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Supreme Court No. 94050-9
Appellate Case No. 33827-4-III
Spokane County Superior Court Cause # 13-2-04785-8

THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re:

Lee Mackessy, Appellant,

v.

Richard Allinger, Respondent.

Copy Received
FEB 16 2017
BRANT L. STEVENS

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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II. Statement of the Case

This action is a simple matter of the parties both serving in the military and earning "points" toward retirement and their subsequent agreement during their dissolution action to each keep any points earned.

The parties are Ms. Mackessy (Mackessy), the petitioner in the original partition action, and the appellant to Division III, and the petitioner in this action. Mr. Allinger (Allinger) was the respondent at trial, the respondent on Appeal to Division III, and the respondent herein.

The parties met while both were "active duty" service members. RP 37. They were both in the military in 1986 when they got married. RP 37. Both parties earned military retirement points during the marriage from the date of marriage (November 1, 1986) until 1996. During this time both parties accrued substantially equal retirement points. Mackessy resigned her command in 1996. RP 39. The parties then separated in July 1998 and filed their dissolution action. Allinger had accrued barely 15 months more "community" points towards retirement than Mackessy at the time of separation.

Both parties then left military service prior to any vesting of retirement benefits. The parties then dissolved their marriage and each agreed to keep their own retirement "points".

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After the parties divorced, the American tragedy commonly known as 9/11 occurred. Allinger was reactivated into active duty service and eventually accumulated sufficient "points" to retire. Allinger did retire and does receive retirement and payments for a service related disability.

Mackessy had earned a Bachelor's of Science Degree, a Master's Degree in Science, and a Master's Degree in Business. RP 56-57. Mackessy's father is retired military receiving a retirement, and Mackessy's sister is a practicing attorney. RP 53. Mackessy is not an unsophisticated person and she is well educated.

The Decree was not a complete agreement. The parties had other agreements that they made and adhered to. The parties did not list household goods, family photos, bank accounts, insurance policies, and so forth. RP 60-61 and 103-104.

Importantly the parties did not even list the student loans incurred during the marriage. These student loans were in excess of $18,000 but are not mentioned in the Decree. Nonetheless, Mackessy paid them because this is what they agreed to do between themselves. RP 62-63 and RP 103-104.

It is admitted by Mackessy that the Decree was not a complete agreement and that the parties made other agreements outside of the Decree. RP 63, lines 5-11. It is admitted by both parties that they divided

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tangible property and non-tangible property (bank accounts for example) outside of the formal Decree.

The trial court correctly concluded that, for many reasons, "It didn't amount to anything when they got divorced in December 1998. And so, Mackessy walked away from that retirement, and likewise, so did Allinger." RP 164. In 1998, both parties had similar retirement "points" earned and both spouses waived any interest they had in the other's "points". The "points" earned are not undistributed but were distributed by agreement (as were many other assets and liabilities between the parties).

Thus, when the court indicates that the retirement "points" were not overlooked it is merely to indicate that it was a known asset that was distributed by agreement.

The default rule that property not awarded in the Decree vests in the parties as tenants in common is only applicable to undistributed property. In re Marriage of Bishop, 46 Wn. App. 198, 729 P.2d 647 (1986). In the instant case there is no undistributed property. The trial court correctly found, and it has not been appealed, that the parties distributed this asset by agreement.

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III. Argument

In a strained effort to obtain discretionary review of the Court of Appeals' determination of her case, Mackessy mischaracterizes the holdings of the Court of Appeals and ignores existing law which supports these holdings.

RAP 13 .4(b) sets forth four conditions under which the Supreme Court may accept review of a decision of the Court of Appeals' terminating review of the lower court's decision. Mackessy fails to meet her burden to show that any of these bases have been met and, thus, her Petition for Review should be denied.

First, this court may accept review if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court. Here, Mackessy provides no argument, or support for this proposition, thus subsection (1) is not met. RAP 13.4(b)(1).

Second, this court may accept review if the decision is in conflict with another decision of the Court of Appeals. Here, there is no such conflict cited, as none exists. Thus, subsection (2) is not met. RAP 13.4(b)(2).

Third, this court may accept review if a significant question of law under the Constitution of the State of Washington, or of the United States is involved. Again, here, no such interest is implicated, which has not

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already been clearly addressed and defined. Thus, subsection (3) is not met. RAP 13.4(b)(3).

Finally, fourth, this court may accept review of a decision of the Court of Appeals if the issue involves an issue "of substantial public interest that should be determined by the Supreme Court." Here, no such interest is implicated. Thus, subsection (4) is not met. RAP 13.4(b)(4).

Mackessy appears to argue, that because the majority and the concurring opinion from Division III reached the same conclusion but in different ways, that a conflict with a decision from this court exists. Thus argument fails on several fronts.

Mackessy failed to assign any assignment of error to the Trial Court Finding of Fact 2.28, which states:

> *It makes no difference that the decree fails to specifically mention either military retirement because Petitioner knew all about it and they agreed to each keep their own. (Transcript Judge's Ruling, page 16, lines 20 - 24).*

The court found, after trial, that the "asset" was disclosed and the asset was distributed by agreement between the parties. Mackessy's failure to assign error to this finding by the trial court is dispositive. Unchallenged findings of fact are verities on Appeal. In re Marriage of

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Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Thus, there is zero basis for the Appeal to Division III or Petition for Review by Mackessy.

Mackessy also intentionally misrepresents the written ruling by Division III. Thus, when the court indicates that the retirement "points" were not overlooked it is merely to indicate that it was a known asset that was distributed by agreement.

