COA No. 338631
Spokane County No. 143022644

FILED

JAN 06 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of

KENT E. DICKERSON,
Appellant

V.

MELISSA J. DICKERSON,
Respondent

Spokane County NO. 16-3-00505-3

RESPONDENT'S BRIEF

DOUGLAS R. HUGHES
Attorney for Respondent
W. 422 Riverside, Suite 920
Spokane, WA. 99201
(509) 624-1380
WSBA #30354

TABLE OF CONTENTS

1. Table of Authorities 3

2. Issues Presented 4

3. Statement of the Case....4

4. Argument.....9

5. Conclusion.....17

TABLE OF AUTHORITIES

Cases

1. In re Marriage of Akon, 160 Wn. App. 48 (2011)...16

2. Bering v. Share, 106 Wn.2d 212 (1986)....9

3. In re Estate of Borghi, 167 Wn.2d 480 (2009)...14

4. In re Buchanan's Estate, 89 Wn. 172 (1916)...12

5. Burnside v. Simpson Paper Co., 123 Wn.2d 93 (1994)...16

6. Dolan v. King County, 172 Wn.2d 299 (2011)...9

7. Koher v. Morgan, 93 Wn. App. 398 (1998)...12

8. Morse v. Antonellis, 149 Wn.2d 572 (2003)...16

9. In re Marriage of Rich, 80 Wn. App. 252 (1996)...16

10. In re Marriage of Rideout, 150 Wn.2d 337 (2003)...9

ISSUE PRESENTED

I. **Was there substantial evidence to support the trial court's concussion that all property was community property?**

STATEMENT OF THE CASE

The parties were married on June 30, 2007. Ms. Dickerson testified that the parties discussed finances prior to the marriage. Ms. Dickerson testified that the parties shared a joint goal to combine all finances and work to build a net worth of over a million dollars. Ms. Dickerson testified that the discussions of the parties were to view all available resources when considering this goal. Upon achieving financial goals, the parties would then retire from work outside the home.

Shortly after the marriage, both parties combined financial accounts. RP 52. Mr. Dickerson closed his Wells Fargo checking account and added himself to Ms. Dickerson's USAA account. RP 52. The parties moved into Mr. Dickerson's residence on Highline in San Antonio, Texas. RP 131. Ms. Dickerson sold her home on Gudalupe street and deposited the proceeds into the joint account. RP 53. The parties then used community funds to pay off Mr. Dickerson's Highline residence. RP 53.

Ms. Dickerson testified that this arrangement was consistent with

the parties discussions regarding financial goals. The parties both utilized their funds to pay off any debt and to raise funds for a new residence. When the Highline home was rented and the parties prepared to relocate, the proceeds were placed into the parties joint checking. RP 52. The actions of both parties after marriage manifested an intent to combine all property into the community. Findings of Fact, Conclusions of Law 2.21.17.

In October 2007, the parties jointly executed a community property deed and agreement regarding the Highline home. RP 48; Petitioner's Exhibit 17. They both explicitly stated that for the desired purpose of converting the residence into community property they wished to transfer the property into community property and shared legal title. RP 48-49. Ms. Dickerson testified that this was discussed among the parties. Ms. Dickerson testified that it was Mr. Dickerson who filled out the community property paperwork and drove her to have it notarized and entered with the county clerk. RP 49.

Consistent with this deed, rental income from the property were placed into the parties joint checking account and treated as community property. Mr. Dickerson testified that he signed the community property paperwork regarding the Highline residence. Mr. Dickerson further testified that though his intent at the time was to create community property, he did not have this intent at the time of trial. RP 125.

In 2007, Mr. Dickerson was issued a W-2 for compensation for his work with the Nav Man corporation, with retirement contributions paid in the amount of approximately $9,000.00. See Petitioner's Exhibit 10. Mr. Dickerson was unclear on the specific dates in 2007 that he was working. The W-2 indicated that Mr. Dickerson received compensation from the company. The W-2 also indicated that Mr. Dickerson received financial contribution to a retirement account in 2007 of approximately $9,000.00. Mr. Dickerson provided no evidence to explain where these funds were deposited. See RP 102.

