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SUPREME COURT
STATE OF WASHINGTON
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Supreme Court No.: 97213-3

NO. 50979-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CATHERINE S. SHUBECK

Plaintiff/Respondent,

vs.

JOHN R. SHUBECK and SHELLY A. WILLIAMS,

Defendants/Appellants.

Appealed from Pierce County Superior Court Case No. 16-2-06813-3

RESPONDENT CATHERINE S. SHUBECK'S RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF CASE

Following a five day bench trial in June 2017 in the Pierce County Superior Court, the trial court found Appellants John R. Shubeck and Shelly A. Williams had fraudulently transferred assets with actual intent to hinder, delay, or defraud Respondent Catherine S. Shubeck. The trial court also determined these transfers were constructively fraudulent. Appellants appealed the case to the Washington Court of Appeals, Division II. In doing so, Appellants failed to provide to the Court of Appeals a verbatim report of proceedings, making the Findings of Fact entered by the trial court verities and binding upon the Court of Appeals. As such, the Court of Appeals did not review whether the Findings of Fact were supported by substantial evidence. Instead, it conducted a de novo review of the trial court's conclusions of law. *See* Petition for Review, Appx A, Court of Appeals Opinion at pgs. 14-15.

Similar to their present Petition for Review, Appellants' original brief to the Court of Appeals contained a significant amount of factual assertions not contained within the record. This prompted Respondent to file a motion to strike Appellant's brief, which was granted. *See* Response to Petition, Appx. A. The Court of Appeals ultimately affirmed the vast majority of trial court's ruling. *See* Petition for Review, Appx A, Court of Appeals Opinion at pgs. 24-25. Only one minor issue, the scope of Ms.

Williams' future liability, was remanded. *Id.* Respondent does not seek review of that issue here.

In Appellants' Petition for Review, they once again set forth significant factual allegations not contained within the record. *See generally* Petition for Review at pgs. 1-9. This Court should strike those portions of the Petition and disregard the assertions made therein.

In seeking review, Appellants have the burden of demonstrating why review should be accepted under one or more of the tests established in RAP 13.4(b). Appellants present a multitude of issues that they believe either conflict with the decision of this Court and the Court of Appeals, or involve an issue of substantial public interest. *See* Petition for Review at pgs. 10-19. However, it is abundantly clear that these assertions are not supported by the record, and moreover, are not supported by the law.

ARGUMENT

Respondent addresses each issue presented in the same order Appellants have presented the issue in their Petition for Review.

A. Separate Property vs. Community Property

Appellants have failed to demonstrate how any of the tests contained in RAP 13.4(b) have been met. Instead, Appellants have set forth factual allegations not contained in the record to further advance a theory that Ms. Williams had enough money in her own personal bank account prior to marriage to acquire the assets subject to this lawsuit. *See* Petition for Review at pgs. 10-13. Importantly, the assets in question were purchased after Appellants were married in 2009, making them presumptively community property. *See* Petition for Review, Appx A, Court of Appeals Opinion at pgs. 4-6 and 7-8. Moreover, Mr. Shubeck's money was utilized to pay for them, as he was depositing his income into Ms. Williams' bank accounts throughout the marriage to pay for assets and pay down the debts owing on those assets. *Id.* Respondents' primary argument, one which they have adamantly maintained throughout these proceedings, is that once Mr. Shubeck deposited his income into Ms. Williams' separate bank account, it became her separate money and anything she purchased with those funds became her separate property. *See* Petition for Review at pg. 13. This argument is premised on form over substance. It fails to acknowledge the source of those funds. It is clear that funds used to purchase the assets came from Mr. Shubeck's income. The funds were deposited into Ms. Williams' bank account and then used to purchase assets and paying down debts. Appellants don't even deny this fact. Instead, they continue to contend that, notwithstanding this set of facts, all of the assets still belong solely to Ms. Williams. There has been no error in application of the law here by either the trial court or the Court of Appeals. Appellants have failed to cite to case law that would conflict with the decision of the Court of Appeals, much less demonstrate that there is an issue of substantial public interest here.

