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NO. 63377-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

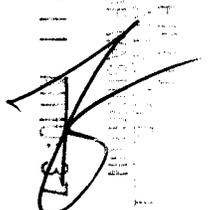
In Re the Marriage of:

NANCY Q. HOWELL,
Petitioner/Respondent,

and

GEORGE W. HOWELL, Jr.
Respondent/Appellant

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I



REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This case revolves around a dispute of a paragraph that appears in substantially similar form in three places in a property settlement agreement entered into more the 15 years ago. Exhibits O and W of the property settlement agreement both state:

(2)(c) \$50,000.00 to be received by wife as an irrevocable beneficiary on husband's life insurance policy upon his death. Husband shall provide wife with evidence of such insurance and its irrevocability prior to the execution of this agreement. If this life insurance lapses, wife shall have a lien against husband's estate in the amount of \$50,000.00. If wife precedes husband in death, the obligation shall become null and void. (CP 16).

A similar paragraph is found under Exhibit H to the property settlement agreement and states:

Any and all insurance policies in his name including all insurance on his life with the stipulation that wife is to be an irrevocable beneficiary of \$50,000.00 of his life insurance policy upon husband's death. If wife precedes husband in death, this obligation shall become null and void. Husband shall provide wife with evidence of such insurance and it's[sic] irrevocability prior to the execution of this agreement. If this life insurance lapses, wife shall have a lien against husband's estate in the amount of \$50,000.00; (CP 17).

It is an uncontested fact Mr. Howell complied with these provisions of the property settlement agreement entered into between the parties. Ms. Cooper states in her own declaration submitted to the court in support of her motion, “. . . I agreed to accept a portion of my property settlement by being named as an irrevocable beneficiary on his life insurance policy in the amount of \$50,000. Respondent had a policy in place in the amount of what I believe to have been \$300,000, with his daughter as beneficiary. He amended the beneficiary designation to comply with the court order by allocating \$50,000 to me and provided proof of having done so prior to the entry of our decree of dissolution of marriage.” (CP 30).

The insurance policy lapsed. (CP 111). The court found Mr. Howell did not breach the contract. (CP 121). However, the court ordered Mr. Howell to perform additional actions not contained in or contemplated by the parties during the execution of the property settlement agreement. (CP 122). Further, the court went on to make a finding of fact that the word “estate” as used in the property settlement agreement was ambiguous and meant the “present estate” of the Appellant. (CP 171).

II. ARGUMENT

A. Ms. Cooper’s Additional “Facts” should be Stricken

A court’s findings of fact are verities on appeal when supported by substantial evidence. Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). Substantial evidence is the type of evidence in sufficient amount to persuade a fair-minded person of the truth of the premise upon which the evidence is presented. Holland v. Boeing Co., 90 Wn.2d 384, 390-391, 583 P.2d 621 (1978). “Evidence not presented before the trial court is not considered on appeal.” Herron v. Tribune Publishing Co., 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

Ms. Cooper argues the facts contained in the statement of the case are “completely false” and attempts to add additional testimony. Ms. Cooper states, “It is in addition to, not in lieu of” and “Not only was it discussed, it was part of the Property Settlement Agreement and agreed upon by Mr. Howell at the time.” Brief of Respondent at 1. Ms. Cooper does not cite to the record below nor does the record below contain a declaration or other factual information upon which Ms. Cooper can base these facts. Ms. Cooper was given every chance to file a Reply declaration or responsive declaration to contest those facts at the trial court level. Ms. Cooper chose to do neither. The facts attested to by Mr. Howell were uncontested at the trial court level.

Ms. Cooper’s attempt to inject additional facts into the appellate record should be stricken and not considered by the Court of Appeals. Secondly, Mr. Howell’s recollection of the settlement and what the settlement was for clearly amounts to substantial evidence upon which

the court could determine the property settlement contract was not breached by Mr. Howell. Such a fact should be and is a verity on appeal.

