

66925-7

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No. 66925-7

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

HARVEY PATRICK CHEW,

Appellant,

v.

CASSANDRA LYNN SAGE,

Respondent.

BRIEF OF APPELLANT

ROBERT A. GARRISON,
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CHEW, Appellant.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES3
ASSIGNMENT OF ERROR4
ISSUE PERTAINING TO ASSIGNMENT OF ERROR4
STATEMENT OF CASE4
BRIEF PROCEDURE5
STATEMENT OF FACTS5
ARGUMENT6
REQUEST FOR ATTORNEY FEES10
CONCLUSION11

TABLE OF AUTHORITIES

STATE CASES

Callan v. Callan, 2 Wn.App. 446, 468 P.2d 456 (1970)7
In re Marriage of Bocanegra, 58 Wn.App. 271 (1990)7, 10
Gimlett v. Gimlett, 95 Wn.2d 699 (1981).....7
In re Marriage of Smith, 241 P.3d 449 (Wash.App. Div. 2 2010).....7
Stokes v. Polley, 145 Wash.2d 341 (2001).....7
Matter of Phillips' Estate, 92 Wn.2d 362 (1979)8
Warning v. Warning, 21 Wn.2d 85 (1944)8

STATE STATUTES

RCW 11.44.0158
RCW 26.09.1706
RCW 26.09.14010
RCW 84.60.0108

STATE RULES

RAP 18.1(c)10

OTHER AUTHORITIES

Black's Law Dictionary7, 8, 9

ASSIGNMENT OF ERROR

The court erred in part, in ordering Mr. Chew to pay real estate taxes past due on the townhome properties, when the Decree of Dissolution assigned the properties with their encumbrances to Ms. Sage.

Issue Pertaining to Assignment of Error

Did the trial court err in assigning real estate taxes past due on the townhome properties to Mr. Chew when the Decree of Dissolution assigned the properties with their encumbrances to Ms. Sage?

STATEMENT OF CASE

The parties were divorced in February, 2010. The Decree of Dissolution, among other provisions for division of the parties' properties and extensive debts, awarded to Ms. Sage three townhomes formerly owned through an LLC by Mr. Chew, "subject to encumbrances." Mr. Chew was ordered to pay "expenses" through January 31, 2010. At the time of the decree, real estate taxes were owed on the properties for 2009 and 2010.

Subsequently, Ms. Sage moved for clarification and enforcement of the order, alleging, among other complaints, that Mr. Chew should pay the taxes on the properties. The court below ultimately ordered Mr. Chew to pay taxes incurred up to the date of the dissolution decree and Ms. Sage to pay those incurred thereafter.

This appeal follows, raising the question whether tax obligations, already assessed and a matter of public record before the dissolution decree, should be considered “encumbrances,” and thus Ms. Sage’s responsibility, or “expenses,” and thus Mr. Chew’s responsibility.

BRIEF PROCEDURE

Ms. Sage filed a Motion for Order Clarifying and/or Enforcing Decree of Dissolution and Parenting Plan. (CP 17 - 31) The Honorable Judge Ronald Kessler heard the motions and orders were entered on January 7, 2011 ordering Mr. Chew to pay the back taxes. (CP 178 - 181) Mr. Chew filed a Motion for Clarification and Reconsideration of that order. (CP 182 - 188) This motion was also heard by Judge Kessler on February 11, 2011, and orders were entered March 4, 2011, stating that Mr. Chew was liable for back taxes up to the date of the Decree. (CP 233 – 234)

STATEMENT OF FACTS

The Decree of Dissolution was entered February 3, 2010. (CP 9 - 16)

Among other provisions, it made the following allocations:

Decree 3.3 Property to be Awarded to the Wife

The wife is awarded as her separate property the following property. . .
Three townhomes: 713 N. 94th St. #C, #D, #E: C: Parcel #3126049474, D:
Parcel #3126049473, E: Parcel #3126049302, subject to the
encumbrances thereon. . . .

The allocation of liabilities included the following statement:

Decree 3.4 Liabilities to be Paid by Husband

“Unless otherwise provided herein, the husband shall pay all liabilities incurred by him since the date of separation, all debts incurred by the marital community and all liabilities associated with property awarded to him. The husband shall be solely liable for any expenses associated with the Kirkland Home and with the townhomes through January 31, 2010.”

At the time of the entry of the Decree, taxes were due on the townhome properties for 2009 and 2010. (CP 32 – 136, Dec. of Cassandra Sage, Ex. 4.)

Although this issue was not specifically addressed in the Decree of Dissolution, it was a matter of public record, ascertainable by anyone who visited the King County assessor’s website.

Pursuant to the Decree, Mr. Chew transferred the parties to Ms. Sage, who then listed the properties for sale, as had been intended by the court and parties. (CP 32 – 136, 34, Dec. of Sage; CP 139 – 156, 144, Dec. of Chew.) On December 14, 2010, in her Motion for Clarifying & Enforcing, Ms. Sage demanded that Mr. Chew pay the back taxes owing on the property awarded to her.