B. Separate Property Retains Characterization

Again, Appellants argue that "[a]ssets purchased retain the designation of the bank account from which it is purchased." *See* Petition for Review at pg. 13. They however cite to no authority for this assertion. *Id.* Instead, they recite language from a series of Appellate and Supreme Court cases analyzing separate and community property, all of which Respondent is in agreement with. *Id.* In fact, those cases all support Respondent's position, and some of those cases are the same cases relied upon by the Court of Appeals. Just because Mr. Shubeck deposited his income into Ms. Williams' separate bank account, did not suddenly make that money Ms. Williams' separate asset. Such an application would allow parties to evade creditors and would essentially eviscerate the very purpose of the fraudulent conveyance laws. Again, Appellants have failed to demonstrate how this issue meets any of the tests required under RAP 13.4(b).

C. Designation of an Asset

This argument is a continuation of the previously misguided legal arguments. Appellants again argue that once Mr. Shubeck's money was deposited into Ms. William's separate bank account, it became her separate property. *See* Petition for Review at pgs. 14-16. For this assertion, Appellants cite to the case of *Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972), where this Court stated "[s]eparate property will remain separate property through all of its changes and transitions so long as it can be traced and identified." Respondent agrees. First, all of the assets, except the Lexus ES300[1], were purchased during the marriage, making them presumably community property. Mr. Shubeck's income is also presumably community property, or perhaps it can be characterized as his separate property. But in either case, once it is deposited into Ms. Williams' bank account, it does not lose its characterization as either community property or Mr. Shubeck's separate property and suddenly become Ms. Williams' separate property. Ms. Williams was not solely utilizing her own separate funds to purchase assets. Much of those funds belonged to the community, or at the very least, belonged to Mr. Shubeck. In either event, it demonstrates Mr. Shubeck had an interest in the property.

Appellants also cite to an unpublished opinion from the United States District Court for Western Washington as having some authority in

[1] The Lexus ES300 belonged to Ms. Williams originally, but she sold it to Mr. Shubeck prior to their marriage. *See* Petition for Review, Appx A, Court of Appeals Opinion at pg. 4. Mr. Shubeck eventually fraudulently transferred the vehicle back to Ms. Williams in October 2012. *Id.* at pg. 7.

this matter. *See* Petition for Review at pg. 15 (citing to *LaRoche v. Billbe*, et al, No. 2:2013cv01913 (W.D. Wash. 2014)). *LaRoche* is a lawsuit for legal malpractice filed by a plaintiff against the attorney who represented her in a divorce. *Id.* In *LaRoche*, the District Court apparently cites to the unpublished opinion of *In re Marriage of Hoffman*, 168 Wn. App. 1008 (2012) for the assertion that income deposited into separate bank accounts did not result in commingled funds.[2] *Id.* The case of *In re Marriage of Hoffman* is actually the underlying divorce case involving LaRoche and her former husband Hoffman. First, neither of these cases have precedential value. Appellants don't even cite to *In re Marriage of Hoffman* for their argument, instead citing to the *LaRoche* court's alleged interpretation of *In re Marriage of Hoffman*. Second, the facts and analysis contained in *In re Marriage of Hoffman* are totally irrelevant to the case at hand. That case involved two divorcing parties and the division of assets among themselves. Moreover, the law cited to in both *LaRoche* and *In re Marriage of Hoffman* actually supports Respondent's legal position. *See e.g. In re Marriage of Fox*, 58 Wn. App. 935, 938, 795 P.2d 1170 (1990); *see also e.g. In re Marriage of Sanchez*, 33 Wn. App. 215, 218, 654 P.2d 702 (1982).

[2] Appellants failed to reference where in the *LaRoche* decision the court states this, and counsel for Respondent was unable to locate the quote.

D. Standard of Review-Findings of Fact Errors

Appellants contend that it was error for the Court of Appeals to treat the trial court's Findings of Fact as verities. *See* Petition for Review at pgs. 15-16. However, it was Appellants who failed to provide to the Court of Appeals a transcript of proceedings. The Court of Appeals could not possibly have reviewed the trials court's ruling on a basis of substantial evidence if it did not have a transcript of the proceedings and testimony given. Moreover, the party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence. *Bulzomi v. Dept. of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Where the appealing party, following a trial, fails to provide a verbatim report of proceedings, the findings of fact entered by the trial court become "verities and binding upon [the appellate] Court." *Morris v. Woodside,* 101 Wn.2d 812, 815, 682 P.2d 905 (1984)(citing to *Chace v. Kelsall*, 72 Wn.2d 984, 987, 435 P.2d 643 (1967)). Thus, the Court of Appeals did not err in relying on the Findings of Fact. Finally, Appellants cite to no law to support their position. There was no error here.

