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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30662-3-III

In re the Marriage Of:

LIUBOV A. SCHMIDT, Appellant

and

KENNETH R. SCHMIDT, Respondent.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

Respondent contends that the trial court's judgment awarding Mr. Schmidt nearly \$1.7 million in assets and \$25,000.00 to Mrs. Schmidt should be upheld notwithstanding that:

- Mr. Schmidt failed to trace the loans as his separate property;
- The trial court failed to identify any assets as community property, while awarding Mrs. Schmidt \$25,000.00 for her share of the community property; and
- The trial court's division and maintenance award left the parties in a position that was grossly disparate to each other, and to their respective needs and resources.

Respondent argues that the evidence was sufficient to establish the entire lending enterprise, including all of the loans that were made during the time of the marriage, to be Respondent's separate property based upon the testimony of Respondent and Ed Anderson. There are two problems with this argument. First, the Respondent's burden in establishing the enterprise as his separate property is to present clear and convincing evidence tracing the loans to his separate, premarital funds, with evidence more substantial than mere self-serving claims and hearsay. *Pollock v. Pollock*, 7 Wn. App. 394, 400, 499 P.2d 231 (1972). For example, in

Marriage of Skarbek, 100 Wn. App. 444, 449, 997 P.2d 447 (2000), the husband was able to trace as his separate property funds deposited into a joint bank account “by exhaustively documenting the details of the bank account activity.” Here, by contrast, Respondent did not even attempt to trace the loans. Astonishingly, he could not account for large transactions involving tens and hundreds of thousands of dollars reported in his accounts. RP 620, 626, 630, 631-32, 634, 636. He admitted that the household and business funds were commingled. RP 621-25, 626. As stated in *Pollock*, “Separate funds used for such a purpose should be traced with some degree of particularity.” 7 Wn. App. at 400. Respondent entirely failed to meet this burden, particularly compared to the detailed analysis found to comprise adequate proof of tracing in *Skarbek*.

Second, in considering whether Respondent established the business to be a separate, passive enterprise, the court must consider *all* of the evidence before it in determining whether clear and convincing evidence establishes its separate character. Here, the totality of the evidence established:

- Respondent reported the enterprise as an active business, rather than a passive investment, for tax purposes; Ex. 5 Tab 1, RP 304-06;
- Respondent claimed 11,000 miles in business travel for the enterprise, amounting to approximately 220-440 hours in travel time alone; Ex. 5, Tab 1, RP 307-08;
- Respondent claimed a deduction for the business use of his home; Ex. 5, Tab 1; and
- Respondent spent sufficient time and personal effort on the lending enterprise to produce all of the documentation, accounting, and correspondence that comprises the entirety of Exhibit 4.

“The rule is well settled that, where the separate property in question is an unincorporated business with which personal services ostensibly belonging to the community have been combined, all of the income or increase will be considered as community property in the absence of a contemporaneous segregation of the income between the community and separate estates.” *In re Smith's Estate*, 73 Wn.2d 629, 630-31, 440 P.2d 149 (1968). Here, the trial court effectively sought to avoid operation of the “contemporaneous segregation” rule by declining to

consider Schmidt Enterprises to be a business at all, based solely on the self-serving testimony of Kenneth Schmidt and his business associate that he spent very little time on the enterprise. But in reaching this conclusion, the trial court disregarded the Respondent's admissions and the objective documentary evidence of Respondent's activities in maintaining the enterprise. Considering *all* the evidence before the court, clear and convincing evidence does not support the conclusion that Schmidt Enterprises was not an active business operation, nor was the evidence sufficient to support the trial court's legal conclusion that Respondent's activities were so minimal or insubstantial as to render *Pollock* and the contemporaneous segregation rule inapplicable.

As an active business, the "contemporaneous segregation" rule applied to Schmidt Enterprises. There was no evidence or testimony that Mr. Schmidt allocated any portion of the business income to the community estate. Consequently, the entire income or increase in the business was community property, and the trial court's categorization of Schmidt Enterprises as Respondent's separate property was legally erroneous.

