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No. 669460

IN THE COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

DON GLOVER, Respondent,

vs.

DEBBIE GLOVER, Appellant.

BRIEF OF APPELLANT

Alison A. Ferguson
Attorney for Appellant

152 Third Avenue South, Suite 102-B
Edmonds, WA 98020
(425) 640-3278
WSBA No. 36384

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I. Introduction

This is a dissolution case involving Debbie and Don Glover, who were married for almost ten years.

The trial court ruled that the parties' assets should be awarded to whichever person currently had the property in their possession, with the additional ruling that if either party had property that they knew belonged to the other person, they should return it to that person.

The trial court also ruled that a temporary order for child support entered on January 9, 2010, should be reduced to judgment, despite the fact that Don Glover and/or his attorney used inflated figures when determining Debbie Glover's imputed income for purposes of calculating child support, and despite the fact that Debbie Glover did not have counsel representing her, was out of the country when the motion was heard, and did not receive notice of the motion.

Finally, the trial court ruled, despite the huge disparity in income and Debbie Glover's ability to work and/or earn money as compared to Don Glover's ability, that Don Glover should be awarded a judgment for back child support in the amount of over \$7,000, that Don Glover should not have to pay attorney fees and

costs, and that Don Glover should not have to pay spousal maintenance.

Debbie Glover appeals the trial court's decision to not specifically order the return of her personal property as outlined in Trial Exhibit 72. Debbie Glover also appeals the trial court's decision to not vacate or revise the temporary child support order that was entered on January 9, 2010. Finally Debbie Glover appeals the trial court's decision to not award spousal maintenance and/or attorney fees because it felt that Don Glover did not have the ability to pay.

II. Assignments of Error

Assignments of Error

5. The trial court erred when it ruled that a determination regarding the division of personal property could not be made.
6. The trial court erred when it determined that spousal maintenance should not be awarded.
7. The trial court erred when it determined that the order of temporary child support should not be either vacated or revised.
8. The trial court erred when it failed to order Don Glover to pay Debbie Glover's attorney fees.

Issues Pertaining to Assignments of Error

1. Did the trial court err when it did not specifically order Don Glover to return Debbie Glover's personal property to her as listed on Ex. 72? (Assignment of Error No. 1.)
2. Did the trial court err when it determined that spousal maintenance should not be awarded because Don Glover did not have the ability to pay? (Assignment of Error No. 2.)
3. Did; the trial court err when it did not vacate or revise the temporary child support order entered on January 9, 2010? (Assignment of Error No. 3.)
4. Did the trial court err when it failed to award Debbie Glover's attorney fees? (Assignment of Error No. 4.)

III. STATEMENT OF THE CASE

Trial in this matter was held on October 20, 21, 22 and 26, 2010. The Court issued its oral ruling on November 19, 2010, and final orders were entered at a presentation hearing held on January 24, 2011.

1. Distribution of Property.

The Court, in its oral ruling stated:

The testimony was about some property that was brought into the marriage by the parties; some, but apparently not a lot, that was acquired by the parties during the marriage. The disturbing thing about this is that the testimony is so widely divergent about what was brought into the marriage, what has happened to it, where it is, in whose possession it is, who took it at the time of separation, whether or not it was left at the

time of separation that, quite frankly, I have to admit that I can't decide that.

The ultimate result of that is, I'm going to order that each party retain the property currently in their possession, because I think it would be an exercise in futility for me to do anything else.

Now, let's just be candid with each other. If the wife has some property that she knows belongs to the husband, I expect that property to be returned. Same for the husband.

...

On Exhibit Number 72, Mr. Glover, if you have any of those items that you know belong to her, return them.

Same for Ms. Glover: If there is any item that you know belongs to him or that he inherited from his mother or has sentimental value to him much the same as things would have to you, return them.

Other than that, I am at a loss as to what more I can do.

RP p. 474, l. 18 – p.476, l. 3.

