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Division III
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No. 36767-3

**COURT OF APPEALS, DIVISION NO. III
OF THE STATE OF WASHINGTON**

In re: Marriage of Selvidge:

HEC D. SELVIDGE,
Petitioner-Appellant

v.

REBECCA SELVIDGE,
Respondent-Appellee.

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

COMES NOW Appellant Hec Selvidge, by and through his undersigned attorneys of record, and submits this Reply Brief.

In Reply, Mr. Selvidge argues that it would have been easy for the trial court to account for his separate property interest on the testimony and exhibits at trial, and that the Court should have done so. Next, he argues that the trial Court erred by looking outside the record where the basis of the Appellee's motion required the Court to consider *only* the record – in short, that the Appellee sought the wrong relief, and the court erred by granting it. Finally, he argues that the trial Court erred by using a cash payment to correct a patent disparity, yet still leaving the parties on patently disparate footings, despite the easy ability to achieve an equitable distribution.

B. ARGUMENT & AUTHORITY

In Reply, we briefly address the issue of assignment of error and then reply to the issues as the Appellee has organized in her Response brief.

1. Reply Re: Assignments of Error

The Respondent argues that it is “impossible to adequately respond,” yet somehow proceeds to argue each error and issue raised by the Appellant's brief. RAP 10.3(4) requires¹ a separate, concise statement of

¹ RAP 10.3 applies to the content of briefing, using the “should” command. The clear purpose of the rule is to outline the issues for review, which the Appellant's brief does with clarity. The Court liberally interprets the RAP to promote justice and facilitate the decision

the errors and the issues pertaining thereto, which is contained in the Appellant's brief. The Appellant's brief identifies the issues broadly and then spends nearly two pages of text (at 7-9) explaining in detail the specific errors of fact and law at issue here. There is no colorable argument that the Appellee does not understand the issues or errors claimed on appeal.

2. Equitable Lien

A separate property claim may be made if it is traceable. The heart of this issue is equitable – the marital community benefitted by receiving what Mr. Selvidge spent his separate funds to obtain. This was not done as a gift, as the Respondent claims, and the trial court's error (see Appellant's Brief at 11-12) resulted in a mischaracterization of the property.

The purpose behind the execution of the deed was explained:

- Q And do you recall why you executed that Deed?
A Yes, sir.
Q Why is that?
A Because I had to, to get the loan from Northwest Farm Credit.
Q Okay. Was it your intent to gift that property to Becky?
A No, sir.
Q Okay. So the sole purpose for you entering that Deed was because the bank told you to?
A Yes, sir.
Q And would the bank have extended the loan to you if you did not do that?
A No, sir.

of cases on the merits. RAP 1.2. The issues presented for review are clear, and were clearly argued by the Appellant. Should the Court so direct, Appellant is willing to provide the Appellee a more definite statement of issues and errors to facilitate an amended response brief.

RP at 256:3-16. The fact of title is not controlling as to community or separate property interests. *In re Marriage of Kile & Kendall*, 186 Wn.App. 864, 880-81, 347 P.3d 894 (2015). This issue is also one that the Court of Appeals reviews *de novo*. *Id.* at 876.

The Appellee concedes, relying on *Borgh* (*Response* at 14), that the trial court found that Mr. Selvidge purchased the 21 Robinson Street property as his separate property. But *Borgh* goes on to say:

This case illustrates the conundrum. A court starts with the presumption that the property is Jeanette Borghi's separate property because it was acquired with her own funds before her marriage to Robert Borghi. The parties in this case agree it was initially her separate property. Then, the court must rely on the inclusion of both Robert and Jeanette Borghi's names on the 1975 deed to support a presumption that the property is community property. Applying these presumptions simultaneously, the court reaches an impasse. If we somehow reason that the community property presumption must prevail because it is later in time, then what became of the rule that clear and convincing evidence of actual intent is needed to overcome the original separate property presumption? In sum, applying a gift presumption to counter the separate property presumption in these circumstances would reduce community property principles to a game of King's X. We refuse to do so and instead adhere to the well-settled rule that no presumption arises from the names on a deed or title. To the extent *Hurd* and *Olivares* suggest a gift presumption arising when one spouse places the name of the other spouse on title to separate property, we disapprove these cases.

Estate of Borghi, 167 Wn.2d 480, 490, 219 P.3d 932 (2009). Contrary to the Appellee's assertion, "clear and convincing" is a high threshold. Mr.

