IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 99939-2, Consolidated with No. 99941-4

IN RE THE PERSONAL RESTRAINT PETITION OF
JUSTIN LEWIS

Petitioner.

ON PETITION FOR REVIEW FROM DIVISION THREE
OF THE COURT OF APPEALS #369650-III
Asotin County Cause No. 16-1-00150-7
Scott D. Gallina, (Former) Judge

MEMORANDUM OF AMICI CURIAE THE DEFENDER INITIATIVE AND WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF MOTION FOR RECONSIDERATION

DEFENDER INITIATIVE Robert C. Boruchowitz, WSBA No. 4563 901 12th Avenue P.O. Box 222000 Seattle, Washington 98122 Phone: (206) 398-4151 boruchor@seattleu.edu Attorney for Amicus Curiae	WASHINGTON DEFENDER ASS'N Alexandria "Ali" Hohman, WSBA No. 44104 810 Third Avenue, Ste. 258 Seattle, Washington 98104 Phone: (206) 623-4321 ali@defensenet.org Attorney for Amicus Curiae

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I. INTRODUCTION

The Court's opinion misapprehended the facts concerning trial counsel Van Idour's knowing failure to comply with the admission to practice rules and the Standards for Indigent Defense. The majority failed to address the CrR 3.1 on Standards ("CrR 3.1 Stds") and the reasons it passed the Rules. The majority misapprehended the clear holding of *City of Seattle v. Ratliff*, 100 Wn.2d 212, 220(1983): "Denial of representation by one actually authorized to practice in court constitutes a denial of counsel, not merely ineffective assistance."

The majority also overlooked the implications of the holding in *In re Michels*, 150 Wn.2d 159 (2003), and of the analysis in *State v. A.N.J.*, 168 Wn.2d 91 (2010), in which the Court discussed the importance of indigent defense standards.

And the Court misapprehended the facts and law relating to conflict of interest.

The Court's misapprehension of the facts and previous holdings undermines the soundness of the legal principles announced in the opinion and threatens to undercut the standards.

II. ARGUMENT

A. The Court Ignored Its Standards Rule

The decision to recognize as constitutional counsel a lawyer who deliberately practiced without a Washington State Bar License, in violation of the first requirement of Standard 14 Qualifications, contradicts this Court's history of requiring effective and accountable public defense services.

The Court early in the opinion wrote: "Accordingly, Van Idour was not authorized to practice law when he represented the petitioners." *Matter of Lewis*, 99939-2, 2023 WL 1457586, *6 (Feb. 2, 2023). Yet it held: "Van Idour had an Idaho bar license, therefore he qualifies as counsel under the Sixth Amendment." *Id.,7.* It ignored the lawyer's failure to comply with CrR 3.1 Standards.

In *Michels*, *supra*, the Court upheld discipline for a pro tem judge who sat on his own clients' cases and took guilty pleas without properly advising the accused persons. Justice Johnson for the Court emphasized the importance of standards required by RCW 10.101 and stated: "Short cuts around constitutional and statutory requirements and other conditions of due process are unacceptable and are not tolerated in any court by any judicial officer." *Michels*, 150 Wn.2d at 170. This Court's decision herein allows short cuts around the requirements of CrR 3.1 Standards.

The Court overlooked the principles in *Michels*:

> The rights of the poor and indigent are the rights that often need the most protection. Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided.[2] The fact that this was side-stepped … is most troubling. Disregarding our most basic and important principles weakens the legal system as a whole. … this court will not tolerate short cuts to due process.

150 Wn.2d at 174.

"Suspending" from Washington practice an inactive Idaho lawyer who was never admitted in Washington provides some protection for future clients but offers no remedy for Mr. Lewis whose lawyer did not comply with the rules this Court established to protect clients such as Mr. Lewis.[1]

Then Chief Justice Madsen wrote about the adoption of the rule on standards:

> …we have learned that in areas of our state, the promise of access to effective assistance of counsel promised by our constitution has not been met and that we needed to take new measures to fully enact the rights and protections due to those who enter the criminal justice system.[2]

The Chief Justice noted that attorneys would be asked to certify that they met "the minimum basic professional qualifications

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[1] This Court suspended Van Idour in September 2021. *In re Robert Jerry Van Idour*, Supreme Court No. 202,021-6, Order Imposing 18-month Suspension, September 7, 2021. He was inactive in the Idaho Bar as of May 2021.*See* Idaho bar roster excerpt in Appendix.

[2] Chief Justice Barbara Madsen, *Enacting standards for public defenders is a difficult but necessary balancing act*, Full Court Press,July 2012.

identified in Standard 14.1;…" [3] She added:

> Public defense attorney certification and caseload guidelines will require changes in policy and practice, but such changes are necessary to address documented ongoing flaws in indigent defense programs throughout the state.[4]

The decision herein does not permit addressing those flaws. The County, the judge, and the prosecutor knew that this lawyer was not admitted in Washington. But they permitted him to represent clients for nearly one year. Because of this opinion, all Washington's counties and cities know that deliberate violation of the Standards has no consequence, and they can hire unlicensed lawyers and lawyers who violate the Standards.

Van Idour never provided a Washington bar number,[5] and he only once in 12 months, in December 2017, provided the

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[3] *Id*.
[4] *Id*.
[5] CrR 8.4 requires including the Washington Bar membership number in the signature block on all pleadings.

required quarterly certification. He falsified that certification, stating he met the minimum requirements of Standard 14.1, which include being admitted to the Washington Bar.[6] He did not disclose what percentage of his time was devoted to public defense, which is required. He had cases in Idaho.[7]

The Court herein ignored the preamble to CrR 3.1 Standards: "The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel." The most basic element is admission to the Washington Bar.

As Justice Gordon McCloud wrote in dissent:

> Van Idour knowingly failed to comply with several important prerequisites to practicing law in Washington that bear on his competency and accountability. For example, he never took the

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[6] *See* Appendix.

