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No. 65712-7-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION I
CLERK

JEFFREY TODD SIMPSON,
Appellant

v.

CALLY MARIE SIMPSON,
Respondent

BRIEF OF RESPONDENT

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(ORIGINAL)

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STATEMENT OF THE CASE

This case arises from a dissolution proceeding where after a trial on the merits both parties were awarded specific personal property and a judgment was entered against the appellant.

Issues Pertaining to Assignments of Error

1. Did the trial court properly consider and award the separate and community property of the parties in the decree of dissolution?
2. Did the trial court err in calculating attorney's fees awarded to Cally Simpson in the decree of dissolution?
3. Did the trial court apply a proper burden of proof in entering judgment against the Appellant for detained or converted personal property?

Factual background

Cally Simpson and Jeffrey Simpson married October 14, 2006 and separated shortly after on April 1, 2009. VRP 3, 4, 6. The parties ultimately filed for dissolution the same year. No children were produced during the marriage leaving property division as the sole matter before the court. VRP 4.

On June 14, 2010 the trial court conducted a bench trial on the dissolution proceeding. VRP 1. During the course of the trial, the court addressed the parties' assets including real property, personal property (including jewelry and prior separate property), debts, and request for attorney's fees. VRP 19, 26, 31. After a brief trial on the merits, the court recessed prior to issuing its ruling which the court, on its own, reduced to written findings of fact and a decree of dissolution signed by the court and entered on the same day. VRP 66; CP 1. The court did not place its oral ruling on the record. The trial court awarded both spouses various personal property, debts, and entered a judgment against Jeffrey Simpson. CP 2-3. The judgment against Jeffrey Simpson includes \$10,658.00 in attorney's fees and \$3,441.00 for jewelry not returned to Cally Simpson. CP 3. Jeffrey Simpson now appeals.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONSIDERED ALL PROPERTY BEFORE THE COURT AND DID NOT IMPROPERLY DENY JEFFERY SIMPSON'S RIGHT TO PERSONAL PROPERTY.

Standard of Review

Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge. *See* 3 WASH. STATE BAR ASS'N, WASHINGTON FAMILY LAW DESKBOOK § 65.4(1), at 65-9 (2d ed. 2006).

As long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002) (quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. *In re Marriage of Greene*, 97 Wn. App. 708, 986 P.2d 144 (1999). A court should “not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility.” *Id.* at 714 (citing *In re Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996)).

The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors include (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective. RCW 26.09.080.

In weighing the above factors, the court must make a “just and equitable” distribution of the marital property. RCW 26.09.080. In doing so, the trial court has broad discretion in distributing all marital property, including separate property, and its decision will be reversed only if there is a manifest abuse of discretion. *Griswold*, 112 Wn. App. at 339 (citing *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992)). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1977).

Separate Property

The appellant appears to assign error to the trial court’s distribution of separate and community property. Brief of Appellant, 7. The trial court awarded husband, “any property taken from the residence and in his possession, except that property awarded to wife in this decree.” CP 2. The court further awarded the husband specific personal property as listed in paragraph 3.2 of the decree of dissolution. CP 2. The trial court has broad authority to award all property before the court. *Griswold*, at 339; RCW 26.09.080.

Appellant does not appear to assert that the trial court's distribution of property is not fair and equitable and has offered no legal authority or argument that the trial court has committed a manifest abuse of discretion; therefore, the trial court's distribution of property must be affirmed.

II. THE TRIAL COURT PROPERLY CALCULATED ATTORNEY'S FEES AWARDED TO CALLY SIMPSON.

The trial court awarded a judgment against Jeffrey Simpson in favor of Cally Simpson for half of her attorney's fees incurred during the dissolution proceeding. CP 3. The court determined that Cally Simpson's attorney's fees totaled \$10,595.00 resulting in a judgment in favor of Cally Simpson for \$5,297.50. CP 3. The Appellant argues that the trial court improperly calculated the amount of attorney's fees. Brief of Appellant, 7.

Cally Simpson provided the court with an attorney's fees declaration showing \$5,095.00 spent up to time of trial, \$2,500.00 for a day of trial and preparation, and payment to her first attorney of \$3,000.00. VRP 59. The figures offered in both testimony and documentary evidence total \$10,595.00, the amount awarded in the decree. VRP 59; CP 3. Therefore, the trial court did not make a scrivener's error.

III. THE TRIAL COURT DID NOT ERR IN ORDERING JEFFREY SIMPSON TO RETURN CALLY SIMPSON'S PERSONAL PROPERTY OR PAY PROPER COMPENSATION.