ARGUMENT

A property decree is final and not subject to modification by the court. RCW 26.09.170 provides in relevant part:

The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

The interpretation of judgments and decrees is a question of law for review by the court. Callan v. Callan, 2 Wn.App. 446, 448, 468 P.2d 456 (Wash.App. Div. 1 1970). Where the language of the decree is unambiguous, there is no room for interpretation. In re Marriage of Bocanegra, 58 Wn.App. 271, 792 P.2d 1263 (Wash.App. Div. 3 1990). Where ambiguity exists, the court seeks to ascertain the intention of the original court by using general rules of construction applicable to statutes, contracts, and other writings. Gimlett v. Gimlett, 95 Wn.2d 699, 629 P.2d 450 (Wash. 1981)

The court should read a decree in its entirety and attempt to give effect to every word and part, if possible. In re Marriage of Smith, 241 P.3d 449 (Wash.App. Div. 2 2010), citing Stokes v. Polley, 145 Wash.2d 341, 346, 37 P.3d 1211 (2001); Callan, 2 Wash.App. at 449, 468 P.2d 456.

This case turns on the interpretation of the words “encumbrance” and “expense.” If those words cover two distinct, definable categories, then no ambiguity exists in the original decree.

Black’s Law Dictionary defines “encumbrance” as follows:

Any right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee by conveyance. . . . A claim, lien, charge, or liability attached to and binding real property; e.g. a mortgage; judgment lien; mechanics’ lien; lease; security interest; easement or right of way; accrued and unpaid taxes.” (emphasis added)

Black’s Law Dictionary 527 (6th Edition 1990).

Like other liens and encumbrances on real property, property taxes are a matter of public record. Their existence is ascertainable by anyone willing to look, and they follow the property, not the person. The status of property taxes as a lien with primacy over all other liens is codified in RCW 84.60.010:

All taxes and levies which may hereafter be lawfully imposed or assessed shall be and they are hereby declared to be a lien respectively upon the real and personal property upon which they may hereafter be imposed or assessed . . . and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which said real and personal property may become charged or liable.

Real estate taxes are not only by definition an encumbrance, they are the encumbrance of first priority upon the property. All other claims that could be defined as encumbrances can only be satisfied against the property once the taxes are fully paid.

The status of assessed but unpaid property taxes as an encumbrance is used implicitly in many legal settings. It applies in estate law, where the value of back taxes is deducted from the value of the property in determining the value of the estate. RCW 11.44.015. Matter of Phillips' Estate, 92 Wn.2d 362, 363-364, 597 P.2d 1358 (Wash. 1979). It is used in the same way in family law. Warning v. Warning, 21 Wn.2d 85, 150 P.2d 64 (Wash. 1944). (“[S]he was living in the home which had been awarded her in the divorce action, and . . . the property was free

from encumbrance, all the taxes against the same having been paid.”)

Thus, the plain meaning of “encumbrances” encompassed all claims attaching to the property, including taxes. The corresponding order for Mr. Chew to pay “expenses” in connection with the property up to a certain date created no ambiguity. Black’s Law Dictionary also defines expenses:

That which is expended, laid out or consumed. An outlay; charge; cost; price. The expenditure of money, time, labor, resources, and thought. That which is expended in order to secure benefit or bring about a result.

Black’s Law Dictionary 577 (6th Edition 1990).

“Expenses” in the context of property both in law and common understanding pertains to the variable costs of operating the property, such as maintenance. Where “encumbrances” had already been assigned, there was no reason to conclude “expenses” would include liens and taxes.

The original Decree of Dissolution contained no ambiguity. By its plain language, it assigned encumbrances on the properties to Ms. Sage and expenses to Mr. Chew. By universal usage, the term “encumbrance” includes assessed property taxes. Giving full effect to the language of each part, and using the term in its common legal meaning, the “expenses” assigned to Mr. Chew referred to non-encumbrance costs associated with the property, such as maintenance.

Despite this clear distinction and the absence of ambiguity, the trial court reassigned the property taxes from being an “encumbrance” on the property

awarded to Ms. Sage into an “expense” chargeable to Mr. Chew. This stepped beyond the powers of the court in clarifying the decree. Bocanegra at 275. Therefore, the Order on Motion for Reconsideration should be overturned and the terms of the original Decree reinstated.

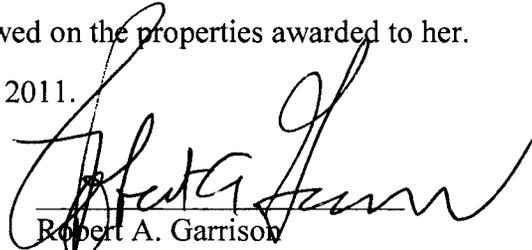
REQUEST FOR ATTORNEY FEES ON APPEAL.

Appellant requests attorney fees on appeal pursuant to RAP 18.1(c) and RCW 26.09.140, which award attorney fees based on financial need.

CONCLUSION

For the aforementioned reasons the Court should grant Appellant’s appeal and reverse the award of judgment against Mr. Chew, assigning to Ms. Sage responsibility for the back taxes owed on the properties awarded to her.

Dated this 11th day of July, 2011.


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CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the state of Washington that I deposited into the United States Mail, first class postage affixed and prepaid a copy of the foregoing Brief of Appellant on the 11th day of July, 2011, to the following counsel of record at the following addresses:

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