71830-4

No. 71830-4-I

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

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STATE OF WASHINGTON
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JENIFER L. BLACKMON,
Respondent,

v.

JOHN BLACKMON,
Appellant.

AMENDED BRIEF OF RESPONDENT

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A. IDENTITY OF THE PARTIES

John Blackmon is the Appellant herein

Jenifer Jacobsen is the Respondent herein

B. TABLE OF AUTHORITIES

1. Statutory Authority

RCW 26.09.080 4

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RCW 26.50.010(1) 8

2. Case Law

Bradley v. Fowler, 30 Wn.2d 609, (1948).....11

In re Marriage of Green, 97 Wn.App. 708, 986 P.2d 144 (1999).....5

In re Marriage of Griswold, 112 Wn.App. 333, 48 P.3d 1018, (2002).....6, 7, 10

In Re Marriage of Hunter, 52 Wn.App. 265, review denied, 112 Wn.2d 1006 (1989).....12

In re Marriage of Katare, 175 Wn.2d 23 (2012).....8

In re Marriage of Konzen, 103 Wn.2d 470, 693 P.2d 97 cert. denied, 473 U.S. 906 (1985).....4, 6

In re Marriage of Kovics, 121 Wn.2d 795, 855, P.2d 629 (1993) 8

In re Marriage of Rockwell, 141 Wn.App. 235 (2007).....4, 6, 7

In re Marriage of Sedlock, 69 Wn.App. 484, 849 P.2d 1243 (1993).....4, 6

In re Marriage of Tower, 55 Wn.App. 697, 780 P.2d 863 (1989) 4

In re Marriage of White, 105 Wn.App. 545, (2001) 5

C. ASSIGNMENTS OF ERROR

1. The trial court did not err in considering the Wife as sole supporter in determining the division of property.

2. The trial court did not abuse its discretion in dividing assets owned by the parties in accordance with the record before the trial court.

3. The trial court did not abuse its discretion in determining the value of assets based upon the evidence at trial.

4. The trial court did not abuse its discretion in ordering the Appellate to repay funds taken by him out of bank accounts owned by the parties and designated for each of the parties' minor children.

5. The trial court did not err in dividing assets and ordering a Parenting Plan on the basis of the evidence before it.

6. The trial court did not abuse its discretion in finding that there was a basis for Section 191 limitations on the father in the Final Order Parenting Plan.

7. The trial court did not abuse its discretion in naming Respondent's attorney as the contact for Appellant's agent in light of the No Contact Order between Appellant and Respondent.

8. The trial court did not abuse its discretion in giving the Appellant ninety days to take possession of his property.

D. STATEMENT OF THE CASE

1. The Appellant, herein after referred to as Husband, and Respondent, Jenifer Jacobsen, formerly known as Jenifer Blackmon, hereinafter referred to as Wife, were married on April 23, 1993. They had three children as a result of the marriage. CP 155.

2. On or about January 25, 2012 Husband filed a Petition for Dissolution of Marriage in Snohomish County Superior Court. CP 82.

3. On August 15, 2013, a Decree of Dissolution was entered dissolving the marriage of the parties and bifurcating the case. CP 92.

4. A Final Decree of Dissolution was entered after trial on March 19, 2014. At that same time, Findings of Fact/Conclusions of Law were entered along with a Final Order Parenting Plan and a Child Support Order. CP 155, 156.

5. During the course of the dissolution of marriage action, Husband was convicted of sexual assault crimes. The victim was one of the parties' children. CP 135.

6. Husband was sentenced to 172 months of incarceration. CP 135.

7. A Final Order Parenting Plan was entered which did not allow any contact between Husband and his children. CP 153.

8. A Child Support Order entered which required no transfer payment by Husband to Wife except for disability payments received based upon Husband's disability. CP 154.

E. ARGUMENT

1. The trial court did not err in considering the Wife as sole supporter in determining the division of property.

Husband's argument appears to be one that there was no substantial evidence which supported the court's Findings of Fact 2.21.5 and 2.21.6 in making a disproportionate division of property in this case. CP 155. As long as the Findings of Fact are supported by substantial evidence, they will not be disturbed on appeal. In re

Marriage of Rockwell, 141 Wn.App. 235 (2007). Contrary to the statements made in Appellant's Brief, the court considered evidence of Husband's disability pension in dividing the property of the parties. VRP 111,140-141, 167-169, 191, 216, 276, CP 154.

