

Court of Appeals No. 49007-2-II.
Superior Court No. No. 15-2-02049-0

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

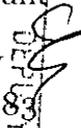
VINCENT L. BADKIN,
a divorced man,
Appellant/Plaintiff,

v.

SAMANTHA J. BADKIN,
a divorced woman,
and
HOWARD M. ALLEN and
NANCY B. ALLEN,
husband and wife, individually and
the marital community composed thereof,
Respondents/Defendants..

REPLY BRIEF OF APPELLANT and
RESPONSE TO CROSS APPEAL

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COURT OF APPEALS
DIVISION II

REPLY BRIEF OF APPELLANT
AND RESPONSE TO CROSS-APPEAL

I.

In their “Respondents’ Brief,” the defendants no longer seem to dispute that the family home in question has been held as a “resulting trust” community property of Vincent and Samantha Badkin, and that it was not distributed as part of the decree of dissolution of the marriage.

Community property not disposed of by the decree of dissolution is held by the parties as **tenants in common**. *Marriage of Monaghan*, 78 Wn. App. 918, 929 (1995). And Vincent filed this court action in the trial court for its partition.

In *Monaghan, supra*, the marriage of Dolores and Robert Monaghan was dissolved on 09-01-1987. The decree divided the parties’ community property equally. However, almost five years later, on 07-17-1992, Dolores moved in the trial court and contended (among others) that the accounts receivable of the business were not included in the order of dissolution of the marriage and that they were *undistributed community property*. The Court of Appeals (Div. 2) held that community property not disposed of by decree is held by the parties as *tenants in common*, cited *In re Marriage of de Carteret*, 26 Wash.App. 907, 908, 615 P.2d 513 (1980); that the “adjudication of rights in property not disposed of in a dissolution decree **requires an independent action for partition**.” *Devine v. Devine*, 42 Wash.App. 740, 743, 711 P.2d 1034 (1985), citing *In re de Carteret*, 26 Wn. App.

907, 908, 615 P.2d 513 (1980).

Therefore, a subsequent petition to partition the property is a continuation of the dissolution action, but the property is **partitioned as though the co-tenants had never been married** and **without regard to the equitable division** of the property in the dissolution. *Seals v. Seals*, 22 Wn.App. 652, 590 P.2d 1301 (Wash.App. 1979), *de Carteret v. de Carteret*, 26 Wn.App. 907, 615 P.2d 513 (Wash.App. Div. 2 1980).

In *Seals, supra*, in 1976, a decree of dissolution was entered against the husband. Within 4 months, Doris Seals (former spouse) filed a partition action, alleging that certain property had not been disclosed in the dissolution action. The trial court in the partition action found that Mr. Seals (former husband) had breached his fiduciary duty to his wife and had willfully and fraudulently failed to disclose to her and to the trial court the existence of community property in the dissolution action. Mrs. Seals was awarded approximately one-half of the property with interest from the date of the dissolution trial, with her attorney's fees, plus her costs and expenses for the 2-week trial.

On appeal, the husband contended, among others, that the dissolution action barred the partition action under the principles of **res judicata or collateral estoppel**. The Court of Appeals, in *Seals*, affirmed the trial court and held:

Property undisposed of by a dissolution action becomes property

held by the former spouses as tenants in common. *Yeats v. Estate of Yeats*, 90 Wash.2d 201, 580 P.2d 617 (1978); *Olsen v. Roberts*, 42 Wash.2d 862, 864, 259 P.2d 418 (1953). In an action to partition a tenancy in common, the subject matter is not identical to the prior dissolution action. Since the property here was undisclosed, the partition action was necessary for its disposition. Under circumstances such as these, the partition action is simply a continuation of the dissolution proceeding.

And the Court awarded additional attorneys fees to Mrs. Seals on appeal under RCW 26.09.140.

II.

Contrary to arguments in Respondents' Brief p.1;

The family home was NOT purchased with the money of the Allens (the trustee - parents of Samantha Badkin). Instead, it was being purchased by Vincent and Samantha, who were making the mortgage payments even though the Allens took out a mortgage in their names for ease of financing. (CP 28).

