No. 338274

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

LEE L. MACKESSY,

Appellant,

v.

RICHARD J. ALLINGER,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Petitioner/Appellant Lee Mackessy brought a partition action in Spokane County Superior Court to divide Defendant/Respondent Allinger's Military Retirement Benefits on November 21, 2013. The Petition requested that the Court Partition the community property portion of the Allinger's Military Retirement that accrued during the parties' marriage as it was neither mentioned nor distributed in the parties' dissolution entered in 1998. Following a bench trial, the Court denied Mackessy's petition on the grounds that there was no legal theory to support the petition and the equitable defenses of laches, detrimental reliance, and waiver applied.

II. ASSIGNMENTS OF ERROR

[1] THE TRIAL COURT ERRED IN HOLDING THE PETITIONER HAD NO LEGAL THEORY TO SUPPORT HER ACTION AND IN DENYING THE PETITION WHEN THE COURT MADE A FINDING OF FACT THAT THE MILITARY RETIREMENT WAS NOT INCLUDED IN THE DECREE OF DISSOLUTION.

[2] THE TRIAL COURT ERRED IN FINDING THAT (1) THE PARTIES' PREVIOUS LEGAL REPRESENTATION DISCOLSED AND DISCUSSED THE MILITARY RETIREMENT AND (2) THAT ALLINGER WAS STILL BURDENED BY SUBSTANTIAL DEBT TAKEN FROM THE DISSOLUTION IN 1998.

[3] THE TRIAL COURT ERRED IN HOLDING THE EQUITABLE DEFENSES OF WAIVER, LACHES, AND PROMISSORY ESTOPPEL APPLIED.

III. STATEMENT OF THE CASE

Allinger and Mackessy were lawfully married on November 1, 1986, in Aiken, South Carolina. CP 4. Both Allinger and Mackessy were employed by the United States army at the time of their marriage. *Id.* Allinger joined the military on September 23, 1985. *Id.* Allinger was in and out of the Army and Reserves until 2012. *Id.*

The parties initially filed for divorce in 1996, both were represented by counsel. Exhibit P1. The parties reconciled and had their third child. RP 39, 13. The parties then petitioned for divorce in 1998. CP 5. An order of Dissolution was entered on December 2, 1998, Cause Number 98-3-01639-4. The dissolution was approved by the then Honorable Commissioner Ellen Clark. CP 7:8. Section 2.8 of the Finings of Facts and Conclusions of Law was marked and listed the parties' community property. *Id.* Allinger's military retirement was not listed in Section 2.8. *Id.* Section 2.9 was marked and identified Allinger's and Mackessy's separate property. *Id.* Allinger's military retirement was not listed as separate property of either of the parties. *Id.* Additionally, the military retirement was not referenced or listed or memorialized in the Decree of Dissolution. *Id.*

Mackessy left the military sometime between 1986 and 1988 because Allinger was activated out of reserves and Mackessy chose to quit the military in order to stay at home with their children while Allinger was in Iraq for over 15 months. RP 39, 21:24; RP 58, 9:10. Mackessy never returned to the military during the duration of the parties' marriage or after. Mackessy had been out of the military nearly ten (10) years without an intention to return at the time of the dissolution in 1998. *Id.*

Allinger's military retirement matured on July 31, 2012, and now receives monthly compensation directly correlated to the length of Allinger's service and rank upon retirement. Exhibit R106. Allinger currently receives approximately $2,487.00 each month for his retirement benefits. *Id.*

The parties modified their residential schedule and parenting plan relating back to the 1998 dissolution several times including in 2005, 2010, and 2013.

Mackessy became aware of Allinger's military retirement through Allinger's financial disclosures during discovery relating to a petition for modification filed by Allinger in 2013. RP 53, 1:4. Mackessy brought this partition action on November 21, 2013, less than nine (9) months after learning of Allinger's military retirement. CP 1.

In March of 2015, Mackessy and Allinger filed cross motions for summary judgment. CP 34-41, 50-56. The Court denied both parties' motion for summary judgment holding that there was an issue of material fact as to the parties' agreement at the time of dissolution that prohibited a ruling on summary judgment. CP115-116.

This matter went to trial on August 11, 2015. The Court heard testimony from Mackessy and Allinger.

At trial, counsel agreed that it is undisputed that Allinger receives military retirement benefits and the parties' community property interest was 35 percent of the retirement and Mackessy' separate property interest is 17.5 percent. The proper calculation would be 17.5 percent of Allinger's retirement to Mackessy or approximately $435.00 per month if the Court were to partition the asset. RP 31, 2:4.