RCW 26.09.080 states the factors to be considered by the court in making an equitable division of property. Factor 4 of the statute states that "the economic circumstances of each spouse at the time the division of property is to become effective" is to be considered by the court. RCW 26.9.080(4). In applying that factor, the trial court has broad discretion in distributing the marital property and its decision will be reversed only if there is a manifest abuse of discretion. In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97 cert. denied, 473 U.S. 906 (1985). The courts have ruled that the division does not need to be equal nor should it focus on mathematical preciseness. The court states that the goal of fairness is achieved "by considering all circumstances of the marriage and by exercising discretion, not by using inflexible rules". In re Marriage of Tower, 55 Wn.App. 697, 700, 780 P.2d 863 (1989), review denied, 114 Wn.2d 1002 (1990). Since the decision of the Court was based on evidence supplied at the time of trial, there was no abuse of discretion. VRP 140–141, 167-169, 191, 216, 276, CP 154. In re Marriage of Sedlock, 69 Wn.App. 484, 491, 849 P.2d 1243 (1993).

2. The trial court did not abuse its discretion in dividing assets owned by the parties in accordance with the record before the trial court.

RAP 2.4 sets forth a scope of review of a trial court decision. The rule states that the Appellate Court will review the decision or parts of the decision designated in the Notice of Appeal. RAP 2.4(a).

RAP 2.5 states that the Appellate Court may refuse to review any claim of error which was not raised in the trial court, RAP 2.5(a).

The record on review only includes the Report of Proceedings, the Clerk's Papers and Exhibits. RAP 9.1(a). The Appellate Court can consider additional evidence on review if properly requested. RAP 9.11(a). No such request has been made of this court. As a result, the facts alleged by the Husband in his Appellate Brief are beyond the scope of the review as they are not a part of the Verbatim Report of the Proceedings or other evidence in this case.

Husband had a full opportunity to be present at the trial and to give testimony if he saw fit. Husband had witnesses at trial who gave testimony. VRP 21-41, 42-70. Husband was afforded all opportunity to litigate the case and chose the facts to be presented. The Appellate Court should not go beyond the record of the trial court as to facts that were not disputed at the trial.

In exercising its discretion, the trial court has jurisdiction to distribute assets owned by the parties at the time of trial. In re Marriage of White, 105 Wn.App. 545, 549 (2001). Here the Husband makes allegations regarding alleged disposition of assets. However, the trial court record does not support Husband's statements in his appeal brief. The Verbatim Report of Proceedings is full of references to the bee keeping business, storage units in Florida and the diesel boat referred to in his Appellate Brief. Bee keeping business: VRP 98-99, 171-174, 174-175, 235, 268-268. Storage units in Florida: VRP 104-105, 133, 105-106, 180-182, 269. Diesel boat: VRP 103-104, 134, 176-180, 256. They were assets still owned by the parties at the time of the trial.

3. The trial court did not abuse its discretion in determining the value of assets based upon the evidence at trial.

It is the duty of the trial court to weigh evidence and to determine that values of assets from conflicting testimony. In re Marriage of Green, 97 Wn.App. 708, 986 P.2d 144 (1999). The Husband's third assignment of error simply appears to be that he did not agree with the conclusions drawn by the court as to the value of property. However, as long as the Findings of Fact are supported by substantial evidence, they will not be disturbed on appeal. In re Marriage of Rockwell, 141 Wn.App. 235 (2007).

"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, 48 P.3d 1018 (2002).

"When the trial court has weighed the evidence, the review court's role is simply to determine whether substantial evidence support the Findings of Fact and, if so, whether the findings in turn support the trial court's Conclusions of Law." In re Marriage of Green, 97 Wn.App 708, 986 P.2d 144 (1999).

An Appellate Court should not substitute its judgment for the trial courts. It should not weigh the evidence or judge witness's credibility. Husband would have the Appellate Court re-examine the evidence because he disagrees with how the assets were distributed and the values assigned to them after trial. In re Marriage of Sedlock, 69 Wn.App. 484, 491, 849 P.2d 1243 (1993).