In addition, the down payment for the house (as part of the purchase price) was made by the parents of Samantha as a gift to Samantha and Vincent. (CP 28 - the Complaint); and (CP 63 – the letter of Samantha to her mother expressing their “thanks for [her parent’s] **generous gift**”). Also, in her letter to their real estate agent, Samantha wrote: “As you know, we have bought a house. Actually, my mother took the loan in just her name, while we make the loan payments and eventually (two years probably) will refinance the loan into Vince and my name.” (CP 64).

Contrary to the argument, the down payment gift was NOT a “promise to make a gift” – it was a gift made outright at the time the title was conveyed to the trustee-parents. The down payment, by definition, was not the full purchase price. The mortgage payments were a part of the full purchase price.

During the “**default**” trial for dissolution of the marriage, Samantha testified but concealed from the court the fact that the family home was their community property. The trial court never considered the house as a separate or community asset – and never referred to it.

Contrary to arguments in Respondents’ Brief at p. 3;

In their motion to dismiss, the defendants specifically asserted that they were relying on the evidence “*upon the allegations in the Complaint . . .*” and argued that the Complaint must have been based on an “oral agreement” and, therefore, they argued, it was time-barred. (CP 10). Now, on appeal, the defendants appear to have abandoned their issue of expiration of the statute of limitations on an oral agreement and argue new issues.

In Respondents’ Brief at p. 6; in “Section V. Argument,” in the alternate to Vincent’s motion to strike: The defendants cite *Carkonen v. Alberts 196 Wash. 575, 578-579, 83 P.2d 899 (1938)*, and quote the text out of context, misquote the facts in the Complaint and misinterpret the law on resulting trusts: **First**; contrary to the argument, the Complaint does NOT alleges that the funds were *intended*

to be a gift. On the contrary, the Complaint states that the down payment WAS a gift, a complete gift, done at that time, which belonged to Vincent and Samantha at the time of the purchase. **Second**; contrary to the argument that “*the intent to make a gift does not create a resulting trust,*” this court action is NOT for an action for an alleged “*promise to make a gift*” or over an “*intent to make a gift*” because the gift was already made and completed at the time of the purchase and Vincent and Samantha took possession of the house, began to live there, began to make the mortgage payments, etc. (Respondents’ Brief at p. 7). **Third**; the “gift,” as a down payment, was not the total purchase price. Otherwise, there would have been no need for the mortgage payments, there would have been no need to have the deed in the names of the parents, and the house would have been an outright gift from the parents to Vincent and Samantha. There would have been no resulting trust. **Fourth**; this court action is NOT for enforcement of an oral agreement. As cited in the opening brief, by definition, an action for a resulting trust seeks only to convey legal title to property that **the claimant already beneficially owns.**” *Dacey v. Taraday*, 196 Cal. App. 4th 962 (2011) (citing *Estate of Yool*, 151 Cal. App. 4th 867, 874-876, 60 Cal. Rptr. 3d 526 (2007)). Therefore, the Complaint was not to enforce a promise to make a gift or to enforce an oral agreement because the resulting trust was already created by operation of the law at the time the deed was conveyed to the trustee-parents – Vincent and

Samantha Badkin as the beneficiaries.

The fact that the total purchase price was not made at the time of the purchase but a mortgage was taken does not defeat the creation of a resulting trust. The defendants quote the text out of context from *Carkonen v. Alberts*, 196 Wash. 575, 578, 83 P.2d 899 (1938) by leaving out the significant factual differences between the two cases:

In the 1938 case, in *Carkonen, supra*, plaintiff verbally employed Alberts, as a real estate agent, to negotiate on his behalf the purchase of certain real property. Carkonen agreed to supply the money with which to pay the purchase price of the land. Carkonen took Alberts to the property. But Alberts purchased the property with his own money and subsequently sold it to a third party at a profit for himself. The court action was instituted to establish a trust for the plaintiff in the proceeds from the sale of the property. In *Carkonen*, the only issue presented was: if a real estate broker, orally employed as an agent to negotiate for his principal the purchase of land, violates the principal's confidence and purchases the land with his own money and thereafter sells the land at a profit, may a trust be established for the principal's benefit in the proceeds received by such agent from his sale of the land? In *Carkonen*, the court opined:

That situation [a resulting trust], however, is not presented by the admitted facts before us. If, pursuant to an oral agreement, respondents purchased the land for appellant with funds supplied by appellant, or if, pursuant to an oral agreement, respondents advanced the purchase price **as a loan to appellant** to secure

the payment of which respondents took legal title to the property in their name, in either case such purchase would give rise **to a resulting trust.**

...
or that the principal incur, at that time, an absolute obligation to pay as part of the original consideration of the purchase.
(Id 579 – emphasis added).

