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THE
COURT OF APPEALS
STATE OF WASHINGTON
2011 OCT 10 PM 4:37

NO. 66704-1-I

COURT OF APPEALS, DIVISION, ONE
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:

PENNY L. SWEET,

RESPONDENT

and

KENNETH W. SWEET,

APPELLANT.

AMENDED RESPONSE BRIEF OF RESPONDENT

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In re Marriage of Olivares, 69 Wn. App. 324, 329, 848 P.2d 1281 (1993)

STATUTES

RCW 26.09.080(4)

A. Assignments of Error

Assignments of Error

Assignment of Error No. 1. The trial court erred when it awarded 50% of the Toyota Tundra to Ms. Sweet in the amount of \$9,829.50 after the entire insurance pay-out on the totaled vehicle was already paid to Mr. Sweet, thereby awarding her money that he already received.

Issues Pertaining to Assignment of Error

Should the court disregard Ms. Sweet's testimony that the whole sum of \$19,659 from the insurance pay-out for the Toyota Tundra was given to Mr. Sweet?

B. Statement of the Case

Mr. Sweet reported that Ms. Sweet was a Registered Nurse while her testimony was that she was "doing in-home nursing care" (RP 177). She stated she had been a "practical nurse" but that her licensing was too far in the past and the requirements had changed (RP 18). She would need to go back to school for about two years for an LPN. Then in 2001 to about 2003 she had her realtor's license and worked as a sales associate at Windermere Real Estate and later at Executive Real Estate (RP 20-21).

She made no income as a realtor (RP 21). Later in 2002 to spring of 2003 she worked in a call center for \$10 per hour (RP 21-22).

Ms. Sweet stated that Mr. Sweet worked as some kind of investment broker for National Securities in Seattle when they first were married (RP 15). Then he started a business called WSI in 2000 or the beginning of 2001 which lasted only a few months when it closed after there was a fist fight between Mr. Sweet and another individual (RP 16-17). After that he started a hedge fund which that was reported to her as being “done” when the investors all withdrew (RP 17). In July 13, 2004 they filed a Chapter 7 bankruptcy (RP 25). That same year after the Chapter 7 filing they filed a Chapter 13 (RP 40). At the time of the filing the Chapter 7 they indicated that there were seven children in their household, one was Mr. Sweet’s child with his previous wife, three of them were theirs and she had three others who were not Mr. Sweet’s (RP 57).

Beginning in 2001 through the filing of the Chapter 13 bankruptcy Mr. Sweet reported that he made virtually no income (RP 4). Their only reported income was from her work with a take home pay of \$1,343 and \$1,000 per month for Social Security (RP 37-38).

After Mr. Sweet had been borrowing extensively against the home in Redmond (RP 28-29), the house was paid off from the proceeds from their \$4,100,000 products liability settlement related to the death of their child (RP 45-46). Those funds were deposited into Geneva Opportunity fund under Mr. Sweet's exclusive control (RP 48-49).

In September 2007 the parties sold the parties' Redmond home (RP 46-47). Mr. Sweet transferred the proceeds in the amount of \$358,402.00 to his separate Key Bank account (RP 46-47). Mr. Sweet then may have transferred the proceeds into the Geneva Opportunity Fund in order to buy the commercial property in downtown Carnation, stating "I think I deposited it into Geneva Opportunity Fund, and then wrote a check from Geneva Opportunity Fund for the building. We paid cash for it." (RP 216). There was no documentation of that transfer. Regardless of the fund that was used to purchase the commercial property, the property was transferred into Deer Haven Properties, LLP in which both of the parties were equal partners (RP 54-55).

In contrast to the statement of the case presented by Mr. Sweet, Ms. Sweet reported that due to Mr. Sweet's refusal to do any of the maintenance around the home there was a sizable amount of deferred maintenance and damage. After the police took Mr. Sweet into custody they discovered that Mr. Sweet had installed an extensive pin hole spy

camera set up throughout the house (RP 69-71). Ms. Sweet stated that the spy cameras had to be removed before the property could be sold (RP 70). Ms. Sweet had an estimate that it would cost \$12,000 to repair that and other electrical problems throughout the house (RP 71-72).

At trial Ms. Sweet reported that the value of the residential property was \$950,000 in its current condition (RP 83). In cross examination Ms. Sweet repeatedly attempted to clarify that when she reported the property tax assessment for 2010 was \$1,690,000, she was not trying to assert that was the property's value (RP 379 -381). She admitted that the statement implied that she thought the property was worth that amount at that time. Mr. Sweet testified that he thought the property was worth "about \$3.5 million" (RP 227).

The court altered the chart attached to Amended Decree of Dissolution from the one proposed by Ms. Sweet by awarding one-half of the insurance pay-out on the 2006 Toyota Tundra to the wife. The pay-out was for \$19,659 and the court divided that into half each in the amount of \$9,819.50. Ms. Sweet testified that she had given the full amount of \$19,659 to Mr. Sweet (RP 90). The change netted Mr. Sweet \$9,819.50 extra and shorted Ms. Sweet by the same amount.

C. Argument

1. **The court was well-within its discretion to award the property as set forth in the Amended Decree of Dissolution.**

In re Marriage of Harrington, 85 Wn. App. 613 (1997) provided that

The court has broad discretion in awarding property in a dissolution action, and will be reversed only upon a showing of a manifest abuse of discretion. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985); *Olivares*, 69 Wn. App. at 328. A manifest abuse of discretion is present if the court's discretion is exercised on untenable grounds. *Landry*, 103 Wn.2d at 809-10, *Olivares*, 69 Wn. App. at 328.