When parties offer conflicting evidence in valuation, the court may adopt the value asserted by either party or any value in between

the two. In re Marriage of Rockwell, 141 Wn.App. 235 (2007). VRP 21-41, 42-70, Ex. 34, VRP 256-269. That is what happened here.

4. The trial court did not abuse its discretion in ordering the Appellate to repay funds taken by him out of bank accounts owned by the parties and designated for each of the parties' minor children.

Husband acknowledges using funds held for the parties' children by removing monies from bank accounts designated for the children, Appellant's Brief at 11.

These accounts were held in the names of the parties, as the children were minors. VRP 153-155, 272, 299-300. The taking of these funds created a debt owed by the Husband. The monies were taken by him after separation and before trial. Brief of Appellate at 11. Whether the bank accounts are considered an asset or a debt of the parties, the funds were subject to being allocated and divided by the court. In re Marriage of Griswold, 112 Wn.App. 333, 48 P.3d 1018 (2002).

Husband's complaints in this area of his brief appear to simply be a disagreement with what the court ordered and it does not rise to the level of an abuse of discretion.

Husband took funds from those accounts and used them for his own purposes. Since they were an asset of the marital community, they were subject to being divided as all property, both community and separate, was before the court for division. The court properly ruled in requiring the Husband to replace the funds improperly taken by him.

5. The trial court did not err in dividing assets and ordering a Parenting Plan on the basis of the evidence before it.

The Husband wrongfully states in his Appellate Brief that a finding of mental illness was a basis for the division of property and the Parenting Plan. There was no Finding of Fact that states that the court's chosen allocations of assets between the parties was based upon mental illness. CP 155. Therefore, there was no error.

6. The trial court did not abuse its discretion in finding that there was a basis for Section 191 limitations on the Husband in the Final Order Parenting Plan.

A trial court's Parenting Plan is reviewed for an abuse of discretion as well. In re Marriage of Katare, 175 Wn.2d 23 (2012). A trial court wields broad discretion when fashioning a Permanent Parenting Plan. In re Marriage of Kovics, 121 Wn.2d 795, 801, 855 P.2d 629 (1993).

RCW 26.09.191 clearly mandates that a basis for restrictions on a parent's residential time with the children may be based on a history of acts of domestic violence. RCW 26.09.191 states in part as follows:

> RCW 26.09.191:
>
> (2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct:
>
> (ii) physical, sexual, or a pattern of emotional abuse of a child;
>
> (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or
>
> (iv) the parent has been convicted as an adult of a sex offense under ...

The evidence before the court was clear that the Husband had been convicted of the crime of sexual assault and therefore under the

statute, a limitation on the father's contact with his minor children was mandated by statute. The court clearly and appropriately ruled that Husband should have no contact with the children by any means during the remainder of their minority. To do otherwise would have been an abuse of the trial court's discretion. RCW 26.09.191. CP 135, 155.

The information contained in the Appellant Brief on this point is again beyond the scope of the record in this matter and should not be considered by the Appellate Court. RAP 9.1(a).

RAP 2.4 sets forth a scope of review of a trial court decision. The rule states that the Appellate Court will review the decision or parts of the decision designated in the Notice of Appeal. RAP 2.4(a). RAP 2.5 states that the Appellate Court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a).

The record on review only includes the Report of Proceedings, the Clerk's Papers and Exhibits. RAP 9.1(a). The Appellate Court can consider additional evidence on review if properly requested. RAP 9.11(a). No such request has been made of this court. As a result, the facts alleged by the Husband in his Appellate Brief are beyond the scope of the review as they are not a part of the Verbatim Report of the Proceedings or other evidence in this case.

7. The trial court did not abuse its discretion in naming Respondent's attorney as the contact for Appellant's agent in light of the No Contact Order between Appellant and Respondent.

The information contained in the Appellate brief on this point is inaccurate, beyond the scope of the record in this matter and should not be considered by the Appellate Court. RAP 9.1(a). CP 156.

Findings of Fact 2.21.24 is the provision of the pleadings that gave Husband ninety days to remove his property. CP 155. The court in that finding did not state that Wife's attorney had any control over the property removal. The Finding of Fact simply states that any of Husband's agents or proxies should go through Wife's attorney's office to make arrangements. Finding of Fact 2.21.24, CP 155.