E. Names on Title Not Determinative of Ownership

Appellants correctly cite to case law for the proposition that the name on title is not always indicative of ownership. *See* Petition for

Review at pg. 16-17. However, the reasoning utilized in those cases simply does not apply here. = Not only was Mr. Shubeck named on various titles, but he was also named on loan documents, and his money was utilized to pay for the assets. *See* Petition for Review, Appx A, Court of Appeals Opinion at pgs. 4-8. Moreover, the assets were purchased during the marriage, making them presumptively community property. *Id.*

F. Improper Definition of Commingled Funds

Appellants assert that they "never mixed separate funds with joint funds because they never had a joint bank account." *See* Petition for Review at pg. 18. Again, this argument is not supported by law. Maintaining a joint bank account is not a pre-requisite for commingling funds. The record demonstrates that Mr. Shubeck deposited his income into Ms. Williams' separate bank account, where she also maintained her funds, over a period of many years, and those funds were utilized to pay for assets and pay down community debts. *See* Petition for Review, Appx A, Court of Appeals Opinion at pg. 5. This is what the law considers commingling.

G. Prenuptial Agreement

Appellants contend that they adhered to their prenuptial agreement and that the Court of Appeals erred by agreeing with the trial court that it was unenforceable. *See* Petition for Review at pg. 18. They further contend that the Court of Appeals should not have relied on inaccurate findings of fact. *Id.* Appellants fail to cite to any law for their proposition and fail to explain how this is an issue of substantial public interest. Moreover, the Findings of Fact, which are verities on the Court, demonstrate clearly that Appellants failed to abide by the terms of their prenuptial agreement. *See* Petition for Review, Appx A, Court of Appeals Opinion at pg. 5. Appellants have attempted throughout these proceedings to utilize the prenuptial agreement as a sword against Respondent, arguing that they abided by the terms of the agreement, and therefore, all of the assets in question belong to Ms. Williams. The record simply does not support that assertion.

H. Fraudulent Transfer Statute

1. Appellants assert there was no fraudulent transfer because Respondent started to collect on the spousal support via a wage garnishment shortly after the fraudulent transfer case was initiated. *See* Petition for Review at pg. 18. It is true that Respondent was able to successfully start garnishing Mr. Shubeck's wages shortly after the fraudulent transfer action was initiated in 2016. *See* Petition for Review, Appx A, Court of Appeals Opinion at pgs. 8-9. This was only because Ms. Shubeck obtained a judicial subpoena to the Washington State Employment Security Department and discovered that Mr. Shubeck was actually still working. *Id.* Mr. Shubeck had previously wrote her a letter stating he was retiring, that he would not be enslaved to her anymore, and therefore would not be paying her anymore. *Id.* This was not true, as Mr. Shubeck continued to work for a new employer, one that he concealed from Ms. Shubeck. *Id.* The wage garnishment that was initiated in 2016 was costly for Ms. Shubeck, as it needed to be renewed every 60 days. *Id.* Mr. Shubeck refused to willingly pay the arrears, and instead imposed the costly burden on Ms. Shubeck to garnish his wages. *Id.* Moreover, Mr. Shubeck willingly refused to pay ongoing spousal support that became due and owing during the duration of the fraudulent transfer action. *Id.* Thus, while the wage garnishment chipped away at the arrears, ongoing support continued to become due and owing and went unpaid. This, coupled with the many transfers of assets, the agreed upon decree of legal separation, and the overt attempts to make Mr. Shubeck insolvent was an effort to hinder and delay Ms. Shubeck's efforts to collect the debt.

2. Appellants contend that the lower court's finding that Mr. Shubeck was insolvent, as the term is defined under former RCW 19.40.021[3], was error. *See* Petition for Review at pg. 18. "A debtor who is generally not

[3] The Uniform Voidable Transactions Act, RCW 19.40 et seq (formerly known as the Uniform Fraudulent Transfer Act) was amended in 2017 with an effective date of July 23, 2017. *See* S.B. 5085, 65th Leg., 2017 Sess. (Wa. 2017); *see also* RCW 19.40.900. At the time of trial, the previous rendition of the statute, the Uniform Fraudulent Transfer Act (the "UFTA"), was in effect. The judgment and conclusions of law are premised on the UFTA. This Court should analyze this case under the UFTA.

paying his or her debts as they become due is presumed to be insolvent." Former RCW 19.40.021(b); "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation." Former RCW 19.40.021(a). In the present matter, Mr. Shubeck was not paying his debts as they became due and owing. *See* Petition for Review, Appx A, Court of Appeals Opinion at pgs. 8-9. Moreover, he had transferred his interest in all his assets to Ms. Williams, making his debt to Ms. Shubeck greater than all of the debtor's assets, at a fair valuation. *Id.* at pgs. 6-8. Thus, Mr. Shubeck was insolvent. In a quite confounding assertion, Appellants argue that Mr. Shubeck was "faithfully paying the judgment." *See* Petition for Review at pg. 18. Clearly, he was not, as Ms. Shubeck had to file a fraudulent transfer lawsuit and garnish his wages. He was by no means willfully paying.