B. The Court Erred in Finding Ambiguity

Clear and unambiguous language is not subject to reconstruction of interpretation. Marriage of Mudgett, 41 Wn. App. 337, 342, 704 P.2d 169 (Div. 1, 1985). Marriage of Mudgett, 41 Wn. App. 337, 342, 704 P.2d 169 (Div. 1, 1985). The court found the word “estate” used in the following sentence was ambiguous, “If this life insurance lapses, wife shall have a lien against husband’s estate in the amount of \$50,000.00.” (CP 17). The court found the word estate could mean either Mr. Howell’s present estate or his estate created after his death. (CP 171). In Mudgett the court was asked to interpret a sentence to be ambiguous. The sentence stated in pertinent part “[s]ubject to a non-interest bearing lien in favor of the husband to be paid when the residence is sold”. Mudgett at 342. The court reasoned the language was bargained for and clear as written. Mudgett at 342. In the instant case the language is again clear, “wife shall have a lien against husband’s estate in the amount of \$50,000.00”. The sentence is clear and unambiguous the policy has lapsed and the wife now has a lien against the husband’s estate. If the court is correct in finding the word estate to mean the present estate then Ms. Cooper has a lien against Mr. Howell’s present estate. If Mr. Howell is correct then Ms. Cooper has a lien against his future estate created upon his death.

However, the court’s interpretation of the word estate to mean present estate creates the absurd result of a lien against the present estate that would have no effect until after death of the estate holder. The \$50,000 lien is contingent upon the death of Mr. Howell occurring before the death of Ms. Cooper. (CP 17). Under the court’s interpretation Ms. Howell would have an unenforceable lien against Mr. Howell’s present estate. If Mr. Howell dies before Ms. Cooper then and only then would Ms. Cooper have a lien that could be enforced against his present estate. Of course, after Mr. Howell dies he will no longer have a present estate. “Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail.” Byrne supra at 451.

The problem is Ms. Cooper has made a unilateral mistake. This case does not hinge on a question of ambiguity. Ms. Cooper seems to believe she bargained for a “secured” lien despite the plain language of the property settlement agreement. “Where there is a unilateral mistake, courts will not invoke their equitable powers to aid the party who was the sole cause of his misfortune.” Loeb Rhoades, Hornblower & Co., 28 Wn.App. 499, 500, 624 P.2d 742 (Div. III, 1981). Ms. Cooper was the only party to have representation of an attorney. Ms. Cooper’s attorney drafted the agreement. (CP 17). Ms. Cooper has only herself to blame for any mistake in her understanding of her rights under the property settlement agreement.

Ms. Cooper may have believed she had additional rights under the separation contract but those beliefs do not justify the court rewriting the contract or finding ambiguity where none exists. *See* Byrne v. Ackerlund, 108 Wn.2d 445, 453, 739 P.2d 1138 (1987). The sentence in question is clear as written. The life insurance policy has lapsed the wife now has a lien against the husband’s estate.

C. Modification is Impermissible

“A property settlement agreement incorporated into a dissolution decree that was not appealed cannot be later modified.” Byrne *supra* at 453. “Adding terms to the contract would amount to writing a new contract. The court is not permitted to do this”. Mudgett *supra* at 342. The court impermissibly modified the parties’ property settlement agreement by adding additional provisions that Mr. Howell must now undertake in order to secure the lien against his estate. Ms. Cooper in her response suggests the court did not modify the agreement but “simply gave Mr. Howell other reasonable options as a courtesy.” (Brief of Respondent at 3). Unfortunately, the order of the court is much more than a mere courtesy. The order is an impermissible modification of the terms of the property settlement agreement.

The sentence that defines the rights of the parties in the event of lapse of the insurance policy states, “If this life insurance lapses, wife shall have a lien against husband’s estate in the amount of \$50,000.00.” (CP 17). The court found Mr. Howell did not breach the contract by

allowing the insurance policy referenced in the property settlement agreement to lapse. The above sentence now controls, the wife shall have a lien against the husband's estate.

Whether the lien is against Mr. Howell's present estate or future estate does not allow the court to modify the terms of the property settlement agreement. The agreement states Ms. Cooper has a lien. The agreement does not state Mr. Howell must provide security for the lien. Nor does the agreement state the lien is secured. Despite these facts the court ordered Mr. Howell to perform one of the following actions:

- 1) Secure and maintain a policy of life insurance in the amount of \$50,000, naming the Petitioner Nancy Cooper (fka Nancy Quinn Howell) as the irrevocable beneficiary of said policy pursuant to the Property Settlement Agreement filed with the Court on July 18, 1994; or
- 2) Write a Will or Codicil leaving Petitioner \$50,000 if she survives him. Said Will or Codicil shall be made irrevocable and Respondent shall ensure that sufficient funds remain in his estate to fund this bequest; or
- 3) Provide Petitioner with some other asset such as a) a \$50,000 deed of trust or mortgage on real property with equity in excess of \$50,000, or b) a joint bank account in the amount of \$50,000 that cannot be decreased below \$50,000 by Respondent and cannot be accessed by Petitioner until Respondent's death; or c) name Petitioner as irrevocable beneficiary of an IRA or retirement account in the amount of \$50,000 with Respondent being required to ensure that the account value not be decreased below \$50,000; and
- 4) Provide proof of the same to Petitioner's counsel immediately upon completion. (CP 122).

