

FILED

JAN 27 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 342271

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION
III

PRISCILLA HERR
Respondent,

v.

SHIZUO YAMADA
PETITIONER.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Respondent requests that the court affirm the trial court's ruling on the validity of the prenuptial agreement and subsequent distribution of the property of the marital community. The appellant contends that the superior court failed to identify the correct burden of proof and quantum of proof necessary to determine the validity and enforceability of a prenuptial agreement. This is incorrect. The court properly identified the factors as identified in *Marriage of Matson*, 107 Wn. 2d. 479, 482, 483, 730 P.2d 668 (1986) and *In re Marriage of Foran*, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992), and applied these appropriately. The trial court's ruling should be upheld.

II. STATEMENT OF CASE

Priscilla Herr, age 76, and Shizuo Yamada, age 75 were married on October 27, 1986 and separated March 27, 2013. CP 3-5.

On September 17, 1986, Mr. Yamada and Ms. Herr entered into an agreement entitled a Written Consent of Support. Ex 1. This was at the suggestion of Mr. Yamada's divorce attorney, Michael Brouman. RP 22: 16-21. The pertinent sections of the agreement involve an agreement whereby Mr. Yamada agrees that, "property earned by Priscilla that constitutes community property under the laws of the State of California shall be Priscilla's sole and separate property." And, "Mr. Yamada

understands that upon execution of this document, he is relinquishing any and all claim to any part, portion or whole of any earnings, inheritance, or proceeds of Priscilla for any reason . . .” Ex. 1; RP 21: 14-21

Ms. Herr worked for an attorney at the firm of Troy Casden Gould. RP 22: 22-24. Mr. Yamada and Ms. Herr met with Mr. Yamada’s divorce attorney, Michael Brouman, at Mr. Brouman’s office in August 1986. RP 23:5-6. Ms. Herr provided Mr. Yamada and Mr. Brouman a complete list of her financial assets, her income and all financial accounts. RP 23: 22-25. She included listed evaluations of her personal property. RP 142: 7-10. The agreement was signed on September 17, 1986, notarized and filed with the Los Angeles County Recorder’s office on September 22, 1986. RP 20: 1-19.

On August 1, 1987, Mr. Yamada signed an agreement entitled Declaration of Responsibility of Robert (Mr. Yamada) Shizuo Yamada. RP 28: 19-23; 138: 12-18; RP 158: 6-8. In the declaration, Mr. Yamada assumes and accepts responsibility for all debts and/or expenses held in his name to be his sole responsibility and intended those debts and/or expenses to be separate and apart from all of the property and responsibility of Ms. Herr. RP 29: 9-19; 158: 19-25; 159: 3-16.

On January 22, 1992, Mr. Yamada signed another Declaration of Responsibility. RP 35: 11-17. This document contains nearly identical

language to the 1987 Declaration as to Mr. Yamada assuming sole responsibility for debts and/or expenses in his name. The Declaration also includes a statement in paragraph 6, that, 'Priscilla and I signed a pre-nuptial agreement, "Written Consent of Support", on September 17, 1986, and it was recorded by the Los Angeles County Recorder's Office on September 22, 1986, . . .' RP 40: 23-25; 41: 1-2.

The 1992 Declaration further reinforces the provision in the September 1986 pre-nuptial agreement that he relinquishes, "any and all claim to any part, portion or whole, of any earnings, inheritance, or proceeds of Priscilla for any reason." RP 41: 2-9. During the trial, Mr. Yamada did not deny signing the 1992 document, but stated that he could not recall signing it. RP 182: 9-10. In paragraph 8 of the 1992 Declaration, Mr. Yamada assumes, "complete responsibility for payment of any legal fees for an attorney of my wife's choosing for the enforcement of this Declaration . . ." RP 159: 3-16.

At the time of their marriage, Ms. Herr did not own a home. RP 34: 22-23. Mr. Yamada held a one half interest in the family home occupied his ex-wife. RP 167: 21-25, 168: 2-6.

Ms. Herr began purchasing property in Tri-Cities, Washington in August 1991. RP 48: 4-8. Ms. Herr purchased properties using her own personal savings and a bank loan in her name alone. RP 48: 10-21. On

August 14, 1996, Ms. Herr purchased a home a 9115 Maple Drive in Pasco, Washington. RP 73: 15-25, 74: 1-6.

Mr. Yamada purchased a home in Lakewood, CA in September 1998 or 1999. RP 58: 1-12, 167: 9-13. Mr. Yamada sold the Lakewood, CA home on January 17, 2001. Mr. Yamada did not share the proceeds of the home, nor did he deposit the money into a joint bank account. Initially, Mr. Yamada claimed he lost money on that sale. RP 168: 7-20. Later, Mr. Yamada acknowledged he received \$82,949.50 in proceeds and that he put that money into his bank account. RP 170: 3-13.