3. Appellants contend that when Mr. Shubeck was "removed from title, he was only owed whatever his share of the asset was" and "since he did not contribute toward the purchase of the asset, no consideration was due." *See* Petition for Review at pg. 19. Again, this argument is not supported by the record. Mr. Shubeck's income was utilized to pay for the assets and pay down community debts, including the debt owed on those assets. Mr. Shubeck had a vested interest in all the assets, yet received no consideration when he transferred the assets.

4. The lower court attributed appropriate value to the assets in question. *See* Petition for Review, Court of Appeals Opinion at pgs. 7-8.

I. Award of Attorneys' Fees

Appellants contend that the Court of Appeals "reversed the entire judgment and remanded it back to the trial court. With a full reversal of a judgment and remand to the trial court, [Appellants] should not be responsible for [Respondent's] legal fees." *See* Petition for Review at pg. 19. This argument, like many other made by Appellants, is simply not accurate. The Court of Appeals did not reverse the entire judgment. The Court of Appeals remanded for a minor issue, the scope of Ms. Williams' future liability, but affirmed the rest of the judgment. *See* Petition for Review, Appx A, Court of Appeals Opinion at pg. 24. Respondent is simply appalled at Appellants willingness to make such bold and false assertions, which have been consistent throughout these proceedings and which further support the award for attorneys' fees under a theory of intransigence and RCW 26.18.160. Moreover, Appellants appealed many more issues than just the scope of the Ms. Williams' future liability. The award for fees is supported by the law and the record.

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ATTORNEYS FEES AND COSTS

Respondent requests an award for her reasonable attorneys' fees and costs for defending against this Petition for Review for the same reasons Respondent sought fees and costs before the Court of Appeals.

CONCLUSION

Appellants Petition for Review should be denied. Appellants have failed to demonstrate how any of the tests contained in RAP 13.4(b) have been met. As described above, their arguments are not supported by the record or the law, and some of the arguments are simply boldface falsehoods.

DATED this 13th day of June, 2019.

DAVIES PEARSON, P.C.

THOMAS L. DASHIELL,
WSBA #49567
Attorneys for Respondent
Catherine S. Shubeck

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of Davies Pearson, P.C., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein.

On this date, I caused to be served via Fed Ex overnight delivery and email the foregoing document on:

Defendants/Appellants
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Shelly A. Williams
1350 Pilchuck Heights FI
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Telephone: 253-303-0135
Email: jrshubeck@gmail.com; shellyonfoxisland@gmail.com

The undersigned further certifies that on this date I electronically filed the foregoing documents with the Washington State Supreme Court's filing portal.

SIGNED and DATED this 13 day of June, 2019 at Tacoma, Washington.

Kathy Bates, Legal Assistant

APPENDIX

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

January 17, 2018

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RE: CASE #: 50979-2-II: Catherine S Shubeck v John R Shubeck & Shelly A Williams

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The Respondent's motion to strike Appellant's brief is granted in part. Within 30 days, Appellants shall file an amended brief that (1) does not state any fact, including background facts, without a footnote referring to the record on appeal, (2) in referring to the record on appeal, does not refer to an exhibit not admitted at trial, except if Appellants are arguing that the trial court erred in not admitting the exhibit and (3) does not append Appendix A or any similar appendix containing additional argument. All argument must be contained within the 50-page limit.

The Respondent's other objections to the Appellant's brief are overruled. The Respondent's request for attorney fees is denied. The Respondent is granted an extension of time to file her brief. That brief is due 30 days from the filing of the amended Appellants' brief.

Very truly yours,

Derek M. Byrne
Court Clerk

DAVIES PEARSON, P.C.

June 13, 2019 - 2:21 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Catherine S. Shubeck v. John R. Shubeck and Shelly A. Williams
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