

No. 71017-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

BARBARA G. KAYE, Respondent

v.

KARL H. KAYE, JR., Appellant

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

H. Michael Finesilver (fka
Fields)
Attorney for Appellant

207 E. Edgar Street
Seattle, WA 98102
(206) 322-2060
W.S.B.A. #5495

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I. Statement of the Case:

A. When The Marriage Became Defunct

In the presentation of her case in chief Barbara Kaye denied recalling how long she and Karl were in counseling; she denied being ambivalent in her feelings towards her husband, the marriage and her boyfriend (RP 111) and denied expressing that ambivalence throughout the year of joint counseling sessions that occurred after she moved out of the Sunrise Drive home. (RP 112). It was after the counselor testified and confirmed her ambivalence (RP 224 and 225) as did Karl (RP 143) that she admitted to it on rebuttal as d in the brief submitted on Karl Kaye's behalf at page 12.

B. The Separate Contributions From Karl's Separate Estate To the Community Totaled Over \$668,000

The total value of the stocks that he listed in the pre-nuptial agreement added up to \$167,400 (trial exhibit 6; exhibit B of the pre-nuptial agreement). Karl managed and grew the value of this portfolio in his Dean Witter account during the marriage. (RP 151-152). He did so until it ran out prior to sale of his rental property in 2003. (RP 71). Trial exhibit 111, a check register, shows sale proceeds that were contributed by Karl to the account that Barbara managed from July 2003 – December

2004, totaling \$77,365 in a 17 month period (RP 98-101). No records could be found to account for the rest of the \$501,000 in sale proceeds (RP 71) but Barbara admitted that the balance of the sales proceeds were contributed from time to time to the account that she managed to and from which she paid the community bills (RP 71) until they ran out (RP 101). That added to the Dean Witter funds show that a total in excess of \$668,000 of separate property contributed by Karl to the community.

Nor was there evidence of Karl having separate expenses. Barbara testified that from credit cards that he used they would purchase such things as Roseville, cranberry glasses, guns, and she understood all those purchases to be community in nature (RP 247 – 248).

C. The Pre-Nuptial Agreement

Barbara admitted that she did not doubt the accuracy of the values of assets listed by Karl (RP 113) and that she did not verify any of the information because she did not care (RP 113). She admitted on cross examination that consulting a lawyer had “crossed her mind” and that she read it before signing it (RP 115). She did not testify, as represented by the Response brief as to any reason why she did not consult a lawyer, except that she did not care (RP 113). Karl testified, that he told her “she should

talk to a lawyer if she wanted to.” (RP 150). She did not deny that testimony in her rebuttal.

Nor did she testify that she did not understand the agreement when she signed it. She presented no evidence that she did not understand it. She testified that she understood that assets acquired from earnings are community property and that the agreement was consistent with that notion (RP 116). She testified that she understood that the agreement does not preclude the building of a community estate (RP 116). She even read out loud the entirety of paragraph 6 related to the definition in the prenuptial agreement of separate property and its language as to credits for separate property contributions in case of a dissolution of the marriage. She expressed no confusion or ignorance as to the meaning of those provisions. In fact testified that the agreement did not preclude a court from giving credit where separate property contributions are made to the separate property of the other spouse (RP 117).

D. The Sunrise Drive Property

The purpose of the refinances was to help pay for the community expenses (RP 154).

As to the Sunrise property Barbara did not deny in rebuttal that the acreage is not presently sub-divided in to buildable lots as of trial, merely that it could be. (RP 149 - 150).

II. Argument

A. The Pre-Nuptial Agreement

1. Substantive Fairness

In re Marriage of Foran, 67 Wn. App 242, 834 P.2d 1081 (1992) involved a husband who was physically and emotionally abuse to Ms. Foran both before and after their marriage, and who had a huge separate estate and a wife, who had virtually no separate property when they married. She was clearly the economically disadvantaged spouse as between the two of them at the time of the agreement.

The Response brief fails to point out another provision of the agreement that characterized Mr. Foran's labor and compensation for it as his separate property. Thus what was unfair in substance, as a matter of law, is that it was the prenuptial agreement that perpetuated Ms. Foran being an economically disadvantaged spouse at the time of divorce.