The Decree of Dissolution awarded the husband:

“Miscellaneous household goods, tools, personal effects, bank accounts, employment benefits, social security benefits, and similar in his name or that are currently in his possession.” ... “The husband is further ordered to return any items contained in Trial Exhibit 72 (attached) that he knows belongs to the wife and are currently in his possession.” *CP*, p. 14, ll. 25 to end of page¹. The

¹ Some cites to *CP* in this brief indicate “to the end of the page” because there are no lines where the text is located.

Decree awarded the wife: “Miscellaneous household goods, tools, personal effects, bank accounts, employment benefits, social security benefits, and similar in her name or that are currently in her possession.” ... “The wife is further ordered to return any items to the husband that she knows belongs to the husband was inherited from his mother or holds sentimental value that are currently in her possession.” *CP*, p. 15, ll. 7-13.

2. Spousal Maintenance.

During the Court’s oral ruling on November 19, 2010, an analysis was made of the six elements under RCW 26.09.090. *RP*, p. 481, l. 23 – p. 485, l. 1. Although the Court found that the first five elements were met in determining Ms. Glover’s need for an award of spousal maintenance, it concluded: “So, after all the considerations of the issue of maintenance, I cannot in good faith or good conscience, order maintenance, because I don’t believe that while there is, in my view, a need for maintenance to be paid, that Mr. Glover has the ability to pay. So there will be no maintenance. *RP* p. 484, l. 21 – p. 485, l. 1.

Paragraph 2.12 of the Findings of Fact (*CP*, p. 7, ll. 14-17.) and paragraph 3.7 of the Decree of Dissolution (*CP*, p.16, ll. 23-25) reflect this oral ruling.

3. Back Child Support.

The Court ruled that the back child support incurred based upon the temporary order entered on January 8, 2010 up until the time of trial should be reduced to a judgment. *RP*, P. 479, ll. 3-5. Judgment in the amount of \$7,026 was awarded. *See Order of Child Support, CP*, p 23, l. 20.

4. Attorney Fees. Debbie Glover's request for attorney fees was denied based upon the Court's determination that, although the Debbie Glover had a need, Don Glover did not have the ability to pay. *RP*, p. 485, ll. 17-23. This ruling is reflected in paragraph 3.7 of the Findings of Fact (*CP*, p. 10, last paragraph) and paragraph 3.13 of the Decree of Dissolution (*CP*, p.18, ll. 20-22).

IV. ARGUMENT

"A dissolution is an equitable proceeding in which the trial court has broad discretion to fashion remedies." *See RCW 26.09.080; In re Marriage of White*, 105 Wash.App. 545, 549, 2001). In this case, Debbie Glover came into this marriage with everything she had prior to the marriage – furniture, pictures and other memorabilia, her late husband's tools, appliances, to name

but a few – and walked away with virtually nothing except a sizable debt for back child support.

1. The Court erred when it ruled that a determination regarding the division of personal property could not be made.

During the trial, testimony and exhibits were provided as follows:

- a. Debbie Glover removed certain items from the home on or about July 26, 2010, and placed in storage. *RP*, p. 38, l. 19 – 25; p. 199, l. 18 – p. 200, l. 20, p. 358, ll. 5-14; Ex. 24. There was no evidence that any of Don Glover’s separate property was taken at that time, except by Don Glover’s own testimony. *RP*, p.32, ll. 13-23. Brandy Schlichemeyer testified on behalf of the Debbie Glover and stated that no property belonging to Don Glover was taken from the home. *RP*, p. 200, ll. 13-20. Crystal Simmons testified on behalf of Debbie Glover that the items contained on Ex. 24 were the items that were located in the storage unit. *RP*, p. 358, ll. 9-14. Ms. Simmons went on to testify that at least some of the items that Don Glover had testified were taken out of the home by Debbie Glover were in fact located in his home. *RP*, p. 358, l. 15 – p. 359, l. 4.

b. Debbie Glover testified and provided exhibits showing that furniture and items belonging to her before the marriage were still in Don Glover's home. Ex. 72 listed these items, and Ex. 73 depicted some of these items that had been present in Debbie Glover's home in Canada before marrying Don Glover. *RP*, p. 293, l. 2 – p. 302, l. 16.

