, 2004 in the amount of \$60,960.82, to purchase and develop a South Hill lot, parcel no. 3562.0128. Ex. 112; RP 108, lines 13-14. There was another written document supporting this loan, which also required payment upon sale. Ex. R112. Mr. Chism described the acquisition as a joint venture with the Wills. RP 108, line 17. The real estate market crash of 2008 prevented the parties from profitably selling this South Hill lot. RP 108, lines 23-25.

When the WSP investigation ensued, Garry and Shirley Will were trying to assist Todd and Nicole Chism, as well as their grandchildren, given the family's financial struggles. RP 247, line 5. The Wills did not feel comfortable making any demand for payment on the two loans during this time of hardship. RP 243, line 15. RP 247, line 20. They felt that their children and grandchildren were already in financial and personal

crisis and making financial demands would be counter-productive. RP 243, line 18, RP 248, line 8.

The charges were proven to have been made by the WSP with a reckless disregard for the truth, and were dismissed. Ultimately, a lawsuit against the WSP by Todd and Nicole Chism was resolved with a \$1,569,991.15 million settlement being received by them. Ex. R128. Todd Chism was reinstated to the Fire Department.

However, there was no opportunity for the Wills to make demand for payment after resolution of the WSP investigation as simultaneously, the marriage was ending due to domestic violence perpetrated on Nicole Chism by Todd Chism. RP 297 line 2 through RP 301 line 4. The parties separated. RP 302 line 23. Protection orders were entered prior to trial in the dissolution action after death threats were made by Mr. Chism to Nicole Chism. RP 303 line 20 to RP 304 line 2; RP 305 line 21 through RP 307 line 2. Texts from Mr. Chism also made obscene references to Shirley Will, referring to her as a DFC (dumb f***** c****) RP 183, line 19, and “worthless” RP 207, line 1. Mr. Chism displayed substantial hatred toward his former family. Ex. R129; Ex. R130; Ex. R131, RP 183 line 2 through RP 208 line 17. The trial court found the domestic violence claims made by Ms. Chism to be credible and entered a 10 year order of protection

against Todd Chism in the decree. CP 80.

Nicole Chism testified that she intended to sell the home on the 4 acre parcel (that served as the basis for the \$160,000.00 loan from Garry and Shirley Will) upon the children's graduation from high school. RP 20, line 2 and line 21; RP 16. She also acknowledged this loan in her financial declaration filed in this matter. RP 20; Ex. R138. Ms. Will also testified that Nicole Chism planned to sell the home upon the children's graduation from high school and expected to be repaid at that time. RP 249 line 21 through RP 250 line 4.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S DETERMINATION THAT TWO VALID LOANS EXISTED BETWEEN GARY AND SHIRLEY WILL AND TODD AND NICOLE CHISM.

The Appellant asks this court to find that the two loans made by the Wills to were in fact a gifts, or that in the alternative, the loans are barred by the six year statute of limitations for demand notes. If substantial evidence existed at the time of trial to support the legal conclusion of the trial court, the findings must not be disturbed on appeal. Bering v. Share, 106 Wn.2d 212, 220 (1986). The substantial evidence standard is appropriate when the trial court weighed competing documentary evidence and resolved issues of credibility. Dolan v. King County, 172 Wn.2d 299, 310, 258 P.3d 20 (2011). Further, appellate courts do not supplant their own determinations of credibility for that of the trial judge in family law matters. In re Marriage of Rideout, 150 Wn.2d 337, 351-52 (2003).

A. A Gift Did Not Occur

The law on gifts is well established. A valid gift is made only when 1) the donor intends to make a gift; 2) the gift is delivered as perfectly as the circumstances will reasonably permit. Oman v. Yates, 70 Wn.2d 181, 185, 422 P.2d 489 (1967). Washington courts will not ordinarily presume that a

transfer of property between parties is a gift. Lappin v. Lucurell, 13 Wn.App. 277, 282 (1975). Only an otherwise unexplained transfer between closely related parties may be presumed to be a gift. Id. at 282. The party asserting an interest in property obtained by gift must prove it by “clear, convincing, strong, and satisfactory” evidence. Tucker v. Brown, 199 Wash. 320, 325 (1939). The existence (or lack thereof) of donative intent is an issue “addressed to the perception of the trial court.” Buckersfield’s Ltd. v. B.C. Goose & Duck Farm Ltd., 9 Wn.App. 220, 224 (1973). If substantial evidence supports the finding, it shall not be overturned on appeal. Id.

