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No. 34256-1-II

THE COURT OF APPEALS, DIVISION II

State of Washington

**In re the Marriage of:
MARIUSZ K. KOWALEWSKI, Petitioner**

and

BARBARA KOWALEWSKA, Respondent

APPELLANT'S OPENING BRIEF

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Assignments of Error

1. The Superior Court erred in distributing real property located in Poland via its Decree of Dissolution, and in refusing to vacate or amend the Decree to exclude real property situated in Poland.

Issues Pertaining to Assignments of Error

1. May the Superior Court distribute among the parties to a Washington divorce, “all right, title and interest, including rights to sell, rent or make any decision over, and full monetary value of, the parties” real estate located in Poland?

Statement of the Case

This case calls upon the court to reaffirm the holding and rationale of Brown v. Brown, 46 Wn.2d 370, 372, 284 P.2d 859 (1955) (attached). Brown holds generally that Washington courts are without authority to decide ownership issues as to real property located in foreign jurisdictions.

This is a routine dissolution case, with one unusual aspect: The parties have real property in Poland – both an Apartment located in

Wroclaw, Poland, and a parcel of farmland in Orlowiec, Poland. See Decree at paragraph 1.2; CP 12; CP 5 (paragraph “m”).

In its Decree of Dissolution, the court awarded the Apartment to Ms. Kowalewska and the farmland to Mr. Kowalewski. Specifically, the court purported to award “all right, title and interest, including rights to sell, rent or make any decision over, and full monetary value of” the parties’ property in Poland. CP 12.

The court also divided all of the parties’ real and personal property in Washington State, but the sole issue on appeal is whether the court properly had jurisdiction to affect title to the property in Poland.

Appellant concedes that all of the parties consented to jurisdiction at the time of the divorce trial. Hence, a question presented is whether, and to what extent, the parties can properly agree to confer jurisdiction over the Polish property.

Following the entry of the Decree, and after the time for appeal had expired, Mr. Kowalewski sought to vacate the Decree’s provisions relating to the Polish real estate on the basis of CR 60(b)(1) – “mistake . . . or irregularity in obtaining a judgment”, CR 60(b)(5) – “The judgment is void”, and CR 60(b)(11) – “Any other reason justifying relief from the operation of the judgment.” CP 18.

The trial court denied Mr. Kowalewski's motion to vacate, making some express findings and conclusions in its order.

First, the court found that it "has had personal and subject matter jurisdiction over the parties and the matter herein at all relevant times." CP 22.

Second, the court found that "the parties expressly waived any objection to the court's exercise of jurisdiction over their rights in real property situate outside the State of Washington." CP 22-23.

Third, the court opined that it "did not purport to directly affect title to the property in Poland." CP 23.

Fourth, the court decided issues about the propriety of dividing the Polish real estate "should have been raised previously in [Mr. Kowalewski's] motion for reconsideration and/or his appeal." CP 23.

For these reasons, the motion was denied. This timely appeal followed.

APPLICABLE LAW AND ARGUMENT

Standard of Review

The standard of review for a decision granting a motion to vacate under CR 60(b) is abuse of discretion. Lockett v. Boeing Co., 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). A court abuses its discretion when its

decision is based on untenable grounds or reasoning. Lockett, 98 Wn. App. at 309-10. See also Barr v. MacGugan, 119 Wn. App. 43, 78 P.3d 660 (2003).

Summary of the Arguments:

The conclusion that the Pierce County Superior Court had subject matter jurisdiction over division of real property in Poland is legally wrong. Parties cannot, by agreement, confer jurisdiction over foreign property. The determination that this Decree does not “directly affect title” to the real estate in Poland is inconsistent with the plain language of the Decree. And, since the court lacked jurisdiction to affect title to Polish real estate, the question of whether the issue should have been raised previously is irrelevant since the judgment is void. Accordingly, the decision to deny Mr. Kowalewski’s CR 60 motion is based on untenable grounds or reasoning and the trial court’s decision should be reversed.

The Superior Court is without jurisdiction or authority to award title to property located in Poland.

The question of the Superior Court’s jurisdiction to affect title to real estate located outside Washington State has been conclusively settled.

