

FILED
Court of Appeals
Division III
State of Washington
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No. 372251

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CATHY LONG (fka KEELE)

Appellant

v.

BRIAN KEELE

Respondent

RESPONDENT'S BRIEF

Brian D. Keele

pro se litigant

Brian Keele

57421 N 385 Pr NE

Benton City, WA 99320

TABLE OF CONTENTS

1.	Introduction.....	3
2.	Assignments of Error.....	6
3.	Statement of the Case	7
	3.1 Sequence of Events	9
4.	Argument.....	13
	4.1 Summary of Argument.....	13
	4.2 Argument to Change Ownership to a Title/Lien Basis..	14
	4.3 Argument to Reject the Appellant’s Position.....	17
5.	Conclusion.....	23
6.	Trial Court Documents	25

TABLE OF AUTHORITIES

Cases

Aiassa v. Aiassa, 151 Wash. 468, 472, 276 P. 547 (1929)

Byrne v. Ackerlund, 108 Wn.2d 445, (1987)

Marriage of Sedlock, 69 Wn. App. 484, 849 P.2d 1243 (1993)

Shaffer v. Shaffer, 43 Wash.2d 629 (1953)

Wells v. Wells, 130 Wash. 578, 580-81, 228 P. 692 (1924)

1 Introduction

The Trial Court was correct in awarding both the martial house and commercial property the property to Mr. Keele, while delaying the distribution of the Ms. Long's (fka Keele) equity interest in the property for an extended period of time. The Court's intention was clearly to provide a stable home for the children and to produce income for raising and educating the children.

Both properties are income producing. The martial home has a large production greenhouse on the grounds, and the commercial property is for retail sales of nursery products.

Mr. Keele is the primary custodian of the children and both children currently live with him. He has sole decision making. He was found "to be the only parent who is capable of addressing the children's needs presently." (Court Transcript of Court Rulings, p. 4-5)

Ms. Long was found to be emotionally abusive to the children (Court Transcript of Court Rulings, p. 7) and "is not presently able to address her own challenges and the challenges of the children simultaneously." (Court Transcript of Court Rulings, p. 5). She is entitled to supervised visits with

the children on every other weekend. (Court Transcript of Court Rulings, p. 6)

The Trial Court did not make a mistake when it indicated “The needs of the children, that have to be raised, educated, and sent off into the world is paramount.” (Court Transcript of Court Rulings, p. 11) The Court further indicated “The Court balance her reasonable interest in accessing this equity with the need to provide for both children and in particular considers the challenges faced by Steven to become self-sufficient accordingly.” (Order for Reconsideration, p. 1-2)

The Trial Court’s ruling and the order on reconsideration clearly did not specify the type of ownership of the properties. .” (Court Transcript of Court Rulings, p. 11) (Order for Reconsideration, p. 1-2). The wording of the Trial Court was consistent with that of a title/lien arrangement. However, final orders were drafted detailing property ownership as a tenants in common, with extra requirements that address many of the issues raised by the appellant. (Final Divorce Order, p. 3)

I also recognize the difficulties with long term tenants-in-common ownership of real estate. Thus, I am asking the Court to award myself sole title to the property, and to award Mrs. Long a lien against the property.

If the Court denies my request for a title/lien arrangement, then I am asking the Court to affirm that tenancy in common meets the requirements and precedence of Washington law, provided certain conditions are met.

2. Assignment of Error

I am asking the Court to determine whether the Trial Court erred specifying tenancy in common in the Final Divorce Order, as opposed to specifying a title/lien arrangement?

Did the Trial Court error by acting on the reconsideration motion in which the central arguments incorrectly claimed that tenancy in common could not be definite and final, and that a specific sale date must be specified?

3. Statement of the Case

Ms. Long and I were married in 2003. In February of 2004 Hannah was born, and in May of 2006 Steven was born. At the time of trial, the youngest child had just turned 13 years old (Not 14 as the mother reported).