Here, Ms. Chism introduced the written agreements between the Wills and the community. One of these documents refers to a loan from the Wills to the community in the amount of \$60,960.82. Ex. R112. The second document refers to a “loan/gift” in the amount of \$160,000.00 Ex. R104. In Ex. R104, Todd and Nicole Chism are each designated as “borrower”. Ex. 104. Both documents are signed by the Todd and Nicole Chism as well as by the Wills.

Mr. Chism testified during his case in chief as to his understanding of the nature of the loans. RP 72-74. With regard to the \$160,000.00 loan that allowed the parties to obtain the 4 acre parcel, at RP 72, line 23 Mr. Chism

testified, “There was never anything formal as far as payment amounts or when. Um, it was kind of left open....”

Further discussing the \$160,000.00 loan, Mr. Chism first claimed that there was no written agreement on repayment. RP 73 at 19-23. When directed to Ex. 104, Mr. Chism recalled that repayment would be expected “in the event of sale.” RP 74 at 4-5. Mr. Chism referred vaguely to a conversation about postponing payments on the loan. RP 74 at 16-18. At no point does Mr. Chism refer to the agreement as a “gift.” Mr. Chism even recalled a period of time during which the community made \$600 payments per month on the loan, though because Ms. Chism was in charge of keeping the books, he was unsure of the particulars of the arrangement or how long payments were made. RP 73 at 22-23.

Ms. Chism was also called as a witness in the Petitioner’s case in chief. Ms. Chism testified that at no point was there a discussion or understanding that the loans were gifts. RP 23 at 18-25, RP 19 at 1-2. She testified that her parents had made similar loans to the community over the years for real property investments and that they had all been paid back, save the two at issue here. Id.

Shirley Will also testified that at no point was there an intention that these loans were in fact “gifts.” RP 228 at 11-14. Ms. Will testified that she

and her husband had purchased an 11-acre parcel of land and the adjoining 40 acres for \$250,000.00. RP 227 at 9. Four acres were “carved out” and transferred to the Mr. and Ms. Chism. RP 227 at 22-25. Ms. Will testified that Ex. 104 memorialized the agreement that the value of the four acres transferred to Mr. and Ms. Chism would be repaid “as soon as [the community] were able to.” RP 228-29. Ms. Will also described a period during which the community made payments toward the loan (from managing the Wills’ rental property) but that when the community fell on difficult times, the parties to the loan agreed to postpone payments. RP 234-35.

Ms. Will also testified as to Ex 112, the “South Hill Lot loan.” RP She explained that she expected repayment and that the purchase and transfer of the property was for the purpose of “financial gain.” RP 238 at 19. The written agreement itself states that “any increase in property value from the original purchase price/loan amount will be split equally between the parties.” Ex 112. Ms. Will testified that the market crash and family turmoil had understandably delayed repayment but that it was still fully expected. RP 239 at 4-14.

In response to the South Hill lot loan memorialized at Ex., R112, Mr. Chism even acknowledged that he was provided funds from Garry Will.

RP 108, line 13. He characterized the transaction as a joint venture. RP 108, line 17. He described that the lots would be segregated, marketed and a profit share completed “as money came in.” RP 108, lines 17-23.

Ms. Will testified that her husband was a contract logger, builds roads, and that they own an orchard. RP 224, line 5. Mr. and Mrs. Will do not have a great deal of savings. RP 224, line 12. Both of the Wills are 67 years old. RP 224, line 13. They have not saved enough money to get through their retirement years and that is why they are still working. RP 225, lines 5-7.

Ms. Will testified that Mr. Chism personally promised to pay her back for the loan on the 4 acre parcel. RP 228, line 25. She testified that all of the loans were put in writing to protect them and their investment. RP 230, line 14. She testified that she and her husband were listed as lenders and the Chisms were listed as borrowers. RP 230, lines 16-23.