[7] Van Idour practiced in Idaho in 2017 and later. *See*, *Wilson v. Wilson,* Idaho Ct. App., Docket 46991, 2020 WL 1487684 (Mar. 23, 2020)(pursuant to GR 14.1, this is unpublished and attached in appendix); Appellant's Brief in *Wilson v. Wilson*, 2019 WL 4673542(SupremeCt.Idaho)(Appendix). See also, list in appendix.

> mandatory exam designed to test substantive knowledge of Washington law, he made knowing misstatements about his admission status, and he violated the basic condition that a person obtain authorization from *this* court before beginning to practice law in this state. These are not "technical" violations. The last one, in particular, is a violation that deprived this court and the Washington State Bar Association (WSBA) of the ability to evaluate whether he met the most basic qualifications necessary to provide competent legal services.

Lewis, *13.

When people holding themselves out as lawyers are not adequately "regulated, the dangers to the public are manifest...." *Hunt*, 75 Wn. App. at 803 (1994).

This Court has written that "in some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance." *A.N.J.,* 168 Wn.2d at 98. There was an illusion that Mr. Lewis had qualified counsel.

This Court, reversing a juvenile conviction for ineffective assistance of counsel, wrote:

> We note that state law now requires each county or city providing public defense to adopt such standards, guided by standards endorsed by the Washington State Bar Association…

A.N.J., 168 Wn.2d at 110. This Court now has incorporated public defense standards into its Rules, but the majority opinion herein completely overlooked those standards.[8]

The Court misapprehended the teaching of *Strickland v. Washington*, 466 U.S. 668 (1984) concerning prevailing professional norms. Prevailing professional norms in Washington require compliance with Cr.R. 3.1 Standards.

This Court adopted CrR 3.1 Standards to protect clients who are not able to retain counsel. Chief Justice Gonzalez in concurrence in *Davison v. State*, cited cases involving "the

[8] Justice Sanders, concurring in *A.N.J.*, referred to another Asotin County case, *State v. Wilson,*144 Wn. App. 166 (2008). The defender had requested co-counsel because she had no felony trial experience and was not qualified to be sole counsel. The judge denied the motion because of the projected cost to the County. 168 Wn.2d at 121.

systematic deprivation of effective assistance of counsel."

Gonzalez, J. concurring, *Davison v. State*, 196 Wn.2d 285, 298–99 (2020), *as amended on denial of reconsideration* (Oct. 20, 2020) (internal citations omitted).

He added:

> In the wake of the Grant County case, *A.N.J.*, and other similar cases, this court adopted caseload limitations on public defenders. …

Id. at 305.

The bar admission process is "to guard the public and its confidence in the judicial system." *Matter of Simmons,* 190 Wn.2d 374, 387 (2018).

This purpose of protection was thwarted. Van Idour was not admitted under any Admission to Practice rule.

Without regulatory review of a bar applicant, past problems are overlooked. Van Idour's firm had the Nez Perce County public defense contract. A report found "near unanimous agreement" among the county's judges "that there is

not a single thing about the public defense system in their county that they believe is worth replicating anywhere else." [9]

Despite the lawyers' wealth of experience, "the big complaint is their lack of day-to-day communication with their clients." [10]

Mr. Ayerst's letter to the judge provides evidence of the same problem in Asotin County: "I wrote Mr. Van Idour for almost two week[sic] with no answer."[11] The County Commissioners sent a letter to all four public defense counsel in November 2017 complaining that "clients aren't always seen by their attorneys in a timely fashion."[12]

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[9] Nat'l Legal Aid and Defender Ass'n, *The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts*, p. 10 (2010) https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/standingcommittees/220301_hjud_other_meet_time-Minutes_Attachment_1.pdf.
[10] *Id.*, at 60.
[11] *See*, Appendix to the Amici Memorandum in Support of the Petition for Review.
[12] Kerri Sandaine, *Asotin County officials to crack down on public defense attorneys meeting with clients*, Lewiston Trib. (November 21, 2017)https://lmtribune.com/northwest/asotin-county-

The Court herein distinguished *Ratliff*'s ruling, that constitutional counsel includes "only those persons authorized by the courts to practice law", by focusing on the language "in the circumstances of this case." *Lewis*, *7.

But the principle that a legal intern can provide constitutional counsel "as long as the rules were followed", *Id.*, should apply to an unlicensed attorney who does not follow the Court rules for public defense counsel.

The majority discussed the "tradition of admission upon qualification" *Lewis*, *8 (internal citation omitted), but did not follow this principle to its logical conclusion--admission depends on qualification, which Van Idour never completed.

The majority relied on the practice of pro hac vice admission to support its conclusion but ignored the requirement

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officials-to-crack-down-on-public-defense-attorneys-meeting-with-clients/article_039d74ad-6e99-599a-8cf2-d70852f53858.html.

that a local lawyer actually participate in the representation, which did not occur in this case.

The Court noted, "The *constitutional* question of whether a practitioner qualifies as counsel 'is whether the court has satisfied itself of the advocate's competence and authorized [them] to practice law.'" *Lewis*, at *9 (emphasis added).

But no court so satisfied itself before Mr. Lewis was convicted.

B. Van Idour's Conflict of Interest

The Court recognized that "counsel may deprive a defendant of assistance of counsel when a conflict of interest renders that assistance ineffective." *Lewis*, *5. It cited *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983), in which the court applied a per se rule of reversal for someone represented by an unlicensed person because

> … an advocate "who would knowingly commit the crime of unlicensed practice of law would inevitably suffer from serious constraints on their ability to provide effective representation" at trial. ... A vigorous defense, *Solina* reasoned, could

> lead others to inquire into the advocate's background and discover their lack of credentials. 709 F.2d at 164...

Lewis, at *1.

The unlawful practice of law is a strict liability crime. *State v. Yishmael*, 195 Wn.2d 155, 165-72, 456 P.3d 1172 (2020). But the Court said that if the advocate believes they are properly licensed, no conflict of interest exists. *Lewis*, at *12. Van Idour knew he was not authorized to practice.