Selvidge testified about the reason that the quitclaim deed was executed – to obtain a bank loan. *See above*. The marital community received the benefit of the equity built in the real property with Mr. Selvidge’s separate assets. *CP* at 322; *RP* at 327:18-328:9. The quitclaim deed did not make this interest untraceable – the necessary evidence to do so is in the record, admitted at trial. *Id.*

The heart of the issue is traceability of the interest. The trial court record is sufficiently developed to both distinguish and apportion Mr. Selvidge’s separate property interest. *See Marriage of Chumbley*, 150 Wn.2d 1, 5-6, 74 P.3d 129 (2003). It is only when it is “impossible” to distinguish or apportion the property that it becomes community property. *Id.* The trial court’s record was sufficiently developed with both testimony and exhibits to determine distinguish and apportion the separate property interest. *See Appellant’s Brief* at §C.1².

3. Motion to Reconsider

The trial Court abused its discretion in granting Ms. Selvidge’s Motion to Reconsider because the grounds for the Motion was CR 59(a)(7), and motions on that basis are limited to the trial court record:

On a motion for reconsideration based on CR 59(a)(5)–(9), the court must base its decision on the evidence it already heard at trial.

² Containing nearly a dozen citations to the record in detailed support of this assertion.

Holiday v. Merceri, 49 Wn.App. 321, 330, 742 P.2d 127 (1987) (citing *Jet Boats, Inc. v. Puget Sound Nat'l Bank*, 44 Wn.App. 32, 42, 721 P.2d 18 (1986)). The trial Court erred because it went beyond the record from trial and directed new evidence. The trial court's order designated "Hec Selvidge Logging" as having a value of \$5,000. *CP* at 18. Ms. Selvidge's motion to reconsider was about the value of a bank account; if the Court is going to direct new proceedings to revisit or correct an error, then both parties should present evidence as to what the Court originally divided – the business.

4. Value of Logging Account

Assuming, *arguendo*, that the Court should have granted Ms. Selvidge's reconsideration motion and reconsidered the issue of the logging account, the trial Court still erred in establishing the value of the account. And it was not harmless error, as further explained below. Fortunately, correcting the error does not involve the procedural gymnastics of a separate suit envisioned by the Appellee.

The Appellee's "corrections" to the statement of facts stating that "The [trial] court did not acknowledge a lack of evidence about the [account]..." are somewhat disingenuous. To be clear, the Court stated:

...the Court remembers looking through the record numerous, numerous times at what testimony was presented as to that and the Court did receive -- the Court doesn't recall

seeing a lot of -- or hearing a lot of evidence, like a bank record or an account.

RP at 605:11-15. Appellee next suggests that the figure is somehow agreed, but at the time, the Appellant raised objections that it was not an agreed figure and that the asset-debt matrix is not competent evidence of value:

[MR. MILLER]: ...that amount appears on the Asset Debt Matrix, but it is not an agreement of the parties. The Asset Debt Matrix, A, is not actually competent evidence; it's not a stipulation; it does not represent any sort of agreement of the parties.

RP at 605:19-23. The court went on to further acknowledge the lack of evidence at trial (several times³), and ultimately stated:

I agree that if Mr. Selvidge testified yeah, there's \$43,000 in that account and Ms. Selvidge testified yeah, there's \$43,000 in that account, then a bank statement wouldn't be necessary and the Court would find by a preponderance of the evidence that there's \$43,000 in the account. So I don't think the Court needs a bank statement or a financial declaration or something to that effect if there's testimony to that effect. The Court just doesn't recall any testimony to that effect or even any questions being asked about it.

RP at 610:12-20.

Regardless, a party's (self-interested) proposed valuation of an asset (*See RP* at 429:6-22), is of no value as evidence of the asset's *actual* value. Additionally, the worksheet cannot pass best evidence muster when used as evidence of value. *See ER* 1002. Finally, at trial, counsel objected to the use

³ 606:13-16; 607:11-19; 608:14-19;

of the asset-debt matrix “based on some inaccuracies” in the math on the worksheet. *RP* at 428:17-18.

The problem of valuing this account is that there was no evidence of value presented at trial. This dovetails to the Court’s error in granting the Motion for Reconsideration. To correct the lack of evidence at trial, the Appellee presented a motion to reconsider that constrained the trial Court to consider the record from trial. In short, the Appellee sought the wrong relief, and did so in a manner that *precluded* the relief sought. *See Holaday*, 49 Wn.App. at 330. What the Appellee should have done was to make a “motion of the party aggrieved... [for] a **new trial**... on some of the issues when such issues are clearly and fairly separable and distinct.” *See* CR 59(a) (em. added).