The Superior Court does not have such jurisdiction. Brown v. Brown, 46 Wn.2d 370, 281 P.2d 850 (1955). The case is attached.

The Brown case involved a divorce Decree issued by California courts which purported to award title to property in Spokane to husband.

When challenged in Washington, our Supreme Court held:

It is a fundamental maxim of international jurisprudence that every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory. The rule is well established that in divorce proceedings the courts of one state can not directly affect the legal title to land situated in another state.

Brown, 46 Wn.2d at 372. (Citations omitted.)

Just as California courts cannot affect legal title to real estate in Washington State, so too, Washington State courts cannot affect legal title to real estate in Poland.

Jurisdiction cannot be conferred by agreement of the parties.

The trial court's decision in this case that Mr. Kowalewski "waived" jurisdictional objections is untenable. Parties cannot confer subject matter jurisdiction on the court by agreement between themselves; a court either has subject matter jurisdiction or it does not; if it does not, any judgment entered is void, and is, in legal effect, no judgment at all. Marriage of Furrow, 115 Wn. App. 661, 63 P.3d 821(2003) (citing to In re Habeas Corpus of Wesley, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959)).

Ultimately, this case is about comity and about the Sovereign authority of Poland.

Polish courts are certainly capable of dividing *fairly* property in Poland, and they will have the benefit of the Washington court's Decree in analyzing what is equitable. They may have much more information about values and other facts, such as chain of title and circumstances under which the property came to be owned by the parties. Thus, notions of comity¹ militate in favor of having Polish property divided by the courts in Poland.

There may be special laws applicable to ownership of Polish property by foreigners that might apply. On these issues, too, the Polish courts are more competent to decide what should be done.

In all events, neither Mr. Kowalewski, nor Ms. Kowalewska, nor their lawyers have authority to waive, or agree to waive, the sovereign authority of Poland to decide ownership of real estate in Poland. Only the duly elected government of Poland can do that. Cf. State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005) ("Ordinarily, only the person who possesses a constitutional right may waive that right.")

¹ Comity is the idea that no one court is necessarily more fair or reasonable than another and that courts should respect the integrity and fairness of other jurisdictions, and that it cannot be presumed that another court is somehow "less fair" than are the courts in Washington, at least without some substantive showing on that question, and none appears in the record here.

The Decree in this case did purport to affect title to the real estate in Poland.

The Decree in this case contains the following operative language:

BARBARA B. KOWALEWSKA is awarded as her exclusive property all right, title and interest, including rights to sell, rent or make any decision over, and full monetary value of, the parties' apartment located in Wroclaw, Strzegomska 290/12, Poland.

CP 12.

And, the Decree contains the following additional operative language:

MARIUSZ K. KOWALEWSKI is awarded as his exclusive property all right, title and interest, including rights to sell, rent or make any decision over, and full monetary value of, the parties' farmland located in Orlowiec, Poland.

CP 12.

It is impossible to imagine any language ***more*** intended to affect title to the real estate.

If the trial court did not ***intend*** to directly affect title to the property in Poland, that is certainly unclear from the language of the Decree, and as a matter of fact, the court did affect title to the Polish Property in its Decree. It was, for reasons stated above, without jurisdiction to do so.

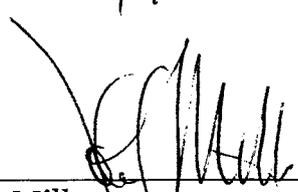
A void judgment or judgment in excess of the court's jurisdiction may be challenged at any time.

Obviously, the question of the court's jurisdiction to affect title to Polish real estate could have been raised at any time, even prior to trial. Still, a void judgment may be challenged at any time; similarly any part of a judgment or decree which exceeds the court's jurisdiction is void, and a motion to vacate under CR 60(b)(5) should be granted as to any portions of a decree entered without jurisdiction at any time. Marriage of Leslie, 112 Wn.2d 612, 772 P.2d 1013 (1989).

CONCLUSION.

For reasons set out above, the decision below should be reversed with instructions vacate those parts of the Decree purporting to divide any property located in Poland. The courts in Poland must ultimately decide who has what ownership rights in that property.