Harrington at 624. Throughout Mr. Sweet's argument he never approaches the issue that the overall award of property was in any manner an abuse of discretion. It is this overall award of property to the parties that must be in error.

The approach by Mr. Sweet is that the "untenable grounds" was that two items of property, the residential real estate and two \$100,000 obligations owed to the community, should have been given different values by relying on other evidence. Mr. Sweet relies upon an assertion that the valuation of some of the parties' property could have relied upon was inaccurate and that evidence was ignored by the court as to other possible valuations.

2. Contrary to Mr. Sweet's claim, Ms. Sweet's valuation of the home at \$950,000 was reasonable.

Ms. Sweet asserted that the reasonable sale price of the house at the time of trial was \$950,000 (RP 81). She was trained as a realtor (RP 20). On the other hand, despite the collapse of the United States' economy, Mr. Sweet had tremendously higher estimates of value for this property, although he never informed the court what he believed to be the value of the property at the time of trial. Mr. Sweet did not offer any expert testimony as to the value. (He referred to a CMA that was admitted in evidence only through the admission of Ms. Sweet's declaration (RP 381). He called the CMA a "certified estimate of value", although the document itself was titled "Comparative Estimate of Value." While that document was not admitted as expert testimony, the valuation discussed in trial was much closer to Ms. Sweet's valuation of \$950,000 than Mr. Sweet's valuation of \$3,500,000.

3. The court acted within its discretion to value the property at the time of trial.

Without any admission whatsoever that the economy might have had a downward effect on the real estate, Mr. Sweet seeks to value the property at the time of separation without producing any evidence as to loss of value due to disrepair. Ms. Sweet testified that Mr. Sweet failed to maintain the property before the separation (RP 68-78, 454-455).

4. The award to the two notes with \$100,000 left owing to Mr. Sweet was appropriate.

Mr. Sweet testified that about \$100,000 was left owing on both of the notes (RP 204 -206). He acknowledged that he made the loans to his business partners in around 2008 even though Ms. Sweet made clear her opposition (RP 205). Although Mr. Sweet asserted that he has repeatedly tried to collect on the notes (RP 207), he failed to report any actual collection activities such as litigation to obtain judgment. He relied upon the verbal statement from one of the obligors, Greg Erickson, as to his ability to collect on the other note with Michael Callahan (RP 207).

5. The court did not necessarily award the estate of the parties on a 50/50 basis as alleged.

The court did not directly assert that the estate should be awarded on a 50/50 basis; that is an assumption based upon the division of the

assets in the Amended Decree. The court was fully aware of the widely opposing statements of value for the residence and was fully aware that the two \$100,000 obligations owed to the community from Mr. Sweet's business partners might likely be uncollectable. The court's comments made that clear.

A 50/50 division would be generous for Ms. Sweet. However, it is fair enough since Mr. Sweet was awarded the \$200,000 owed to the community by his friends and business partners. That asset could not pan out and still the division would be eminently fair.

The court's paramount concern in awarding property of the parties is the economic circumstances of the parties after the dissolution. *See In re Marriage of Olivares*, 69 Wn. App. 324, 329, 848 P.2d 1281 (1993); *In re Marriage of Chavez*, 80 Wn. App. 432, 439, 909 P.2d 314, *review denied*, 129 Wn.2d 1016 (1996); *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997); *see also* RCW 26.09.080(4). Although it was not clear in the record as to why, there was no testimony about Mr. Sweet's economic circumstances, possibly due to his rape conviction shortly before trial (RP 7, 330). Ms. Sweet has the parties' three children from their marriage to care for without a current prospect for future earnings and she has her other three children as well who were not from this marriage. She has no skills to make a lot of money, much unlike Mr.

Sweet. The award is fair regardless of whether Mr. Sweet collects on the notes.

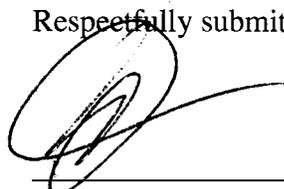
D. Conclusion

Mr. Sweet concludes his brief that he should be entitled to fair treatment under the law and to have his case based on the facts. In reality, the decision by the court was more than fair to Mr. Sweet. His estimate of the value of the home at \$3,500,000.00 just does not make sense.

Ms. Sweet could readily complain that what looks like a 50/50 division of the property would not be appropriate in the circumstances where she is left caring for the family by herself while facing the daunting task of trying to prepare the home for sale. However in the totality of the circumstances it is reasonable. There was no “manifest abuse of discretion” in the final award whether or not the division of the assets were exactly on a 50/50 basis.

October 10, 2011.

Respectfully submitted,



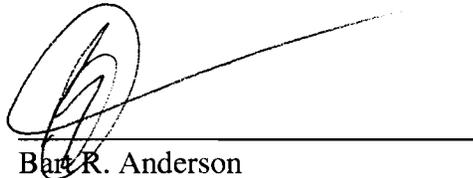
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PROOF OF SERVICE

I certify that I served a copy of this RESPONSE BRIEF OF RESPONDENT on October 10, 2011 on Appellant Kenneth Sweet by emailing a copy to his attorney of record, Lee Jacobson, at leejacobsonlaw@aol.com; by faxing a copy to his attorney of record, Lee Jacobson at 206-244-2880 and by delivery via messenger to his attorney of record, Lee Jacobson to 1420 5th Ave #2200, Seattle, WA 98101 on October 10, 2011.

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

Dated this 10th day of October, 2011.



Bart R. Anderson
Attorney for Respondent
WSBA #12285

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