The Court observed that the judge allowed Van Idour to appear. [13] But he stipulated that he "knew that the [nunc pro

[13] That judge was imprisoned for assault with sexual motivation. "According to charging documents, some of the alleged incidents occurred as far back as 2014..." Atty. Gen. of Washington News Release, *Former Asotin County judge Scott Gallina pleads guilty to assault with sexual motivation*, (April 4, 2022)https://www.atg.wa.gov/news/news-releases/former-asotin-county-judge-scott-gallina-pleads-guilty-assault-sexual-motivation (last visited Feb. 20, 2023); *See also*, Kerri Sandaine, *Former Columbia County judge Gallina sentenced to 15 months in prison*, Lewiston Trib. (July 12, 2022)https://www.union-bulletin.com/news/northwest/former-columbia-county-judge-gallina-sentenced-to-15-months-in-

tunc] Order did not constitute admission to practice law in Washington." [14]

Despite what he might have believed, "Respondent agrees that neither the pending applications nor the court appointments authorized him to practice and that he should have confirmed his authority to practice during the term of the contract." He stipulated that he "acted knowingly."[15] It makes no sense that a lawyer with 36 years of experience, who signed

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prison/article_397c0306-0205-11ed-a5db-e3b1dd01f558.html(last visited Feb. 20, 2023).

This Court denied review of the claim that the judge "engaged in criminal activities that violated the appearance of fairness doctrine and Ayerst's due process right to a fair and impartial tribunal." *Lewis*, 6. The Court of Appeals denied this claim in part because the judge had not yet been convicted. *Matter of Ayerst*, 17 Wn. App. 2d 356, 365 (2021), *aff'd sub nom. Matter of Lewis*, 99939-2, 2023 WL 1457586(Feb. 2, 2023).

[14] Stipulation to Suspension, Disciplinary Board, Washington State Bar Association, Proceeding No. 19#00008 ODC File No. 17-01923 (July 21, 2021)https://mywsba.org/webfiles/cusdocs/000009701210-0/059.pdf(last visited Feb. 20, 2023).

[15] *Id*.

a contract requiring a Washington license and who submitted applications for admission that were not accepted, would "believe" that it was acceptable to represent accused persons in Washington without a Washington license.

Van Idour's unlicensed behavior constituted a crime. The unauthorized practice of law[16] is prohibited to protect the public. *Hunt*, 75 Wn. App. at 803.

Ignoring the conflict of interest caused by Van Idour's criminal conduct eviscerates confidence in courts and directly harms the public.

This harm is not hypothetical. 10% of Washington's population, approximately 770,000 Washingtonians,[17] live in poverty. *Population In Poverty- Washington Percent of Population in Poverty by Age Group*, 1969-2020, Off. of Fin.

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[16] RCW 2.48.180.

[17] Washington's population in 2020 was 7,705,281. U.S. Census-Washington2020.https://www.census.gov/library/stories/state-by-state/washington-population-change-between-census-decade.html(last visited Feb. 15, 2023).

Mgmt..,https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/social-economic-conditions/population-poverty(last visited Feb. 15, 2023). The harm disproportionately affects Black, Indigenous, Latino/x, and people of color who are overrepresented in involvement in the criminal system.[18]

III. CONCLUSION

Upholding convictions when the trial lawyer knowingly did not have the right to practice in Washington and violated the rule that the Court established to ensure effective public defense is inconsistent with prior precedents and the establishment of CrR 3.1 Standards.

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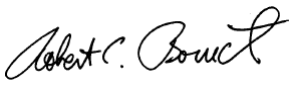
[18] Race and the Criminal Justice System, Task Force 2.0: *Race and Washington's Criminal Justice System: 2022 Recommendations to Criminal Justice Stakeholders in Washington* (2022).123, Fred T. Korematsu Center for Law and Equality.https://digitalcommons.law.seattleu.edu/korematsu_center/123

When a person is not authorized and not qualified to represent a client, the client has been denied counsel. That is structural error requiring reversal without a showing of prejudice. CrR 3.1 Standards informs the determination whether Mr. Lewis' "lawyer" was qualified, and he clearly was not, because he was not admitted to practice in Washington.

The motion to reconsider should be granted and the conviction reversed.

Respectfully submitted,

Signed February 21, 2023.



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Attorney for Amicus Curiae

1. CERTIFICATE OF COMPLIANCE WITH RAP 18.17 AND CERTIFICATE OF SERVICE

On February 21, 2023, I hereby certify that the word count for this motion, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 2,500 words.

I further certify that on February 21, 2023, I served one copy of the following documents: Memorandum of Amici Curiae and Motion to Leave to File Memorandum of Amici Curiae via the Washington Courts E-Portal on the following:

Lise Ellner
Attorney for Appellants

Benjamin Curler Nichols, Asotin County Prosecuting Attorney
Jaime Kiona Young, Asotin County Prosecuting Attorney
Curtis Lane Liedkie, Asotin County Prosecuting Attorney
Attorneys for Respondent

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The Defender Initiative

901 12th Ave.
P.O. Box 222000
Seattle, Washington 98122
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boruchor@seattleu.edu

2. APPENDIX

FILED
OFFICE OF COUNTY CLERK
ASOTIN COUNTY, WA

DEC - 1 2017

CLERK/DEPUTY

[X] SUPERIOR COURT [ ] JUVENILE DEPARTMENT
[ ] DISTRICT COURT [ ] MUNICIPAL COURT
FOR
[ ] CITY OF [ ] COUNTY OF _____,
STATE OF WASHINGTON

[ ] No.: _____
[ ] Administrative Filing

CERTIFICATION BY:
[NAME], [WSBA#] Robert J. Van Dalen

FOR THE:
[1ST, 2ND, 3RD, 4TH] CALENDAR QUARTER OF [YEAR]

CERTIFICATION OF APPOINTED COUNSEL OF COMPLIANCE WITH STANDARDS REQUIRED BY CRR 3.1 / CRRLJ 3.1 / JUCR 9.2

The undersigned attorney hereby certifies:

1. Approximately _____% of my total practice time is devoted to indigent defense cases.
2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:
   a. **Basic Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1.
   b. **Office:** I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.
   c. **Investigators:** I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.
   d. **Caseload:** I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective October 1, 2013 for felony and juvenile offender caseloads; effective January 1, 2015 for misdemeanor caseloads: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]
   e. **Case Specific Qualifications:** I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013]

Signature, WSBA# — Date: 12-1-17

Attorney Roster Search

Type the last name or the beginning of the last name of the attorney you are trying to find. Use more letters
cannot find the attorney you are looking for, contact the Licensing Department at (208) 334-4500.