Mr. Dickerson testified that his entire retirement and investment accounts were a T. Rowe price account. Mr. Dickerson testified clearly that he had no other investment accounts and no other financial accounts.

At the time of trial, Mr. Dickerson presented statements for a T. Rowe Price account ending 7704 for the period from separation through December 2007 (hereafter the contested T. Rowe Price account). Mr. Dickerson did not produce at trial or in answers to interrogatories any statements for his investment accounts from the time prior to marriage. RP 72.

Mr. Dickerson acknowledged in testimony that the contested T. Rowe Price account showed a zero balance on November 1, 2007. RP 71. This was a date after the parties marriage in June 2007. Mr. Dickerson's

market positions had been converted into cash during this year. After the parties marriage, in December 2007, the T. Rowe Price statement for the contested account shows a substantial investment having been acquired in December 2007. RP 71. Though he had alternative reasoning for these events, Mr. Dickerson acknowledged that the statement he provided showed a zero balance in November 2007 and a substantial balance in December 2007. RP 71.

After the marriage, Mr. Dickerson took over management of the financial affairs of the community. Ms. Dickerson testified that she signed any and all papers necessary for Mr. Dickerson to manage her accounts. RP 233. Ms. Dickerson testified that Mr. Dickerson assured her he was taking care of these things and pursuing the joint financial goal of the parties regarding net worth and retirement planning. Ms. Dickerson testified that she was under the impression that all financial accounts were merged and being consistently managed as part of this overall financial plan.

After the marriage, the parties moved from San Antonio, Texas to Chattanooga, Tennessee. They had a positive experience building their home, and formed KMD Enterprises to operate a company dealing with real estate and building investments. Mr. Dickerson performed nearly all of the duties under KMD Enterprises, which involved multiple building projects. RP 220.

In addition to the building projects of KMD Enterprises, Mr. Dickerson focused on the parties investments. This was akin to a full time job for Mr. Dickerson. In deposition, Mr. Dickerson testified that he spent "six to eight hours" focused on the investments. RP 228. At trial, Mr. Dickerson misrepresented this involvement, seeking to downplay his role in a more passive light. RP 223.

Upon cross examination, Mr. Dickerson acknowledged that he did spend considerable time managing the investments and coordinating building projects. RP 234-235. Mr. Dickerson acknowledged that he never took compensation for these many hours of his labor directed to community purpose during the course of the marriage. RP 235.

The parties later relocated to the Spokane, Washington area. They purchased a home and continued the division of labor that had been previously established. Ms. Dickerson utilized her labor to work for compensation from a corporation outside the marriage; Mr. Dickerson focused on management of building projects and investments.

Mr. Dickerson's behavior prior to separation was concerning to Ms. Dickerson. Mr. Dickerson became threatening to her, prohibiting her movements after an injury and starting an altercation at the home in which he physically assaulted her. She sought a restraining order, which was granted, and a dissolution case was filed. The court upheld the temporary

restraint while the case was pending, and the parties agreed to continuation of the restraint for 6 months following entry of the decree. Mr. Dickerson later plead guilty to an assault charge which resulted from the original events leading to the restraining order in this case.

The parties agreed to the distribution of assets and financial accounts. The disagreement at trial was about the character of those assets, and whether any property equalization would be ordered from one party to the other. Ms. Dickerson prevailed at trial and Mr. Dickerson now seeks review.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S DETERMINATION THAT ALL PROPERTY WAS COMMUNITY PROPERTY.

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, (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).

In the current case, the court examined evidence regarding the financial accounts of the parties. As noted above, Mr. Dickerson provided no account statements from prior to the marriage as exhibits at the time of trail. The court lacked the ability to determine if the assets were indeed acquired prior to the marriage given the lack of documentary evidence provided for Mr. Dickerson's claims regarding the main T. Rowe Price account. The relevant trial exhibits have been requested in a supplemental designation of clerk's papers to establish that Mr. Dickerson did not provide evidence to support his claims.

The account statements that were provided included Exhibit 128, which was a December 2007 statement for T. Rowe Price account 4488. This December 2007 statement indicated that Mr. Dickerson had a zero balance in his T. Rowe Price account in November 2007, after the date of the marriage in June 2007. Subsequent to this zero balance in November 2007, Mr. Dickerson's T. Rowe Price statement showed a significant balance and market position. See Respondent's Trial Exhibit 128; RP 71.

