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Court of Appeals
Division III
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No. 36393-7

WASHINGTON STATE COURT OF APPEALS, DIVISION III

BEVERLY SEVIGNY,

Petitioner,

v.

MICHAEL G. SEVIGNY,

Respondent

ON APPEAL FROM YAKIMA COUNTY SUPERIOR COURT

MIKE SEVIGNY'S REPLY BRIEF

Gregory M. Miller, WSBA No. 14459

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I. INTRODUCTION AND GENERAL REPLY

The Response does not fully address but tries to side-step Mike's statutory argument that post-separation property is not marital property and is not subject to division. Beverly's primary argument in her Response Brief is that Mike did not show the 16th Ave properties were acquired post-separation. That is wrong. The undisputed documentary evidence shows all the LLC's properties but one were acquired after the February 1, 2013, separation date; that Beverly had no ownership or management interest in the LLC; and that Mike's funds used to purchase properties after February 1, 2013, were from his post-separation income from the construction business. *See, e.g.*, OB pp. 7-8, p. 12 fn.4, pp. 31-33, & record cites.

Mike's portion of the LLC's post-separation acquisitions and gains thus were necessarily from Mike's separate earnings and efforts under RCW 26.16.140, which states: "While spouses. . . are living separate and apart, their respective earnings and accumulations shall be the separate property of each." This is, ironically, reinforced by the unchallenged finding added by Beverly's counsel that "The marital community ended on February

2013. The parties stopped acquiring community property and incurring community debt on this date.” CP 13, ¶5. This includes the LLC, no matter how it is characterized for the divorce.

As pointed out in Mike’s Opening Brief, the trial court disregarded the law on post-separation acquisitions and, in fact, included that post-separation property in the property division with a transfer payment of over \$700,000. *See* OB pp. 12-15. That transfer payment was both impractical and impossible for Mike to make on top of more than doubling his maintenance payments to \$6,500 for ten years. *Id.*

Nevertheless, the gist of Beverly’s policy argument is it did not matter when the property was acquired – as to that post-separation property purchased by the 16th Ave. company, the marriage never ended, no matter the source of the funds for the purchase. Her closing arguments thus had nothing to do with separation or acquisition dates though her Response belatedly raises those points. But at trial, and in reality, Beverly’s argument boils down to it did not matter when the properties were acquired because the marriage never ended as to that property. This argument at best relates to the source of funds for acquiring those properties, that

some of the funds used after February 1, 2013, were community funds which originally funded the LLC. However, under settled law, particularly *In re Marriage of Griswold* and *In re Marriage of Short*,¹ as discussed in Mike’s Opening Brief at pp. 26-29, and *In re Marriage of Elam*² as discussed at OB pp. 29-31, this theory would at most provide a right of lien for community funds expended to acquire them, and then the proportional increase in value for such community share. But that was not what was argued below. Rather, it was the simplistic – she gets half the company - without any analysis of ownership or post-separation contributions. But this argument undoes the separate and apart statute. *See* OB pp. 33-35, and *infra* § II. B.

Finally, any arguments in the Response Brief not specifically addressed herein are adequately addressed in Mike’s Opening Brief to which the Court is respectfully directed, or need not be addressed.

¹ *In re Marriage of Griswold*, 112 Wn. App. 333, 48 P.3d 1018 (2002); *In re Marriage of Short*, 125 Wn.2d 865, 890 P.2d 12 (1995).

² *In re Marriage of Elam*, 97 Wn.2d 811, 650 P.2d (1982).

II. REPLY ARGUMENT

A. **The Maintenance Award Must Be Vacated For Failing To Craft A Payment Mike Can Make While Also Meeting His Own Needs And For Acquiescing In Beverly's Request To Be Kept "In The Style To Which She Had Become Accustomed" When That Impoverishes Mike.**

The gist of Beverly's Response Brief is to say -- well, this is a family law property division, just affirm the trial judge. The Response thus does not really tackle the case law on maintenance that says the court cannot make Mike a pauper just to keep Beverly in the "style to which she became accustomed" at the latter part of the marriage. Because Beverly's Response fails to genuinely address the maintenance issue, the Court is respectfully directed to Mike's Opening Brief, pp. 37-43, and the basic principles therein.

