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Court of Appeals
Division III
State of Washington

NO. 302288

WASHINGTON STATE COURT OF APPEALS
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In Re the Marriage of

JUDY RUTH SWANSON

Respondent

v.

CHESTER JAMES MORRISON

Appellant

BRIEF OF RESPONDENT

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I. INTRODUCTION

Judy Swanson (hereinafter referred to as "Judy") and Chester Morrison (hereinafter referred to as "Chester") were married on or about April 25, 1987 in Ellensburg Washington. They have no children from the marriage. The parties separated on or about July 14, 2010, after 23 years of marriage. Both Chester and Judy brought separate property into the marriage. After they separated they entered into and filed a Separation Contract which disposed of their separate and community property.

The Separation Contract neglected to include over one hundred head of cattle which were the property of Chester. Judy moved to amend the Separation Contract to include the cattle and give her an equitable lien for one half the value of the cattle. Chester objected and a trial followed.

The Trial Court found that the cattle were Chester's separate property, but that Judy had an equitable lien in the cattle for one half of the cattle's value.

II. ASSIGNMENTS OF ERROR/ISSUES ON APPEAL

A. ASSIGNMENTS OF ERROR.

1. The record shows that the Trial Court did not abuse its discretion in awarding Judy an equitable lien in Chester's personal property. Any labor by either spouse expended during the marriage to increase the value of separate property is community property. *Lindemann v. Lindemann*, 92 Wn. App. 64, 72, 960 P.2d 966 (1998). Chester provided the labor that increased the value of the herd during the 23 year marriage. That labor was community property and therefore the community is entitled to a lien on the increase of the value of the cattle.

B. ISSUES ON APPEAL

1. Did the Trial Court abuse its discretion by awarding Judy an equitable lien for one half the value of the cattle? Any labor by either spouse expended during the marriage to increase the value of separate property is community property. *Lindemann v. Lindemann*, 92 Wn. App. 64, 72, 960 P.2d 966 (1998). Chester provided the labor that increased the value of the herd during the 23 year marriage. That labor was community property and therefore the community is entitled to a lien on the increase of the value of the cattle.

III. COUNTER STATEMENT OF THE CASE

Judy Swanson and Chester Morrison were married on or about April 25, 1987 in Ellensburg Washington. (CP at 105). They have no children from the marriage. (CP at 105-106). The parties separated on or about July 14, 2010, after 23 years of marriage. (CP at 105). Both Chester and Judy brought separate property into the marriage. (CP at 106).

During the marriage Judy worked and took care of the house and domestic responsibilities so that Chester could operate his ranch and otherwise take care of the cattle. (RP at 41, 44; CP at 106-107).

On August 23, 2010, Chester and Judy entered into a Separation Contract that characterized and divided the assets of the marriage. (CP at 11-25). The Separation Contract stated in pertinent part:

“Each party hereby warrants to the other the he or she is not now possessed of any property of any kind or description whatsoever, other than as set forth in Articles XIV and XV . . . If it shall hereafter be determined by a court of competent jurisdiction that either Husband or Wife is now possessed of any property not set forth herein, or that Husband or Wife has made without the consent or knowledge of the other, any gifts or transfers of community property

other than as set forth herein, each of the parties hereto covenants and agrees to pay the other, upon demand, an amount equal to one-half of the fair market value of the property.”

(CP at 13). At the time of the parties' separation, Chester owned 105 cows and 90 calves and 4 bulls. (RP at 10, 25). The cattle were not listed in the Separation Contract. (CP at 11-25).

Although the brand that the cattle are under is registered under both Chester and his brother Tom Morrison's names, Chester is the only one who contributes to the cattle operation. (RP at 14, CP at 106). Tom has not received any income from the cattle operation since 1981; he has contributed only sporadic and casual effort to the cattle operation since 1981. (RP at 14, 50, 52). Neither Chester nor Tom has ever filed a Partnership return with the Internal Revenue Service. (RP at pg. 14, lines 4-10). However, Chester claimed a loss on his personal tax returns for the cattle operation. (Exhibit 21).

On December 6, 2010, Judy filed a motion to amend the Separation Contract to include the cattle and give Judy a lien for half of the value of the cattle pursuant to the original Separation

Contract. (CP at 36-38). A trial was held on June 24, 2011 with regard to this issue. (CP at 100).

The Trial Court issued a memorandum decision finding that the cattle were Chester's separate property; they had a value of \$111,750, and that Judy had a lien on the cattle in the amount of \$55,375. (CP at 108-109).