In 2007, we started to build two small greenhouses on the property and in 2008 we grew our first small crop. For the first several years, we grew and sold plants on a part-time basis. (Testimony of Brian Keele, p. 226)

In 2009, my maternal grandmother passed away, and I inherited a significant sum of money from a trust fund. The house was paid off, retirement were funded, and investment funds were started for each of the children. After that, approximately 1 million dollars sat in a brokerage account for a few years. Those funds were used to purchase and erect a large used commercial greenhouse, then ultimately to purchase and develop commercial property. (Testimony of Brian Keele, p. 229-230)

As of the date of trial, the business had not yet been profitable, and no income had been derived from it. The expectation has always been that it will become profitable. During the last year of our marriage, our income

was from the wife's SSI, her employment, and from savings. (Testimony of Brian Keele pg. 229)

While I do not currently have rent nor mortgage payment, property taxes \$10,000/yr; which significantly exceeds rent paid for an apartment when I was not living at the house.

The Hanford Employment Welfare Trust (HEWT) was split 65% to myself and 35% to Ms. Long in order to create an equal division considering crop losses resulting from Ms. Long cutting water off to the greenhouse, from her selling propane and the propane tank back to the supplier, to pay for Ms. Long's portion of property taxes due from living at the property during the divorce process, to pay income taxes, and to balance assets. (Court Transcript of Court Rulings, p. 15)

The Trial Court's primary concern was that Ms. Long "is not a reliable historian of events." The Court found that Ms. Long has "an existing emotional problem ... that does interfere with her ability to parent and her ability to parent both children." The Court further found that "Mrs. Keele is in a position where I find that she is not presently able to address her own challenges and the challenges of her children simultaneously." (Court Transcript of Court Rulings, p. 2,3, 5)

The overwhelming theme of both Court's Ruling, the Final Orders, and the Order on Reconsideration was that "The needs of the children, that have to be raised, educated and sent off into the world, a world is paramount"

3.1 Sequence of Events

The Court's Ruling: Judge Ekstrom did not specify either a title/lien arrangement nor tenancy in common. However, his description was clearly consistent with a title/lien arrangement (p. 11):

"As to Queensgate Gardens, including the business property, and personal- property thereon and the residence, same resolution. They are, they go to Mr. Keele with a one-half interest that's (*inchoate*) that is, that ripens on sale as a separate property award, as an award to Mrs. Keele. So, he gets the property. Whenever it's sold, she has that not as spousal maintenance..."

The word "inchoate" is labeled inaudible in the verbatim transcription, but is clear at 16:40 on the audio recording.

Final Orders: Final orders were drafted by my attorney, Mr. Jeremy Bishop and were approved by the Trial Court. He came up with the tenants-in-common language and limitations on each party. While I

reviewed the document, I was not involved in any discussion regarding forms of property ownership. The relevant section is as follows (p. 3):

“These properties as well as the business entity known as Queensgate Gardens, are ordered to be held and owned by the parties as tenants in common; however, neither party may sell their share without the consent of the other party. The husband shall have exclusive use and possession of the properties and shall maintain them as a reasonably prudent owner, including an obligation to maintain taxes, (including any past due property taxes), insurance, and utilities. The husband may list any of the properties for sale, and shall have exclusive decision making regarding all aspects of the property and specifically with regard to a decision to sell the entirety of either property. In the event of a sale, the parties shall share the net proceeds of from such sale 50/50. The court shall retain jurisdiction over said property and the parties co-ownership thereof. This shall include the Court’s ability to hear matters relating to financing, improvements, and future “buy-out” of the wife’s interest in the properties.”