Under RCW 26.09.090, the trial court must take into account the ability of the obligated spouse to meet his or her own needs. OB pp. 39-40. There is no support in the statutes or cases for the proposition requested by Beverly and granted by the trial court, that she be kept "in the style to which she had become accustomed" after the divorce, particularly where this is a marriage in which, like *Stacy v. Stacy*, 68 Wn.2d 573, 576, 414 P.2d 791 (1966), the "divorce decree will undoubtedly reduce the standards of living of both

parties” since the parties here do not have “independent means”. *See* OB, pp. 41-43 and *Cleaver v. Cleaver*, 10 Wn.App. 14, 20, 516 P.2d 508 (Div. I, 1973) (a spouse is not “entitled to maintain her former standard of living as a matter of right.”). *Accord, In re Marriage of Kaplan*, 4 Wn.App.2d 466, 474, 421 P.3d 1046 (Div. I, 2018).

Because the maintenance award does not take into account Mike’s inability to make the payments while also taking care of his own financial needs, the maintenance award must be vacated.

B. Property Acquired After Separation Is Not Community Property Per RCW 26.16.140. Beverly’s Argument Would Nullify The Separate And Apart Statute, The Separate Liability Statute, and The Separate Debts Statute, And Would Dramatically Change Marital Dissolution Law.

The Separate and Apart Statute and Separate Liability Statutes³ both have been part of Washington’s marital dissolution law continuously since 1881, as noted in Mike’s Opening Brief at p. 30, and in the RCWA annotations for RCW 26.16.190. The Separate Debts statute dates to 1873.⁴ for each statute. Beverly’s arguments would wreak a fundamental change to that law by

³ RCW 26.16.140, 26.16.190, and 26.16.200, respectively.

⁴ *See* RCWA 26.16.200, “Historical and Statutory Notes”, citing Laws 1873, p. 452, §10.

nullifying their basic principles – when the marriage is over, when it is defunct, and when the two spouses have separated to live life on their own, they nevertheless are still economically connected in their future separate lives no less than when they were married.

Beverly's arguments focused on the rather simplistic argument that anything acquired by the LLC post-separation but prior to the final decree was community, which unfortunately the trial court accepted wholesale. In closing Beverly argued the after-acquired property was community, even though acquired *after* separation.

Her argument was that, basically, it did not matter when the property was acquired – as to that property, the marriage never ended. While Beverly's argument potentially relates to the source of funds for acquiring those properties, at most that provides a right of lien for community funds expended. But the evidence at trial, which was not refuted, was that what Mike contributed to the LLC after February, 2013, was his personal, post-separation income from the construction business and his management. *See*, pp 1-3 *Supra*. Moreover, Beverly's argument undercuts many of the basic premises

of divorce, and of Washington's basic community property structure and modernized no-fault policy.

The purpose of marital dissolution and the rules on community property and responsibilities, is to pool resources while a couple is married in an equitable manner unless otherwise agreed by the spouses, but, because marriage is a contract, to also let them disengage and quit the other and move on with their life with the minimum of future entanglements to their former spouse, particularly where, as here, there are no children who need to be cared for to insure they do not become wards of the State. After the Dissolution Act of 1973 which brought into the state "no-fault" divorce,⁵ in Washington both spouses are entitled to their freedom from the other. Women in particular were no longer forced to remain in unhappy or unsatisfactory marriages. *Id.*

But a key part of being able to move on, beyond the new principle of "no-fault" dissolution and consistent with the earliest principles of divorce, is that once separation occurs, future

⁵ See 20 Scott J. Horenstein, WASHINGTON PRACTICE FAMILY AND COMMUNITY PROPERTY LAW § 43:2 (2nd ed. 2015), "History of the drafting of the dissolution act of 1973".

acquisitions and debts belong to just the spouse who obtained them – the separated spouse, had neither an entitlement to future earnings or acquisitions of the other, nor any responsibility for the debts or torts of the other. *See* RCW 26.16.140, 26.16.190, 26.16.200. The entire point was to be as free of the other person as possible. That is the point of the “bright line” of the separation date. But what Beverly requested below, and what the trial court mistakenly did in the property characterization and division, was to undercut these basic principles, and erase the bright line. These errors, detailed in the Opening Brief, require reversal and remand under the correct application of the rules.

C. Washington Is A No Fault Divorce State And A Spouse’s Marital Misconduct Cannot Be A Basis For Ignoring The Statutes And Established Legal Rules On Property Division.

Beverly’s counsel repeatedly brought up what she perceived as Mike’s fault-based misbehavior which should be punished in the property division and maintenance award – the “if he is going to stray, he must pay” approach. *See* OB, pp. 36-37 and records cited therein. This is a favorite tactic of Beverly’s counsel in the Yakima courts. Sometimes that tactic and result is done at least somewhat

subtly to avoid appellate scrutiny. No one wants to address it at either level – either the recognition of the all-too human foibles which lead to divorce; or the willing acquiescence in “punishing” the so-called “bad” party.