Lastly, with respect to the characterization of the estate assets as community or separate, Respondents fail to explain how the trial court's

award of \$25,000.00 reflecting Appellant's share of the community property can be reconciled with the trial court's failure to find any specific community assets having that value. The preliminary question in dividing a marital estate is whether the property is community or separate in nature. *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). With respect to the property award to Appellant, the trial court's ruling is both contradictory and poorly reasoned. On the one hand, the trial court declined to find that there were any community assets at all; then it observed that the loans that it felt "might" be community property had no value; then it awarded Appellant \$25,000.00 for her share of the community property that it did not find existed. CP 85-87. The inability to explain and account for the award that *was* made is indicative of the convoluted and erroneous reasoning applied to the property characterizations in this case.

Concerning the reasonableness of the division and maintenance awards, Respondent requests that this court find no abuse of discretion in the trial court's decision to make no provision for the educational and medical needs of a fifty year-old Russian immigrant with a documented maximum income of \$15,794.00, while awarding Respondent, an eighty year-old retiree, assets worth more than \$1.7 million and a monthly income greatly in excess of his own stated needs. "An award of

maintenance that is not based on a fair consideration of the statutory factors constitutes an abuse of discretion.” *In re Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996). There is no indication that the trial court considered the existing liabilities arising from Mrs. Schmidt’s dental treatments or the additional \$10,880.00 in dental work that it would cost to finish repairing her teeth. Mrs. Schmidt respectfully submits that a maintenance award failing to provide for any means of earning more than poverty-level wages or for undisputed medical expenses is not a fair consideration of the statutory factors, particularly when the Respondent, by his own admission, has far more resources than he needs.

II. ATTORNEY FEES

Respondent requests an award of attorney fees pursuant to RAP 18.1, citing no legal authority in support of its request and suggesting that punitive grounds exist for such an award due to Mrs. Schmidt’s decision to vigorously assert her rights. Citation to authority advising of the grounds for the award and appropriate argument are required to grant fees under RAP 18.1. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 420, 157 P.3d 431 (2007). Absent any citation to authority for such an award, the request should be denied.

Moreover, Respondent cites to no authority to support the position that an award of fees in a dissolution would be appropriate absent consideration of the financial positions of the spouses and balancing the needs of the requesting spouse against the ability of the other spouse to pay. *In re Marriage of Moody*, 137 Wn.2d 979, 994, 976 P.2d 1240 (1999). Respondent provides no facts or argument to suggest that he lacks adequate resources to pay his own fees, or that Mrs. Schmidt has the ability to pay them. The request is groundless and should be denied.

III. CONCLUSION

The primary issue in this case concerns the Respondent's burden of proof to establish, by clear and convincing evidence, that the Schmidt Enterprises lending business was his separate property, and the quantum of proof required for sufficient tracing. The trial court concluded that Respondent spent such a minimal amount of time in operating the business that it was not an active business enterprise subject to the contemporaneous segregation rule set forth in *Pollock*. But this conclusion cannot be supported in light of the fact that Respondent himself treated his business as an active enterprise to the IRS, took business deductions for a substantial amount of travel related to the

enterprise, and invested sufficient time and energy to creating the documents comprising Exhibit 4 to monitor and promote his lending business.

Furthermore, the property division and maintenance award was an abuse of discretion because, considering all of the evidence before the court, the conclusion that a fifty year-old immigrant should be required to subsist at near poverty level while her eighty year-old former spouse should be a millionaire enriched from his marriage, is not a fair consideration of the statutory factors.

For all of these reasons, Appellant respectfully requests that the judgment and decree of dissolution be reversed and the cause remanded to apportion to Appellant a fair share of the community assets and for an award reasonably calculated to provide for her medical needs and to assure her ability to support herself in the future.

RESPECTFULLY SUBMITTED this 12th day of October, 2012.


ANDREA BURKHART, WSBA #38519
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DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 12th day of October, 2012 in Walla Walla, Washington.



Andrea Burkhart