The default rule that property not awarded in the decree vests in the parties as tenants in common is only applicable to undistributed property. In re Marriage of Bishop, 46 Wn. App. 198, 729 P.2d 647 (1986). In the instant case there is no undistributed property. The trial court correctly found, and it has not been appealed, that the parties knew of the "asset" and distributed the "asset". Thus, by definition, there is no "undistributed" asset to be distributed by the courts.

Mackessy and Allinger distributed, by agreement, multiple items not specifically included in the Decree. The Decree did not include any bank accounts, insurance policies, retirement plans, over $18,000 in student loans, and $6,000 paid to Allinger to buy out his equity in the family home. Despite the fact that none of these items were specifically included in the Decree, they were all distributed between the parties by agreement.

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When there is such overwhelming evidence that the parties distributed all of their assets/debts by agreement there is no basis for the court to intervene.

Mackessy presents three issues that appeal to this court. First, Mackessy asserts that it was error for the trial court to dismiss her petition when the court found that the "retirement" was not specifically listed on the face of the Decree. Mackessy's position ignores the fact that the court also found that the parties specifically addressed and distributed the "retirement" and many other assets not listed in the Decree by agreement.

Mackessy appears to be unable to accept the fact that parties may dispose of their assets by agreement and outside of a formal decree. People are generally free to bind themselves to any contract, barring illegality of subject matter or legal capacity. Fosmo v. Department of Personnel, 114 Wn.App 537, 540, 59 P.3d 102 (2002). Generally, people have the right to make their own agreements entirely oral, entirely in writing, or partly oral and partly in writing. Barber v. Rochester, 52 Wn2d. 691, 698, 328 P.3d. 711 (1958); Lopez v. Reynoso, 129 Wn.App 165, 171, 118 P.3d. 398 (2005). Here, the parties chose to enter into an agreement partially oral and partially in writing. The court found that all assets were duly distributed between the parties pursuant to the written decree and their oral agreements. Thus, there are no undistributed assets.

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The remaining two allegations of error are surplusage as they are not germane to the dispositive issue but merely supportive findings of fact made by the court. The court, as the fact finder, had every right to determine that the parties knew about the retirement and that the "theory" proposed by Mackessy defied logic and was contrary to the facts.

Similarly, the third issue presented for review by Mackessy is devoid of any factual basis. While the trial court found that waiver, laches, and detrimental reliance were all invoked and proved, the court need only rely on a single defense to deny Mackessy's claims. The trial court (and Division III) both found waiver by Mackessy due to the fact that each party knew of the other's "points" and they both agreed to keep their own. This agreement by the parties not only distributed the "points" but also amounted to a waiver of the right to seek division of this same asset later.

Even if this court found that the "points" were not distributed, the only "points" that could even be before the court are approximately 16 months of earned "points" between the time Mackessy resigned in 1996 and the parties filed for divorce in July 1998. Thus, Mackessy brought this case allegedly to divide 16 months of "points" earned in a 20+ year career of Allinger. This equates to 6.66% that could be deemed community and 3.33% that Mackessy is apparently requesting.

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It would seem absurd, and frivolous, to devote this amount of time and money for a mere 3% of a former spouse's retirement 17 years after the Decree was entered.

This action was pursued solely to harass Allinger, a decorated veteran who served his country and became disabled and unable to work as a result of his service to the United States. This court should award fees to Allinger for responding to this appeal.

The absurdity of Mackessy's request was not lost on the trial court. Mackessy never believed Allinger would stay in the military or earn a retirement from the military. RP 53-54. Allinger was activated after September 11, 2001, and eventually retired from military service with 90% disabled status. RP 91. At the time of trial Allinger received $2,253 in military retirement. RP 89. Mackessy's request is equal to 3% of $2,253 or $67.59 per month or de minimis. The case is frivolous/harassment given Mackessy's asserted income of over $150,000 annually, as any retirement benefit from Allinger would be de minimis.

Allinger is entitled to attorney fees and costs.

Mackessy repeatedly advances arguments that are without merit, frivolous, and designed only to drive up costs. This Court should award Allinger his attorney fees associated with this appeal.

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A court may award attorney fees to a prevailing party for having to defend against frivolous claims or arguments. RCW 4.84.185. An action or claim is frivolous when it cannot be supported by rational argument in fact or law. Goldmark v. McKenna, 172 Wn.2d 568, 582, 259 P.3d 1095 (2011). The court may award attorney fees on appeal in a dissolution proceeding "after considering the financial resources of both parties." RCW 26.09.140.

Intransigence is a basis for attorney fees in dissolution proceedings. In re Marriage of Crosetto, 82 Wn. App. 545, 564, 918 P.2d 954 (1996). This would also apply to supplemental proceedings as a result of a dissolution action as the same equitable principles would apply.

"Intransigence" may be shown by "litigious behavior, bringing excessive motions, or discovery abuses." In re Marriage of Wallace, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002). "Intransigence" also describes parties motivated by their desire to delay proceedings or to run up costs. Id.

Mackessy's arguments are advanced without basis in law or fact and are simply a further attempt to drive up costs and delay the resolution of this matter. Allinger deserves resolution of this dispute, and Mackessy's repeated attempts to advance meritless arguments deprive him of that finality and security.

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IV. Conclusion

Allinger respectfully requests this court deny the petition for review. Allinger respectfully requests attorney fees for responding to this appeal as Mackessy has significant ability to pay and Mr. Allinger has a need for an award for fees. Additionally, this appeal is frivolous and this court has authority to award fees in a frivolous appeal.

Dated: 2/15/17

Respectfully submitted,

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 15th day of February, 2017 I deposited a copy of the attached **ANSWER TO PETITION FOR REVIEW** with Eastern Washington Attorney Services, Inc. directed to:

Brant L. Stevens
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Dated: 2/15/17

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