At trial, Mackessy testified that in the initial divorce, Mackessy was represented by Peter Karademos and Allinger Represented by Mary Schultz. RP 38, 14:16. Mackessy testified that neither attorney ever mentioned a pension or separation of Allinger's military pension as community property. RP 38, 16;18; 39, 7:8. Upon questioning by the Court, Mackessy testified that for six months of the dissolution proceedings in 1996, the parties were actively litigating the divorce with discovery ongoing. RP 73-75. During redirect, Mackessy testified that the

entirety of the litigation and discovery was focused exclusively on the Parenting Plan. RP 80, 11:17.

At trial, Allinger also testified that the 1996 petition for divorce focused exclusively on the parenting plan. RP 94, 15:25; 95 1:3. Allinger stated that the only issues discussed in the divorce were the parenting plan and the parties never got to the financial issues. *Id.*

Mackessy testified that there was absolutely no discussion regarding the military retirement between Allinger and Mackessy when discussing what was allocated as assets in the dissolution in 1998. RP 41, 8:20. Mackessy testified that had the military retirement been discussed it would have been written down and included in the dissolution. RP 65, 12:14.

Mackessy testified that she first spoke to Allinger regarding the military retirement about three years ago in 2012, after Allinger requested a modification of the parenting plan and his retirement pension was disclosed on the financial worksheet. RP 53, 1:4.

Allinger testified that the military retirement was discussed during the dissolution in 1998, but admitted that there were some things that were not included in the dissolution paperwork. 95- 96.

Allinger stated that at each modification of the parenting plan, Mackessy waived and "re-waived" her rights to Allinger's military pension. CP- response to SJ by Allinger. However, the military pension

was never mentioned in any of the paperwork filed with the court. RP 107, 16:19. Allinger testified that the petition for modification in 2013 was purely for housekeeping in order for the paperwork to reflect an accurate record of the agreement by the parties. RP 108, 9:15. Allinger further testified that he was an organized person who likes to have his ducks in a row. RP 108-109.

Evidence was presented during the Summary Judgment proceedings and trial that Allinger discharged a significant portion of the debt he "took" from the dissolution in a chapter 7 bankruptcy filed on August 30, 2000, discharging the $32,671.08 in unsecured debt from the divorce. CP Decl of Lee Mackessy in Support of Response to SJ.; CP P - 9.

The Court gave its ruling orally on August 13, 2015. The ruling is fully integrated into the Order. CP 177-180. The Court found that there is no dispute that Allinger's retirement was not mentioned in any of the divorce documents. RP 153, 13:15. The Court added that a number of things were not included in the final divorce documents, although the documents were very well done and very thorough for pro se litigants. RP 153 16:25.

The Court explicitly emphasized that the fact that the military retirement was not an undisclosed asset. RP 154, 23:24. The Court also

focused on the fact that the parties had counsel in the initial petition for dissolution in 1996. The Court stated,

> In my opinion, there is simply no chance, there is just no chance that, with attorneys of this caliber, that the military retirement, when the initial divorce was filed, that the military retirement and any retirement for that matter would not have been fully explored through discovery... Again, my point is, there is no undisclosed asset here. Ms. Mackessy knew the husband had retirement points, as we would call them. And Mr. Allinger knew that his wife had accumulated retirement points. So I guess the question before the Court is: Why not mention that in the divorce decree? And none of us can go back in time and climb into a time machine and figure all this out and be there. Only the parties know, and they have their—each of them have their perspective about what happened. Could be all sorts of reasons for this.

RP156, 14-25; 157, 1:9. The Court continued:

> Now, really, the biggest problem that I have is, I'll just call it Ms. Mackessy's theory of the case. And that really runs contrary to public policy that we want to promote in Washington State, and that policy is to allow people to contract between themselves and to settle cases without the necessity of time-consuming, expensive litigation."

RP 158, 18:23. The Court continues to explain further issues with Mackessy's theory of the case when there is no purposely concealed property. RP 161, 22:23. The Court stated it understood partition actions wherein property is left out based on deception or fraud, but the Court found that Mackessy had no theory of the case as nothing was hidden, nothing was concealed. RP 163, 10:11.

The Court found that the military retirement was not included in the dissolution because it "just wasn't important enough for the parties to mention because the retirement doesn't amount to anything. It didn't amount to anything when they got divorced in December of 1998. And so, Ms. Mackessy walked away from the retirement." RP 164, 2:6.

The Court concludes based on the fact that Mackessy knew the retirement benefits existed and were not listed in the dissolution that Mackessy has no valid, legal theory. "Ms. Mackessy, well, she shouldn't have signed off on the decree and the findings if she had any intention whatsoever of laying claim to the military retirement at a later date. There simply is no valid, legal theory that supports her argument. There is no fraud. There was no deception. There was no concealment." RP 166, 2:6.