Petitioner’s Motion for Reconsideration: Ms. Long filed a motion for reconsideration, based largely on the premise that “The Court has a duty to *not* award property to parties as joint tenants in common without a specific date for sale of the properties....and the parties have a right to have their property interests definitely and finally determined.” Selected excerpts from the motion include (p. 3-4, 7):

“While the court ordered that the parties each have an equal interest in the Queensgate business and personal property and the family home to be realized upon the sale of the properties, it did

not give a specific date for the sale. The Court has long held that leaving parties to a divorce as tenants in common without resolution of their property rights and interests violates the court's duty to finalize property distribution."

"The court has a duty to not award property to parties as tenants in common without a specific date for sale of the properties. "The court has a duty to dispose of all property of the parties before it, *Shaffer v. Shaffer*... and the parties have a right to have their property interests definitively and finally determined..."

"Therefore, we ask the Court to reconsider its order and set a specific date for a final division of assets and a buyout of Mother's ownership interest within a reasonable time."

Note: Grandparent's visitation was additionally a topic of reconsideration and is not a topic of appeal.

Memorandum in Response to Motion for Reconsideration: We replied that the Court did not error, and even if it did error, the error is harmless. Again, we did not have a detailed discussion regarding forms of property ownership nor legal details (p. 2-3).

"Unlike the cases cited by the petitioner, the Court in this case was clear as to what the rights and responsibilities of each party are with respect to real property. "The Court did not merely leave the parties in the same situation they would have been but for dissolution. The Court clearly granted the present use and responsibility for maintenance and payment of expenses associated with the property to the husband and granted the wife essentially a lien against the property in an amount equal to one-half of the future sales price..."

"The objection to the language included in the Decree of "tenants in common" is nothing more than an argument over semantics.

The ruling is clear with respect to rights and responsibilities of each party in relation to the property. The term “tenant in common” was not used by the court in its oral ruling, but was a mechanism selected by the undersigned in order to ensure an efficient security interest for the wife. The interest of the parties could have been defined in various different ways. Some alternatives would accomplish exactly what the decree does, but will require additional legal work. In any event, if the court agrees, with Petitioner’s objection to the definition of the parties future relationship as to the real property, that does not necessitate a different practical outcome; only a change to the language used to create that outcome will be needed.”

Order on Motion for Reconsideration: The Court ordered a definitive time for sale or refinance of property (p. 1,2):

“As to the petitioner’s equity interest in the residence, she may elect to require Respondent to sell or re-finance on Steven’s 23rd birthday, she may make the same election with respect to the business on Steven’s 30th birthday. In doing so, the Court balances her reasonable interest in accessing this equity with the need to provide for both children and in particular considers the challenges faced by Steven to become self sufficient.”

Amended Final Divorce Order: The Amended Final Divorce Order is identical to the quoted Final Divorce Order, with the addition of a new paragraph that is almost identical to the above quote from the Order on Motion for Reconsideration.

Relief from Judgement: I filed a motion for Relief from Judgement under CR-60, asking that the term tenant in common be nullified and instead be replaced with a title/lien arrangement. That effort was rejected, on the basis that I did not meet the CR-60 definition of a mistake, and that such issues should be decided by the Appeals Court.

4. Argument

4.1 Summary of Argument

I am seeking to be awarded the property with title in my name, which is encumbered by a lien to Mrs. Long, and which comes into effect upon sale. That option would be consistent with the intent of the Court's ruling for property division. It would be clearly consistent with Washington law for long term property division. A title/lien arrangement would meet Ms. Long's objections to tenancy in common and put her in a superior position to future lienholders. The option would help meet the Trial Court's primary concern that the needs of the children are paramount.

Should the Court reject a title/lien arrangement, then I ask the Court to affirm that in some circumstances tenancy in common can be definite and final, regardless if there is a specific sale date or not.

The Court should decisively reject the Appellant position, which would essentially force a sale of the property, and hence negating the Trial Court's primary concern. It is perplexing that Ms. Long's opening argument wildly references a child rape case with absolutely no relevance whatsoever to our case. It is even much more perplexing that Ms. Long's argument completely fails to address the needs of the children, when her solution would most certainly jeopardize income and stability.