However in this case in the prenuptial agreement, in this case, labor is treated as community property consistent with community property law (paragraph 7 c).

The pre-nuptial agreement did not, by its terms, perpetuate Barbara Kaye as being the economically disadvantaged spouse as it did for Mrs. Matson or Mrs. Foran. This is because Barbara Kaye did not sign the agreement being as an economically disadvantaged spouse. Nor did the agreement prevent the building of a community estate because its definition of community property is consistent with RCW 26.16 and not repugnant as it was in *In re Marriage of Matson*, 107 Wn. 2d 479, 730 P.2d 668 (1986), or *Foran*, supra. The most that can be said is that the community estate was not larger as of the time of dissolution of the marriage, is not because of any provision of the agreement but rather a result of Karl not working the entire period of the marriage. But that was a decision made knowingly by both parties before they decided to get married.

The waiver of a survivor or homestead rights in the separate property of the other, references no statute (trial exhibit 6; paragraph 9). The response brief cites to no statute through which such rights are bestowed upon a surviving spouse. The homestead exemption is contained in RCW 6.13. It makes no reference to entitlement in the separate property home of the other spouse.

The homestead statute RCW 6.13.020 as of the most recent amendment in 1981 prior to the signing of the prenuptial agreement did not entitle the surviving spouse to claim the homestead exemption in the deceased spouse's separate property residence because the statute required then, as it does now, that the person exercising the exemption to be a "owner" of the property. Barbara Kaye was not an owner when the prenuptial agreement was signed. There was no homestead exemption available to her to waive.

The Response brief also argues at pages 9 and 11 that paragraph 6 of the agreement characterizes debts secured by separate property as community liability, but that the proceeds of the debt are separate property. This is untrue. The paragraph says nothing of the character of such debts. If anything, this paragraph of the agreement evinces a clear and unambiguous intent of the parties that the proceeds of loans taken out during the marriage, secured by separate property, are separate in nature. As such, the loans themselves are separate rather than community. *National Bank of Commerce of Seattle*, 1 Wn. App. 713, 463 P.2d 187 (1969). Thus, the provision is consistent with community property law not contrary to it.

No provision of the pre-nuptial agreement supports the argument at page 9 of the Response brief that the fruit of Karl's labor is his separate property and that the fruit of her labor belonged to the community. If Barbara had decided to make improvements to her separate condominium by her own labor, the agreement would treat those contributions as a gift to her separate estate by the community. There is no provision of the agreement in which the fruit of their labor is treated in a disparate manner.

The Response brief argues beginning at page 12 that Karl's concept of fairness is "idiosyncratic". The colloquy used in support of this argument, beginning at page 13, is Karl's idea that where Barbara earns over \$12,000 per month and has no rent to pay, and he has nearly \$3000 per month in mortgage payments and only \$1100 in income that \$8000 per month as maintenance is reasonable. The amount of maintenance to be paid going forward after 28 years of marriage has no bearing on whether the pre-nuptial agreement was fair when entered 28 years prior.

The Response brief concedes the fact that the circumstances on which the trial judge focused were the current ones, rather than those that existed at the time the agreement and thus an abuse of discretion as was executed, held by *In re the Marriage of Bernard*, 165 Wn. 2d 895, 204 P.3d 907 (2009) since it does not address this issue.

While she testified that she did not get reimbursed for community property contributions to his separate estate (RP 227) she did not identify any contributions to his separate estate except for the payment of the mortgage payments to the Sunrise Property. But then, they occupied the Sunrise Property as a residence, she testified that the rental value of the property was \$4,000 per month (RP 130) and credit back to the separate estate as reasonable rent for its use if the property is contemplated if credit for the payment of separate mortgage obligations is sought in the overall property division. See *In re the Marriage of Miracle*, 101 Wn. 2d 137, 675 P. 2d 1229 (1984).

Finally, whether Karl reimbursed the community or not does not relate to the fairness of the agreement as Respondent attempts to do in the response brief.

