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NO. 72518-1-I

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

KIRK E. BUHNE

Appellant,

v.

MARJORIE A. WORTZ,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvas

REPLY BRIEF OF APPELLANT

Kirk E. Buhne
pro se

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TABLE OF CONTENTS

A. ARGUMENT 1

1. THIS COURT SHOULD DISREGARD THE LIST OF ABUSE ALLEGATIONS CONTAINED IN THE RESPONSE BRIEF, AS THE TRIAL COURT NEVER FOUND THAT MS. WORTZ CARRIED HER BURDEN OF PROVING THAT ANY OF THOSE ACTS OCCURRED 1

2. MR. BUHNE RAISED THE ISSUE OF CREDIT FOR MONIES RECEIVED BY MS. WORTZ AT TRIAL AND IT IS PROPERLY BEFORE THIS COURT 3

3. THE PARENT MORTGAGE ON THE VICTORIA HOME IS PRESUMPTIVELY VALID UNTIL A COURT DETERMINES THAT THE PRESUMPTION OF VALIDITY HAS BEEN OVERCOME BY MAKING CERTAIN FINDINGS; IN THE ABSENCE OF THOSE FINDINGS, THE MORTGAGE IS PRESUMPTIVELY VALID 5

4. THE TRIAL COURT ERRED IN AWARDING \$70,000 IN UNSEGREGATED ATTORNEY'S FEES WHERE INTRANSIGENCE DID NOT PERMEATE THE PROCEEDINGS 8

5. THIS COURT SHOULD REMAND AND INSTRUCT THE TRIAL COURT TO CONSIDER MR. BUHNE’S UNDISPUTED HEALTH PROBLEMS WHEN IT DETERMINES HIS ABILITY TO PAY MAINTENANCE 10

B. CONCLUSION 11

TABLE OF AUTHORITIES

DECISIONS OF THE WASHINGTON SUPREME COURT

In re Hamilton’s Estate, 70 P.2d 426, 190 Wash. 646 (1937) 6-7

In re Bailey’s Estate, 364 P.2d 539, 58 Wn.2d 685 (1961) 7

Johnson v. Huntley, 39 Wn.2d 499, 236 P.2d 776 (1951)..... 7

Lee v. Swanson, 69 P.2d 824, 190 Wash. 580 (1937) 5

Mell v. Winslow, 306 P.2d 751, 49 Wn.2d 738 (1957)..... 5

State v. Armenta, 948 P.2d 1280, 134 Wn.2d 1 (1997)..... 1

DECISIONS OF THE WASHINGTON COURT OF APPEALS

In re Marriage of Irwin, 64 Wn. App. 38, 822 P.2d 797 (1992)..... 4

In re Marriage of Luckey, 73 Wn. App. 201, 868 P.2d 189 (1994)..... 4

In re Marriage of Matthews, 853 P.2d 462, 70 Wn. App. 116 (1993).. 10

STATUTES

RCW 19.40.041 6

In addition to the issues and arguments presented in the Appellant's Opening Brief, Mr. Buhne respectfully offers the following for the consideration of this Court.

A. ARGUMENT

1. THIS COURT SHOULD DISREGARD THE LIST OF ABUSE ALLEGATIONS CONTAINED IN THE RESPONSE BRIEF, AS THE TRIAL COURT NEVER FOUND THAT MS. WORTZ CARRIED HER BURDEN OF PROVING THAT ANY OF THOSE ACTS OCCURRED.

The Brief of Respondent attempts to mislead this Court into thinking that the trial court found that Mr. Buhne had committed a long list of extremely disturbing acts of domestic violence. BOR at 1-2. Yet the trial court did not make any finding that any of these acts occurred. Ms. Wortz has not cross-appealed the trial court's failure to make such a finding, therefore this Court must presume that Ms. Wortz failed to carry her burden of proof regarding these allegations. State v. Armenta, 948 P.2d 1280, 134 Wn. 2d 1, 14, (1997).