4.2 Argument to Change Ownership to a Title/Lien Basis

The intent of the Trial Court's Ruling is very clear; I get the property and Mrs. Keele's has a one-half interest that comes into effect upon the sale of property. Her interest is effectively a lien that is due upon sale.

However, the Final Divorce Order includes the terminology "These properties...are to be held and owned as tenants in common..."

Byrne v. Ackerlund, 108 Wn.2d 445, (1987) holds that a lien/title

arrangement is much different than a tenant in common:

“Tenancy in common is a form of co-ownership involving equal rights to possession, enjoyment, and income from the property. This form of co-ownership also imposes certain fiduciary duties between the tenants. 86 C.J.S. TENANCY IN COMMON 17-25 (1954). The possibility of animosity between divorced tenants creates a likelihood that litigation may be necessary in order to finally dispose of the property or otherwise terminate the tenancy in common relationship. In contrast, where one party holds title and the other a lien, the parties' respective interests are more removed. A lien is merely an encumbrance to secure an obligation and involves no characteristics of co ownership. SEE SWANSON v. GRAHAM, 27 Wn.2d 590, 597, 179 P.2d 288 (1947). Where, as here, the value of the lien is fixed at a specific dollar amount or by mathematical formula and is enforceable only upon the occurrence of a particular event (the voluntary or involuntary sale of the house), the prospect that future litigation will be necessary to finally determine the respective interests of the parties is less likely.”

Byrne also definitively clarifies what is definitive and final as required by *Shaffer*.

“Much of the difficulty in this case stems from SHAFFER's language that the respective property interests of the parties must be "definitely and finally determined". SHAFFER, at 631; SEE ALSO LITTLE, at 190. This court has never clarified exactly what constitutes a definite and final determination. We believe that the SHAFFER requirement is satisfied by a specific disposition of each asset which informs the parties of what is going to happen to the asset and upon what operative events, E.G., that a set sum or formula of money will be paid upon the sale of certain property.

SEE GENERALLY YEATS v. ESTATE OF YEATS, 90 Wn.2d 201, 205, 580 P.2d 617 (1978). The trial court is not required to do the impossible in attempting an exact determination of ALL aspects of one's interests. The Court of Appeals was concerned that Byrne will not know the exact value of her liens until there is a definite time for sale. But it is a common, and surely acceptable, practice for divorcing spouses to agree to divide the proceeds from the sale of certain property without knowing what the exact value will be at the time of sale. Property settlement agreements are to be examined by the trial court for general fairness, SEE YEATS, at 205; it is not necessary to set a fixed deadline and value for each item of disposition. We conclude that the dissolution decree at issue here was sufficiently final and definite in its disposition of the parties' property.”

The requirement for definite and final under Shaffer is satisfied by specifying a disposition of the asset upon an operative event, such as a sale. It is also noteworthy that the definition for definite and final isn't limited to a title/lien arrangement but may also be applied to tenancy in common.

Ms. Long distinguishes our case from *Byrne*, that the parties in *Byrne* had entered into a settlement agreement, whereas our case is litigated. That fact certainly weighed into the decisions. Importantly however, the settlement agreement was not a part of discussions about a title/lien arrangement nor discussions about definite and final.

If the Court chooses that a title/lien arrangement would be appropriate in our case, then the primary argument for the Motion for Reconsideration is

called into question. The argument was that the property interests were not “definitely and finally determined”, as is required by *Shafer v. Shaffer* Wash.2d 629 (1953).

Hence, I respectfully request that the Order for Reconsideration should be reconsidered and nullified and that the original Final Orders be re-written to depict a title lien arrangement. Such an arrangement would be definite and final, and consistent with legal precedence. I would keep requirements for maintenance, insurances, taxes, and utilities.

4.3 Argument to Reject the Appellant’s Position

Should the Court reject implementing a title/lien arrangement, then I encourage the Court to find tenancy in common as is detailed in our case is consistent with the legal requirements of the state for long term and indefinite joint property ownership.