Substantial evidence was provided that these were loans and not gifts, much less donative intent proven. The trial court was entitled to rely on this testimony and its findings are well supported by the evidence. CP 68-74, findings 2.21(6) through 2.2(14). The trial court properly rejected any claim by Mr. Chism that the loans were actually gifts.

B. The Repayment Of The Loans Was Conditioned On Sale of the Subject Properties, Not Payable On Demand.

A cause of action accrues when it becomes a present enforceable demand. Howard v. Equitable Life Assur. Soc. of US, 197 Wash. 230, 239 (1938). Describing demand notes, the court has said “an instrument is payable immediately if no time is fixed *and no contingency specified upon which payment is to be made.*” GMAC v. Everett Chevrolet, Inc., 179 Wn.App. 126, 134 (2014) *citing* Allied Sheet Metal Fabricators, Inc. v. Peoples Nat. Bank of Washington, 10 Wn.App. 530, 536 (1974) *emphasis added*. The statute of limitations for such a “demand note” begins to toll upon execution of the agreement. Howard, 197 Wash 230 at 239. However, parties may frame an agreement to rely on some other condition precedent to payment. Hopper v. Hemphill, 19 Wn.App. 334, 338 (1978).

The contracting parties’ intent is critical in assessing their obligations. “Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used. An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective.” GMAC v. Everett Chevrolet, Inc., 179 Wn.App. 126, 134 (2014). “Determination of the intent of contracting

parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.” Jones Associates Inc. v. Eastside Properties, Inc., 41 Wn.App. 462, 467 (1985). Specifically, “the applicable rule to a suit on a note between the maker and payee, which the parties do not argue to be governed by the provisions of the Uniform Commercial Code, is that the parties’ intention or lack thereof to condition the duty to pay is to be gathered from the parties’ situation, their relationship, the subject matter, and their intended purposes as revealed by the evidence.” Vogt v. Hovander, 27 Wn.App. 168, 178 (1979).

The two written loan contracts at issue in the instant case do not fit the definition of a demand note. Though a precise date for repayment is not stated, each contains a “contingency specified upon which payment is to be made.” GMAC, 179 Wn.App. at 134. Ex 104 states in relevant part “If this property is sold, the borrowers agree that the \$160,000.00 loan/gift shall be repaid to lender.” Ex 104. Similarly, Ex 112 states “the original loan amount will be repaid at a mutually agreed upon time or when the property is sold or transfers ownership.” Ex 112. Giving effect to all of the words in

these agreements requires a conclusion that these clauses are conditions precedent to repayment of the loaned amounts.

Evidence introduced through Mr. Chism, Ms. Chism, and Shirley Will all explain the intention of those clauses was to ensure that the Wills received a benefit from their investment and that the Wills expected to be paid. Indeed, both Mr. and Ms. Chism testified that they intended to repay the loans upon sale of the properties. When directed to Ex. R104 (\$160,000.00 loan on 4 acre parcel), Mr. Chism recalled that repayment would be expected “in the event of sale.” RP 74 at 4-5. This testimony alone obviates any claim of a demand note.

Nicole Chism testified that she intended to sell the 4 acre parcel (that served as the basis for the \$160,000.00 loan from Garry and Shirley Will) upon the children’s graduation from high school. RP 20, line 2 and line 21. RP 16. Ms. Will also testified that Nicole Chism planned to sell the home upon the children’s graduation from high school and expected to be repaid at that time. RP 249 line 21 through RP 250 line 4.

Similarly, with regard to Ex. R112, (\$60,960.82 loan on South Hill lot), Mr. Chism characterized the transaction as a joint venture. RP 108, line 17. He described that the lots would be segregated, marketed and a profit share completed “as money came in.” RP 108, lines 17-23. Ms.

Will also testified in detail as to the intent to be paid back for this South Hill lot loan and for the parties to share the proceeds upon sale. RP 238 line 7 through RP 239 line 14. This testimony again refutes any current claim by Mr. Chism of a demand note.

