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NO. 66704-1-I

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

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STATE OF WASHINGTON
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IN RE THE MARRIAGE OF:

PENNY L. SWEET,

RESPONDENT,

and

KENNETH W. SWEET,

APPELLANT.

APPELLANT'S BRIEF IN REPLY

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REPLY ARGUMENT

1. <u>Gross misvaluation of one of the parties' assets inevitably leads to an unfair property division where the trial court endeavors to divide the property equally between the parties</u>.

Ms. Sweet offers a half-hearted, and sometimes non-existent, defense of the trial court's assignment of values to certain assets awarded in the divorce. Her primary argument seems to be that, even if the values assigned to those assets were erroneous, the overall division of property and debt was within the discretion of the court.

The valuation of property awarded in a divorce case, however, is a material and ultimate fact. WOLD v. WOLD, 7 Wn.App. 872, 503 P.2d 118 (1972). The purpose of requiring the trial court to set forth its valuation of the property in a dissolution case is to provide the appellate court with an opportunity to discover whether there has been an abuse of discretion. IN RE MARRIAGE OF HADLEY, 88 Wn.2d 649, 565 P.2d. 790 (1977). It naturally flows the valuation must be at least somewhat accurate, otherwise the appellate courts cannot properly determine whether an abuse of discretion has occurred.

In WOLD v. WOLD, supra, the Court stated:

> "It is obvious that the trial court abuses its discretion when it orders a division of property without having knowledge of the value of a substantial part of it."

The same logic applies if the court substantially misvalues the property.

Of course, the trial court has some discretion in its valuation of assets. See e.g., IN RE MARRIAGE OF SORIANO, 31 Wn.App. 423, 643 P.2d. 450 (1982). In the case at bar, however, a number of the assets were grossly misvalued. An ersatz "Key Bank community property surplus," which Ms. Sweet made no attempt to justify in her Response Brief, presumably because she couldn't explain it (even though she was the one who claimed at trial the asset existed), was valued at $60,000.00 and counted toward Mr. Sweet's share of the assets. Two promissory notes which Ms. Sweet's attorney conceded to the trial court were probably uncollectable were valued at $200,000.00 and counted toward Mr. Sweet's share of the assets.

Overall, virtually every asset of consequential value in this case was assigned a value that favored Ms. Sweet and disfavored Mr. Sweet. The value assigned by the trial court to the principal asset in the case, the Sweets' marital residence, is a case in point. The court could have valued the asset at the time of the parties' separation, when the home was in pristine condition, but chose instead to value it at the time of the trial, when the home's condition had substantially deteriorated under Ms. Sweet's care. The court could have valued the home at any number of amounts entered into evidence (Ms. Sweet's market analysis of the home's value, Mr. Sweet's estimated value of the home, the assessed value of the

home, and even Ms. Sweet's own testimony earlier in the case about the value of the home). Instead, the court chose to value the home based solely on Ms. Sweet's answer of "Yes," to her attorney's question at trial as to whether $900,000.00 was the amount for which she wanted to sell it. This amount was at least $400,000.00 less than any of the other proffered values. Not content with valuing the home at the lowest possible amount, the trial court then subtracted $76,000.00 from the value of the home to cover the "costs of sale" (CP 108 and 204), even though Ms. Sweet repeatedly testified the home was in need of substantial repair before it could be sold (RP 82-84, 403, 435 and 452), the home was about to be foreclosed upon (RP 402), and she had no idea how she intended to save it from foreclosure (RP 402).

At the conclusion of trial, even the two most valuable assets awarded to Mr. Sweet were of little value to him. The first of these assets had no present value and was in fact primarily a debt, specifically, all but $50,000.00 of two liens totaling $530.000.00[1]. The court credited this $480,000.00 "asset" to Mr. Sweet as part of his award of the property,

[1] After the parties separated, they borrowed funds from a private lender by way of a "hard money" loan (RP 84-85, 233, 358, and 401-403). A "hard money" loan is a short term loan in which the lender withholds the monthly payments and interest on the loan from the amount lent (RP 258). Due to the substantial interest rate on such loans, which in this case ran as high as $3,000.00 to $4,000.00 per month (RP 86 and 462), the Sweets received only a small percentage of the loans that resulted in the liens in question (RP 85, 158-159, 233 and 358)

even though Ms. Sweet received more of the funds from the loans which resulted in these liens than did Mr. Sweet[2]. While there is perhaps justification for making Mr. Sweet responsible for that portion of these loans that resulted in funds to Ms. Sweet for "undifferentiated support," there was little rational basis for crediting Mr. Sweet that portion of the loans that paid the interest on the money that went to Ms. Sweet for attorney fees, the property taxes on the home while Ms. Sweet alone lived there (RP 257-258), or the interest on the funds that paid Ms. Sweet's property tax. As unfair as this was, Mr. Sweet did not challenge this "award" on appeal, since it was arguably in the trial court's discretion to divide the liability in the manner it did. Nevertheless, the value the trial court assigned to the two promissory notes discussed above, as well as the ersatz "Key Bank community property surplus," looks particularly egregious when considered with the fact that out of $480,000.00 credited to Mr. Sweet from the hard money loans, Mr. Sweet only received $120,000.00. When all was said and done, Mr. Sweet's actual property

[2] Penny Sweet received $134,000.00 from the hard money loans at the outset of the case ($50,000.00 for attorney fees and $84,000.00 for "undifferentiated support; RP 85, 158-159, and 358), while Mr. Sweet received $60,000.00 from the initial loan and an additional $60,000.00 from a later loan (RP 233), for a total of $120,000. Even though Ms. Sweet received more funds from these hard money loans, Mr. Sweet was ultimately deemed responsible for $480,000.00 of the $530,000.00 resulting liens.

award in this case was over a half million dollars lower than indicated on the trial court's Complete Assets and Debts table.