Here, however, the alleged misconduct was in-artfully injected into the proceedings several times, and the punishment clumsily requested such that it becomes obvious it is not part of a normal community property division of marital property. The grabbing and “dividing” of future-acquired, non-marital property should have been recognized by the trial court for the fault-based, over-reaching punishment it was intended to be, but sometimes it is human nature to not want to see some things for what they are. It is for the appellate court to correct this, however tactfully or forcefully that needs to be done, in order to both respect the community property laws we have had since the 1880’s, and the no-fault system we have had since 1973.

III. RESPONSE ARGUMENT TO CROSS APPEAL

A. **The Trial Court Did Not Abuse Its Discretion In Fixing An Interest Rate Below 12 Percent But At A Small Premium Over What Beverly Could Earn On The Unpaid Funds If She Had Received And Invested Them.**

Beverly's sole issue on her cross-appeal is that the trial court erred by setting the interest rate for the unpaid equalization payment below the statutory maximum of 12 per cent. The trial court has discretion to set the rate of interest in the judgment or provide for no interest at all. *In re Parentage of Fairbanks*, 142 Wn.App. 950, 958, 176 P.3d 611 (Div. III, 2008) ("This court reviews a trial court's decision setting the interest rate on a judgment for abuse of discretion); *In re Marriage of Stenshoel*, 72 Wn. App. 800, 811-812, 866 P.2d 635 (Div. I, 1993). As noted in *Stenshoel*, this point was settled by the Supreme Court in *Berol v. Berol*, 37 Wn.2d 380, 383, 223 P.2d 1055 (1950) which requires the low threshold of "some apparent reason" for changing or eliminating the interest entirely on a judgment or deferred payments in a marital dissolution.⁶

⁶ Though the "some apparent reason" test of *Berol* has been cited frequently, it is so settled that last five times it has been cited since 2005 have all been in unpublished decisions. It is settled law.

Certainly one reason justifying a lower interest rate is to avoid giving a windfall to the spouse receiving the payments of a rate that would be greatly in excess of what could be earned if that spouse had the funds, while at the same time safeguarding that fund and giving the paying spouse an incentive to pay it off sooner than later. The trial court did that here.

In this case the reason for the lower interest is plain from the record of the presentation when Mike's attorney objected to the 12 percent that Beverly's lawyer put into the proposed final order, since the trial court had not addressed it in her letter opinion. *See* RP 221:20. The colloquy and oral ruling of the trial court at the presentation on July 6, 2018, shows the "apparent" and sound reason why the trial court set the interest rate at six percent:

Mr. Schwartz: The first objection is regarding the interest rate on the judgment. The judgment is over three-quarters of a million dollars. They're presenting 12 percent. That's one percent per month. Essentially that would have interest at 7,600 dollars a month.

....

On top of spousal maintenance of 65[00 dollars per month]. It's just not doable. We would ask the Court set something realistic, perhaps 3, 3.5. That's the kind of return people are getting on better investments right now.

...

... 12 percent is just not workable.

The COURT: I'm going to set the interest rate at 4 percent. That's reasonable under the circumstances given the uneven distribution as well as the . . . maintenance.

RP 221-222.

This comports with the minimal requirement stated by the Supreme Court in *Berol*. The trial court clearly balanced the interest rate with all the circumstances, including the 60-40 overall distribution, the high amount of monthly support required, the additional monthly amount that would be required by the high rate of interest, and the fact that it would still give Beverly a premium over what she could earn if she had the money to invest. The interest rate is supported by the record.

Nevertheless, if this Court believes the record is inadequate to support trial judge's decision, the solution is absent reversal on Mike's appeal, to remand for the purpose of entering more detailed reasons, at such time the trial court can also consider more specifically what Beverly would earn on the amount if she had the funds, and could adjust the interest rate to insure Beverly does not receive a windfall but is secured.

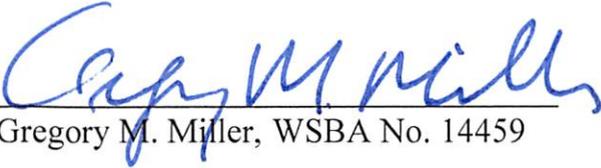
IV. CONCLUSION

Appellant Mike Sevigny asks the Court to vacate the property division and maintenance award and remand for a fair and equitable property division under the correct characterization of their properties. Mike requests the Court specifically instruct that on remand, the trial court is not to divide the post-separation earnings and accumulations of either party because those earnings and accumulations are their post-marital separate property per RCW 26.16.140. Also Mike request that the cross-appeal be denied and, given the overall property awards, that both parties bear their own fees on appeal.

Respectfully submitted this 7th day of October, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By


Gregory M. Miller, WSBA No. 14459

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Michael G. Sevigny*

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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