Marriage of Sedlock, 69 Wn. App. 484, 849 P.2d 1243 (1993): *Sedlock* clearly allowed for short term tenancy in common when respective parties interests were clearly established and defined:

“The present case is distinguishable from *Shaffer* and *Bernier* and more analogous to *Byrne*, in that the parties were not "left in the same situation as if the trial court had simply failed to dispose of the property." In addition, unlike *Bernier* and *Shaffer*, here, the tenancy in common was intended to be of short duration and the parties' respective interests in the home were clearly established by the court. Therefore, based on the distinguishing circumstances in *Shaffer* and *Bernier* and the Supreme Court's reluctance to broaden *Shaffer* in *Byrne*, we hold that the trial court did not abuse its discretion or exceed its jurisdiction by leaving the parties as tenants in common for a short duration.

Sedlock clearly allows for tenancy in common when the parties respective interests are clearly defined, as is in our case.

However, that Court ONLY considered short term tenancy in common and ruled that it was acceptable practice. The fallacy in logic of Ms. Long's argument is, the Court did NOT even consider whether long term tenancy in common was acceptable or not. It is improper and illogical to infer the *Sedlock* ruling indicates long term or indefinite tenancy in common is forbidden by Washington Legal precedence.

The Court in *Sedlock* also referenced and thus reaffirmed two much older cases that were left as tenants in common. Both of which are somewhat similar to our case:

“The Supreme Court has recently expressed an unwillingness to broaden *Shaffer* beyond its facts. In *Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987), the trial court awarded the husband the house and the wife a lien of \$2,500 plus 50 percent of the net proceeds above a certain amount. The decree did not provide a definite time within which the lien would have to be paid. Rather, the lien was payable upon the transfer of the property, which was completely within the discretion of the husband. In refusing to apply *Shaffer* to reverse the trial court, the Supreme Court found that the parties were "not left in the same situation as if the trial court had simply failed to dispose of the property." *Byrne*, at 449. See also *Wells v. Wells*, 130 Wash. 578, 580-81, 228 P. 692 (1924); *Aiassa v. Aiassa*, 151 Wash. 468, 472, 276 P. 547 (1929) (in both cases the courts awarded property to parties as tenants in common because sale was imprudent at that time and partition was impractical).”

In *Wells*, it was unpractical from a business standpoint to split a Yakima apple orchard. In *Aiassa*, it was rental property in Seattle. In both cases, it was acknowledged that it was undesirable jointly own the property, but given the circumstances, it was the best solution. Neither case had a set date for sale. The fact that the Court acknowledged the two cases in *Sedlock* supports an argument for tenancy in common for long terms and without a specified sale date.

As described above, tenancy in common arrangement specified in our case also meets the requirement to be definitive and final as defined by *Byrne*,

regardless of whether the tenancy in common is indefinite or specifies a lengthy time until sale.

Hence, the original Final Divorce Order was also definitive and final and met the requirements of Washington Law. The same with the Amended Final Divorce Order.

The Court made the right financial decision. The Court set the following requirements on myself to minimize the risks to Ms. Long:

“The Husband...shall maintain them as a reasonably prudent owner, including an obligation to maintain taxes, (including any past due property taxes), insurance, and utilities.”

Similar requirements would be detailed for any loan or lien on real estate. The wife’s recourse is a contempt-of-court motion. For a loan or lien, recourse would be foreclosure, which generally requires incurring legal fees and court action.

Ms. Long does indeed have more to look forward to than simply the burdens of ownership. She has a desirable long term passive real-estate investment. She does not need to even pay a share in taxes or business

development expenses. At some point it will be a decent retirement for her. Any improvements I make, she will be entitled to half that value at sale. Should I develop it into a solid income producing business, she will share that realize value upon sale.