2. Procedural Fairness

The response brief raises issues belied by the findings from which Barbara Kaye has not appealed (CP 48-49 and RP 321-322). They therefore stand as verities on this appeal (see *Talps v. Arreola*, 83 Wn. 2d 655, 521 P.2d 206 (1974)). The soundness of the values of the assets stated in the agreement was not found by the court to render it procedurally unfair. The court's sole focus was whether the agreement was knowingly

and intelligently entered in to and whether the absence of legal advice, per se, rendered it therefore procedurally unfair.

The Response brief cites to *Foran* supra at 256, as observing that independent counsel was required since the agreement was unfair. This is not accurate. More precisely the decision held that Mr. Foran's lawyer was obligated to advise her of the adverse effects of the agreement, and the rights she was giving up because he endeavored to tell her "part of the story" as the majority put it.

"In short, Mr. Pewe undertook to tell Peggy only part of the story, the part that served his client, and not the whole story. *Cf. Bohn v. Cody*, supra." *Foran*, supra.

Here, there was no evidence that the attorney who drafted the agreement communicated anything of any kind to Barbara Kaye.

B. When The Marriage Was Defunct: Impact on Characterization of Restricted Stock

The response brief relies upon *In re the Marriage of Pletz*, 71 Wn. App. 699, 861 P.2d 1080 (1993) at page 19. *Pletz*, supra was overruled and even depublished (*In re the Marriage of Pletz*, 123 Wn. 2d 1026, 873 P.2d 489 (1994)). However, *In re Marriage of Nuss*, 65 Wa App 334, 344, 828 P.2d 627 (1992) has not been overruled: "Under any of these formulations, the question 'is whether **the parties** (emphasis supplied) by

their (emphasis supplied) conduct have exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship'

There was nothing in Karl's conduct that indicated that he had given up on the relationship. Quite the opposite. (RP 142). Barbara never testified that she had no intention of coming back to Karl, and the Response brief, in making that representation, does not support it with a citation to the record. In her testimony in chief she denied expressing any ambivalence in the joint counseling sessions.

"Q. Wouldn't it be accurate to say that you were ambivalent about staying in the marriage?

A. No.

Q. Wouldn't it be accurate to say that you were torn between your feelings for Mark and your allegiance to the marriage?

A. No.

Q. You would say that's not accurate?

A. That's not accurate.

Q. You never voiced that as an issue for you at any of the counseling sessions?

A. No."

However, after the counselor testified that she in fact did express these very same ambivalent feelings throughout their year of counseling, in rebuttal she admitted: "As far as this ambivalence thing goes, it was ambivalence and do I want to come back to him, or stay out of the house."

(RP 242). She did not testify that she was unwilling to go back to Karl. She merely testified that in the counseling sessions she never indicated a willingness to return to live with Karl (RP 242). But no one said that she did in counseling.

She also denied having a romantic relationship with Mark Nelson. “I never brought up that I loved Mark Nelson at all. He’s somebody that I live with in his house.” (RP 242). This was directly contrary to what both the counselor testified to (RP 224) and what Karl testified to (RP 143), and the trial judge did not believe her since he characterized theirs as a “romantic relationship”. (RP 325).

As to the character of the stock, the testimony was not that the entire stock was separate as represented at page 21 of the brief. There was no evidence to support the trial judge’s legal conclusion that the entire stock is her separate property. The undisputed testimony was that 65 of 450 shares were community, 41 shares from 2010 and 24 shares from 2012. (RP 39 – 40). However there was no “clear, cogent and convincing evidence” presented to support the self-serving testimony that 387 shares of the restricted stock vested post separation.

There is only one trial exhibit that references the restricted stock: trial exhibit 5. Trial exhibit 5 makes no reference to vesting or a vesting

schedule. It merely shows that 78 shares were "acquired" as of May 31, 2012 and 12 shares as of March 4, 2013 which is information neither consistent with, nor corroborative of Barbara Kaye's testimony. The exhibit does not reflect when these shares were granted nor the period of time she had to work before they were "acquired."

