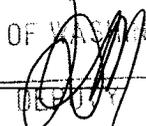


FILED
COURT OF APPEALS
DIVISION II

No. 37372-6-II

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STATE OF WASHINGTON
BY 

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE MARRIAGE OF:

LOUISE ABRAMS,

Appellant,

v.

CHRISTOPHER N. GUDJOHNSEN

Respondent.

APPEAL FROM SUPERIOR COURT OF CLARK COUNTY

HONORABLE E. JAMES E RULLI, JUDGE

CLARK COUNTY CAUSE NO. 007-3-00239-9

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

- A. The trial court properly found that the parties own no interest in and to any community real property.
- B. The trial court properly found that the real property is Petitioner's separate property.
- C. The trial court properly found that the Petitioner traced the funds to purchase the real property and the mobile home to his separate funds.
- D. The trial court properly found that the execution of a quit claim deed and placing Respondent's name on the title to the mobile home does not convert these assets to community assets.
- E. The trial court properly found that there was not sufficient evidence adduced at trial that community funds were used to improve the property.
- F. The trial court properly found that any contribution by the community to the property was less than the reasonable rental value of the property.
- G. The trial court properly distributed the property in a just and equitable manner without valuing the property.
- H. The trial court properly awarded \$300 per month to Respondent in spousal maintenance after considering the statutory factors.
- I. The trial court properly entered all of its Findings of Fact and Conclusions

of Law.

**II. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF
ERROR:**

A. The trial court properly characterized the land and mobile home as Mr. Gudjohnsen's separate property.

B. The trial court properly considered the statutory factors in entering the award of maintenance.

III. STATEMENT OF THE CASE

Christopher Gudjohnsen married Louise Abrahms on August 21, 1999. (RP-53) The couple separated on February 12, 2007. (RP-53) Pursuant to decree of dissolution from his previous spouse, the court awarded Gudjohnsen a residence on NW 94th Street, Vancouver, Washington on March 23, 1998. (RP-55, Exhibit-1) Gudjohnsen entered in to a land sale agreement to use the proceeds from the NW 94th Street house to buy bare land in Camas, Washington on February 18, 1998. (RP-56, Exhibit-2) He purchased the Camas land in his name alone with no intention of conveying

any interest to his wife. (RP-57 to 58) Prior to marriage, Mr. Gudjohnsen and his son lived with Mr. Abram's and paid rent. (RP-67)

In March, 2000 Mr. Gudjohnsen refinanced the property and the loan office prepared a quit claim deed which put Ms. Abrams name on the property. (RP-70, Exhibit-12) Mr. Gudjohnsen testified that the loan officer told him if he wanted to borrow money, he had to sign the deed. (RP-71)

Mr. Gudjohnsen purchased a mobile home for \$15,640 from his separate funds to place on the property. (RP-77) The parties refinanced the property on other occasions to obtain a lower payment and interest rate. (RP-80, Exhibit-19)

This matter went to trial on Mr. Gudjohnsen's petition for dissolution of marriage on January 4 and 11, 2008. The trial court awarded the real property to Mr. Gudjohnsen as his separate property. (RP-301 to 302)

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY CHARACTERIZED THE LAND AND MOBILE HOME AS MR. GUDJOHNSEN'S SEPARATE PROPERTY.

This court reviews a trial court's decision following a bench trial to determine whether the findings of fact are supported by substantial evidence

and whether those findings support the court's conclusions of law. Dorsey v. King County, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). The appellate court engages in de novo review of a trial court's classification of property as community or separate. In re Marriage of Chumbley, 150 Wn.2d 1, 5, 74 P.3d 129 (2003).