If Mr. Howell chooses one of the court ordered "options" then Ms. Cooper will have more than what was bargained for. According to the plain language of the property settlement agreement if Ms. Cooper dies before Mr. Howell then Ms. Howell would receive nothing. By making her the irrevocable beneficiary of an IRA, 401(k), joint bank account, deed of trust against real property, or other option Ms. Cooper's estate would likely make a claim for the \$50,000 asset she would now be "granted". This is directly contrary to the provision that Ms. Cooper must outlive Mr. Howell in order to have any interest in either a lien or in the proceeds of the life insurance policy.

The court modified a clear and unambiguous agreement between two parties. Both parties bargained for a "lien" in the event the policy lapsed. Neither party bargained for a list of

requirements in the event the policy lapsed. The modification is impermissible under Washington law.

D. There Still is No Justiciable Controversy

“[A] claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development, and the challenged action is final.” Neighbors and Friends v. Miller, 87 Wn.App. 361, 383, 940 P.2d 286 (Div.1 1997). There is no dispute regarding the language in the property settlement agreement that clearly states, “If wife precedes husband in death, the obligation shall become null and void.” (CP 16). The obligation referred to is the \$50,000 lien or payment from the proceeds of the life insurance policy. There is a major factual development that has yet to occur; both parties are still alive. The controversy will be ripe only when one of the parties dies.

As long as both parties are still living then there is no justiciable controversy. In the event Mr. Howell predeceases Ms. Cooper then a controversy may occur if the estate does not have enough assets to pay the lien. If Ms. Cooper predeceases Mr. Howell then no controversy would exist because Ms. Cooper would have no interest in additional funds. Ms. Cooper complains about what may occur after Mr. Howell dies. Those complaints are exactly what would amount to a justiciable controversy. Until Mr. Howell dies and there are no funds to satisfy the lien then there is no controversy. The court erred in hearing this case before it was ripe for determination.

III. ATTORNEY FEES

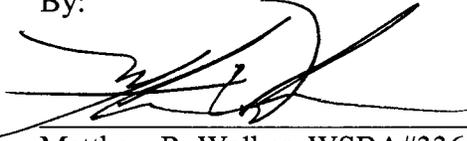
The Petitioner/Respondent’s continued attempts to put forth arguments unfounded upon the law or within the bounds of modifying the law are frivolous and attorney’s fees should be awarded to the Respondent/Appellant. The most telling statement in regards to this frivolous and intransigent push is from the words of the Respondent, “Ms. Cooper was not content to have a lien on Mr. Howell’s estate at his death”. Brief of Respondent at 3. The Respondent’s discontent is the root cause to the need for this appeal and the erroneous ruling below.

IV. CONCLUSION

The trial court erred by finding ambiguity where none exists. The court erred by modifying a property settlement agreement entered into more than 14 years ago. The court erred in hearing a case that was not yet ripe for determination. The errors should be corrected and the court below should be directed to file an order dismissing the original motion to enforce and awarding the appellant reasonable attorneys fees for the necessity of filing this appeal.

Arndt & Walker
Attorneys at Law, LLC

By:

A handwritten signature in black ink, appearing to read 'M. Walker', is written over a horizontal line.

Matthew R. Walker, WSBA#33660
Attorney for Appellant

CERTIFICATE OF SERVICE
Court of Appeals, Division I
No. 63377-5

I certify under penalty of perjury of the laws of the State of Washington that on the 10th day of ~~September~~ 2009, from Coupeville, WA, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following in the manner indicated below:

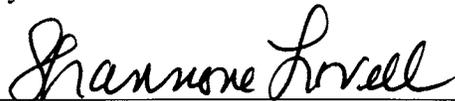
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Shannone Lovell