The Court continued to hold that Allinger had multiple theories, some of which were advanced to the Court, and some of which he didn't, that support denying the petition. RP 166, 16:18. First, was the legal defense of waiver, the court found Mackessy waived any future claim to the retirement. "First and foremost would be waiver by the wife as to any future claim to retirement, and her actions clearly dictate that that's exactly what she did." RP 166, 19:21. The Court made no other findings relating to the defense of waiver.

The Court also held that the equitable theory of laches applied. The Court found Mackessy chose not to pursue the retirement plan for 16 years. Pg 166 line 25- pg 167 line 1. The Court found that Mackessy knew about the military retirement "from day one" and waited 16 years to pursue a claim. RP 167, 5:9. The Court made no other findings under the theory of laches.

Finally, the Court proposed the equitable defense of detrimental reliance, which the Court found applied to this case. The Court stated, "When the wife signed that decree, Mr. Allinger relied on the fact that she wouldn't, at some future time, lay claim to the military retirement, and husband then relies on that to his detriment." RP 167, 14:17. The Court continues, "So, arguendo, Mr. Allinger, who is disabled and he is the sole source of income in his household, supporting a wife and young child and sounds like an adult child too, relies on every penny of his military retirement probably in planning his finances and his life." RP 167, 17:21. The Court continues, "When one considers that [sic] factor that the Court was made well aware of that Mr. Allinger is still laboring to pay off the huge amount of unsecured debt that it appears he took on after the divorce." RP 168, 2:4. The Court made no other findings relating to the legal theory of detrimental reliance.

Based on these findings and conclusions, the Court denied the Partition action as it pertains to the military retirement in total. RP 168, 8:9. The Court also held that each party was responsible for its own attorney fees and costs. RP 169, 19:22.

IV. ARGUMENT

ASSIGNEMTN OF ERROR [1]:
THE TRIAL COURT ERRED IN HOLDING THE PETITIONER HAD NO LEGAL THEORY TO SUPPORT HER ACTION AND IN DENYING THE PETITION WHEN THE COURT MADE A FINDING OF FACT THAT THE MILITARY RETIREMENT WAS NOT INCLUDED IN THE DECREE OF DISSOLUTION.

A. MACKESSY HAS A LEGAL THEORY TO BRING A PARTITION ACTION AND IS ENTITLED TO PARTITION AS A MATTER OF LAW BASED ON THE COURT'S FINDING OF FACT THAT THE MILITARY RETIREMENT WAS NOT INCLUDED IN THE DECREE OF DISSOLUTION.

The appellate courts review a trial court's conclusions of law de novo. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880 (2003). The trial court denied Mackessy's Petition stating Mackessy had no legal theory to support a partition of the military retirement. RP 166, 2:6. However, it is clear under Washington case law that Mackessy has a legal theory to bring her partition action.

As the Washington State Supreme Court explained in Chase v. Chase, "As a general rule, if the court does not dispose of community property in

a decree of divorce, rights to such undistributed property vest equally in spouses as tenants in common by operation of law." 74 Wn.2d 253, 257-58 (1968). Where there is no disposition of the property rights of the parties by the divorce court, the "community property must become common property." Ambrose v. Moore, 46 Wn. 463, 466 (1907). The Courts reasoned that after the divorce, there is no community and there can be no community property. *Id.* Therefore, if the divorce does not vest or divest title, the title does not remain in abeyance, and it must vest in the former owners of the property as tenants in common. *Id.* (Internal citations omitted). "The rule is well settled that property of the spouses not disposed of by a divorce decree vests equally in the parties, who are tenants in common." Pittman v. Pittman, 64 Wn.2d 735, 737 (1964) *citing* Cowan v. Sullivan, 48 Wn.2d 680 (1956); Olsen v. Roberts, 42 Wn.2d 862 (1953); and Sears v. Rusden, 39 Wn.2d 412 (1951). The Courts have consistently held that community property not disposed of in the dissolution decree becomes the property of the former spouses as tenants in common.

The proper action to allocate and determine the rights of the tenants is common is a partition action. Olsen, 42 Wn.2d at 864. (stating "of course, an action for partition will lie by a tenant in common."). In Seals v. Seals, the court directed that "since the property here was undisclosed the

partition action was *necessary* for its disposition." 22 Wn.App. 652, 655 (Div. III, 1979) (emphasis added). The court may divide the property without reference to the previous division and equity of assets in the dissolution wherein the asset was not included. Wagers v. Goodwin, 92 Wn. App. 876, 884-84 (1998).

