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COURT OF APPEALS
DIVISION II
2014 SEP -5 AM 11:56
STATE OF WASHINGTON
BY 
DEPUTY

NO. 46158-7-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

Richard Frost,

Defendant/Appellant,

vs.

Fred Hacker and John Hacker,

Plaintiffs/Respondents.

BRIEF OF RESPONDENT

THOMAS F. MILLER WSBA # 20264
JENNIFER M. MODAK WSBA # 42018
MILLER LAW OFFICE, P.S.
2620 RW JOHNSON BLVD SW, SUITE 212
TUMWATER, WA 98512
ATTORNEYS FOR RESPONDENT

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I. INTRODUCTION

Tammie Frost executed of a promissory note on behalf of the marital community after the statute of limitations had expired to enforce a debt. A moral obligation connected with a past legal debt will furnish consideration for a subsequent new promise, here the promissory note. The Thurston County Superior Court Judge Carol Murphy held that the promissory note was due and owing to Fred Hacker and that the signature of Tammie Frost bound the marital community. The trial court did not err.

II. COUNTER STATEMENT OF THE CASE

Fred Hacker was approached by Richard and Tammie Frost to provide money to enable the Frosts' to purchase real property. Richard and Tammie Frost borrowed money from Fred Hacker for the purpose of a down payment for the purchase of real property on a Real Estate Contract from Andree Peter. The down payment of \$16,328.00 was made by Fred Hacker for the benefit of Richard and Tammie Frost and paid to the Tiller Law Firm Trust Account who was handling the closing of the sale. Hacker took no security interest in the property and considered the money as a personal loan. A copy of the cashier's check identifies Fred Hacker and references the Frost purchase. CP. at 21. Fred Hacker also loaned Richard and Tammie Frost additional monies in the amount of \$6,835.00.

On January 31, 2013, Tammie Frost executed a promissory note acknowledging the amount due and owing. CP. at 22. Interest was to accrue at the rate of 6% per annum. The principal amount of the promissory note was \$35,671.20. Tammie and Richard Frost refused to make payment. CP. at 20.

In 2013, Hacker brought suit to collect on the promissory note. CP. at 4-6. Three months after the suit, Hacker demanded full and immediate payment of the note. CP. at 23.

Hacker made a cross motion for summary judgment against Richard and Tammie Frost, individually, and the marital community for failure to pay on the promissory note. CP. at 14. Richard brought a cross-motion for summary judgment dismissal of the claims against the marital community and against himself individually. CP. at 25.

The Thurston County Superior Court Judge Carol Murphy granted Hacker's motion for summary judgment against Tammie Frost and the Frost marital community. CP. at 46-48. Judge Murphy held that Tammie Frost had bound the Frost marital community. CP. at 47. Richard Frost's cross motion for summary judgment was denied. CP. At 46-48.

Judge Carol Murphy entered final judgment against Tammie Frost individually and against the Frost marital community. CP. at 56-58. Richard Frost appeals.

III. ASSIGNMENT OF ERROR

Respondent Hacker does not assign any error to the Trial Court.

1. The trial court did not err when it held that the marital community was liable for the promissory note. The trial court properly found the marital community was bound by the act of Tammie Frost.

IV. ARGUMENT

A. The applicable standard of review is *de novo*.

The Respondent agrees this Court reviews summary judgment *de novo*. *Schmitt v. Langenour*, 162 Wn. App. 397, 404, 256 P.3d 2135 (2011).

B. Frost's moral obligation to pay past debt constitutes consideration for the promissory note.

In Washington, Frost's moral obligation constitutes consideration for the new promissory note arising from past debt owed to Fred Hacker. The Court of Appeals, Division III, set forth the well settled rule as follows:

The familiar and uncontradicted rule that upholds a new promise after the bar of the statute of limitations has often been expressly put upon the ground that although the debt is not legally enforceable, there is still a moral

obligation which comes within the exception of the rule and is sufficient to sustain the new promise.

Orsborn v. Old Nat. Bank of Washington, 10 Wn. App. 169, 173, 516 P.2d 795 (1973).