C. There Was No Waiver of the Loan

As discussed above, parties are free to condition repayment on the occurrence of a certain event even if the time of that event is not certain. In this case the loans were due on sale. Mr. Chism appears to claim that these terms were waived (or converted to a gift).

In the case of a challenge to the enforceability of a loan, a party will not be deemed to have waived a condition precedent to payment “without proof of the clearest and most satisfactory kind.” Brown v. Winehill, 3 Wash. 524, 527 (1892). The burden of proof then is on the party alleging waiver. Club Envy of Spokane, LLC v. Ridpath Tower Condo Ass’n., 337 P.3d 1131, 1134 (Wash. App. Div. III, 2014) (party asserting an equitable remedy or defense has the burden of proof). The standard of clear and convincing evidence calls for “proof of the clearest and most satisfactory kind” in a civil case and is commonly used in the context of equitable defenses. *See* Club Envy, 337 P.3d 1131 at 1134; King County v. Taxpayers of King County, 133 Wn.2d 584, 642 (1997); Teller v. APM Terminals

Pac., Ltd., 134 Wn.App. 696, 712 (2006). Mr. Chism's efforts to convert the terms of their written contract to a gift completely fail to meet this burden.

D. The Court Was Required To Assess Credibility

In evaluating the persuasiveness of the evidence and the credibility of witnesses, appellate courts defer to the trier of fact. In re Marriage of Akon, 160 Wn.App. 48, 57 (2011) *citing* Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, (1994). "[C]redibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal." Morse v. Antonellis, 149 Wn.2d 572, 574 (2003). The role or function of the appellate court is not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses. In re Marriage of Rich, 80 Wn.App. 252, 259 (1996).

From the facts of this case, it is clear that Mr. Chism had every incentive to claim gift, waiver or demand note in order to evade the rightful repayment of the loan to the Wills and to deprive his wife of property that would otherwise be rightfully awarded to her. There was substantial domestic violence at the end of the marriage. However, the venom that Mr. Chism is at a level virtually unseen in family law proceedings. The derogatory references made by Mr. Chism toward Ms. Chism, her parents,

and even his own daughter are chilling and evidence a deep hatred for these individuals.

In order to understand the trial court's credibility determinations, it is critical for this appellate court to review the text messages made by Mr. Chism admitted as Ex. R129, R130 and R131. Death threats were clearly communicated by Mr. Chism to Nicole Chism who threatened to put a 9mm bullet in her head. RP 303 line 20 to RP 304 line 2; RP 305 line 21 through RP 307 line 2. Texts from Mr. Chism also made obscene references to Shirley Will, referring to her as a DFC (dumb f***** c***) RP 183, line 19, and "worthless" RP 207, line 1. Again, it is critical for this appellate court to review Mr. Chism's testimony on cross-examination set forth at RP 183 line 2 through RP 208 line 17.

Here, the trial court made findings that there are valid and enforceable loans based on the parties' situation, their relationship, the subject matter, and the intended purpose of the loans. The trial court appropriately weighed credibility. The findings are well supported by the evidence. The parties clearly intended to create a condition precedent to repayment. Both loans were properly included in the liabilities calculation at trial.

II. PAROL EVIDENCE WAS ADMISSIBLE AND PROPERLY TAKEN AT TRIAL AND THE APPELLANT'S FAILURE TO OBJECT AT TRIAL BARS HIM FROM CONTESTING ITS ADMISSION ON APPEAL.

“Parol” evidence is evidence extrinsic to a written agreement. Berg v. Hudesman, 115 Wn.2d 657, 670 (1990). Parol evidence may be introduced to clarify the meaning of the terms of a written agreement without altering them. DePhillips v. Zolt Const. Co., 136 Wn.2d 26, 32 (1998).). Specifically, when a repayment term is ambiguous in that it is either an unconditional promise or creates a condition precedent to payment, the question may be resolved through extrinsic evidence. Vogt v. Hovander, 27 Wn.App. 168, 177-78 (1979). Parol evidence should not be introduced to explain a fully integrated agreement. Lopez v. Reynoso, 129 Wn.App. 165, 176 (2005).