Furthermore, allegations of fraudulent concealment of community property in the divorce action is not necessary to support a partition action. Olsen, 42 Wn.2d at 865. The Washington Supreme Court held that "the reason why the court did not dispose of the community property in the divorce proceeding is immaterial." *Id.* In Olsen, the amended petition was found not to be attacking the decree for fraud or concealment of an asset in a divorce action, but simply seeking to partition property that was outside of the initial decree. *Id.* The trial court which dismissed the petition, was reversed, and the appellate court in Olsen, held that the petitioner indeed had a cause of action. *Id.* Therefore, the material issue is simply whether the community asset was disposed of in the divorce action.

Furthermore, in order to dispose of an asset in a dissolution action, there must be sufficient specificity in the settlement agreements or decrees of dissolution to identify the assets and their disposition. Yeats v. Yeats' Estate, 90 Wn.2d 201, 205 (1978). In Yeats, after 24 years of marriage, Milliam and Agnes Yeats filed for dissolution and contemporaneously

signed a property settlement agreement. *Id.* at 203. The question presented for the trial court at summary judgment, was whether the property settlement agreement disposed of certain insurance policies and other property. *Id.* The Settlement Agreement contained boilerplate language in relation to the insurance policies.[1] However, at the time of the execution of the Settlement Agreement, there were nine life insurance policies on the life of the husband and three on the life of the wife. *Id.* at 205.

The Yeats Court found the boilerplate language inadequate to dispose of the policies reasoning that one cannot learn what might have been agreed to from the terms of the agreement. *Id.* "It is pure speculation to determine what the parties intended or what the agreement meant. We hold that there must be sufficient specificity in settlement agreements or decrees of dissolution to identify the assets and their disposition." *Id.* The Court found the requisite specificity was not present in Yeats inasmuch as the policies were not even mentioned.

The Yeats court continued and discussed the underlying policy question as to the specificity required in dealing with such matters in a settlement agreement or a decree of dissolution in contention with the policy for settlement and finality of divorces. *Id.* The dissolution of

[1] "II. Insurance: The Husband shall maintain in effect for the benefit of the Wife life insurance on the life of the Husband in the amount of $10,000.00 naming the Wife as sole beneficiary thereof." *Id.* at 204.

marriage act mandates disposition of the property of the parties. RCW 26.09.050 provides in part: "In entering a decree of dissolution of marriage... the court shall consider, approve... the disposition of property and liability of the parties." Although RCW 26.09.070 encourages written separation contracts by making them binding on the court, the statute leaves final authority in the court if it finds the agreement unfair at the time of its execution. RCW 26.09.080 specifically requires that the court shall make a just and equitable division of property, considering the nature and extent of community and separate property. "It is impossible for the court to perform its statutorily mandated duties if it is unaware of the nature and extent of the property." Yeats, 90 Wn.2d at 205. It is necessary for the court to know what assets exist in order to consider them in evaluating the dispositive scheme. *Id.* Based on these holdings and reasoning, the Yeats Court affirmed the trial court's decision granting summary judgment in favor of the wife holding the wife and husband became tenants in common as to the community owned policies. *Id.* at 206. The Court partitioned the policies pursuant to the parties' respective interests.

The Yeats court did not specifically discuss the fact that the life insurance policies were known by the parties and disclosed assets at the time of the execution of the settlement agreement. However, because the

settlement agreement generally referenced the existence of life insurance policies as an asset, although in vague, unspecific, boilerplate language, it can be assumed that the court knew the parties had knowledge of the existence of the insurance policies at the time of the execution of the settlement agreement. The Yeats Court took no issue in partitioning the assets despite the fact that they were known disclosed assets. The exclusive and material issue for the Court was whether the agreement between the parties adequately specified the policies in order for the court to dispose of the assets in a divorce action. Therefore, logic concludes that the disclosed or undisclosed nature of the assets is immaterial to partition assets not contained in a settlement agreement or decree of dissolution.

Persuasive authority with facts similar to the facts in this case comes out of California in the Huddleson v. Huddleson and Norton v. Norton cases. In Huddleson, over 12 years after dissolution, the wife brought an action seeking distribution of the pension as an undistributed community property asset. Huddleson v. Huddleson, 187 Cal. App.3d 1564, 1568 (1986). The trial court entered judgment n favor of the wife awarding 12.4 percent of the pension. *Id.* The appellate court affirmed, stating, "Regardless of whether the parties know of, or discuss, the vested pension, if the 'court was not called upon to award it, and did not award it, as community property, separate property, or any property at all' then the

pension is a missed asset subject to a post-dissolution claim. *Id.* at 1569 (internal citations omitted).