Current Status Definitions

Search again

Results (as of 5/19/21)

Robert Jerry Van Idour

Status	Inactive
Admittance Date	09/25/1980
Firm	
Mailing Address	PO Box 1814 Lewiston, ID 83501
Phone	(208) 413-3625
Phone Ext	
Fax	
Bar Email Address	lawyerbobv@gmail.com
Website Address	
Court eService Email	lawyerbobv@gmail.com

https://mycourts.idaho.gov/odysseyportal/Home/WorkspaceMode?p=0#

Case Information

CR-2017-412 | State of Idaho vs. Anthony P Demitter

Case Number
CR-2017-412
File Date
06/08/2017

Court
Clearwater County Magistrate Court
Case Type
Criminal

Judicial Officer
Robinson, Randall W.
Case Status
Closed - After Judgment

Party

State
State of Idaho

Active Attorneys
Lead Attorney
Hood-Gilmore, Lori Michelle

Defendant
Demitter, Anthony P
Aliases
AKA Demitter, Tony
DOB
XX/XX/1966

Active Attorneys
Lead Attorney
Van Idour, Robert Jerry
Public Defender

Inactive Attorneys
Attorney
Brandt, Alison M.
Public Defender

Attorney
Kovis, Charles Eugene
Public Defender

Case Information

CR-2017-96 | State of Idaho vs. Nicole C Schlieper

Case Number
CR-2017-96
File Date
02/06/2017

Court
Clearwater County District Court
Case Type
Criminal

Judicial Officer
Green, Adam H.
Case Status
Closed

Party

State
State of Idaho

Active Attorneys
Lead Attorney
Tyler, Eric Clayne

Defendant
Schlieper, Nicole C
DOB
XX/XX/1989

Active Attorneys
Lead Attorney
Van Idour, Robert Jerry
Public Defender

Case Information

CV-2017-466 | In The Matter Of The Guardianship Of Beverley Geraldine Barker

Case Number
CV-2017-466
File Date
03/03/2017

Court
Nez Perce County Magistrate Court
Case Type
G1b- Guardianship (Incapacitated)

Judicial Officer
Evans, Michelle M.
Case Status
Closed

Party

Subject
Barker, Beverley Geraldine
DOB
XX/XX/1949

Other Party
Kaschmitter, Angela Marie
Aliases
FKA Cook, Angela Marie
DOB
XX/XX/1972

Active Attorneys
Lead Attorney
Van Idour, Robert Jerry
Retained

Case Information

CV-2017-475 | Gary Wilson Petitioner, vs. Jennifer Wilson Respondent.

Case Number
CV-2017-475
File Date
03/03/2017

Court
Nez Perce County Magistrate Court
Case Type
B1b- Divorce Without Minor Children

Judicial Officer
Ramalingam, Sunil
Case Status
Closed

Party

Respondent
Wilson, Jennifer Amy
Aliases
CONV Euler, Jennifer Amy
CONV Mathews, Jennifer Amy
FKA Kinnick, Jennifer Amy
FKA Smith, Jennifer Amy
DOB
XX/XX/1976

Active Attorneys
Lead Attorney
McDowell-Lamont, Sarah Anne
Retained

Petitioner
Wilson, Gary Alan
DOB
XX/XX/1966

Active Attorneys
Lead Attorney
Van Idour, Robert Jerry
Retained

Case Information

CR-2017-645 | State of Idaho vs. James Troy Houser

Case Number
CR-2017-645
File Date
01/31/2017

Court
Nez Perce County Magistrate Court
Case Type
Criminal

Judicial Officer
Evans, Michelle M.
Case Status
Closed - After Judgment

Party

State
State of Idaho

Active Attorneys
Lead Attorney
Nez Perce County Prosecutor

Defendant
Houser, James Troy
Aliases
CONV Houser, Troy
DOB
XX/XX/1962

Active Attorneys
Lead Attorney
Van Idour, Robert Jerry
Retained

Inactive Attorneys
Attorney
Evans, Patricia Lorraine
Retained

Case Information

CV-2017-222 | In The Matter Of The Suspension Of The Drivers License Of James Troy Houser, Defendant

Case Number
CV-2017-222
File Date
01/31/2017

Court
Nez Perce County Magistrate Court
Case Type
H2g- BAC License Suspension

Judicial Officer
Ramalingam, Sunil
Case Status
Closed - After Judgment

Party

Subject
Houser, James Troy
Aliases
CONV Houser, Troy
DOB
XX/XX/1962

Active Attorneys
Lead Attorney
Van Idour, Robert Jerry
Retained

Inactive Attorneys
Attorney
Evans, Patricia Lorraine
Retained

State
State of Idaho

Active Attorneys
Lead Attorney
Nez Perce County Prosecutor
Retained

Other Party
State of Idaho-BAC-NPC

Active Attorneys
Lead Attorney
Nez Perce County Prosecutor
Retained

FILED

2017 JUN 12 P 3:22

MCKENZIE KELLEY
COUNTY CLERK
ASOTIN COUNTY, WA

SUPERIOR COURT OF WASHINGTON
FOR ASOTIN COUNTY

STATE OF WASHINGTON, Plaintiff, v. ROBERT AYERST, Defendant.	CASE NO. 16-1-00150-7

CORRESPONDENCE. Copy sent to counsel.