The trial court has broad discretion in awarding property during a dissolution proceeding. *Griswold*, at 338; RCW 26.09.080. The trial court's determination will only be disturbed upon appeal by finding a manifest abuse of discretion by the trial court. *Griswold*, at 339. The burden of showing a manifest abuse of discretion rests with the appellant.

Appellant argues that RCW 26.16.210 places a burden of proof upon Cally Simpson that she has not met. Brief of Appellant, 7. RCW 26.16.210 provides:

In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.

However, this statute does not apply to actions between husband and wife. See, *Erfurth v. Erfurth*, 90 Wash. 521, 156 P. 523 (1916). This statute primarily relates to property settlement agreements that may impact community creditors. See *Clayton v. Wilson*, 145 Wn. App. 86, 186 P.3d 348 (2008); *Whitney v. Seattle-First Nat'l Bank*, 16 Wn. App. 905, 560 P.2d 360 (1967). Therefore, this statute is of no guidance to the court.

The Appellant further contends that WAC 446-30-050 places the burden of proving claims of ownership upon Cally Simpson. Brief of Respondent 7-8. However, this administrative code chapter deals with the burden of proof relating to vehicles seized for altered vehicle identification numbers and therefore is not on point for the issues before the court. See WAC 446-30.

Findings of fact are reviewed under the substantial evidence standard. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 792, 98 P.3d 1264 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Perry*, 123 Wn. App. at 792. This is a deferential standard that views all reasonable inferences in the light most favorable to the prevailing party. *Korst v. McMahan*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). “The fact finder measures witness credibility, and [the Court of Appeals does] not review that determination on appeal.” *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671 (2005). Where there is substantial evidence, the Court of Appeals will not substitute its judgment for that of the trial court even though the court might have resolved a factual dispute differently. *Korst*, 136 Wn. App. at 206. Unchallenged findings of fact are verities on appeal. *Perry*, 123 Wn. App. at 792.

RCW 4.56.080 provides authority to the court to award a judgment in lieu of returning wrongfully detained personal property. RCW 4.56.080 provides:

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

During trial, the Appellant offered no testimony or evidence, other than his closing statement, to refute Cally Simpson's allegation that he has detained or converted her separate personal property. Furthermore, the Appellant has not challenged Cally Simpson's characterization of the property as her separate property. Therefore, the evidence before the court regarding the jewelry was the testimony of Cally Simpson along with documents showing possession of the property by the Appellant is sufficient to affirm the trial court. VRP 25-27.

IV. CALLY SIMPSON REQUESTS AN AWARD OF ATTORNEY'S FEES ON APPEAL UNDER RCW 26.09.140.

The court has the discretion to order a party to pay the other party's attorney fees associated with the appeal of a dissolution and modification

actions. RCW 26.09.140. The decision to award fees under RCW 26.09.140 is discretionary and must be based upon a consideration that balances the needs of the spouse seeking fees against the ability of the other spouse to pay. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995).

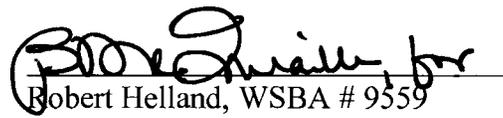
Furthermore, an appellate court may order attorney's fees for a frivolous appeal. RAP 18.9. "An appeal is frivolous (and a recovery of fees warranted) if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *Harrington v. Pailthorp*, 67 Wash. App. 901, 913, 841 P.2d 1258 (1992); *Cary v. Allstate Ins. Co.*, 130 Wash. 2d 335, 347, 922 P.2d 1335 (1996). The Appellant has not raised debatable issues and has not offered any applicable legal authority and scant argument to support their assertions.

CONCLUSION

Cally Simpson respectfully requests that this court affirm the trial court's decision and issue an award of attorney's fees in her favor.

DATED the 24th day of January, 2011.

RESPECTFULLY SUBMITTED,


Robert Helland, WSBA # 9559
Attorney for Respondent
Barbara Melville #32386

Declaration of Transmittal

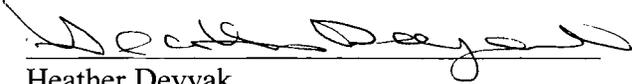
UNDER PENALTY OF perjury under the laws of the State of Washington, I affirm the following to be true:

That on January 24, 2011 I transmitted a true and correct copy of the Brief of Respondent attached hereto, by United States Mail, ABC Legal Services or by personal delivery to the following:

Jeffrey T. Simpson
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Bonney Lake, WA 98391

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One Union Square
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Signed at Tacoma, Washington on January 24, 2011.


Heather Devyak