Ms. Abrams urges this court to follow Division I 's 1993 decision regarding a case with similar, but distinguishable facts to this case. In re Marriage of Hurd, 69 Wn. App. 38, 50, 848 P.2d 185 (1993), review denied, 122 Wn.2d 1020 (1993) (Brief of Appellant at page 16)

Division I appears to have rejected the reasoning in Hurd, supra in In Re Estate of Borghi, 141 Wn. App. 294, 169 P.3d 847 (2007) In that case the wife died intestate. Prior to marriage, she entered into a real estate contract to purchase property. After the parties married, a statutory warranty deed was issued to both husband and wife. Upon her death, the court determined that the real property was community property.

On appeal, Division I concluded that the precedent established in In re Estate of Deschamps, 77 Wash. 514, 137 P. 1009 (1914) controlled and found that the property was the wife's separate property. The Borghi, supra court indicated reluctance to follow Deshamps, but court properly

concluded that Deschamps, supra controls.

Mr. Gudjohnsen respectfully submits that the trial court properly characterized the property under either Deschamps, supra or Hurd, supra.

Hurd involved conveyance of property back to both husband and wife after the purchaser failed to make the necessary payments under a real estate contract. Hurd, supra. The husband specifically directed the property be conveyed to both of them as husband and wife. Supra. The court indicated “Mr. Hurd's act of requesting that the deed be conveyed back in the names of both parties permits a presumption that he intended to make a gift to the community. In view of Mr. Hurd's testimony that he often placed property in both parties' names for "love and consideration", upon remand the court needs to determine what Mr. Hurd meant by that phrase.” Supra at 52.

Mr. Gudjohnsen acquired the property prior to marriage using proceeds from selling a home from his previous marriage. (RP-55 to 56, Exhibits 1 and 2) Property acquired before marriage is separate property. RCW 26.16.010, .020. The character of property as community or separate is determined as of the date of acquisition. In re Marriage of White, 105 Wn. App. 545, 550-51, 20 P.3d 481 (2001). He testified that he had no intent to give Ms. Abrams any interest in the property. (RP-57)

Mr. Gudjohnsen produced extensive evidence at trial showing that the

property was refinanced numerous times to achieve lower monthly mortgage payments. (RP-65 to 81, Exhibits 9 through 18) The evidence indicates that a loan officer prepared a quit-claim deed and required the parties to sign as a condition of refinancing. (RP-70)

Ms. Abrams testified that she expressly told Mr. Gudjohnsen she did not want her name on the deed at the time he purchased the property. (RP-212) She testified that she believed her name should go on the deed to the property after marriage, although she never told Mr. Gudjohnsen of this belief. (RP-212) Ms. Abrams acknowledged that Mr. Gudjohnsen purchased mobile home placed on the property with his separate funds. (RP-216)

The trial court found that Ms. Abrams had no interest in the property and that the quit claim deed was simply a requirement of the lender to obtain refinancing and that Ms. Abrams failed to prove otherwise. (RP- 301 to 302, 308) The trier of fact, which observes the witness's manner while testifying, alone passes on a witness's credibility and measures the weight of the evidence. In re Sego, 82 Wn.2d 736, 740, 513 P.2d 831 (1973).

Property acquired during the marriage has the same character as the funds used to purchase it. In re Marriage of Zahm, 138 Wn.2d 213,224 ,978 P.2d 498 (1999). Separate property maintains that characterization through transfers if it can be traced and identified; the separate property is not

rendered community property unless the separate property is commingled to the extent that it may not be distinguished or apportioned. In re Marriage of Pearson-Maines, 70 Wn. App. 860, 866, 855 P2d 1210 (1993).

When separate property increases in value, the added value is presumed to be separate property, unless this presumption is rebutted by direct and positive evidence that the increase is attributable to community funds or labors. Marriage of Elam, 97 Wash. 2d 811, 650 P.2d 213 (1982). if there is direct and positive evidence that the increase in value of separate property is attributable to community labor or funds, the community may be equitably entitled to reimbursement for the contributions that caused the increase in value. Elam, supra. In the case at bar, Ms. Abrams failed to trace any contributions to the property to the satisfaction of the trial court. (RP-301 to 302) The community made the payments on the mortgage, but the community obtained the benefit of living on the property for less than the rental value of the property. (RP-301 to 302)

The party claiming a community property interest in separate property bears the burden of proving the change in character of the property. Jones v. Davis, 15 Wn.2d 567, 569, 131 P.2d 433 (1942). The trial court properly found that Ms. Abrams failed to meet this burden and that the property is Mr. Gudjohnsen's separate property.