The husband in Huddleson also argued that the wife waived her claim. The trial court found that the plaintiff had not waived her rights in the pension because she did not know what her rights were with respect to it at the time she agreed to the property settlement. *Id.* at 1571. The wife testified that the parties thought the pension had no cash value at the time the dissolution was entered and the settlement agreement was signed. *Id.* at 1572. The appellate court affirmed the trial court's ruling that waiver did not apply because although she knew of the existence of the pension, the wife did not believe she possessed a present claim to her community interest in the pension. *Id.* at 1572-73.

The husband in Huddleson also asserted the equitable defense of laches. The wife upon learning that she had community interest in the pension delayed approximately one year from the time she first learned of her interest until she filed suit and the retirement matured near the time of the trial. *Id.* at 1574. The appellate court affirmed the trial court's ruling that although 12 years is a lengthy wait, the nature of pensions and the wife's timeliness with filing the lawsuit after learning of her interest in the pension was not barred by laches. *Id.*

The California appellate court reiterates at the conclusion of the Huddleson case that the rationale for allowing recovery of such omitted assets is a public policy choice which favors the equitable division of marital property over the competing concern for preserving the finality and stability of judgments. *Id. citing* Casas v. Thompson, 42 Cal3d 131, 141 (California Supreme Court, 1986).

Similarly in Norton v. Norton, a 24 year delay to partition pension benefits which constituted community property was granted. 2006 WL 234748. In the Norton case, both parties knew about the pension, were represented by counsel throughout the dissolution proceedings, but neither party listed it during the divorce proceedings or in the stipulated judgment of dissolution. *Id.* at 1. The appellate court affirmed the partition of the pension.

The case law is clear that Mackessy has a legal theory to partition the military retirement despite the absence of fraud or concealment contrary to the trial court's ruling. The reason why the military retirement was not included in the dissolution is immaterial; the only material issue is whether the military retirement was included and disposed of in the dissolution by the court. The record is clear: the military retirement was not a part of the dissolution. It was an error of law to deny the petition for

partition on the grounds that the military retirement was a known asset when it was not included in the dissolution.

When the trial court made a finding based on the evidence presented at trial that the military retirement was not included in the dissolution, the trial court erred in not partitioning the community interest portion of the asset. An asset not included in a dissolution, for whatever reason, that is community property, automatically as an operation of law becomes owned by both parties as joint tenants in common. Once the trial court found that the military retirement was not included, the trial court had no discretion to deny the partition, as Allinger and Mackessy became joint tenants in common. There is no dispute between the parties that if the partition action was successful, Mackessy would be entitled to 17.5% of the military retirement.

The trial court pointed to the policy of finality of judgments and the policy to encourage matters to settle outside of litigation to support its holding. However, this policy is outweighed by the statutory requirements that all the assets must be before the court for fair and equitable division in a dissolution. Furthermore, if Washington law were to require the asset be unknown to one or both parties, undisclosed, or based on fraudulent concealment, it could create an incentive to leave disclosed assets out of dissolution which could result in one spouse potentially getting a windfall

when it comes to community property assets that the court was completely unaware of.

For these reasons, Mackessy respectfully requests this Court reverse the trial court and partition the Military Retirement awarding Mackessy 17.5 percent of Allingers Military Retirement.

ASSIGNEMTNT OF ERROR [2]

THE TRIAL COURT ERRED IN FINDING THAT (1)THE PARTIES' PREVIOUS LEGAL REPRESENTATION DISCLOSED AND DISCUSSED THE MILITARY RETIREMENT AND (2) THAT ALLINGER WAS STILL BURDENED BY SUBSTANTIAL DEBT TAKEN FROM THE DISSOLUTION IN 1998.

B. THE FINDINGS THAT (1) THE PARTIES' PREVIOUS LEGAL REPRESENTATION DISCLOSED AND DISCUSSED THE MILITARY RETIREMENT AND (2) THAT ALLINGER WAS STILL BURDENED BY SUBSTANTIAL DEBT TAKEN FROM THE DISSOLUTION IN 1998 SHOULD BE REVERESED AS THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176 (2000).

The Court erred in its finding of fact that the military asset was disclosed and the rights of the parties discussed with Allinger and Mackessy in relation to the petition for dissolution in 1996. Both parties were represented by high caliber attorneys. However, both parties testified

that the litigation and the crux of the dissolution exclusively focused on the parenting plan and residential schedules; the financial aspect was not discussed during the six months of litigation. Mackessy testified that neither attorney ever mentioned a pension or separation of Allinger's military pension as a community property. RP 38, 16;18; 39, 7:8. Mackessy testified that the entirety of the litigation and discovery was focused exclusively on the Parenting Plan. RP 80, 11:17.