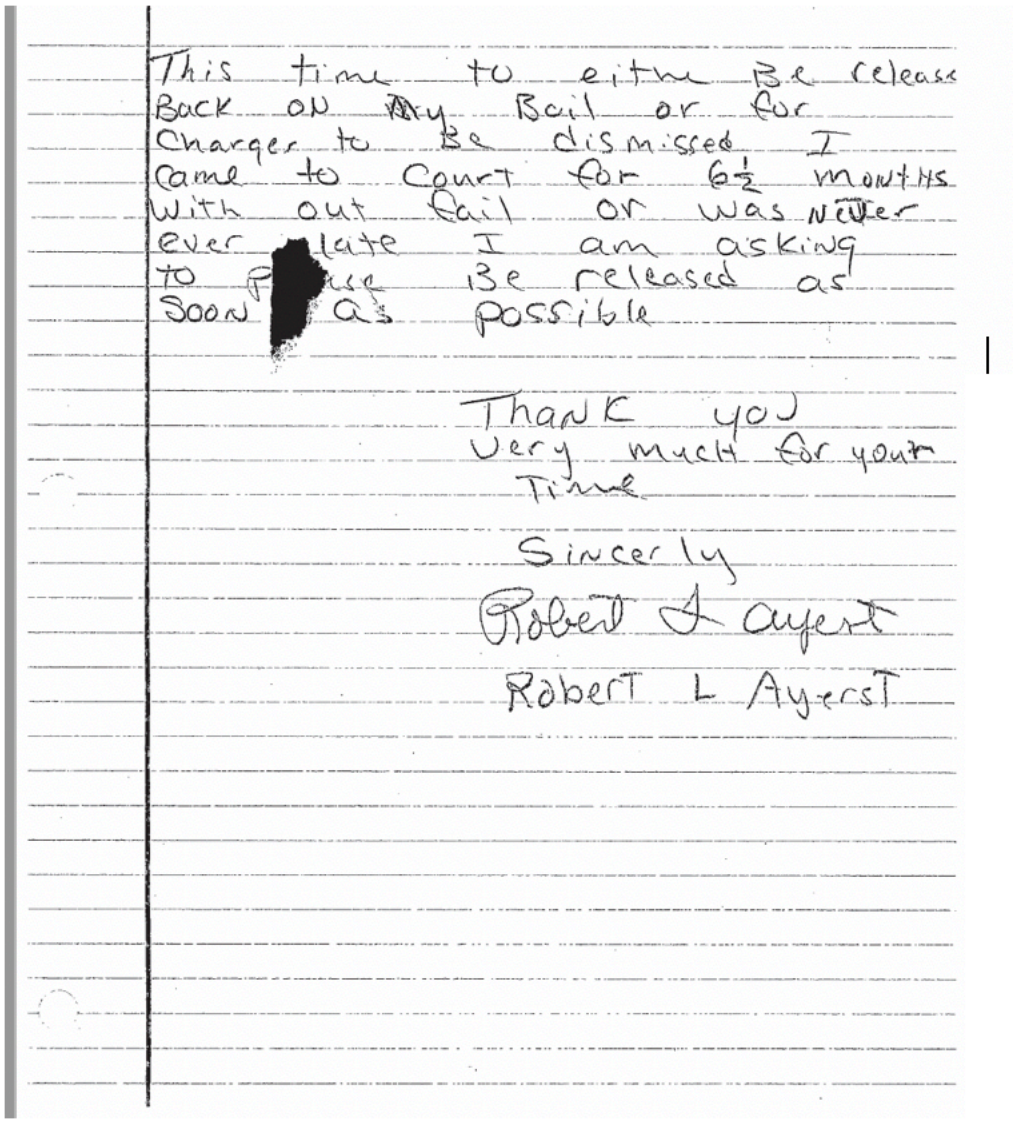
47

May 28 17

Judge Galina

my Name is Robert Ayerst and I talked to you in your chambers a couple times about This warrant That was put on me April 7Th 17 I am Trying TO get This resolved and get Home I was Just married and am needed at Home my attorney at the time JOHN Fay called me around The First part of april and Said That my pre trail was going to Be posponed and He would get in touch with me in a couple Days He Never Called me so I called the Court Clerk and found out I Had been giving Robert VAN I dour I called mr VanIdour for almost 2 week with No answer I called the Prosecutors Offict I called you and was told it would Be Taken Care of Now I'm in Jail again I also Heard my Speedy trial right ended 12/14/16 I am asking at

C



This time to either Be release Back on My Bail or for Charger to Be dismissed I came to court for 6½ months With out fail or was never ever late I am asking to Please Be released as Soon as possible

Thank you
very much for your
Time

Sincerly
Robert L Ayerst
Robert L Ayerst

Supreme Court of Idaho.

Gary A. WILSON, Petitioner-Appellant,
v.
Jennifer A. WILSON, Respondent.

No. 46991-2019.
September 15, 2019.

Nez Perce County District Court
Appeal from the District Court of the Second Judicial District for Nez Perce County.
Honorable Jeff M. Brudie, presiding.
CV2017-475

Appellant's Brief

Robert J. Van Idour, Residing at Lewiston, Idaho, for petitioner-appellant.

Sara M. McDowell-Lamont, Residing at Lewiston, Idaho, for respondent.

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***ii** TABLE OF CASES AND AUTHORITIES

Statutes

Cases

GARY A. WILSON, by and through his undersigned attorney of record, submits his appellate brief as follows:

STATEMENT OF THE CASE

Gary Wilson filed for divorce against his former spouse, Jennifer Kinsey, on March 3, 2017 in Nez Perce County, Idaho. Both parties were Idaho residents and lived in Nez Perce County at that time. The Respondent, Jennifer Kinsey, filed a Response and Counterclaim on March 15, 2017. Their case was assigned to Magistrate Kent J. Merica. The parties engaged in discovery and pre-trial hearings ultimately settling on a trial date of October 17, 2017. The trial in their case was held on October 17, 2017. After receiving evidence and testimony Magistrate Merica took the case under advisement and issued his Findings of Fact and Conclusions of Law in open court on November 30, 2017. Written Findings of Fact and Conclusions of Law memorializing the oral Findings and Conclusions were filed on March 6, 2018. A Decree of Divorce was filed. On April 17, 2018 a Notice of Appeal was filed by the Petitioner. The case was assigned to District Judge Jeff M. Brudie. A transcript of the trial was prepared and filed. A Scheduling Order was entered on September 17, 2018. Oral argument was heard on December 13, 2018 before District Judge Brudie. On December 13, 2018 Judge Brudie took the case under advisement. A written decision denying Petitioner-Appellant's appeal was issued. Notice of Appeal was timely filed from that decision.