Here, it is debatable as to whether there was any parol evidence offered. The testimony focused on when repayment was expected in conformity with the due on sale clauses contained in the two loan notes. Admittedly, there was some discussion over the terms “loan/gift” that was used in Ex. R104. Ms. Will testified that the word gift was used so that if something happened to the Wills, the property would not “be tied up in their estate.” RP 233, line 1. She testified that unless they died, she expected to

be repaid. RP 223, line 7. As discussed in the sections above, there was also substantial discussion as to when the Wills expected to be repaid, in essence reaffirming the due on sale terms of Ex. R 104 and Ex. R112.

Each witness explained the context of the agreements and the intention of the repayment clauses. Their testimony did not alter the written agreements. Such testimony, if found to be parol evidence, was properly admitted to explain the content of the agreements and aided the court in its determination of the intent of the parties to the agreements. Credibility was also a factor that the court could weigh from hearing this testimony.

A. **Because no objection was raised at trial, the Petitioner cannot now seek to exclude parol evidence.**

A party may raise lack of trial court jurisdiction, failure to establish facts upon which relief can be granted, and manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a). Generally, “in order to prove error, counsel must call the alleged error to the court’s attention at a time when the error can be corrected.” State v. Falgalde, 85 Wn.2d 730,731 (1975) *see also* Seattle v. Harclao, 56 Wash.2d 596, 597 (1960). The rule applies equally to parol evidence. Berg v. Hudesman, 115 Wn.2d 675,670 (1990), finding that a party cannot argue on appeal that a contract was, in fact, fully integrated and therefore not subject to the

introduction of parole evidence when the issue was not argued at trial. Mr. Chism made no objections during trial relative to the trial court's consideration of testimony that could be deemed parole evidence. His attempt to raise it for the first time on appeal is barred.

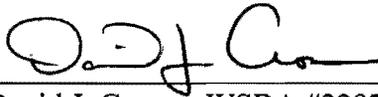
CONCLUSION

The Petitioner argues that the trial court erred in its finding listed under paragraph 2.10(2), (5) in the "Findings of Fact and Conclusions of Law" in that the community owed debts to the Respondent's parents totaling \$220,960.82. (CP 70). Petitioner argues that the loans were in fact gifts or, alternatively, that the debt was the product of "demand notes" subject to a six-year statute of limitations that began tolling on execution of the note. Petitioner argues that if the demand note statute of limitations is imposed, the debts are unenforceable and the trial court should not have considered the debts in its distribution of assets and liabilities. For the first time on appeal, Petitioner argues that testimony of the lender, Shirley Will, was inadmissible as parole evidence.

Substantial evidence was heard by the court to support the conclusions of law that an enforceable debt exists between Shirley and Garry Will (the Wills) and the community. The evidence supports the conclusion that the loan is memorialized in a written agreement which sets

out a condition precedent to repayment of the loan. The statute of limitations will not begin to toll until the condition precedent occurs. Parole evidence as to the nature of the loans was properly introduced to explain the terms of the agreement and did not contradict the writing and was introduced *without objection* at trial. The judgment of the trial court should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. J. Crouse", written over a horizontal line.

David J. Crouse, WSBA #22978
Attorney for Appellant

CERTIFICATE OF SERVICE

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

That on the 20th day of May, 2015, he served a copy of this Appellate Brief to the persons hereinafter named at the places of address stated below which is the last known address.

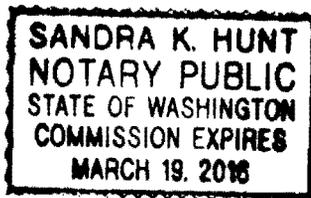
ATTORNEY FOR APPELLANT

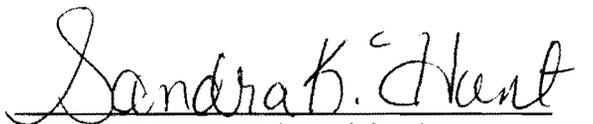
Martin A. Peltram
900 N. Maple Street, Ste. 200
Spokane, WA 99201-1807



DAVID J. CROUSE

SUBSCRIBED AND SWORN to before me this 19th day of May, 2015.





NOTARY PUBLIC in and for the
State of Washington, residing in Spokane.
My Commission Expires: 3-19-2016