IV. ARGUMENT

A. Standard of Review

Review of a Trial Court's findings of fact is limited to determining whether the findings are supported by substantial evidence since "the constitution does not authorize the court to substitute its findings for that of the trial court". *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183, 186 (1959). Substantial evidence means "evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise". *In re Marriage of Vander Veen*, 62 Wn. App. 861, 865, 815 P.2d 843 (1991). *Accord, Magnuson v. Magnuson*, 141 Wn. App. 347, 351, 353, 170 P.3d 65 (Div. III, 2007), *rev. den.*, 163 Wn.2d 1050 (2008).

Property divisions under *RCW 26.09.080* are reviewed for an abuse of discretion. *In re Marriage of Schweitzer*, 81 Wn. App. 589, 595-96, 915 P.2d 575, *affirmed*, 132 Wn.2d 318 (1997) (reversing property award).

A Trial Court abuses its discretion when its decision is manifestly unreasonable; or is exercised or based on untenable grounds or reasons concerning the purposes of the Trial Court's discretion; or for no reason, since then there is no exercise of discretion. *Marriage of Kovacs*, 121 Wn.2d 795, 801, 854, P.2d 629 (1993)(reversing for abuse of discretion). *Accord, Coggle v. Snow*, 56 Wn. App. 499, 505-07, 784 P.2d. 554 (1990) (vacating discretionary decision); *In re the Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).¹ Abuse of discretion thus can be boiled down to the following: a "court acts on untenable grounds if its factual findings are unsupported by the record; the court acts for untenable reasons if it has used an incorrect standard or the facts do not meet the requirements of the correct standard; and the court

¹ "A Court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."

acts unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard". *In re Marriage of Wicklund*, 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996)(reversing trial court). Justice Kulik recently re-emphasized that "an abuse of discretion is found if the Trial Court applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P. 3d 1251 (2007) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn. 2d 677, 684, 132 P.3d 115 (2006))." *Magnuson v. Magnuson, supra*, 141 Wn. App. at 353 ¶15 (Kulik, J., dissenting).

In short, a Trial Court must exercise its discretion in a principled fashion based on the correct legal standard and supported by the record or admitted facts. The party who challenges a maintenance award or a property distribution must demonstrate that the trial court manifestly abused its discretion. *In re Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984).

B. Property Division Principles

On a substantive level, the division of the parties' property and liabilities is governed by RCW 26.09.080.

In a proceeding for dissolution of marriage . . . , the court shall, without regard to misconduct, make such disposition of the property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) nature and extent of the community property;
- (2) nature and extent of the separate property;
- (3) duration of the marriage or domestic partnership; and
- (4) the economic circumstances of each spouse or domestic partner at the time of the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

“The trial court’s paramount concern when distributing property in a dissolution action is the economic condition in which the decree leaves the parties.” *In re Marriage of Gillespie*, Wn. App. 390, 948 P.2d 1338 (1997). The court may consider the health and ages of the parties, their prospects for future earnings, their education and employment histories, *their necessities and financial abilities*, their foreseeable future acquisitions and obligations, and *whether ownership of the property is attributable to the inheritance or efforts of one or both spouses*. *Gillespie*, 89 Wn. App. at 399, 948 P.2d at 1343 (*emphasis added*).

1. The Trial Court Correctly Awarded Judy An Equitable Lien On The Cattle

Upon dissolution of a marriage all property both separate and community is before the court for distribution. RCW 26.09.080. Generally any increase in value of separate property is also separate in nature. *In re Marriage of Elam*, 97 Wn.2d 811, 650 P.2d 213 (1982). However, that presumption is rebutted if a spouse can show that the increase was attributable to community labor or funds. *Id.* at 816. A marital community is entitled to the fruits of all labor performed by either party to the relationship because each spouse is a servant of the community. *Lindemann v. Lindemann*, 92 Wn. App. 64, 72, 960 P.2d 966 (1998)(citing *Brown v. Brown*, 100 Wn.2d 729, 737, 675 P.2d 1207(1984).

In *Lindemann supra*, the Court of Appeals used these same principles in the context of a meretricious relationship. The “husband” in that case had started an auto body shop prior to entering a relationship with the “wife.” *Id.* at 68. The wife did not do any work for the body shop during the 10 years they were together. *Id.* The husband performed all the work at the body shop and over the course of the 10 year relationship the business increased in

value \$218, 725.50. *Id.* at 68, 71. The Court awarded the wife an equitable lien in the amount of one half of the value of the business because the increase was the product of community labor. *Id.* at 73-74. It reasoned that all labor performed by either the husband or the wife was community property even though the labor was performed on a party's separate property; therefore any increase in value was community property. *Id.* at 72.