FACTS OF CASE

The parties were married on June 8, 2014. (Tr. p.5) No children were born of the marriage. (Tr. p. 6) The Petitioner had accrued retirement benefits prior to the parties' marriage and was fully vested in the pension program prior to the parties' marriage. (Tr. p.16) The Respondent incurred student loans during the marriage in her successful pursuit of a master's degree in social work. (Tr. pp. 58-59)The Petitioner was employed by the Clearwater Paper Corporation before his marriage to Respondent and remains employed there. (Tr. p. 14) The Respondent began working for the State of Idaho Department of Health and Welfare as a social worker and continues her employment there. At the time of the divorce she was not vested in PERSI, based on her lack of five (5) years employment with DHW.

A core asset in this case is the home purchased in January of 2014, prior to the parties' marriage and occupied by the parties until their separation. (Tr. p. 7) The Respondent remained in the home after the parties separated. Its purchase was accomplished in a somewhat odd and circular manner.

The Petitioner had difficult credit issues prior to the marriage. (Tr. p. 10) Although they were partially addressed they remained a fiscal impediment during the marriage. (Tr. p. 20) The Petitioner had a civil judgment against him, for which his wages were being garnished. (Tr. p. 63)

Into this mix was injected a decision to try and purchase what is now the Respondent's home. As noted above, the Petitioner had credit issues at the time the home was purchased. The Petitioner made it clear to the mortgage company that this was in all reality, a joint purchase. (Tr. p.20) The Petitioner contributed roughly $35,000.00 from his separate funds as a down payment on the home purchase. (Tr. p. 20) The Respondent and the mortgage company proffered a “gift letter” for the Petitioner's signature

essentially giving all of any interest Petitioner might have in the home at the time of purchase to Respondent, citing the credit issues as a basis for the demand. (Tr. p.20) Petitioner also signed a quitclaim deed in favor of Respondent. (Tr. p. 27) Petitioner testified that it was never his intention to make a gift of the $35,000.00 down payment to Respondent. (Tr. pp.20, 25) After living together in the home both before marriage and after, the parties ultimately separated. The issues of debt division and property allocation were addressed in the lower Court's Findings of Fact and Conclusions of Law, as reflected in the March 6th filing with the Court.

ISSUES PRESENTED

1. Did the lower court commit error by not awarding Petitioner an equitable lien on the real property owned by the Respondent and purchased with separate funds of the Petitioner?

2. Did the lower court commit error in classifying the entirety of the $47,428.62 value of Petitioner's 401K account as having accrued after Petitioner's marriage to Respondent?

ARGUMENT

As noted above Appellant is seeking an equitable lien on the real property awarded to Respondent in the lower court. The key basis for this is the $35,000.00 down payment contributed to the home purchase by Petitioner. However in order to fully evaluate this issue the Court must examine the primary financial factors in this case. This will enable the Court to consider the ultimate effect of the lower Court's decision in allocating both property and debt.

Petitioner was awarded his Clearwater 401K account, citing a value of $47,428.62. The specific language used was "Petitioner's Clearwater 401K Retirement (since marriage). The Court's distribution classifies the post-marriage contributions as community property. However, the value awarded in the Property Value and Debt Distribution Summary (herein Property Summary) does not specify how much that contribution was, so there is no way to determine from the Property Summary what value was allocated as community property. This makes it untenable to analyze the equity of the distribution. Petitioner's contributions to the 401K account were $128.00 every two weeks. (Tr. pp. 39-40) This continued after the marriage date of June 8, 2014. (Tr. p.40) Per Conclusion of Law 11 the divorce was granted as of November 30, 2017. This caps the community contribution to the 401K at $4,608.00 [$128.00 X 36 = $4,608] The import of this calculation is that the lower Court classified all of the 401K amount as essentially a post-marital contribution, thereby overstating the community value that was ultimately divided. This was a post-marital or community contribution of roughly only 10% of the value of the account. This resulted in a disproportionate award of property in a non-fault based divorce. Whatever the parties' differences Idaho law heavily favors equal division of assets. Idaho Code § 32-712(1)(a); **Josephson v. Josephson, 115 Idaho 1142, 772 P.2d 1276 (1989)**

The reality is that the issue of the effect of the Appellant's $35,000 contribution to the post marital home is the main turning point in this case. This was a de facto joint purchase by the parties. The Appellant testified to this effect. He lived there with Respondent and her children during the time they were a married couple, and before. This was not just a kind hearted purchase of an incidental asset. The testimony of the Appellant is clear. Both the evidence presented by the Appellant is clear that he intended this as a contribution to a marital residence, not a freewheeling

unconditional gift. The testimony makes this clear when we examine it closely.

The parties both spoke dealt with the realtor. (Tr. p.17) The house was jointly selected by the parties. (Tr.p.17-18) The parties jointly made repairs to the home. (Tr. pp. 18-19) Again, as noted above the parties lived together in the home before and after marriage and prior to separation. The question comes down to what is the equitable thing to do with the $35,000.00 down payment that Petitioner made?

We begin with the standards of divorce courts. Divorce courts are traditionally regarded as courts of equity. "...equity will consider the conduct of the adversary, the requirements of public policy, and the relation of the misconduct to the subject matter of the suit and to defendant." *Howay v. Howay,* 74 Idaho 492, 497, 264 P.2d 691 (1953) (citing 30 C.J.S. Equity § 98) It is this philosophy of the role of a court of equity that allows a court to look deeper into a transaction than is traditionally allowed, even to explore beyond the four corners rule regarding documentation. This is what occurred in *Barrett v. Barrett,* 149 Idaho 21,24, 232 P.2d 800 (Idaho 2010) In that case a dispute arose as to the nature of real property. The Idaho Supreme Court held that in a disputed case evidence of intent of the parties was not constrained to language of a deed, but could be determined by also examining parol evidence of intent and that the language of a deed was not in and of itself dispositive of intent in a divorce case. ***Barrett*** at 149 Idaho 24 This follows closely on the reasoning of the appellate court in *Winn v. Winn,* 105 Idaho 811, 673 P.2d 411(1983) in which the Idaho Supreme Court examined multiple factors and did not limit itself to the language of the deed.