In oral comments at the conclusion of trial, the court explained that it was not necessary to make any specific findings regarding the domestic violence allegations; the court made no findings of domestic violence and simply renewed the pre-existing order for two years. CP 122, 136; RP 1408-09. The trial court also

took care to refer to Ms. Wortz's accusations as "allegations," never stating or implying that they were findings. RP 1408-09.

In the "Other" section of the Findings and Conclusions, the trial court finds Ms. Wortz's fear is "to some degree" premised on her own mental health problems:

The court (via another judge) has previously found that Ms. Wortz is a victim of domestic violence as defined in RCW 26.50.010(1). However, the court finds that her fear of recurrence of domestic violence is to some degree premised on her PTSD and associated anxiety, and that a permanent domestic violence order of protection is not appropriate at this time.

CP 93.

The trial court emphasized this point in its oral comments, pointing to Ms. Wortz's pre-existing difficulties to explain the decision not to find that Mr. Buhne committed the specific acts of domestic violence alleged at trial:

I strongly suspect that it's a combination of who she is genetically, all the things that she experienced growing up and as a younger woman before she met Mr. Buhne, and clearly she had some significant traumas in her life before she ever met Mr. Buhne, and that there were some traumas associated with the relationship over the course of the marriage.

RP 1408-09.

Finally, the trial court drove home the point that renewal of the DVOP served mainly to assuage Ms. Wortz's subjective anxieties:

My hope is that over the course of a few years, Ms. Wortz will be able to get the therapy that she needs to be a little bit stronger and be able to support herself, and at that point if she feels – she may not feel the need for a protection order anymore.

RP 1412.

Mr. Buhne is mindful of the wastefulness of appealing a domestic violence protection order which would have largely run its course before this Court issues a ruling and might be mooted. Nevertheless, this Court should presume that Ms. Wortz failed to carry the burden of proving the incendiary allegations in her brief, and disregard them as it considers the merits of this case.

2. MR. BUHNE RAISED THE ISSUE OF CREDIT FOR MONIES RECEIVED BY MS. WORTZ AT TRIAL AND IT IS PROPERLY BEFORE THIS COURT

Mr. Buhne requested that he be credited for money that Ms. Wortz received between separation and trial. RP 1385-86. The trial court found that Ms. Wortz intercepted an insurance check for \$14,000 intended for repairs on Mr. Buhne's separate Tacoma home and used it for living expenses since Mr. Buhne had not been able to pay the ordered maintenance. CP 109. During his testimony, Mr. Buhne interjected an explicit request that this amount be credited to his outstanding obligation. RP 1385-86.

Similarly, Mr. Buhne presented detailed testimony on the value of his car, which Ms. Wortz sold pursuant to court order,

retaining the \$6,500 proceeds to use for her own living expenses.
CP 108-09; RP 738-743.

The trial court recognized that the issue of what to do with the \$6,500 vehicle proceeds and the \$14,000 insurance money needed to be resolved; therefore Mr. Buhne obviously made the court aware of the issue. CP 108-09.

While the trial court stated it was taking these facts into account in fashioning a settlement, the court neither characterized these amounts as property awarded to Ms. Wortz or as maintenance; it did not characterize these amounts in any way. Id. It is unclear in what way these amounts were taken into account as they were unallocated. What is clear is that the court found that these monies were Mr. Buhne's separate funds and that Ms. Wortz used the money for "her own living expenses." CP 108-09. Since the purpose of maintenance is to provide for living expenses, the logical conclusion is that these amounts functioned more like maintenance than like predistributed property. See In re Marriage of Irwin, 64 Wn.App. 38 55, 822 P.2d 797 (1992); In re Marriage of Luckey, 73 Wn.App. 201, 209, 868 P.2d 189 (1994).

(The purpose of spousal maintenance is to help support a needy spouse until he or she is able to support himself or herself.)

These issues were fully explored at trial. To the extent that the court calculated Mr. Buhne's unpaid maintenance obligation

without including the funds that Ms. Wortz received and used to maintain herself, this court should reverse the trial court's order and recalculate maintenance to include the amounts Ms. Wortz actually received.