The real issue is whether the trial court gave the Husband a reasonable opportunity to remove his property entry rendering its decision. CP 156. It did so.

8. The trial court did not abuse its discretion in giving the Appellant ninety days to take possession of his property.

The Husband's assignment of error appears to be a disagreement with the methodology used by the court for the Husband to remove his property from the real property of the Wife. CP 155, 156. The Husband made no post trial motions to the trial court on this issue. The Wife did not prevent the enforcement of the trial court's decision. No Notice of Supersedeas in the trial court with the filing of any bond was made. RAP 8.1. No stay was sought. RAP 8.3. No motion under RAP 17 was filed.

The information contained in the Appellate brief on this point is again beyond the scope of the record in this matter and should not be considered by the Appellate Court. RAP 9.1(a).

The real issue is whether the trial court in giving the Husband ninety days offered him a reasonable opportunity to remove his property after entry rendering its oral decision.

A trial court is given broad latitude in setting terms and conditions for enforcement of provisions of a Decree of Dissolution. In re Marriage of Griswold, 112 Wn.App 333, 48 P.3d 1018, (2002).

Giving the Petitioner ninety days within which to remove his property was a reasonable exercise of discretion by the trial court. Whether or not the Husband exercised his rights within that period of time are not before the Appellate Court.

Husband's statements that he was deprived an opportunity to object to the court's conduct is not correct. He was represented by counsel at the trial and all proceedings thereafter. VRP 1. Hearings were never closed to him or to anyone else as they were held in open court.

Husband knew of his rights to be transported for proceedings as he had previously been transported to the court and, therefore, none of his rights were violated in that regard although failure to transport him is not one of the issues before the court as an assignment of error.

The trial court does not abuse its discretion in failing to rule on an issue never brought to the trial court. The Court of Appeals will not consider those questions. Bradley v. Fowler, 30 Wn.2d 609, 621 (1948). Husband never raised those issues.

Husband offers no authority for his position that the trial court abused its discretion in affording him ninety days within which to remove his property from the real property of the Wife.

F. ATTORNEY'S FEES

Wife is requesting an award of attorney's fees and costs in this matter based upon Civil Rule 11 (Frivolous Appeal) and RCW 26.09.140 and In Re Marriage of Hunter. 52 Wn.App. 265 review denied, 112 Wn.2d 1006 (1989).

G. CONCLUSION

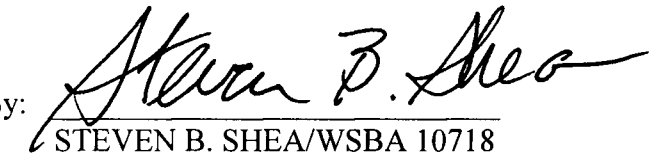
The assignments of errors raised by the Husband in his Appellant Brief fail to raise objections to specific findings of fact. The

arguments made by him are beyond the record and therefore beyond the scope of the Appellate Court to deal with or address.

The record before the Appellate Court clearly shows that there was substantial evidence for the Trial Court's decision on all points and Husband's protestations lack any merit.

The decision of the Trial Court was correct in all respects within the discretion of the Trial Judge. This matter should be affirmed.

Respectfully submitted this 25th day of March 2015.

By: 
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Superior Court of Washington
County of Snohomish

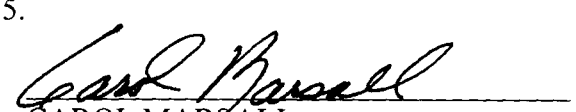
JOHN BLACKMON, Plaintiff, and JENIFER BLACKMON (NKA JACOBSEN, and STEVEN B. SHEA, Respondents.	**NO.** 71830-4-1 **Declaration of Mailing**

I, Carol Marsall, declare as follows:

On March 25, 2015, I deposited in the United States Mail, at Everett, Washington, postage prepaid, a copy of Amended Brief of Respondent regarding the above captioned cause addressed to:

Legal Correspondence – Counselor
John P. Blackmon #367781
Coyote Ridge Corrections Center
P.O. Box 769 HB0824
Connell, WA 99326-0769

DATED this 25th day of March 2015.



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