Mr. Yamada moved to the Tri-Cities in September 2001. RP 177: 10-11. December 17, 2001, Mr. Yamada signed a Quit Claim Deed on Ms. Herr's Maple Drive home in consideration to create separate property. RP 234: 25, 235: 1-3.

The Honorable Bruce Spanner issued a written decision on March 6, 2015. CP 9-12. He determined that of the three agreements, only the 1986 Written Consent of Support was a valid prenuptial agreement. CP 9. In the decision, the court noted that "Although Mr. Yamada has no recollection of signing the document, all of his subsequent actions point to the fact that he did. Mr. Yamada's resume demonstrates that he had a very high level of sophistication with respect to business matters...He signed the 1992 Declaration of Responsibility, acknowledging that he had signed

the earlier Written Consent of Support...There was no evidence that Mr. Yamada ever interfered with, or participated in any real estate transactions.” CP 10. Further, the court went into great detail as to how it determined the validity of the prenuptial agreement, in the context of the Foran 2-prong analysis. CP 11-12.

The parties resumed trial on January 13, 2016 to resolve the remaining issues related to the division of debts and assets. The court issued a written ruling on January 28, 2016. CP 13-20. Findings of Fact and Conclusions of Law and a Decree of Dissolution memorializing the court’s decisions were entered on March 14, 2016. CP 21-27. Mr. Yamada appealed shortly thereafter.

III. ARGUMENT

A. BURDEN OF PROOF

The trial court correctly stated the burden of proof during its statements at the conclusion of the December 14, 2014 trial. The Honorable Bruce Spanner stated “the burden of proof is by clear, cogent and convincing evidence.” VPR 219: 9-10.

B. VALIDITY AND ENFORCEMENT OF PRENUPTIAL AGREEMENT

The trial court did not abuse his discretion as his ruling was based upon a correct view of the law and correct legal analysis. The validity of a

prenuptial agreement is evaluated by means of a 2-prong test. “First, the court must decide whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. If the court makes this finding then the analysis ends and the agreement may be validated.” *Marriage of Matson*, 107 Wn. 2d. 479, 482, 483, 730 P.2d 668 (1986). The second prong contains two tests: 1) Whether full disclosure has been made by the parties of the amount, character, and value of the property involved; and 2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by both spouses of their rights. *Id.*

This two-pronged analysis was further enforced under *Foran*, which states that in determining validity of prenuptial agreement, if the agreement is economically fair on its face, analysis ends and agreement is enforceable; if not, the court determines whether there has been full disclosure and whether agreement was entered into fully and voluntarily on independent advice and with full knowledge by both spouses of their rights. *In re Marriage of Foran*, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992).

With regard to the validity of prenuptial or separate property agreements at the time of execution, Washington has held that: “We adhere to the settled rule that “[t]he validity of prenuptial agreements in

this state is based on the circumstances surrounding the execution of the agreement.” *In re Marriage of Zier*, 136 Wash.App. 40, 47, 147 P.3d 624 (2006) (citing *Matson*, 107 Wash.2d at 484, 730 P.2d 668).

Here, the trial court was tasked with determining whether any or all of the agreements were valid at the time they were executed. The trial court determined that the September 17, 1986 agreement was the only valid agreement. The September 17, 1986 agreement provided a fair and reasonable provision for the party not seeking enforcement of the agreement as evidenced by the following facts:

a. At the time the 1986 agreement was executed, Mr. Yamada was completing a divorce from his previous wife. RP 68: 25, 69:1-4. A review of the dissolution judgment (later entered in 1990) reveals Mr. Yamada maintained a one half interest in the family home of that marriage. RP 37: 12-25, 38: 1-14. There are also debts allocated between Mr. Yamada and his wife in that 1990 judgment. RP 36: 24-25. Mr. Yamada was employed as a business executive. CP 11. He had a Bachelor of Science degree in business administration and graduate courses in governmental accounting, construction accounting and real estate management. RP 26: 4-9.

b. In 1986, Ms. Herr worked as a legal secretary. RP 11: 10-14. She did not own any real property. RP 46: 10-13. She had some small

amounts of cash. RP 46: 18-25. Ms. Herr had a high school education with some post-secondary classes in real estate development and property management. RP 10: 17-25, 11: 1.