Ms. Wortz's point that Mr. Buhne paid \$2,000 for attorney's fees is well taken. It should therefore be deducted from Mr. Buhne's attorney fee award.

3. THE PARENT MORTGAGE ON THE VICTORIA HOME IS PRESUMPTIVELY VALID UNTIL A COURT DETERMINES THAT THE PRESUMPTION OF VALIDITY HAS BEEN OVERCOME BY MAKING CERTAIN FINDINGS; IN THE ABSENCE OF THOSE FINDINGS, THE MORTGAGE IS PRESUMPTIVELY VALID

While Ms. Wortz notes that the Washington Uniform Fraudulent Transfers Act was not raised at trial, this complaint is irrelevant. The mortgage is presumptively valid as a matter of law unless or until a court enters certain findings regarding the mortgage. "[e]very negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Mell v. Winslow, 306 P.2d 751, 49 Wn.2d 738 (Wash. 1957), *citing* Lee v. Swanson, 69 P.2d 824, 190 Wash. 580, 587 (Wash. 1937). The only way to overcome the presumption that the negotiable instrument between Mr. Buhne and his parents was

issued for valuable consideration is to apply the test in RCW 19.40.041, which the trial court did not do.

The issue is not one that can be waived, because the presumption of validity can only be overcome upon entry of certain findings and those findings have not been entered. Therefore, as a matter of law, the Canadian mortgage is still valid.

Further, Ms. Wortz essentially admits that Mr. Buhne's parents loaned him the money, since she acknowledges that the amounts will be deducted from his inheritance if they are not repaid before that time. BOR at 9; See also RP 864-66, 868-69. As Ms. Wortz points out, a borrower "binds himself to repay it at some future time... ." BOR at 9.

While Ms. Wortz claims that Mr. Buhne's promise to pay is illusory because it cannot be enforced, this is inaccurate since the mortgage will become an asset of his parents' estate that will easily be liquidated should it remain outstanding upon their deaths.

Mr. Buhne's situation is similar to one the court resolved in In re Hamilton's Estate, 70 P.2d 426, 190 Wash. 646, 653 (1937). In that case, there was a disagreement about whether \$1,000 given to the deceased was a gift or a loan; no promissory note was produced, but there was testimony of intent that it be a loan. Id. Ultimately the court said that proof of gift had not been met, thus it was a loan:

If the money received by the respondent was not a loan, it must have been a gift. There was no proof that a gift was made of the money in question to the respondent. Proof of a gift must be by clear and convincing evidence, and the negative inference which follows from the fact that no demand for repayment was made for a period of years, and that the debt was not listed originally in the inventory of the estate, is not the clear, positive proof to establish a gift that is required. The rule is that a gift will not be presumed, but it must be shown by clear, convincing, and satisfactory evidence. .

This case is still good law and is cited in Johnson v. Huntley, 39 Wn.2d 499, 236 P.2d 776, 777 (1951) as a proper application of the right of retainer.

In re Bailey's Estate, 364 P.2d 539, 547-48 58 Wn.2d 685 (1961) explains that "the doctrine of retainer is the right of an executor or administrator to deduct from the distributive interest of an heir an amount of money which the heir owed to the estate." That is precisely the situation of Mr. Buhne and his parents with regard to the loans they have made to him. The executor of his parents' estate will have the right of retainer against Mr. Buhne for the mortgage amount, and the loans will thereby be repaid.

Ms. Wortz also argued at trial that the mortgage was fraudulent because the loan amounts may add up to less than the mortgage amount, although it is not clear whether the court adopted this argument. While neither she nor Mr. Buhne offered the precise calculations used to arrive at the mortgage amount, Mr. Buhne's father testified that the difference between the amount of

money loaned to Mr. Buhne versus the repayment amount as embodied in the mortgage was attributable to interest on the loans he had made to Mr. Buhne since 1985. RP 864-66. The repayment amount reasonably reflects interest accrued and shows that the amounts were indeed loans.