In the instant case, the statute of limitations ran on the past debt. However, the *Orsborn* Court followed the uncontradicted rule a moral obligation comes within the exception to the rule and upheld a new promise after the statute of limitations ran. *Id.*

Therefore, in January 2013, Tammie Frost's moral obligation arising from a once legal liability, the monies borrowed by Richard and Tammie Frost from Fred Hacker, constitutes consideration for a subsequent new promise. *Orsborn v. Old Nat. Bank of Washington*, 10 Wn. App. 169, 174, 516 P.2d 795 (1973). The subsequent promise was a promissory note signed by Tammie Frost on behalf of the marital community.

C. Tammie Frost's execution of promissory note on behalf of the marital community made a new promise to pay a once legal liability.

Furthermore, pursuant to *Orsborn*, a once legal debt may be enforceable by a new promise. *Id.* In *Orsborn*, an executrix signed a promissory note for another's debt. *Id.* at 171. The *Orsborn* court held only those who were previously obligated can make a new promise to pay the debt. *Id.* at 172. However, the "executrix of the estate

does not represent the deceased.” *Id.* at 174. Therefore, the executrix could not make a new promise to pay the debt. *Id.* at 174.

However, in the instant case, the marital community was liable for the past debt. Therefore, Tammie Frost on behalf of the marital community was able to make a new promise to pay the past debt. Tammie Frost bound the marital community, as determined by the Judge Carol Murphy.

D. The Promissory Note is not a “gift.”

Waiving the statute of limitations affirmative defense, which is the effect of the promissory note, does not equal a “gift” as the Appellant Richard Frost couches the argument. A “gift” is “the voluntary transfer of property to another without compensation.” Black’s Law Dictionary, 9th ed. (2009).

Tammie Frost on behalf of the Frost marital community had a moral obligation to pay back the past debt and she signed the promissory note obligating the Frost marital community. *Orsborn*, at 172. The Frost marital community did not give a “gift” to Fred Hacker. *Id.* Tammie Frost merely waived the statute of limitations defense by

signing the note, since the community had not paid Fred Hacker what he was due.

Appellant misapplies the law with regards to the promissory note and “gifts”. The *Schwietzer* and *Nichols Hills Banks v. McCool* cases are distinguishable. See *In re Marriage of Schweitzer*, 132 Wn.2d 318, 331, 937 P.2d 1062 (1997); *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 701 P.2d 1114 (1985). The *Schweitzer* Court noted that in *Banks* a loan guaranty signed by the husband on behalf of the couples’ son was an impermissible gift of community property because the benefit was to the son, not the marital community. *In re Marriage of Schweitzer*, 132 Wn.2d 318, 331, 937 P.2d 1062 (1997). The *Schweitzer* Court held that there was no community obligation to finance the son-in-laws education because there was no benefit to the marital community. *Id.*

Again, the Frost marital community long ago received the benefit of the funds from Fred Hacker. Richard Frost argues the promissory note is an impermissible “gift” because he did not consent. However, the community received the benefits long before the note was signed. There was a community obligation to repay the borrowed monies. *Schweitzer*, 132 Wn.2d 318, 331. Therefore neither the past debt, nor the promissory note promising to pay past debt is a “gift”.

Id. The once legal debt by signing a promissory note based upon moral obligation should stand.

The promissory note was not a gift of community funds. Tammie Frost did not breach her fiduciary duties because she did not use any community assets. She merely promised to pay an old debt incurred by the marital community. Richard Frost argues that the “gift” does confer a benefit to the community. See *Schweitzer*, at 331. In the instant case, the marital community received the benefit of the past legal debt for a down payment on a real estate transaction, among other things. And as noted above, a moral obligation can be consideration to enter a new promise to pay an old debt.

“When either spouse exercises discretion in the community interest, the nonacting spouse is without power to frustrate the other’s acts; good faith rather than judgment is the rule.” *In re Marriage of Chumbley*, 150 Wn.2d 1, 74 P.3d 129 (2003) (citing Harry M. Cross, *The Community Property Law in Washington*, 61 Wash. L. Rev 13, 82-3 (1986)).