Here, there is no dispute that the cattle were Chester's separate property. However, the labor performed by Chester on the cattle operation is community property. *See Lindemann*, 92 Wn. App. at 72, 960 P.2d 966. The community is entitled to reimbursement for the value of one member's labor. *Id.*

The testimony at trial was that at separation Chester owned 4 bulls, 105 cows and 90 calves. (RP at 10, 25). No evidence was offered as to how many cattle Chester owned prior to the marriage. Chester also testified as to the value of each type of cow. (RP 24-25). From that testimony, the Trial Court correctly determined that the cattle operation had increased in value in the amount of \$111,750.00. (CP at 108). The Trial Court also correctly awarded

Judy an equitable lien in the cattle as a result of the community labor put into the cattle operation.

Appellant contends that Judy should not be awarded the equitable lien but if she is then it should only be for a quarter of the value of the cattle because his brother, Tom Morrison has a one half interest in the herd. (Brief of Petitioner at 11). However, the preponderance of the evidence shows that Tom did not have any interest in the cattle at the time that Judy and Chester separated. The testimony at trial was that Tom did not provide money or labor in support of the cattle operation since it started in 1981; Chester was the only one who worked the cattle. (RP at 14, 50, 52). Tom never received a salary or any kind of compensation from the cattle operation. (RP at 14, 50, 52). Chester was the only one who received any money from the cattle. (RP at 14, 50, 52). Although Chester and Tom said that the cattle operation was a partnership between them, no partnership tax returns were ever filed with the IRS. (RP at pg. 14, lines 4-10). Chester used the cattle operation as a deduction on his personal tax return. (Exhibit 21). The Trial Court correctly determined that the cattle were Chester's separate

property and that Judy was entitled to an equitable lien for half of the value of the cattle.

The Appellant also argues that the lien placed on the cattle should be voided due to impossibility/impracticality of enforcing the lien and that enforcement of the lien would unjustly enrich Mrs. Swanson. As discussed below neither of these theories is supported by statute or case law nor do they apply in this case.

2. Impossibility/impracticality

Appellant mistakenly applies the theory of impossibility/impracticality to try and void the Separation Agreement and the Dissolution Decree. Appellant claims that because Judy garnished his bank accounts he cannot pay on the lien and therefore the lien should not be enforced. He cites *Mickens v. Mickens*, 62 Wn.2d 876, 385 P.2d 14 (1963) to support his arguments. However, *Mickens* is not analogous to the present case and does not support his claim.

In *Mickens*, the husband and wife entered into a Separation Agreement which was later embodied in the divorce decree. 62 Wn.2d 876, 385 P.2d 14. The Separation Agreement stated that husband was to pay to wife the community equity in the marital

home once it was sold and that husband was to continue to make payments on the house until it was sold. *Id.* at 877. Although the house was listed, it never sold and the husband quit making payments on the house. *Id.* at 878. The house was foreclosed on and the equity in the home was lost. *Id.*

The Supreme Court held that due to the actions of the husband, compliance with the property settlement agreement and decree became impossible. *Id.* However, the Court found that the husband was still required to pay the wife an amount equal to the community equity in the home even though the home had been foreclosed. *Id.* at 883.

Mickens supra, does not apply to the present case. Neither party has taken any action that would make enforcement of the Separation Agreement or the decree impossible. Chester still has possession of the cattle and continues to operate the cattle operation. There was no evidence provided that other than the equitable lien, the cattle were encumbered. There is no evidence of anything that would prevent Chester from either selling cattle to pay the lien or to continue to run the cattle operation and pay monthly payments as suggested by the Trial Court. (CP at 109).

3. Unjust Enrichment.

Under the Rules of Appellate Procedure, “an appellant’s brief must include arguments supporting the issues presented for review and citations to legal authority.” *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *review denied*, 155 Wash.2d 1015, 124 P.3d 304 (2005); *see* RAP 10.3(a)(6). Without supporting argument or authority, “an appellant waives an assignment of error,” *Bercier*, 127 Wn. App. at 824, 103 P.3d 232 (citing *Smith v. King*, 106 Wn.2d 443, 451–52, 722 P.2d 796 (1986)); and the Court need not consider arguments that are not developed in the briefs for which a party has not cited authority.” *Bercier*, 127 Wn. App. at 824, 103 P.3d 232 (citing *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990)).

Appellant does not cite any legal authority to support his arguments regarding his theory of unjust enrichment; therefore the Court should not consider his arguments. If the Court does entertain his unjust enrichment argument, it should find that the argument is without merit for the following reasons.