c. Debbie Glover testified that certain items that belonged to her could be identified because of indications that they were made in Canada or that language contained on the items were in French. *RP*, p. 228, ll 13-17. Debbie Glover further testified as to separate property that she brought with her from Canada and was showed that those items remained in Don Glover's home after the separation. *RP*, p. 298, l. 3 – p. 302, l. 2.

d. Brandy Schlichemeyer testified that she and her mother decided to remove certain items from the home because in the past Don Glover had threatened to destroy their belongings with a chain saw. *RP*, p. 199, l.18 – p. 200, l. 4. Debbie Glover testified that the reason she did not take all of her belongings out of the home in July was because she only removed the most sentimental or

expensive items that Don Glover had threatened to destroy in the past, and because she felt that she would be returning to the home. *RP*, p. 305, ll. 11-19; p. 343, ll. 9-25.

Based upon the testimony at trial and the exhibits showing Debbie Glover's property located in Canada and then in or at Don Glover's home, the court's order that both parties should return property in their possession that they know belongs to the other party, was too vague and unenforceable. Debbie Glover was able to prove that most, if not all, of the items listed on Ex. 72 belonged to her before the marriage, and that she had taken nothing of Don Glover's personal property. To date, Don Glover has not returned any of the items listed on Ex. 72 to Debbie Glover. A substantial injustice has been done to Debbie Glover in that she has been forced to lose property that belonged to her long before she met and married Don Glover. In a dissolution action, all property, community and separate, is before the court for distribution. *In re Marriage of Stachofsky*, 90 Wash.App. 135, 142, (1998). Again, one of those factors taken into consideration is "The economic circumstances of each spouse or domestic partner at the time 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.” RCW 26.09.080(4).

2. The Court erred when it determined that spousal maintenance could not be awarded.

RCW 26.09.090 sets out six factors that the court must consider when determining whether or not to award spousal maintenance. The court considered all six factors, and found that all of the requirements were met that would allow the court to award her spousal maintenance, except that the court felt Don Glover did not have the ability to pay maintenance. *RP*, p. 484, ll. 21-25. This determination was based upon Don Glover’s Financial Declaration (Ex. 41).

Testimony at trial and Don Glover’s financial declaration, showed that Don Glover’s salary is well over \$60,000 per year. *RP*, p. 87, ll. 10-12; Ex. 41. Don Glover’s Financial Declaration was not supported by any evidence – no paycheck stubs, no tax returns – nothing that would indicate the accuracy of the figures he provided for either income or expenses.

Debbie Glover’s income at time of trial was zero. The trial court determined that Debbie Glover “has [n]ever been self-supporting, really. *RP*, p. 479, ll. 13-17.

“Of primary concern [when determining spousal maintenance] are the parties' respective economic positions following dissolution.” *In re Marriage of Washburn*, 101 Wash.2d 168, 181, (1984).

There is no dispute or doubt that the disparity in income between the two parties is great. After considering “all the relevant factors,” including the great disparity in income and especially the economic positions following dissolution, the trial court should have awarded spousal maintenance to Debbie Glover.

3. The trial court erred when it determined that the order of temporary child support should not be either vacated or revised.

A trial court's child support order can be reviewed for abuse of discretion. *In re Marriage of Fiorito*, 112 Wash.App. 657, 663-64, (2002). “A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, including an erroneous view of the law.” *Id.* at 663-64..

During trial, Debbie Glover requested that the court either vacate the order of temporary child support entered on January 9, 2010, or revise it to reflect an obligation of \$150 per month, based on imputed income at minimum wage.

Testimony during trial provided the following information:

a. Don Glover's attorney noted this case for hearing on temporary orders and a temporary order of child support, scheduled to be heard in January 2010. *RP*, p. 319, ll. 3-4.

b. Debbie Glover was out of the country (in Canada), did not receive notice, and was not represented by counsel at the time. *RP*, p. 319, ll. 5-7; p. 319, l. 21 – p. 320, l. 6.

c. Debbie Glover never worked full time outside the home, and most certainly did not work while married and living with Don Glover. *RP*, p. 283, l. 11 – p. 286, l. 4. In addition, Debbie Glover has a severe hearing loss (*RP*, p. 373, l. 13) in both ears and needs to wear hearing aids. She also has suffered from carpal tunnel syndrome, which has caused her to be unable to work. *RP*, p. 306, ll. 5-12.