Here, Tammie Frost’s good faith on behalf of the Frost marital community is the rule. Tammie Frost bound the marital community. The promissory note is a promise to pay an old debt, it did not take community assets at the time of the signing the promissory note and

transform them into a gratuitous gift, as Richard Frost argues. *In re Marriage of Chumbley*, the stocks did not fit in one of the six exceptions requiring both spouses consent, and therefore were not a “gift”. *Chumbley*, at 9. Here, as well, the promise to pay a past debt does not fall within one of the six enumerated exceptions of RCW 26.16.030 and is therefore not an exception requiring consent from both spouses. *Id.* The Frost marital community is liable for the community debt.

E. Frost marital community benefited from the once legal debt.

In January 2013, Tammie Frost on behalf of the marital community signed a promissory note promising to pay an old debt. The past debt was acquired during the marriage and is a community obligation. *Madsen’s Estate v C.I.R.*, 97 Wn.2d 792, 650 P.2d 196 (1982). The past debt includes money Richard and Tammie Frost, as husband and wife, borrowed from Fred Hacker

There is a presumption that money borrowed by one spouse is for the benefit of the community, but presumption of community benefit may be rebutted by evidence that funds were devoted, without other spouse’s knowledge, to purpose that did not benefit community. *Schweitzer v Schweitzer*, 81 Wn. App. 589, 915 P.2d

575, review granted 130 Wn.2d 1001, 925 P.2d 989, remanded 132 Wn.2d 318, 937 P.2d 1062 (1997).

The presumption that all property acquired during marriage is community property can be overcome only by clear and convincing proof that the transaction falls within the scope of a separate property exception. *Dean v Lehman*, 143 Wn.2d 12, 19-20, 18 P.3d 523 (2001). Richard Frost fails to provide clear and convincing proof, or any evidence for that matter, that the transaction falls within the scope of the separate property exception.

Furthermore, Richard Frost did have knowledge of the debt since the marital community received the monies for a real estate transaction and for other purposes. Again, Richard Frost and the Frost marital community received the material benefits from the Fred Hacker. *Orsborn*, at 173-4. Richard Frost attempts to rebut the presumption of benefit to the marital community by claiming no knowledge of the promissory note signed by his wife. The promissory note was only executory promise after the fact to pay an old debt. The note made no use of community property, only a promise to pay back what the community benefited from years before. *Id.*

Richard Frost provided no evidence that he was unaware of money received from Fred Hacker. The community benefited. Richard Frost is left only with the argument that he had no knowledge of the promissory note promising the community would pay the debt.

F. Marital community is liable to Hacker for Promissory Note.

Further, community liability flows from the signature of Tammie Frost on behalf of the marital community. The joinder requirement of RCW 26.16.030(4) may not be used as a sword to allow the community to disaffirm contracts later found to be unprofitable, and that Richard Frost is estopped to disaffirm the promissory note. *Reid v Cramer*, 24 Wn. App. 742, 748 (1979). This is in accord with the public policy which looks with disfavor upon the effort of a spouse to accept that portion of the other spouse's business decisions which rebound to his or her benefit and repudiate those which are not profitable. *Id.*

The marital community is not discharged from its debt simply by the declaration that Tammie Frost was not the manager of the community. RCW 26.16.030. They were married and Tammie did not file for divorce until November 2013.

V. CONCLUSION

This Court should affirm the trial court's judgment in all particulars and award Hacker the attorney's fees and costs incurred in responding to this appeal.

RESPECTFULLY SUBMITTED this 4th day of September,
2014.

MILLER LAW OFFICE, P.S.



THOMAS F. MILLER WSBA # 20264
JENNIFER M. MODAK WSBA # 42018
2620 RW JOHNSON BLVD SW, SUITE 212
TUMWATER, WA 98512
ATTORNEYS FOR HACKER

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing Respondents Response Brief postage prepaid, via U.S. mail on the 4th day of September 2014, to the Court of Appeals, Division II and following counsel of record at the following addresses

Counsel for Richard Frost

Don W. Taylor
Ben D. Cushman
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

Tammie Frost

Pro Se
PO BOX 571
Rainier, WA 98576

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Jennifer M. Modak