The December 2007 statement also showed clear evidence that Mr. Dickerson liquidated all or nearly all of his prior market holdings in August 2007, after the date of marriage. During examination, Mr. Dickerson was not able to testify as to whether any withdrawals or additions were made to his cash holdings after August 2007. RP 72.

Mr. Dickerson was also not able to trace or identify where the $9,000.00 of retirement contributions from the Nav Man Corporation were deposited. Mr. Dickerson testified that he had no investment or retirement accounts other than the contested T. Rowe Price account. But Mr. Dickerson was not able to identify the location of the $9,000.00 Nav Man contribution. RP 102.

If Mr. Dickerson deposited the $9,000.00 of retirement contributions after the date of marriage into his T. Rowe Price account, this would have comingled community and separate funds.

Mr. Dickerson also exercised significant community labor on management of the financial assets. Mr. Dickerson attempted to downplay his involvement at trial, but was impeached with his prior deposition testimony. RP 234-2352.

The evidence produced at the time of trial showed that Mr. Dickerson woke up early each day to manage the financial assets. He was at his desk/computer each day before the opening of the markets on the east coast. He was at his desk throughout the day, approximately 6 to 8 hours each day.

The court found that Mr. Dickerson was good at this financial management. Findings 2.21.29. Mr. Dickerson did not produce any evidence about the rate of return that would have been earned by passive investment versus his highly active role. The court found that Mr.

Dickerson's labor contributed to the great increase in the financial accounts of the parties, including the contested T. Rowe Price account.

Mr. Dickerson did not take any compensation for his labor, but invested this community labor into the financial accounts of the parties, including the contested T. Rowe Price account. The labor of both husband and wife during the marriage is community property. *See* In re Buchanan's Estate, 89 Wn. 172, 181-82 (1916). Failure to draw reasonable compensation from a separate business results in this business being considered community property. *See e.g.* Koher v. Morgan, 93 Wn. App. 398, 403 (1998).

Ms. Dickerson testified that Mr. Dickerson managed all of the financial accounts jointly. She indicated the parties discussed goals of financial management that would result in gain for both parties. The parties discussed this financial management both before and after marriage. Ms. Dickerson testified that she signed over all papers to allow Mr. Dickerson to manage and have ownership of her accounts as community property. Ms. Dickerson testified that Mr. Dickerson represented that all accounts were to be held and managed for community purpose. Until discovery and trial Ms. Dickerson was unaware that Mr. Dickerson had not put her name on the contested T. Rowe Price account.

The parties took overt acts to manifest their intent to combine and

manage assets as community property. This included combining all checking and savings accounts. The clear testimony at trial was that Mr. Dickerson closed his separate Wells Fargo checking and put his funds into Ms. Dickerson's USAA accounts.

Both parties acknowledged that after marriage, Ms. Dickerson deposited significant funds from the sale of her separate property home into the joint checking account. Both parties agreed that after marriage and deposit of Ms. Dickerson's home proceeds into the joint checking that they paid of the mortgage on Mr. Dickerson's separate property Highline home.

In order to further clarify the intent of the parties, they executed a special community property warranty deed regarding the Highline home. See Petitioner's Exhibit 17. This notarized legal document clearly stated that the intent of both parties at the time was to change the character of the Highline home from Mr. Dickerson's separate property into the community property of both parties.

Mr. Dickerson acknowledged at the time of trial that this was his intent at the time of signing the document. Mr. Dickerson asked the court to find the property was now his separate property because he no longer had the same intent at the time of the dissolution trial. The intent at time of trial is not relevant, it is the intent of the parties at the time the action was taken.

With this background of evidence, the trial court concluded that it was

the clear intent of the parties to combine and join all assets and accounts as community property. It is this intent of the parties which is legally controlling.

The Borghi case is not helpful to Mr. Dickerson in this matter, as he did not produce evidence establishing separate ownership of the contested T. Rowe Price account prior to marriage other than testiony. The December 2007 statement showed a zero balance in the account at the end of November 2007. In essence Mr. Dickerson's own evidence established that he held only cash and not investment holdings in November 2007.