RESPECTFULLY SUBMITTED this 19th day of April, 2006.



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Laws of 1951, although we recognize that, as pointed out by the parties, this question is of great public interest.

[6] To decide these questions on the record before us would result in rendering a purely advisory opinion, which we will not do in a declaratory judgment action. *Seattle First Nat. Bank v. Crosby*, 42 Wn. (2d) 234, 254 P. (2d) 732.

The judgment is reversed, and the cause is remanded to the superior court with directions to enter a judgment dismissing the action.

ALL CONCUR.

[No. 33963. Department Two. March 28, 1955.]

CHARLES S. BROWN, Appellant, v. MURIEL H. BROWN, Respondent.¹

[1] JUDGMENT—FOREIGN JUDGMENTS—CONSTITUTIONAL PROVISIONS—FULL FAITH AND CREDIT—COLLATERAL ATTACK. A decree rendered in a sister state can be collaterally attacked in the courts of this state upon the ground that it is void for want of jurisdiction.

[2] DIVORCE—EFFECT OF DIVORCE—DISPOSITION OF PROPERTY—REAL PROPERTY SITUATED IN ANOTHER STATE. In divorce proceedings, the courts of one state cannot directly affect the legal title to land situated in another state.

[3] COURTS—JURISDICTION—LOCAL ACTIONS—ACTIONS AFFECTING REAL PROPERTY. An action for partition of real estate situated in this state and a cross-action for cancellation of a deed to a one-half interest therein were properly brought in this state, because they are both local actions exclusively within the jurisdiction of the courts of this state.

Appeal from a judgment of the superior court for Spokane county, No. 138161, Bunge, J., entered June 11, 1954, upon findings in favor of the defendant, in an action for partition, tried to the court. Affirmed.

Joseph L. McDole and Samuel W. Fancher, for appellant.
Clarke & Eklow, for respondent.

¹Reported in 281 P. (2d) 850.

[2] See 51 A. L. R. 1081; 14 Am. Jur. 430.

MALLERY, J.—The defendant wife owned a house and two lots in Spokane before her marriage to plaintiff on December 11, 1949. Thereafter, he coerced her into deeding him an undivided one-half interest in the property. On September 19, 1952, he procured an interlocutory decree of divorce by default, in a California action in which she did not appear. It approved a property settlement between the parties, which included the deed to the property in question.

The final decree of divorce was entered October 7, 1953, and the plaintiff husband brought this action, as a tenant in common, for the partition of the Spokane real estate, on November 25, 1953. The defendant wife cross-complained seeking cancellation of the deed for fraud, duress, and coercion.

The plaintiff's demurrer to the cross-complaint was overruled. The court dismissed plaintiff's action for partition and granted defendant's prayer on her cross-complaint.

The plaintiff appeals. He does not challenge the sufficiency of the evidence to sustain the judgment, but, instead, contends that the demurrer should have been sustained, and that no evidence should have been admitted in support of the cross-complaint.

He relies upon the rule of *In re Garrity's Estate*, 22 Wn. (2d) 391, 156 P. (2d) 217, that where a property settlement is approved by a divorce decree, the rights of the parties rest upon the decree rather than the property settlement. From this, he argues that the validity of the deed is *res judicata*, and that respondent's cross-complaint to cancel it is a collateral attack upon the California decree.

[1] Assuming, without deciding, that this is so, it is still not decisive of the case. A decree can be collaterally attacked upon the ground that it is void for want of jurisdiction. In *Maple v. Maple*, 29 Wn. (2d) 858, 189 P. (2d) 976, we said:

"In two recent decisions of this court, it has been laid down as the law that the provisions of the Federal constitution requiring that full faith and credit be given in each state to the judicial proceedings of every other state do not prevent a collateral attack upon the jurisdiction of a sister state to

render a judgment which is later offered in evidence in an action brought in another state, and that the record of a judgment rendered in the sister state may, in such collateral attack, be contradicted as to the facts necessary to give the court of that state jurisdiction. *Mapes v. Mapes*, 24 Wn. (2d) 743, 167 P. (2d) 405; *Wampler v. Wampler*, 25 Wn. (2d) 258, 170 P. (2d) 316."