All of the foregoing brings the analysis to the key question in this case, which is what is to be done to recognize the equity of providing Appellant with equitable compensation for his

separate property contribution to the real estate now classified as separate property? The answer is to impose an equitable lien on the home for all or part of the $35,000.00 down payment.

An equitable lien is a court ordered tool for enforcing the doctrine of unjust enrichment. That doctrine was recently stated in *Countrywide Loans v. Sheets and Bank of America, 160 Idaho 268, 371 P.2d 322 (Idaho 2016)* as "unjust enrichment occurs when a defendant receives a benefit which would be inequitable to retain without compensating the plaintiff to the extent that retention is unjust." In this case an equitable lien is the only realistic remedy for Petitioner to receive any compensation for his $35,000.00 expenditure.

CONCLUSION

Appellant's $35,000.00 contribution to the purchase of what he viewed as the family home was never intended as an unconditional gift. He made the payment as part of what was supposed to be a mutually beneficial way to obtain a family residence for both himself and the Respondent. It is manifestly unfair to allow the Respondent to keep all of the benefits of Appellant's separate funds payment. Appellant asks that this Court grant an equitable lien on the Respondent's real property to enforce his claim of unjust enrichment.

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Distinguished by In re Detiege, 9th Cir.BAP (Idaho), March 22, 2022

2020 WL 1487684

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THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY

Court of Appeals of Idaho.

Gary Alan WILSON, Petitioner-Appellant,

v.

Jennifer Amy WILSON, Respondent.

Docket No. 46991

Filed: March 23, 2020

Appeal from the District Court of the Second Judicial District, State of Idaho, Nez Perce County. Hon. Jeff M. Brudie, District Judge. Hon. Kent J. Merica, Magistrate. Order of the district court, on intermediate appeal from the magistrate court, affirming judgment and decree of divorce, affirmed.

Attorneys and Law Firms

Robert J. Van Idour, Lewiston, for appellant. Robert J. Van Idour argued.

Sarah A. McDowell-Lamont, Lewiston, for respondent. Sarah A. McDowell-Lamont argued.

Opinion

GRATTON, Judge

*1 Gary Alan Wilson appeals from an order of the district court, on intermediate appeal from the magistrate court, affirming a judgment and decree of divorce. We affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Prior to their marriage, Gary and Jennifer Amy Wilson acquired a home. Gary contributed approximately $35,000 for a down payment on the home.1 However, due to Gary's bad credit, Jennifer obtained financing and purchased the home on her own. At the insistence of the mortgage lender, Gary signed a "gift letter" stating that the funds he was contributing to the home purchase were a gift and he expected no repayment. Despite Gary funding the down payment, the home was deeded only to Jennifer and only she signed the mortgage documents and deed of trust. Once the purchase was complete, Gary and Jennifer moved into the home.

Thereafter, Gary and Jennifer married. Jennifer later refinanced the mortgage on the home. During the refinancing process, the lender required Gary to sign a quitclaim deed conveying any interest he had in the home to Jennifer "as her sole and separate property." The ostensible purpose of the deed was to ensure that the home was protected from a tax lien against Gary stemming from a prior marriage.

After Jennifer refinanced the mortgage, the marriage deteriorated. Gary and Jennifer separated, and Gary moved out of the home. Eventually, Gary filed for divorce. The main focus of the divorce trial was the funds Gary provided for the down payment on the home. Gary conceded that Jennifer should receive the home, but sought repayment of the funds he contributed to its purchase. Jennifer argued that the funds were a pre-marriage gift that she did not have to repay. Ultimately,

the magistrate court determined that it could not adjudicate whether Gary had any interest in the home arising from a pre-marriage transaction. Consequently, the magistrate court concluded that the home, including any equity arising from the funds contributed by Gary, was Jennifer's separate property and awarded the home to Jennifer free of any obligation to reimburse Gary. Although Gary did not directly recoup the funds he contributed to the purchase of the home, he did receive a greater distribution of the couple's community property due, in part, to his financial contribution to the purchase of the home. The community property that was subject to distribution included Gary's 401(k) retirement account. The 401(k) retirement account predated the marriage, but Gary made contributions to it during the marriage.
Gary appealed to the district court, challenging the magistrate court's property distribution. The district court affirmed the magistrate court's judgment and decree of divorce, concluding that the magistrate court did not abuse its discretion in dividing and distributing the couple's property. Gary again appeals.

II.
STANDARD OF REVIEW

For an appeal from the district court, sitting in its appellate capacity over a case from the magistrate division, this Court's standard of review is the same as expressed by the Idaho Supreme Court. The Supreme Court reviews the magistrate court's record to determine whether there is substantial and competent evidence to support the magistrate court's findings of fact and whether the magistrate court's conclusions of law follow from those findings. *Pelayo v. Pelayo*, 154 Idaho 855, 858-59, 303 P.3d 214, 217-18 (2013). If those findings are so supported and the conclusions follow therefrom, and if the district court affirmed the magistrate court's decision, we

affirm the district court's decision as a matter of procedure. *Id*. Thus, the appellate courts do not review the decision of the magistrate court. *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012). Rather, we are procedurally bound to affirm or reverse the decision of the district court. *Id*.

III.
ANALYSIS

*2 Gary raises two issues on appeal: (1) that the magistrate court erred in failing to grant him an equitable lien against the home for the funds he contributed to its purchase; and (2) that the magistrate court erred in characterizing his entire 401(k) retirement account as community property. On the first issue, Jennifer argues that the magistrate court correctly concluded Gary was not entitled to an equitable lien because the home, along with the equity arising from the funds Gary contributed to its purchase, was her separate property. On the second issue, Jennifer argues that the magistrate court did not err in characterizing Gary's 401(k) retirement account as community property because he failed to present evidence of the account's pre-marriage value. We hold that Gary has failed to establish error as to either issue.