Both the reconsideration and value of the account issues are rooted in the same problem – the lack of evidence of the account’s value at trial. The Appellee could have supplied the evidence at trial, but did not. The Appellee could have used a procedural mechanism (partial new trial, not reconsideration) to correct the lack of evidence, but did not. The Appellee also did not present new evidence with her Motion to Reconsider. Even if this was harmless procedural error, the Superior Court had no evidence differing from the trial record to consider upon Appellee’s Motion.

This error is not harmless. A harmless error does not affect the outcome of the case, and is one that is “trivial, or formal, or merely academic” and did not prejudice the substantial rights of the party assigning error. *Driggs v. Howlett*, 193 Wn.App. 875, 903, 371 P.3d 61 (2016). As described in the Appellant’s opening brief, the valuation of this account compounded with the equalization payment mechanism to create a patent disparity between the parties. A patent disparity can never be a harmless error. *See Urbana v. Urbana*, 147 Wn.App. 1, 11, 195 P.3d 959 (2008).

5. Just and Equitable Distribution

The argument the Appellant is making about the ultimate distribution is direct, and based on the positions of the parties as evidenced at trial. *See Appellant’s Brief* at §C.4 (detailing the relative economic positions of the parties with detailed citations to the record).

The Court’s use of an equalization payment presumes that the parties are in an un-equal position that must be corrected. Where the correction is a transfer of cash and the Court can use any value, leaving similarly situated parties in a disparate position is *un-equitable*. Where, as here, the economic factors work to Ms. Selvidge’s advantage, the Court abused its discretion by leaving Mr. Selvidge at a \$17,000 disadvantage.

Mr. Selvidge is not arguing that the trial court is bound to mathematical exactitudes when dividing property. His argument is bound

to these facts, where there are (1) economically similarly situated parties; (2) an initially unequitable distribution of physical assets; and (3) a cash transfer as the means to achieve equitable distribution. With these features, a trial court abuses its discretion by arbitrarily picking a number that does not reflect the directives of RCW 26.09.080(4).

6. Attorney's Fees & Frivolity

Under RAP 18.9(a), terms or compensatory damages are only available to a “party who has been harmed” by delay or noncompliance. Appellee asserts that the Appellant failed to assign errors and should be *sanctioned*, but sanctions are payable to the Court, not to a party. *Id.* The Appellee’s brief alleges noncompliance, but no resulting harm. *See Appellee’s Brief* at 24. The Appellee’s 25-page brief addressing each issue argued by the Appellant belies her assertion that it was “impossible to adequately respond” and illustrates no harm.

Further, this Appeal is not frivolous by any metric. “[A]ll doubts as to whether an appeal is frivolous are resolved in favor of the appellant.” *Kinney v. Cook*, 150 Wn.App. 187, 195, 208 P.3d 1 (2009). An appeal is only frivolous if the court is convinced that there are no debatable issues presented, considering the entire record. *Id.* Here, the issues are soundly debatable; the trial Court committed clear error in granting the Appellee’s procedurally and substantively defective Motion to Reconsider.

C. CONCLUSION

Mr. Selvidge built equity in the 21 Robinson Street property by the use of his separate property, prior to marriage. The marital community later received the benefit of this equity. The record and exhibits from trial clearly demonstrate how to distinguish and apportion Mr. Selvidge's separate property interest. The trial Court's failure to distinguish and apportion that interest was error.

Ms. Selvidge had the opportunity to establish the value of the logging business, including the accounts, with evidence at trial, but did not do so. Further, had Ms. Selvidge pursued the appropriate post-trial remedy, she would have been able to present evidence to the Court. The Court noted several times that it had looked in the record for competent evidence of the account value, to no avail. Instead of seeking proceedings to supplement the record, Ms. Selvidge asked the Court to reconsider upon the record at trial. The trial Court erred in granting a remedy not sought and by looking outside the trial record.

The trial Court's failure to properly characterize Mr. Selvidge's separate property interest compounded with the trial Court's \$17,000 post-equalization disparity to create a *patent* disparity in the Court's final order. Such a disparity satisfies the abuse of discretion standard applicable on appeal.

This case also presents an unusual situation where the parties in a dissolution are on virtually identical economic footing. If the Court is going to use a cash transfer payment in an attempt to achieve an equitable distribution, leaving similar parties \$17,000 apart is arbitrary – an untenable reason for the trial Court’s order. This, too, satisfies the abuse of discretion standard on appeal.

This Court should determine that the trial Court created a patent disparity between the parties and remand for consideration of Mr. Selvidge’s separate property interest and the ultimate distribution of property.

Respectfully submitted this 26th of November, 2019.


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