The December 2007 statement showed that Mr. Dickerson's entire T. Rowe Price balance appeared between November 2007 and December 2007. Mr. Dickerson could not explain the source of the cash for the acquisition of this asset in December 2007, after the date of marriage.

The Borghi case indicates that assets will be characterized at the time they are acquired. In re Borghi, 167 Wn.2d 480 (2009). The evidence produced at the time of trial showed that the balance in the T. Rowe Price account was acquired between November 2007 and December 2007. Thus, the T. Rowe Price account was acquired ***after*** the date of marriage. Assets acquired during the marriage are community property by definition. Mr. Dickerson did not produce substantial evidence concerning the amount, location, or process of any separate investments prior to marriage. In

addition, the court found an independent and manifest intent by the parties to combine all assets and manage them as community property. This conclusion overcomes the holding in Borghi either way.

The Borghi case, and the other cases cited by Appellant, require that the party asserting changed character of property provide a tracing of this claim.

The party seeking to advance a claim has a duty to produce evidence supporting this claim. Mr. Dickerson provided evidence of market holdings prior to November 2007. Mr. Dickerson provided evidence of cash holdings in August 2007. But Mr. Dickerson was not able to provide any explanation of the source of these holdings from prior to the marriage. While it was acknowledged that Mr. Dickerson had some holdings prior to marriage, the amount, size, scope, and location of these was not established. In the absence of significant evidence to support his separate property claims, the court found the asset to be community in nature.

Whether the contested T. Rowe Price account was community or separate prior to December 0f 2007, the court also found substantial and credible evidence that the manifest and independent intent of the parties was to combine all accounts after marriage. The character prior to at the time of marriage is thus less important than whether the court found substantial evidence of an intent to combine, comingle and change all assets

into community property. The court found that there was.

The court was asked to thus compare the credibility of the parties given competing claims to the nature of the contested accounts. In the absence of documentary evidence about the source of funds, comingling of funds, or location of income/assets acquired after the marriage, the testimony of the parties formed the primary basis of these findings.

Mr. Dickerson's testimony was not credible. When asked directly about this significant involvement in managing the financial assets of the parties, he downplayed and provided false testimony about this. RP 223-235. Mr. Dickerson had to be impeached with his prior deposition testimony, which he then acknowledged was accurate. RP 223-235.

A party providing false testimony which is later impeached lacks fundamental credibility as to their claims. The trial court was well within her bounds to assess the credibility of the parties and find Ms. Dickerson's claims more credible than Mr. Dickerson. This is not error of any kind.

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).

CONCLUSION

Here, the trial court made findings after reviewing the documentary evidence and considering the testimony of both parties. The trial court appropriately weighed credibility of both parties in reaching factual and legal conclusions. The findings are well supported by substantial evidence. The evidence showed that the main contested T. Rowe Price account was either acquired after the marriage or comingled with the community labor of Mr. Dickerson in managing the asset. The court also found substantial evidence that the manifest intent of the parties was to combine all financial accounts and holdings into community property for joint purpose and character. As a result, the determination that all property of the parties was community property was supported by substantial evidence and should not be overturned on appeal. The judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED AND DATED this 5th day of January, 2017:

DOUGLAS R. HUGHES, WSBA #30354
Attorney for Respondent
W. 422 Riverside, Suite 920
Spokane, WA. 99201
(509) 624-1380

CERTIFICATE OF SERVICE

I certify that on January 6, 2017, I served this Respondent's Brief by email, as agreed, on Kenneth H. Kato at khkato@comcast.net

DOUGLAS R. HUGHES, WSBA #30354
Attorney for Respondent

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 6th day of January, 2017, 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
KENNETH KATO, WSBA #6400
1020 N. Washington St.
Spokane, WA 99201

DOUGLAS R. HUGHES, WSBA #30354

SUBSCRIBED AND SWORN to before me this 6th day of January, 2017.

DARLA M. O CONNOR
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
MARCH 9, 2020

Darla M. O'Connor
NOTARY PUBLIC in and for the
State of Washington, residing in Spokane.
My Commission Expires: 3/9/2020