Since the marital community was not legally separated until 15 months after she no longer resided in the Sunrise Drive home, (she often came back to the home unannounced (RP 144) the portion of the restricted stock units to vest within that period of time, renders the community share larger than the 63 shares conceded by her in her testimony. Since the prenuptial agreement requires all community assets to be divided equally upon dissolution of the marriage, this is an issue of some consequence.

C. Spousal Maintenance

The Response brief does not deny the validity of the arguments made on behalf of Karl Kaye. Instead, it obscures the issues in three ways.

First, it resorts to case law as to property division considerations (Response brief at page 23 -24) which have no bearing on the duration of spousal maintenance. Second, it confuses evidence that the amount of maintenance Karl was requesting was thought by Barbara to be

unreasonable, with the length of time maintenance should be awarded. Karl has not challenged the amount of maintenance awarded.

Third, the Response brief argues as if the question of duration was, a zero sum game: either three months, or until Barbara would retire. What the Response brief fails to acknowledge, but does not deny is that RCW 26.09.090 requires that maintenance be awarded "...for such periods of time as the court deems just...after considering all relevant factors including but not limited to: ..." Thus the duration question is a legal determination which must be supported by substantial evidence.

The Response brief does not deny that the trial judge termed the award of spousal maintenance as "transitional". Webster's International Dictionary defines the word "transition" as a "passage from one state, stage ...or place to another." (International ed., 1988, page 1254). It describes the word "transitional" as an adjective. Thus "transitional maintenance" involves getting Karl Kaye, from being dependent, financially on Barbara Kaye's support to achieving a financial place in which he can live off the funds generated from the disposition of his Sunrise Drive property to be able to sustain himself without the need for her financial assistance.

The Response brief does not deny that there was no evidence on the basis of which the trial court could conclude that three months was sufficient time to get to that financial place. Nor does the Response brief deny that the court did not consider the factors required of it under RCW 26.09.090, as the basis upon which to determine a duration of maintenance that is just, which by itself constitutes a manifest abuse of discretion.

III. Conclusion

It is not possible to pinpoint what bothered the trial judge about Karl Kaye. He was not found to have lacked credibility. What is clear is that the trial judge did not view it as reasonable, that she support him until she were to retire, even after twenty eight years of marriage, in which he did not work and she earned over \$150,000 per year. The trial judge expected Karl to live off the proceeds of sale of all or a portion of the \$1.2 million he found the property to be worth, or through a reverse mortgage, if he could qualify, in lieu of maintenance. In the absence of evidence that any of those contingencies could be accomplished within three months, is what constitutes the abuse of discretion. The failure to consider the required statutory factors, particularly the length of the marriage, and to fail to perpetuate the maintenance awarded until any of them could be accomplished is the abuse of discretion. The failure to find the prenuptial

agreement fair, at least as to procedural fairness and fashion a property division according to its requirements constitutes an abuse of discretion.

DATED this 28 day of March, 2014.

Respectfully submitted,

 . # 30184

H. Michael Finesilver (f/k/a Fields)
Attorney for Appellant
W.S.B.A. #5495

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OF THE STATE OF WASHINGTON

KARL H. KAYE, JR.,)
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 Appellant,)
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 BARBARA G. KAYE,)
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 Respondent,)
 _____)

DECLARATION OF
SERVICE

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COURT OF APPEALS DIV 1
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I, Lester Feistel, state and declare as follows:

I am a paralegal in the Law Offices of Anderson, Fields, Dermody,
Pressnall & McIlwain, Inc., P.S. On the 28th day of March, 2014, I placed
true and correct copies of the Reply Brief of Appellant with Seattle Legal
Messengers for delivery on March 28, 2014 to:

Carolyn J. Balkema
9100 Roosevelt Way NE, Suite 201
Seattle, WA 98115-2801
206-524-2775

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

DATED at Seattle, Washington, on this 28 day of March,
2014.


Lester Feistel

Anderson, Fields, Dermody, Pressnall &
McIlwain, Inc., P.S.
207 E. Edgar Street
Seattle, Washington 98102
(206) 322-2060