There is no arguing that Ms. Long's income is limited. But without further evidence, I question whether she is prohibited from receiving most forms of welfare benefits because she is co-owner of property. Has she sat down with an advocate and describing her situation, and showing her the divorce order?

If she recovered financially and applied for a loan, she would have to come armed with a divorce order.

If she was concerned that my actions are leading to liens in an amount which would jeopardize her share of the property, she would have to file a contempt of court order to stop it. If that is an overriding concern, then maybe she should agree to a title/lien arrangement?

I am also concerned, she may also intentionally or inadvertently place a lien against the property in excess of her share n the property.

Ms. Long states that well into retirement, she must scrape by on SSDI. She neglects to mention that under the divorce order which she is appealing, she will receive funds equal to ½ the value of the family house before a normal retirement age, and which would allow her to buy a small house.

Ms. Long also neglects to mention that prior to leaving Hanford, I was no longer working full time, in order to take care of both herself and Hannah. I was exhausting FMLA leave, taking significant additional unpaid leave, and halted 401K contributions. Part of the plan in building the greenhouses was to make me more available and involved with the kids, which it has. Divorce has not changed that. While not mentioned in trial, it was also understood that leaving Hanford and investing in the greenhouse made it unlikely that we would have a traditional retirement at a normal retirement age. We accepted the prospect of working well past a normal retirement age, and divorce has not changed that either.

Furthermore, Ms. Long had a large SSDI lump sum payment in her control at the beginning of the divorce process. It was sizeable enough to have been able to purchase a modest house for cash. Yet she recklessly spent the entirety of that lump sum and now her current finances suffer as a result of her own actions.

Lastly, the financial section of the is written like Ms. Long is a victim of financial hardships brought about by unfair Court actions, yet she does not take responsibility for her actions that have led to her current predicament. She fails to acknowledge that the Court has “A primary concern that Mrs. Keele is not a reliable historian of events”, and she was found to be emotionally abusive. She was found “not presently able to address her own challenges and the challenges of her children simultaneously.” She fails to acknowledge that her own actions are why our children are not in a typical shared custody household and with herself in a better financial circumstance.

For all these reasons, Ms. Longs arguments should be dismissed.

5. Conclusion

The Court should deny this appeal and order re-writing the original Final Divorce Order in terms of a title and lien.

If the Court rejects re-writing the agreement in terms of a title/lien, the Court should reject the basis for the Order for Reconsideration and reinstate the original Final Divorce Order.

If the Court declines my proposed solutions, then I still strongly encourage the Court to also reject Ms. Long's appeal.

Attorney's Fees and Costs: The Court should not grant Ms. Long attorney's fees. She brought this action through no fault of my own. Ms. Long communicated to me that Mr. Ashby is performing on a Pro Bono basis. If Mr. Ashby has even the slightest self-serving motivation, such as trying to recuperate trial fees, he should not ask for fees.

It has taken considerable time to defend against this action. The business has suffered due to my lack of availability. Mr. Ben Dow of Roach and Bishop had provided a quote of \$10,000 to defend this appeal, which would increase to \$20,000 if the case went to oral arguments. I request that amount be awarded to cover my costs related to this appeal.

Documentation can be provided upon request. Considering Ms. Long's financial situation, I would be happy to reduce her stake in the real property by the amount of the award, or to have fees be directed from Mr. Ashby.

6. Trial Court Documents

Court Transcript of Court Rulings

Order for Reconsideration p. 1-2

Testimony of Brian Keele

Final Divorce Order

Petitioner's Motion for Reconsideration

Memorandum in Response to Motion for Reconsideration

Order on Motion for Reconsideration

Amended Final Divorce Order

Relief from Judgement

Dated August 7, 2020

Respectfully Submitted

A handwritten signature in black ink, appearing to read "B.D. Keele". The signature is written in a cursive style with a large, looped initial "B".

Brian D. Keele

BRIAN KEELE

August 07, 2020 - 1:40 PM

Transmittal Information

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