A. Equitable Lien

Gary argues that he is entitled to an equitable lien against the home for the amount he contributed to its purchase as a down payment. Gary contends that despite the gift letter and quitclaim deed he executed, he did not intend his contribution of funds to be a gift. According to Gary, an equitable lien is the only "realistic remedy" available to compensate him for his contribution to what he characterizes as a "joint purchase" of the home.

In Idaho, divorce has traditionally been viewed as an action in equity. *Moffett v. Moffett*, 151 Idaho 90, 95 n.3, 253 P.3d 764, 769 n.3 (Ct. App. 2011). That does not,

however, mean that Idaho courts presiding over a divorce proceeding can exercise authority over all the property divorcing spouses own in an effort to resolve inter-spousal disputes. A court's authority to divide and distribute a married couple's property is governed by statute. *See* Idaho Code § 32-712; *Schneider v. Schneider*, 151 Idaho 415, 426, 258 P.3d 350, 361 (2011). Although courts have authority to divide community property between divorcing spouses, courts may not award one spouse's separate property, or any part of it, to the other spouse. *Schneider*, 151 Idaho at 426, 258 P.3d at 361; *Heslip v. Heslip*, 74 Idaho 368, 372, 262 P.2d 999, 1002 (1953); *Radermacher v. Radermacher*, 61 Idaho 261, 273-74, 100 P.2d 955, 961 (1940). However, when community funds enhanced a spouse's separate property, or the equity therein, courts may impose an equitable lien on that property to compensate the community. *Gapsch v. Gapsch*, 76 Idaho 44, 53, 277 P.2d 278, 283 (1954).

Here, the magistrate court concluded that the home and all the equity in it were Jennifer's separate property. This conclusion was supported by the following findings: (1) the home was purchased and titled only in Jennifer's name prior to the marriage; (2) the transfer of funds upon which Gary based his claim for an equitable lien also occurred before the marriage; and (3) there was no evidence establishing a transmutation of the funds Gary contributed. Because the home was Jennifer's separate property at the time of marriage, the magistrate court concluded that it lacked the authority to adjudicate whether Gary was entitled to any property interest in the home arising from his pre-marriage contribution to its purchase.

Gary does not challenge the characterization of the home or any of the equity in it as Jennifer's separate property.

Rather, Gary urges the imposition of an equitable lien on the home to avert Jennifer's unjust enrichment. Gary asserts that the magistrate court should have looked beyond the four corners of both the gift letter and quitclaim deed he signed and recognized what he characterizes as a “de facto joint purchase.” Gary's argument fails for two reasons. First, Gary has not cited legal authority approving the imposition of an equitable lien in a divorce proceeding for what is in essence an unjust enrichment claim arising from a premarital transaction. We decline Gary's invitation to expand a trial court's authority in a divorce proceeding to reach such a claim.

*3 Second, even if the magistrate court could have adjudicated a pre-marriage unjust enrichment claim, Gary could not have supported the claim with parol evidence of his intent in providing funds for the down payment that contradicted the gift letter and quitclaim deed. Although courts may look beyond the language of a deed to determine whether real property transmuted from separate to community or vice versa during the course of a marriage, *see* *Barrett v. Barrett*, 149 Idaho 21, 24-25, 232 P.3d 799, 802-03 (2010), Gary does not argue that any transmutation occurred. Moreover, Gary testified during trial that the home purchase was structured to keep his name off the title to protect the home from a tax lien against him. The magistrate court could neither condone nor facilitate tax lien avoidance by admitting evidence to contradict the gift letter or quitclaim deed Gary signed. *See* *id.* at 25, 232 P.3d at 803 (discussing situations in divorce proceedings when a court may not consider parol evidence related to a real property conveyance).

B. Characterization of the Retirement Account

Gary argues that the magistrate court erred in characterizing all the funds in his 401(k) retirement account as community property. However, Gary has failed to provide an adequate record for this Court to address the issue. The briefing from Gary's intermediate appeal is absent from the record. Moreover, neither the oral argument transcript from the intermediate appeal nor the district court's order affirming the magistrate court on intermediate appeal address the characterization of Gary's 401(k) retirement account as community property. In short, the record does not indicate that Gary raised the issue of the characterization of his 401(k) retirement account on intermediate appeal at all.

As the appellant, it was Gary's burden to provide a record sufficient to review the issues he raises on appeal. *Gibson v. Ada Cty.*, 138 Idaho 787, 790, 69 P.3d 1048, 1051 (2003). The absence of a record indicating that Gary raised the issue of the characterization of his 401(k) retirement account on intermediate appeal supports the district court's decision not to address the issue in its order on intermediate appeal. *Id.* Consequently, Gary has failed to show error in the district court's order affirming the magistrate court on intermediate appeal.

C. Attorney Fees

Jennifer requests an award of attorney fees and costs on appeal under I.C. §§ 12-120 and 12-121 because Gary "failed to meet the appropriate legal standard in this case."2 As Jennifer is the prevailing party, she is entitled to an award of costs as a matter of course. I.C. § 12-107. However, Jennifer is not entitled to an award of attorney fees under I.C. § 12-120 because that statute is inapplicable to an appeal from a divorce proceeding. *See Smith v. Smith*, 131 Idaho 800, 803, 964 P.2d 667, 670 (Ct. App. 1998). An award of attorney fees

may be granted under I.C. § 12-121 and Idaho Appellate Rule 41 to the prevailing party when the court finds that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *See id*. Although Gary did not prevail, we cannot say he acted frivolously in pursuing this appeal. Therefore, Jennifer's request for attorney fees is denied.

IV.
CONCLUSION

Gary has not shown error in the magistrate court's conclusion that it lacked the authority to impose an equitable lien against the home. Additionally, Gary has failed to provide an adequate record to address whether it was error to characterize his entire 401(k) retirement account as community property. Consequently, the district court's order affirming the magistrate court's judgment and decree of divorce is affirmed. Costs on appeal are awarded to Jennifer.

Chief Judge HUSKEY and Judge BRAILSFORD concur.

All Citations

Not Reported in Pac. Rptr., 2020 WL 1487684

Footnotes

1
According to settlement statements associated with the home purchase, the actual down payment was $34,256.98.

2
Gary did not request an award of attorney fees or costs on appeal.

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