[2] The California court had no jurisdiction over the Spokane real estate. It is a fundamental maxim of international jurisprudence that every state or nation possesses an exclusive sovereignty and jurisdiction within its own territory. The rule is well established that in divorce proceedings the courts of one state can not directly affect the legal title to land situated in another state. See 51 A. L. R. 1081. As was said in *Schluter v. Schluter*, 130 Cal. App. 780, 20 P. (2d) 723:

"If the lower court attempted to fix title to the property in Texas in the interlocutory decree of divorce, it went beyond its jurisdiction, and these portions of the decree complained of are of no binding force and effect. This is clearly made to appear in *Taylor v. Taylor*, 192 Cal. 71 [218 Pac. 756, 758, 51 A. L. R. 1074], where it is said:

"Appellant's first contention is unquestionably correct. That the courts of one state cannot make a decree which will operate to change or directly affect the title to real property beyond the territorial limits of its jurisdiction must be conceded. The doctrine that a court, not having jurisdiction of the res, cannot affect it by its decree is firmly established. [Citing cases.]"

[3] In a divorce action, the fact that a court can effectuate its decree by contempt proceedings against persons within its jurisdiction, even though interests in land in another state are thereby indirectly affected, is of no comfort to appellant. He admits in his brief:

" . . . the California Court at no time attempted to transfer title or change the ownership of the real property in question . . . , but to the contrary left the property exactly as it was prior to the divorce. . . ."

To this it may be added that the California court required no acts of the parties with relation to the land in question. There can be, therefore, no occasion for contempt proceed-

ings in the California court with which we need concern ourselves. Appellant brought his action for partition and respondent her cross-complaint for cancellation of the deed in Washington, because they are both local actions exclusively within the jurisdiction of the Washington courts. We owe no deference to a sister state in such matters.

The judgment is affirmed.

HAMLEY, C. J., HILL, WEAVER, and ROSELLINI, JJ., concur.

May 16, 1955. Petition for rehearing denied.

[No. 33078. Department One. March 28, 1955.]

MARIANNE R. HOYT, Appellant, v. EARL ARTHUR HOYT, Respondent.¹

[1] DIVORCE—APPEAL—REVIEW—PARTIES ENTITLED TO ALIEN ERROR—EFFECT OF DECREE—DIVORCE OF PARTIES. Where, in a divorce action, in which both parties asked for a divorce, the wife appealed from the decree, which awarded a divorce to the husband, the supreme court will not consider her contention that the husband, the supreme court granted to her rather than to her husband.

[2] APPEAL AND ERROR—REVIEW—FINDINGS—CREDIBILITY OF WITNESSES. The trial judge is in a better position to pass upon the credibility of witnesses than are the members of an appellate court.

[3] DIVORCE—APPEAL—REVIEW—CUSTODY OF CHILDREN. Unless an abuse of discretion patently appears, the supreme court will not overturn conclusions reached by trial courts in child custody matters.

Appeal from a judgment of the superior court for Clark county, No. 29796, Ott, J., entered May 21, 1954, upon findings in favor of the defendant, in an action for divorce, tried to the court. Affirmed.

Sanford Clement, for appellant.

McMullen, Snider & McMullen, for respondent.

Reported in 281 P. (2d) 856.

[1] See 17 Am. Jur. 320.

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COURT OF APPEALS

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STATE OF WASHINGTON

BY DM

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

In re the Marriage of:

MARIUSZ K. KOWALEWSKI
Petitioner,

and

BARBARA B. KOWALEWSKA,
Respondent.

COA D NO: 34256-1-II

DECLARATION MAILING

The undersigned declares as follows: I am over the age of 18 years, not a party to this action, and on Tuesday, April 19, 2006 sent by ABC Messinger Service a copy of the Appellant's Opening Brief to So-Khieng K. Lim, Attorney for the Respondent, at 920 Fawcett Avenue, Tacoma, WA 98401:

I declare under penalty of perjury under Washington State Law that the foregoing is true and correct.

Signed at Tacoma, Washington on April 19, 2006.



Dennis A. Isackson
Assistant to J. Mills