The *Carkonen* opinion, in 1938, provides at length very helpful examples of different trust formations and various court opinions from different jurisdictions but does not deal with purchases made on credit or with mortgage payments. The purchase of the family home in this case before the court was made with credit and mortgage payments. Therefore, in pages 25 and 26 of the Opening Brief, Vincent cited to *Restatement (Second) of Trusts § 456, Purchase on Credit*, where the applicable rule is stated:

Where a transfer of property is made to one person, and another person at the time of the transfer undertakes an obligation to pay the purchase price, a resulting trust arises in favor of the latter person, unless he manifests an intention that no resulting trust should arise.

...

d. Purchase **on credit of transferee**, purchaser agreeing to exonerate him. The rule stated in this Section is applicable where the **transferee undertakes an obligation to the vendor to pay the purchase price**, but **another person at the time of the purchase agrees with the transferee to pay** the purchase price to the vendor. The situation is similar to that in which the transferee pays the purchase **price in cash by way of loan** to the other person. See § 448. The difference is that the transferee instead of lending cash is **lending his credit. The real purchaser in each case is the borrower.** Restatement (Second) of Trusts § 456, Purchase on Credit. (CP 53 l. 11-23) and (CP 54 l.1-2). (emphasis added).

Similarly, in his Opening Brief, p. 26-27, Vincent cited court opinions dealing with purchases made on credit and mortgages:

This rule was recently cited by the Vermont Supreme Court in *Gregoire v. Gregoire*, 987 A.2d 909 (Vt. 2009), where "a classic case of a resulting trust" for real property was found. *Id.* at 912. Although the trustee had signed the mortgage, "there was no intent or expectation that he would ever make the payments on the notes. That obligation was assumed entirely by [the beneficiary of the trust]" . . . In such circumstances, **"the trustee's theoretical financial obligation does not defeat the resulting trust."** *Id.* (citing a number of authorities, including Restatement (Second) of Trusts § 456). "[T]he obligation of the trustee is the equivalent of a loan of credit by the grantee for the benefit of persons paying for the purchase." . . . (internal quotes omitted). "That loan may affect the obligations between the parties, but does not prevent the application of a resulting trust." *Id.* (CP 54 l. 10-17). *emphasis added.* (Opening Brief, pages 26-27).

This is the situation applicable in his case. Yet, the defendants, in their response brief, are silent on these legal authorities as to why and how these issues should be decided with their CR12(b)(6) motion to dismiss -- without a full discovery and briefing.

Contrary to arguments in Respondents' Brief, at p. 8; the Complaint does not ask to enforce a promise to make a gift, but states that the down payment was a gift. The Complaint does NOT state that the down payment was "meant to be a gift" because it states that it was a gift made at that time and the defendants must accept the facts in the Complaint as true for their motion to dismiss.

In addition, the "thank you letter" from Samantha to her mother expressing their "*thanks for [her parent's] generous gift*" shows that

the down payment gift was NOT a promise to make a gift but it was a completed gift. (CP 63). Also, in her letter to their real estate agent, Samantha wrote: “*As you know, we have bought a house. Actually, my mother took the loan in just her name, while we make the loan payments and eventually (two years probably) will refinance the loan into Vince and my name.*” (CP 64).

Contrary to the arguments, the Complaint is not to enforce an oral agreement. The resulting trust was already created under the facts of the case by operation of the law. This court action now seeks only to convey legal title to the property that Vincent and Samantha **already beneficially own.**” *Dacey v. Taraday*, 196 Cal. App. 4th 962 (2011) (citing *Estate of Yool*, 151 Cal. App. 4th 867, 874-876, 60 Cal. Rptr. 3d 526 (2007))

In Respondents’ Brief, at page 9; in Part “B. Repudiation of a resulting trust,” the defendants’ arguments on “repudiation” of the resulting trust are beyond the scope of their CR 12(b)(6) motion to dismiss, (based on expiration of a 3-year statute of limitations of their own alleged oral agreement) and are frivolous. These arguments should be stricken. The defendants seem to argue adverse possession on real estate, for which the statute of limitations is 10 years.