After the "award" of the hard money liens, the second most valuable asset awarded to Mr. Sweet was the $22,461.00 proceeds from the sale of the parties' commercial residence, funds which were themselves promptly turned over to Ms. Sweet to satisfy the $99,827.00 judgment in favor of Ms. Sweet, which the court entered at the conclusion of the property division in order to "equalize" the parties' awards. Try as the trial court did to make the property award look fair, Mr. Sweet ultimately received just over $150,000.00 from the Sweets' marital estate.

2. A review of the Findings of Fact, Conclusions of Law, and Amended Decree of Dissolution demonstrates the trial court intended to divide the parties' net assets fifty-fifty.

As seen above, the trial court's failure to accurately value the Sweets' assets is inexorably linked to the inequitable division of their property. While it is tempting to consider the trial court's valuation as an exercise to make it appear the division of property was fair while simultaneously denying Mr. Sweet much of anything of real value, one must interpret the court's decision on its face, i.e., that the trial court intended to divide the Sweets' property equally between the parties.

That the trial court intended to divide the assets equally has to be presumed from the $99,827.00 judgment it entered in favor of Ms. Sweet at the conclusion of the property division. The mathematical computation in which the trial court engaged, seen on the Complete Assets and Debts table attached to the Amended Decree of Dissolution, resulted in a determination that $599,177.50 in net assets were being awarded to Ms. Sweet and $798,831.50 in net assets were being awarded to Mr. Sweet (CP 112 and 208). The difference between these two amounts is $199,654.00. One-half of this amount is $99,827.00. There can be no doubt the court was trying, at least overtly, to divided the parties' assets fifty-fifty. There is simply no other rational explanation for the judgment amount the trial court entered in this matter.[3]

Unfortunately, even the "equalizing" judgment entered at the conclusion of the asset and debt division shows what Mr. Sweet was up against in this matter. When it was pointed out to the trial court in a Motion for Reconsideration that it had made a mathematical error in

[3] If the trial court felt that Mr. Sweet's conduct, and the circumstances in which Ms. Sweet found herself subsequent to the parties' separation, merited Ms. Sweet receiving virtually everything in this case, and to have a $99,827.00 judgment against Mr. Sweet on top of it, the trial court should have come out and said it. Because there were no findings of fact, either oral or written, as to why the trial court valued assets, awarded property, or entered the judgment the way it did, however, one must presume the court was trying to do what the asset and debt calculation demonstrates on its face it did, i.e., divide the property equally.

calculating Mr. Sweet's gross award of assets in the case, and that according to the asset values assigned, his gross award was really $790,243.50 instead of $809,902.50, the court refused to correct this obvious mistake of addition. Like a number of other issues in this appeal, Ms. Sweet offered no defense of the court's action in this respect in her Response Brief, again presumably because there is no argument to support what the court did.

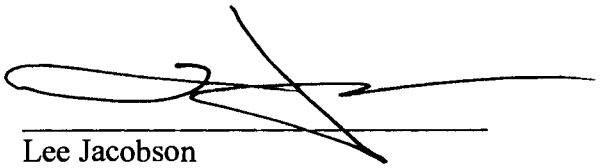
CONCLUSION

The trial court attributed substantial value to assets that in fact had no value (the two promissory notes and the out-of-nothing "Key Bank community property surplus"). The trial court neglected all evidence the parties' home was worth substantially more than Ms. Sweet's unsupported, one-word testimony about what she wanted to sell it for. The trial court ignored photographic and testimonial evidence the parties' home deteriorated substantially under Ms. Sweet's care after the parties separated, and wrongfully chose to value the residence at the time of the trial instead of separation. The court compounded this error when it deducted further sums from the home's value for costs of sale when no sale was imminent or likely to occur. The trial court failed to correct a mathematical error it made when it tallied the parties' assets and debts.

In light of the manner in which other assets and debts were divided, such as the liens resulting from the parties' hard money loans, these errors were not harmless. Mr. Sweet received virtually nothing from this divorce, at least when compared to that awarded to his wife. The property valuation, and resulting division, was an abuse of discretion.

Dated: November 9, 2011

Respectfully submitted,



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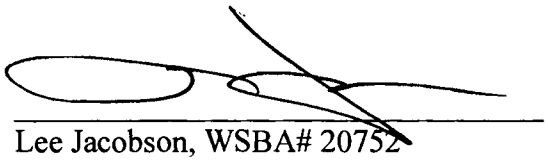
PROOF OF SERVICE

I certify that I served a copy of this Appellant's Brief in Reply on respondent Penny L. Sweet by emailing a copy of it to the office of her attorney of record, Bart Anderson, at bart@bartanderson.com on November 9, 2011. Mr. Anderson accepts service of court documents by email in this case.

On this date I also deposited a copy of this Appellant's Brief in Reply in the U.S. mail, first-class, postage pre-paid, addressed to Bart Anderson, 2122 112th Avenue NE, Suite A-300, Bellevue, WA 98004

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

Dated this 9th day of November, 2011, at Seattle, Washington.



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