At trial, Allinger also testified that the 1996 petition for divorce focused exclusively on the parenting plan. RP 94, 15:25; 95 1:3. Allinger stated that the only issues discussed in the divorce were the parenting plan and the parties never got to the financial issues. *Id.*

No rational fair-minded person would conclude as the trial court did that the military retirement was discussed and discovered during the 1996 divorce action putting the parties on notice of their rights in relation to the military retirement. Therefore, the Court erred in making a finding of fact that the military retirement was discussed with the parties by counsel prior to the dissolution decree in 1998.

The Court erred in finding that Allinger was still struggling to pay off a large amount of debt that he took in the dissolution in 1998. First, there was no testimony presented at trial whatsoever to support such a finding by Allinger or Mackessy. Second, Mackessy provided the Court in the

Summary Judgment proceedings and in the trial with Allinger's bankruptcy discharge of unsecured debt in the amount of approximately $32,000.00. Without any evidence, testimony or otherwise, to support the finding that Allinger was burdened by debt taken in the divorce and evidence demonstrating the debt Allinger "took" in the divorce was completely discharged approximately two years after the divorce, no rational fair-minded person could find as the trial court found that Allinger was burdened with large debt still to this day from the dissolution in 1998. Therefore, the Court erred in finding that Allinger was extremely burdened by debt in relation to the dissolution in 1998.

ASSIGNMENT OF ERROR [3]
THE TRIAL COURT ERRED IN HOLDING THE EQUITABLE DEFENSES OF WAIVER, LACHES, AND PROMISSORY ESTOPPEL APPLIED.

C. ALLINGER FAILED TO MEET HIS BURDEN OF PROOF PROVING THE EQUITABLE DEFENSES OF WAIVER, LACHES, AND PROMISSORY ESTOPPEL.

1. The Trial Court Erred in Holding that Mackessy Waived Her Right To Allinger's Military Requirement.

Findings of facts are reviewed under substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn2d 169, 176 (2000). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court.

Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn2d 873,879-80 (2003). Questions of law and conclusions of law are reviewed de novo. *Id.* A mixed question of law and fact refers not to review of the facts themselves, nor the law governing the situation, but to the law as applied to those facts. Franklin Cty. Sheriff's Office v. Sellars, 97 Wn.2d 317, 329 (1982). Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts. *Id.* at 329-330. The standard of review for mixed questions of law and fact is de novo. *Id. citing* Daily Herald Co. v. Dept. of Employment Security, 91 Wn.2d 559, 561 (1979).

Allinger raised the affirmative defense of waiver throughout the trial. Waiver is an affirmative defense on which the defendant bears the burden of proof. Pellino v. Brink's Inc., 164 Wn. App. 688, 697 (2011). Waiver requires an element of knowledge and intent. Fuller v. Boulevard Excavating, Inc., 20 Wn. App. 741, 744 (1978). A waiver may be express or implied; an implied waiver may be inferred from circumstances indicating an intent to waive. Mike M. Johnson, Inc. v. County of Spokane, 150 Wn.2d 375, 386 (2003). "To constitute waiver, other than by express agreement, there must be unequivocal acts... and the party raising the defense of waiver carries a heavy burden of proof." Wagner v. Wagner, 95 Wn.2d 94, 102 (1980). Courts disfavor implied waivers of

contractual rights generally and the party raising the defense of waiver carries a heavy burden of proof. *See* Brundridge v. Fluor Federal Services, Inc., 109 Wn. App. 347, 356 (2001); Steele v. Lundgren, 85 Wn. App. 845, 852 (1997); Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 418 (2001); *See also* RM Crowe Prop. Servs. Co., L.P. v. Strategic Energy, L.L.C., 338 S.W. 3d 444, 449-50 (Tex. App., 1994) (stating "generally speaking, without an admission of waiver by the opposite party, it is difficult to prove waiver as a matter of law: Intent is the key element in establishing waiver... it is the burden of the party who is benefiting by a showing of waiver to produce conclusive evidence that the opposite party [unequivocally] manifested its intent to no longer assert its claim. This is a particularly onerous burden"). When there is little to no evidence of a knowing, willing, and voluntary waiver, the affirmative defense of waiver must fail. *See* Pellino, 164 Wn. App. at 697 (2011).

Mackessy had no intent to waive her rights, nor could she have the intent to waive any rights which she did not know of. Allingered offered testimony that Mackessy waived her rights to the Military Retirement, but provided no other supporting evidence or evidence of unequivocal acts by Mackessy which support a waiver. The trial court found Mackessy waived her rights and her "acts" support that finding; however, the trial court made no specific findings and does not state what those acts were. At

summary judgment and trial, Mackessy provided evidence that both parties took large debts in the dissolution and that each child support modification was based upon major changes in the lives of the parties and the military retirement was never discussed. The actions do not support a theory of waiver.