These arguments are frivolous especially considering the fact that Samantha, as Vincent’s former spouse and one of the two beneficiaries of the resulting trust, still lives there in their former family home in

Kitsap County while the trustee-parents still live in Oregon. No facts exist in the Complaint to justify these speculations, which were not a part of their original motion to dismiss. The defendants have a heavy burden of demonstrating “**beyond doubt**” that Vincent can prove no set of facts, even hypothetical facts conceivably raised by the Complaint, that would justify relief in their CR 12(b)(6) motion. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *Worthington v. WestNET*, 182 Wn.2d 500, 505–506, 341 P.3d 995 (2015). Moreover, there is no evidence of any repudiation of the trust in the Complaint or anywhere else in the record. The defendants’ argument has no merit and they have not met their burden for their motion to dismiss.

In Respondents’ Brief, at page 10; The argument that “*the action by the Allens which repudiated the trust was simply treating the property as their own— holding it in their own names as their own asset*” is not based on any facts and also frivolous. There is no evidence that the Allens (the trustees) ever lived in the subject home. Vincent and Samantha were the only ones living there and Samantha has been the only person who has been living there since the separation. There is no evidence that the Allens treated the home as their own – other than the fact that the mortgage and the deed are still in their names. At no time was there any repudiation from the parent-trustees nor from anyone else. The defendants’ argument of repudiation is frivolous.

Similarly, there is no factual or legal basis for the defendants to

argue that the “*action by the Allens which repudiated the trust was simply treating the property as their own—holding it in their own names as their own asset.*” Other than Samantha (former spouse of Vincent) living there in the house, there is no evidence that the Allens ever lived there, paid any mortgage, or the property taxes, etc. Again, the argument is frivolous. (Respondents’ Brief, at page 10).

Interestingly, (in their page 10), the defendants’ use of certain words that the “*case law **does not appear to require, nor does it seem a necessary limitation**, that the notice be communicated directly by the trustee*” already admit that there is no established case law to help the defendants, which precludes granting their motion to dismiss.

ATTORNEY’S FEES

The court should deny the defendants’ request for costs and attorney’s fees and award Vincent the costs and attorney’s fees for the defendants’ frivolous arguments on the merits of the case as well as for their arguments for award of attorney’s fees to them, in violations of CR 11. (Respondents’ Brief, p. 13-16; in Section D. Attorney’s Fees).

Many courts have cautioned that a frivolous motion for sanctions is, in itself, sanctionable. See, e.g., *Foy v. First National Bank*, 868 F.2d 251, 258 (7th Cir. 1989), where the court sanctioned the appellee for his frivolous argument that the appellant bank should be sanctioned for filing appeal, because it was “*obvious that the appeal [was] not*

frivolous" and the court directed Foy to pay the attorney's fees reasonably incurred by the bank in defending against the request for sanctions.

As noted above, in *Seals v. Seals*, 22 Wn.App. 652, 590 P.2d 1301 (Wash.App. 1979), the trial court as well as the court of appeals awarded attorneys fees to the party resisting the partition of the community property which had not been brought before the trial court at the time the decree of dissolution was entered.

Below is a summary of the defendants's conduct in this case, which justifies awarding CR 11 sanctions against the defendants and their attorney: In response to the facts in the Complaint for a resulting trust, the defendants moved with their CR 12(b)(6) motion to dismiss, without filing an answer or any declarations, and alleged in their motion that the Complaint must have been based on an oral agreement barred by 3-years statute of limitations. In their motion, "*defendant further requests fees and costs for having to defend a meritless suit.*" (CP 8).

And the defendants continued:

*"this Motion to Dismiss relies upon the allegations in the Complaint filed herein" . . . "Any alleged agreement between the parties out of which these claims arise must have been oral. As such, the three-year statute of limitations in RCW 4.16.080 applies." (CP 10) . . . "Because there is **absolutely no legal grounds upon** which this action could have been maintained, Defendants' **fees and costs should be paid by Plaintiff.**" (CP 11). (emphasis added).*

In response, Vincent provided a reasonably comprehensive but

condensed review of the applicable law, noted that the statute of limitations for a resulting trust does not begin to run unless and until the trustee repudiates the trust, and asked for his own CR 11 sanctions and attorney's fees because the defendants' motion was filed without sufficient research for the applicable law and without relying on the facts of the Complaint. (CP 13-16).