B. THE TRIAL COURT PROPERLY CONSIDERED THE STATUTORY FACTORS IN ENTERING THE AWARD OF MAINTENANCE.

By statute, maintenance "shall be in such amounts and for such periods of time as the court deems just." RCW 26.09.090(1). The court must consider certain statutory factors, including the duration of the marriage, the health and age of the party seeking maintenance, the standard of living established during the marriage, the financial resources of the party seeking maintenance, the time necessary for the party seeking maintenance to acquire sufficient education or training to find employment, and the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance. RCW 26.09.090(1).

The trial considered these statutory factors, indicating "[T]his is not a long-term marriage to warrant what we call lifetime maintenance as Ms. Abrams has requested." (RP-304) The parties were married less than eight years. (RP-53) The court went on to consider the ability to pay and the need

of each party, balanced against her educational background and her ability to obtain employment and concluded that Mr. Gudjohnsen should pay Ms. Abrams \$350 per month through December, 2008. (RP-305) In reaching this conclusion the court expressly decided the maintenance issue based on the totality of all of the evidence presented. (RP-306)

Ms. Abrams receives \$1066 per month in disability income from social security. (RP-196) She testified to monthly living expenses of \$1795. (RP-158) At the time of trial, Ms. Abrams had been living on her disability income, a small amount of income from house sitting for friends and \$300 per month in maintenance payments from Mr. Gudjohnsen. (RP-201 to 203)

Mr. Gudjohnsen nets \$2860 per month from his employment as a truck driver. (RP-84) He testified that he had been working overtime to try to pay legal fees and cover bills. (RP-85)

The trial court considered and evaluated the factors in RCW 26.09.090 against the evidence adduced at trial in arriving at the maintenance award. (RP-304 to 305) Trial courts have broad discretion in awarding maintenance and an award will be disturbed only for a manifest abuse of discretion. In re Marriage of Bulicek, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). A maintenance award that evidences a fair consideration of

the statutory factors does not constitute an abuse of discretion. In re Marriage of Mathews, 70 Wn.App. 116, 123, 853 P.2d 462 (1993). Ms. Abrams fails to show an abuse of discretion, thus the trial court's maintenance award should be upheld.

C. ATTORNEY FEES

Pursuant to RAP 18.1(b) and RCW 26.09.140, Mr. Gudjohnsen requests an award of reasonable attorneys fees and costs in this matter. Mr. Gudjohnsen has had to expend considerable funds to respond to this matter.

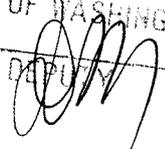
V. CONCLUSION

For the reasons stated above, the ruling of the trial court should be affirmed in all aspects and this appeal should be dismissed.

Respectfully submitted this 18th day of August, 2008,



SUZAN L. CLARK, WSBA #17476
Attorney for the Respondent

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In re the Marriage of:

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Respondent.

NO. 37372-6-II

CLARK COUNTY SUPERIOR COURT
CAUSE NO. 07-3-00239-9

DECLARATION OF MAILING

I, Judy Adams declare:

That I am a citizen of the United States of America; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that on the 18th day of August, 2008 declarant deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the following named individuals, to-wit:

Mr. David Ponzoha
Division II Court of Appeals
950 Broadway, Suite 300
Tacoma, Washington 98402

Ms. Catherine W. Smith
Ms. Valerie A. Villacin
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Seattle, WA 98101

said envelope containing a copy of this declaration and a copy of the Brief of the Respondent in this matter.


JUDY ADAMS

Declaration of Mailing

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