The mortgage is presumptively valid as a matter of law and the trial court did not make the necessary findings to overcome the presumption. Because the mortgage represents a right of retainer that is reasonable given the loans made to Mr. Buhne over the decades, the trial court erred as a matter of law in concluding that the amounts were gifts.

4. THE TRIAL COURT ERRED IN AWARDING \$70,000 IN UNSEGREGATED ATTORNEY'S FEES WHERE INTRANSIGENCE DID NOT PERMEATE THE PROCEEDINGS

Ms. Wortz contends that Mr. Buhne's intransigence permeated the proceedings, so it was unnecessary for the trial court to segregate the amount it awarded based on need versus ability to pay from the amount due to intransigence. BOR 14-15. Her argument assumes, however, that the trial court made a finding that Mr. Buhne's intransigence permeated the entire proceedings. The court made no such finding. Instead it awarded primarily based on need vs. ability to pay, with intransigence as a secondary basis:

The petitioner has the need for the payment of fees and costs and the other spouse has the ability to pay those fees and costs. The petitioner testified at trial

that she has incurred attorney fees and costs an [sic] amount in excess of \$100,000. The court finds that, due to the parties' respective earning capacities and financial status, as well as due to Mr. Buhne's intransigence in failing to provide complete and timely discovery, and in failing to obey court orders, it is reasonable to require Mr. Buhne to pay \$70,000 to Ms. Wortz's attorney for attorney fees and costs.

CP 90 (Findings of Fact and Conclusions of Law, page 6, section 2.15 **Fees and Costs.**) (Emphasis added.) If the trial court had wished to make a finding that Mr. Buhne's intransigence had permeated the entire proceedings, it would have done so in the Fees and Costs portion of the final documents. No such finding was made. Accordingly, this court should decline Ms. Wortz's invitation to read such a finding into the court's language.

Because there is no finding that Mr. Buhne's intransigence permeated the proceedings, and because the award was made primarily based on need vs. ability to pay, this court should either reverse outright because the award is excessive, or in the alternative, remand with instructions to (1) segregate the award, and (2) consider Mr. Buhne's health as a factor in what he is able to pay.

5. THIS COURT SHOULD REMAND AND
INSTRUCT THE TRIAL COURT TO CONSIDER
MR. BUHNE'S UNDISPUTED HEALTH
PROBLEMS WHEN IT DETERMINES HIS
ABILITY TO PAY MAINTENANCE

The trial court was required to take Mr. Buhne's health into account when fashioning a property disposition and maintenance. In re Marriage of Mathews, 853 P.2d 462, 70 Wn. App. 116, 121 (1993). Yet the maintenance award in this case, while reflecting the lack of community property to award Ms. Wortz, does not reflect the negative impact of Mr. Buhne's undisputed health problems on his ability to earn money to pay maintenance.

From shortly before separation and continuing to the present time, Mr. Buhne has suffered disabling consequences from his 17 foot fall and he has not been able to recover his earning power since that accident. RP 914. He attempted to hold down one good job after the accident, but it went unchallenged that he was unable to do so because his head trauma and ongoing physical problems prevented him from performing to an acceptable standard. Id.

For this reason, the trial court's reliance on "historically demonstrated financial resources" was inappropriate because that history was established before Mr. Buhne's 17 foot fall and subsequent undisputed chronic health problems.

B. CONCLUSION

For these reasons and for the reasons set forth in Mr. Buhne's Opening Brief of Appellant, Mr. Buhne respectfully requests that this Court remand for (1) elimination of attorney's fees or entry of a reduced attorney fee award based only on a segregated portion of the original award attributed to intransigence; (2) entry of an amended judgment for unpaid maintenance that credits Mr. Buhne for amounts actually received by Ms. Wortz; (3) findings that reduce Mr. Buhne's separate property by the amount of his parent mortgage; (4) and entry of an amended maintenance award that considers Mr. Buhne's inability to earn at his historical rate due to undisputed injuries sustained in his 17 foot fall from a ladder shortly before Ms. Wortz filed for divorce.

DATED this 1st day of July, 2015.

Respectfully submitted:



Kirk E. Buhne
pro se