In their reply, the defendants finally admitted that in the cited case *"a trust was formed, and the statute of limitations did not begin running until [trustee] repudiated that trust.* (CP 18, l.21-22). However, the defendants then changed their arguments as to why the "repudiation" requirement for statute of limitation to run would be *"clearly absurd, and runs counter to the principles of limitation on actions."* (CP 17, l. 21-22).

Then, the defendants again changed their arguments and continued on and on as to why a resulting trust could not have been formed and, again, how Vincent must have received a notice of a repudiation of the resulting trust — all outside of scope of their CR 12(b)(6) motion for a 3-year statute of limitations based on their own speculation that the Complaint must have been based on an oral agreement. (CP 19-21). Vincent moved to strike defendants' reply for the reasons stated above but the trial court made no ruling on the motion and asked for proposed orders. (CP 23-24; and CP 22).

The trial court apparently signed the defendants' proposed

“findings of fact, conclusions of law” and the order, but the order provided no facts and no applicable conclusions of law upon which the order was based. Yet the order stated: “*There is no actionable harm plead in Plaintiff’s Complaint that is based on any action or failure to act that occurred within three years of filing or serving this Complaint . . . Accordingly, there is no basis in law for Plaintiff’s Complaint to proceed.*” (CP 25).

In his motion for reconsideration, Vincent provided a reasonably review of the applicable law (and the facts in the Complaint). (CP 32-43). The trial court asked for a response from the defendants. In response, the defendants claimed they were taking the facts in the Complaint as true. Yet they cited the “facts” of the Complaint by omitting all of the essential facts for a resulting trust and inserted their own “facts” not in the facts of the Complaint. (CP 45). The defendants expanded their arguments and speculations well outside the facts of the Complaint and beyond the scope of their CR 12(b)(6) motion to dismiss and cited *Carkonen, supra*, by quoting out of context. (CP 46-50).

In his Reply, Vincent noted that the 1938 *Carkonen* case did not deal with purchases on credit and mortgage payments, and cited “*Restatement (Second) of Trusts § 456, Purchase on Credit*” and *Gregoire v. Gregoire, 987 A.2d 909 (Vt. 2009)*, as authority. Vincent also quoted from the letter written by Samantha to her mother expressing their “*thanks for [her parent’s] **generous gift.***” (CP 63);

and also quoted from her letter to their real estate agent, where Samantha wrote: “*As you know, we have bought a house. Actually, my mother took the loan in just her name, while we make the loan payments and eventually (two years probably) will refinance the loan into Vince and my name.*” (CP 64).

In his Opening Brief in the Court of Appals, Vincent again cited the legal authorities for resulting trusts for purchases on credit and mortgage payments, as cited above “*Restatement (Second) of Trusts § 456, Purchase on Credit*” and *Gregoire v. Gregoire, 987 A.2d 909 (Vt. 2009)*. Yet the defendants remained silent on these legal authorities to help them on their CR12(b)(6) motion to dismiss, which the defendants filed without a full discovery and briefing – with their misunderstanding that the Complaint was for enforcement of an oral agreement. Upon Vincent’s response, the defendants changed their arguments repeatedly while repeatedly arguing that Vincent’s Complaint was without merit.

The defendants’s motion to dismiss, alone, caused almost a year of delay in the proceedings. Vincent and his attorney had to do all this work in the trial court as well as in the Court of Appeals, all because of the defendants’ CR 12(b) motion to dismiss, filed without even providing an Answer or any declarations and without proper research. The Complaint was filed on 10-06-2015, for a ruling for a “resulting trust” in the family home and for partitioning of the community property, while Samantha Badkin is still living there in the same house

and while the defendants did not even file an Answer or any declarations.

CONCLUSION

For the reasons stated above and in the opening brief, the Court of Appeals should reverse the orders of the trial court, remand for partitioning of the house, deny the defendants' request for costs and attorney's fees and award costs and attorneys fees to Vincent Badkin, the appellant.

Respectfully submitted on this 21st day of September, 2016



Ahmet Chabuk (WSBA No. 22543)
Attorney for Appellant/Cross Defendant

DECLARATION OF SERVICE:

I certify that on 21st day of September, 2016, I mailed a copy of this document to Mr. Ronald D. Richmond, Attorney at Law, 1521 Piperberry Way SE #135 Port Orchard WA 98366.