d. According to Don Glover's testimony, his counsel used "a state chart" that sets an income based upon age and what they do for a living. *RP*, p. 106, l. 19 – p. 107, l. 1. This "chart" is the median net monthly income of year-round full-time workers according to the United States bureau of census. RCW 26.19.071(6)(e) provides this as an avenue for determining income when no other way is available. Debbie Glover argued that the

imputed income should have been calculated according to RCW 26.19.071(6)(c), or RCW 26.19.071(6)(d). Had the income been imputed correctly, it would have been calculated using either the rate of pay the last time Debbie Glover was employed, or using the minimum wage (at the time the child support order was entered) for Washington State of \$8.55 per hour. Either calculation would have resulted in Debbie Glover being obligated to pay the presumptive amount of \$50 per child, or \$150 per month.

The trial court also ordered that any amount Don Glover owed regarding spousal maintenance (\$3,000) was to offset any back child support amount owed by Debbie Glover. *RP*, p. 480, ll. 15-20. This left Debbie Glover with a judgment owing for back child support in the amount of \$7,026. *See Order of Child Support, CP*, p. 23, l. 20. At the very least, this judgment amounts to an error in the assessment of the amount of recovery in that the temporary order was based upon inflated income figures which resulted in a obligation to Debbie Glover – a homemaker who has never worked outside of the home – of \$912 per month. This not only provided a severe financial hardship upon the Debbie Glover, but also was a substantial injustice.

The trial court had the discretion to either vacate, revise, or at the very least reallocate the result of that order along with awards of spousal maintenance and/or attorney fees in amounts that would leave the parties in equitable positions.

4. The Court erred when it failed to order Don Glover to pay Debbie Glover's attorney fees.

Under RCW 26.09.140, the court may award attorney fees to either party in a maintenance action. In determining whether it should award fees, the court considers the parties' relative need versus ability to pay. *In re Marriage of Shellenberger*, 80 Wash.App. 71, (1995). Washington courts have awarded at least partial attorney fees due to the wide disparity in the parties' incomes. *See In re Custody of Salerno*, 66 Wash.App. 923, 926 (1992) (trial court ordered husband to pay a portion of wife's attorney fees and costs due to the "wide disparity" in the parties' incomes, husband's greater earning ability, and wife's continuing need for support.

Again, there is no dispute regarding the disparity of incomes or wife's continuing need for support, and therefore Don Glover should be ordered to pay at least a portion of Debbie Glover's attorney fees.

VI. CONCLUSION

As the trial court stated in its oral ruling, the dissolution statutes (as well as case law) require “a fair and equitable division of property, assets, and provide for a parenting plan and child support, if appropriate.” See *RP*, p. 474, ll. 1-3. After almost 10-years of marriage, the trial court’s ruling essentially left Debbie Glover with absolutely nothing except an large back child support debt. As a matter of equity and justice alone, this Court should find that the trial court erred – or at least failed to use its discretion appropriately, and require the trial court to revise its orders to leave the parties in this dissolution in a reasonably equitable position.

Respectfully submitted this 26th day of September, 2011.

AA LAW PLLC



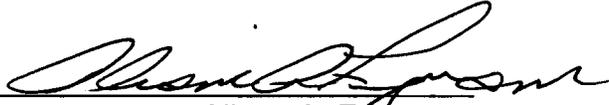
Alison A. Ferguson, Pro Bono
Attorney for Appellant, Debbie Glover
152 Third Avenue South, Suite 102-B
Edmonds, WA 98020
Phone: (425) 640-3278
Fax: (425) 640-3028
WSBA No. 36384

CERTIFICATE OF SERVICE

I certify that on the 26th day of September, 2011, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

Counsel for Debbie Glover
Name Kimberly D. Brown
Address 6724 – 131st Pl. S.E.
Snohomish, WA 98296-8678

() U.S. Mail
(X) Hand Delivery
() Email


Alison A. Ferguson

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