Per the court in *Matson* and *Foran*, the trial court must decide whether the agreement provides a fair and reasonable provision for the party not seeking enforcement of the agreement. Per *Zier*, The validity of prenuptial agreements in this state is based on the circumstances surrounding the execution of the agreement. And in particular, substantive fairness is determined at the time of execution of the agreement. *Id.*

Here, the parties did not enjoy equal economic positions at the time of execution on any of the agreements. Mr. Yamada possessed more by way of property, earning potential, and education. CP 11-12. Ms. Herr sought to protect herself from Mr. Yamada's debts. The agreement provided a fair and reasonable provision for the party not seeking enforcement, Mr. Yamada. In his decision, The Honorable Bruce Spanner wrote, "based upon the facts presented, the Court concludes that the agreement is fair and reasonable, and therefore enforceable."

The Findings of Fact and Conclusions of Law further outlined the court's reasoning for finding that the 1986 Written Consent of Support was a valid and enforceable prenuptial agreement. CP 22-23, 27. In fact,

the Findings of Fact went into great detail explaining the court's application of the *Foran* test. CP 23.

C. DISTRIBUTION OF PROPERTY

Spouses can change the status of their community property to separate property by entering into mutual agreements (oral or written.) The spouse attempting to enforce the agreement that converts community property into separate must establish two things: (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout the marriage. *In re: Marriage of Mueller*, 140 Wash.App. 498, 501, 167 P.3d 586 (2007).

Case law has also determined that even an oral prenuptial agreement to treat income earned during the marriage as separate property was enforceable. *Dewberry v. George*, 115 Wash.App. 351, 359, 62 P.3d 525 (2003).

Mr. Yamada and Ms. Herr entered into a written and recorded prenuptial agreement, which set forth their intention that property earned by Ms. Herr deemed community property in the State of Washington would be her separate property. Ex 1. When Ms. Herr purchased property, it was always in her name alone, and the parties would take it a step further by also having Mr. Yamada sign a quit claim deed relinquishing interest. RP 73: 19-25, 74: 1-6. The trial court found that agreements and actions the

parties took with regard to property obtained by Ms. Herr and her earnings supported the enforceability of the Written Consent of Support. CP 10.

“Implied waiver of contractual rights requires unequivocal acts...”

Am. Safety Cas. Ins. Co. v. City of Olympia, 162 Wn.2d 762, 773, 174 P.3d 54 (2007). None of Ms. Herr’s actions would constitute a waiver of the contractual agreement entered into.

"At the time of dissolution, all property is brought before the court for a 'just and equitable' distribution. RCW 26.09.080." *In re Marriage of Farmer*, 172 Wn.2d 616, 625, P.3d (2011). The factors the court is to consider when dividing the debts and assets of a marriage are contained under RCW 26.09.080, which states that:

“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.”

Although Washington law holds that all property, whether separate or community in character, is before the court for an equitable distribution, in this matter, that rule does not apply. Mr. Yamada and Ms. Herr, specifically entered into a pre-nuptial agreement whereby Mr. Yamada, declared “. . .property earned by Priscilla that constitutes community property under the laws of the State of California shall be Priscilla’s sole and separate property.” And, “Mr. Yamada understands that upon execution of this document, he is relinquishing any and all claim to any part, portion or whole of any earnings, inheritance, or proceeds of Priscilla for any reason . . .” Ex 1; RP 91: 18-25, 92: 1-25.

The trial court in its written decision based its distribution of the assets on RCW 26.09.080 as well as case law. CP 14-15. The court made a finding as to the character of the contested personal property. In fact, the court, in taking all the facts of the case into consideration, awarded Mr. Yamada a disproportionate share of the community property in his favor, to include \$20,000.00, 14 karat diamond ring, and various personal property. CP 18.

IV.CONCLUSION

The trial court did not abuse its discretion in its finding that the 1986 Written Consent to Support was a valid and enforceable prenuptial agreement. Similarly, the trial court did not abuse its discretion in making a distribution of the parties' property. Both decisions were properly rooted in statute and case law. The trial court's ruling should be affirmed. Priscilla Herr should be awarded attorney's fees for the necessity of responding to this appeal pursuant to RAP 18.1.

Dated this 25th day of January, 2017.

Defoe Pickett Law Office

By:

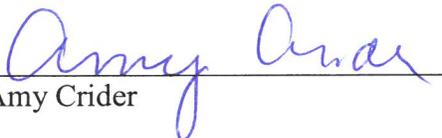


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CERTIFICATE OF SERVICE

I do hereby certify that on the 20 day of January, 2017, I caused to be served a true and correct copy of the foregoing by First Class Mail, postage prepaid, and addressed to the following:

George M. Ahrend
100 E. Broadway Ave
Moses Lake, WA 98837



Amy Crider