The equitable principle of unjust enrichment is based on the idea that one should not be “unjustly enriched at the expense of

another.” *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473, 482 (2007). “A person has been unjustly enriched when he has profited or enriched himself at the expense of another contrary to equity.” *Id.* Enrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties to the transaction. *Id.* In the context of dissolutions, property acquired during the marriage is before the court for distribution so that one party is not unjustly enriched. See *In re Marriage of Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000).

Here the marriage was a long term marriage. During the 23 year marriage, Chester performed work which increased the value of the cattle business. As discussed above Chester’s labor is community property. Judy would not be unjustly enriched by enforcement of the equitable lien. In fact, under the circumstances, if the equitable lien is not enforced Chester would be unjustly enriched. Chester would have received 23 years of community labor without having to pay for it. He would profit at the expense of the community and more particularly at the expense of Judy.

4. ***Separation Contract***

When parties to a separation contract dispute its meaning, courts must ascertain and effectuate their intent at the time they formed the agreement. *In re Marriage of Boisen*, 87 Wn. App. 912, 920, 943 P.2d 682 (1997). Courts accomplish this by “ ‘viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’ ” *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wash.2d 250, 254, 510 P.2d 221 (1973)). It is the court’s duty to read a contract or decree as a whole and in such a manner that every term is given effect. *Stokes v. Polley*, 145 Wn.2d 341, 346-47, 37 P.3d 1211 (2001) (dissolution decree); *City of Woodinville v. Northshore United Church of Christ*, 139 Wn. App. 639, 651, 162 P.3d 427 (2007).

Appellant contends that it was the parties’ intent to leave the cattle out of the Separation Contract. (App. Br. at 12). Although, Appellant does not cite to any authority supporting his contention, he does basis his argument on the fact that the cattle were not

included in the Separation Contract and therefore were not meant to be included. (App. Br. at 12-13). However, this argument ignores the plain language of the Separation Contract.

The Separation Contract stated in pertinent part:

“Each party hereby warrants to the other the he or she is not now possessed of any property of any kind or description whatsoever, other than as set forth in Articles XIV and XV . . . If it shall hereafter be determined by a court of competent jurisdiction that either Husband or Wife is now possessed of any property not set forth herein, or that Husband or Wife has made without the consent or knowledge of the other, any gifts or transfers of community property other than as set forth herein, each of the parties hereto covenants and agrees to pay the other, upon demand, an amount equal to one-half of the fair market value of the property.”

(CP at 13). The Separation Contract clearly and unambiguously states that all property of whatever kind is meant to be included. This is evidenced by the fact that Ms. Swanson took legal action to make sure that the cattle were included. Appellant's arguments are unfounded.

The Contract also unambiguously states that if the party controlling the property does not include it in the Contract, then they are obligated to pay to the other party one half of its fair market

value. (CP at 13). Here, Appellant did not include the cattle in the Contract even though he had control of them. He was therefore liable to Ms. Swanson for one half of their value pursuant to the Separation Contract.

V. CONCLUSION

The Trial Court did not abuse its discretion in awarding an equitable lien to Judy for half of the value of the cattle. The Trial Court did not abuse its discretion in finding that the cattle were the sole property of Chester Morrison.

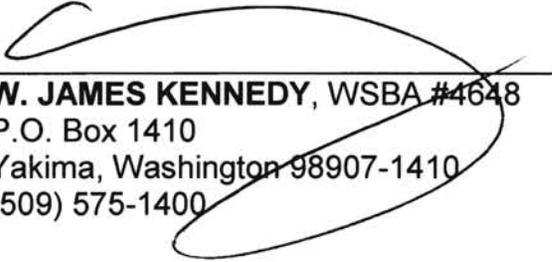
The evidence showed that Chester was the sole owner of the cattle. He was the only one who worked the cattle; he was the only one who received any compensation for working the cattle, and he was the only one who reported the cattle operation on his tax returns.

The work that he performed during the 23 year marriage was community property. Therefore any increase in value to the cattle operation due to his labor was also community property. The Trial Court's award of an equitable lien is supported by both the facts and law.

Further, pursuant to the Separation Contract all property of any kind was to be included in the contract. Mr. Morrison did not include the cattle in the Contract. He was therefore obligated to pay Ms. Swanson one of their value. The Trial Court's ruling is in accordance with those provisions of the Separation Contract. Respondent, Judy Swanson, respectfully requests that the Court uphold the equitable lien as awarded by the Trial Court.

Respectfully submitted this 12 of June, 2012.

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