The alleged waiver was never put in writing, never memorialized despite Allinger's testimony that not only is he an organized, precise man, but that he chose to file a parenting plan modification solely for housekeeping purposes for the exclusive reasons of keeping an accurate record of the parties' agreements. Yet Allinger never recorded or has any written evidence whatsoever of the alleged waiver despite its importance.

Allinger offered no accurate circumstantial evidence of waiver, and only provides self-serving testimony that a waiver took place which Mackessy disputed. The behavior of the parties during the modifications of child support and residential schedules are logically and easily understood based on what was occurring in their lives at the time. The fact that there were modifications to residential schedules and child support is insufficient to create circumstantial evidence of a waiver. This does not meet the onerously high burden Allinger is required by law to meet. Based on the facts presented at trial, Allinger failed to meet his burden for an affirmative defense of waiver.

The trial court failed to make sufficient findings of unequivocal acts supporting waiver. Additionally, the record is deplete of any of these acts or evidence to support a waiver. Allinger failed to meet his extremely high burden at trial. Therefore, Mackessy requests this Court reverse the trial court's findings and conclusions of law that waiver applied barring her right to partition.

Furthermore, any argument of waiver accompanying the divorce or modifications is impermissible as the legal documents are fully integrated which incorporates all of the parties' agreements. There was no waiver provision included in any of the dissolution documents or subsequent domestic modification pleadings.

In cases where the parties have developed a written document evidencing their agreement, which reaonsably appears to be a complete contract, it is presumed to be an integrated agreement unless other evidence establishes that the writing does not, in fact, comprise a final and complete expression of the agreement between the parties. Restatement (Second) of Contracts § 209 (1981). When considered as a whole, a contract is presumed an integrated contract when it is written, clear, and unambiguous on its face. Meyer v. Consumers Choice, Inc., 89 Wn. App. 876 (1998). If the writing is a complete integration, any terms and agreement that are not contained in it are disregarded. Lopez v. Reynoso,

129 Wn. App. 165, 170-71 (2005). Prior or contemporaneous negotiations and agreements merge into the final, written contract or agreement. *Id.* Evidence is not admissible to add to, to modify, or to contradict the terms of the integrated agreement. *Id.*

The dissolution decree in 1998 was a fully integrated contract as it was written, complete, and reasonably specific. Wherefore, any evidence of a waiver is inadmissible as it adds to the terms of the integrated agreement. There is no reference, explicit or implicit, to any waiver agreement by the parties. Evidence of any waiver is prohibited.

2. The Trial Court Erred in Holding That The Equitable Defense of Promissory Estoppel Was Applicable.

Washington courts have recognized the theory of promissory estoppel as put forth in the restatement with the following five elements: "(1) [a] promise which (2) the promisor should reasonable expect to cause the promissee to change his position and (3) which does cause the promissee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided by enforcement of the promise." Tacoma Auto Mall, Inc. v. Nissan North America, Inc., 169 Wn. App. 111 (Div II, 2012).

It is obvious that a promise is necessary in order for there to be an argument that promissory estoppel applies. *Id.* A promise has been defined

as "a manifestation of intent to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2 (1981). Second, the promise must be one which the promisor should reasonably anticipate will lead the promisee to act or to forbear. *Id.* § 90. The rule looks at the matter from the point of view of the promisor. Calamari & Perillo, *Contracts*, § 6.1 at 218 (6th ed. 2009). In addition, the promisee must then reasonably rely upon the promise. *Id.* The reliance of the promisee must be of a definite and substantial character. Central Heat, Inc. v. Daily Olympian, Inc., 74 Wn.2d 357 (1969). Finally, the promise will be enforced only if justice can be avoided by the enforcement of the promise. Restatement (Second) of Contracts § 90 (1981). Whether the enforcement is necessary to avoid an injustice may depend on the reasonableness of the promissee's reliance; its definite and substantial character in relation to the remedy sought; the formality with which the promise is made; the extent to which the evidentiary, cautionary, deterrent, and channeling functions of form are met by the commercial setting, or otherwise and the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant. *Id.* at Comment b.

Allinger provided testimony that was refuted by Mackessy that Mackessy promised to "not go after his pension". Mackessy denies the

promise ever being made. There is no other evidence of a promise offered by Allinger. Allinger also offers no evidence that he changed his position in any way justifiably on the alleged promise. Allinger submitted a Financial Worksheet that details his income and expenses, but presented no evidence, oral or otherwise, as to how his position was changed based upon a justifiable reliance to an alleged promise.

The trial court stated Allinger was still burdened by substantial debt taken in the divorce, but the record does not support such a finding. (See Argument Section B). The trial court applied this defence without sufficient evidence to support it. In fact, most tellingly, the trial court literally stated, "So, arguendo" Allinger changed is position and relied on the promise to not go after the military retirement. RP 167, 14:17.

There is no evidence or findings which support the elements of detrimental reliance. Wherefore, Allinger has failed to meet his burden of proving each element of promissory estoppel in order to preclude the partition of the Military Pension. For that reason, Mackessy requests the trial court be reversed, holding the partition is not barred based on an equitable defense of promissory estoppel.

3. The Trial Court Erred in Holding Laches Applied.

Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them. Lopp v. Peninsula School Dist. No

401, 90 Wn.2d 754 (1978). Laches is an equitable doctrine that may be asserted as a defense to an action when "(1) the plaintiff knew the facts constituting a cause of action, (2) the plaintiff unreasonably delayed commencing an action, and (3) the defendant was materially prejudiced by the delay in brining the action." Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc., 143 Wn. App. 345 (Div. I, 2008). Laches in not available as a defense if the plaintiff has no reason to believe that legal action is necessary. Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 56 (Div. I, 2012).

Laches is an extraordinary remedy; under ordinary circumstances, so long as the applicable statue of limitations has not run, it is not available. South Tacoma Way, LLC v. State, 146 Wn. App. 639 (Div. II, 2008). For laches to be found, there must not only be a delay in the assertion of a claim, but also some change of condition which makes it inequitable to enforce the claim. Waldrip v. Olympia Oyster Co., 40 Wn.2d 469 (1952); *See also* In re Marriage of Sanbom, 55 Wn. App. 124, 128 (Div I, 1989) (finding that an action to recover maintenance from former husband 28 months after the order was not barred by laches as the defendant did not prove any detriment but rather conceded that he did not undertake any major financial obligations that he would have otherwise forsaken had he

anticipated paying the outstanding maintenance; without damages or prejudice, laches was inapplicable.)

As cited above in Argument Section A, in Huddleson v. Huddleson the Court found that a twelve (12) year delay in asserting a claim for an undistributed vested pension, although lengthy, was not barred by either waiver or laches. 187 Cal. App. 3d 1564, 1572 (1986). In Huddleson, the Petitioner became aware of the pension and the community property nature of the pension years after the divorce because the pension vested. *Id.* Weighing the policies, the Huddleson Court found that although a 12-year delay is a lengthy wait, the rational for allowing recovery of such omitted assets is a policy choice which favors the equitable division of marital property over the competing concern for preserving the finality of judgments. *Id.* at 1573. Therefore, the Court held the Partition action was not barred by laches.

Even more compelling is the Norton case, wherein the Court held that a 24-year delay pursuing a pension that was not listed among the parties' assets during the divorce proceedings was not barred by laches. 2006 WL 234748 (S. Ct. of Cali., 2006).

In this case, Mackessy brought this lawsuit on November 21, 2013, less than a year after she discovered that Allinger was receiving his Military Pension, and more importantly, less than a year after Mackessy

learned she has a community interest in the Military Retirement. Mackessy only became aware of the Pension because Allinger filed for a modification of the child support and residential schedule for the parties' youngest son. During discovery and discloser of Allinger's financial worksheet, Mackessy became aware that Allinger was receiving his Pension. Mackessy then began to inquire if she had any legal interest in the Pension and brought this action in a timely manner. The timeline of the lawsuit aligns precisely with Allinger's disclosure of his military retirement. Mackessy could not sit on rights she did not know she had. Once Mackessy learned of her rights and interest in the military retirement, Mackessy timely brought her partition action. Therefore, Mackessy requests this court reverse the trial courts holding that laches applies, and hold that Mackessy timely and reasonably brought her partition action and should therefore not be barred by laches.

V. ATTORNEY FEES AND COSTS

Mackessy requests statutory attorney fees and costs as permitted by RAP 14.3 and 14.4. Mackessy requests an attorney's fees award under RCW 26.09.140; *See also* Seals v. Seals, 22 Wn App. 652 (1979) (court found the partition action as a continuation of the original dissolution action and awarded attorney fees pursuant to RCW 26.09.140).

VI. CONCLUSION

Wherefore, based upon the assignments of errors and arguments presented above, Mackessy requests that the appellate court reverse the trial court's holding denying Mackessy's Petition for Partition as Mackessy has a valid legal theory under Washington law. Furthermore, Mackessy requests this Court reverse the trial court's holding that this action is barred by waiver, promissory estoppel, and laches as insufficient evidence was presented at trial to support the application of these equitable defenses.

Respectfully Submitted this 24th day of March, 2016.

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CERTIFICATE OF SERVICE

I, Brant L. Stevens, hereby certify that on March 24th, 2016, I personally served and true and exact copy of the foregoing Brief to the following:

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