

NO. 43994-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Kitsap County Superior Court Cause No. 11-3-00231-0

In re the Marriage of
DEBORAH SHAWN TANNER,

Petitioner/Appellant,

vs.

ANTHONY DARRELL TANNER

Respondent.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION II

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3 Family Law Deskbook §65.2 at 65-6310

I. INTRODUCTION

Although this court's review is deferential to the trial court, the trial court's misapplication of the law and misunderstanding of the facts in dividing Deborah's and Darrell's separate and community property requires this court to reverse and remand. The trial court manifestly abused its discretion in entering an egregiously unfair and inequitable division of Deborah's and Darrell's separate and community property based on its mischaracterization of property and its disregard of the evidence presented. Specifically, the trial court: (1) overlooked the parties' clear intent that the Miller Bay Road house and the 1951 Chevrolet panel truck were Deborah's separate property, (2) ignored Deborah's right to equitable reimbursement for her separate property that she was forced to use in order to satisfy the community's home equity line of credit obligation (HELOC), (3) awarded Darrell 79 percent of the community assets, and (4) denied Deborah's request for her costs and reasonable attorney fees even though Darrell had superior financial resources and had abrogated court orders and delayed proceedings with his intransigent conduct. Accordingly, this court should reverse and remand.

II. COUNTER STATEMENT OF FACTS

Darrell admits that: (1) Deborah sold her separate property residence and used the proceeds to purchase the Miller Bay Road home; (2) Deborah

took out a mortgage for the Miller Bay Road home in her name alone; (3) he executed and recorded a quit claim deed conveying any community interest in the Miller Bay Road home to Deborah as her sole and separate property; and (4) Deborah later took out a nearly \$50,000 HELOC on the Miller Bay Road home in her name alone that they decided together would be used to pay community obligations, namely investments into the family business, Olympic Home Inspections, Inc. (OHI), and paying off the balances owing on the Cadillac Escalade vehicle and the community's credit card. Br. of Resp't at 1-2; CP at 371-74, 367-77; RP at 42-50.

Darrell further acknowledges that the Miller Bay Road home was sold during the course of the dissolution proceedings and that "the *entirety* of the sale proceeds [were] used to satisfy the \$48,639 . . . still owing on the HELOC" Br. of Resp't at 2.

Darrell, however, fails to acknowledge that he violated the court's temporary orders that restrained him from transferring, borrowing, lapsing, surrendering, or changing any retirement accounts when he cashed out \$12,594 in his individual retirement account in June 2011 without the court's approval. *See* Br. of Resp't; *see also* RP at 147, 174, 246-47. Like Darrell, the trial court overlooked Darrell's violation of its temporary orders and elected not to include the \$12,594 that Darrell

improperly liquidated from his IRA in effecting its division of property.

RP at 246-47; CP at 302, 308-11.

III. REPLY

The trial court erred by: (1) classifying the Miller Bay Road home as a community asset despite the parties' clear intent to identify the Miller Bay Road home as Deborah's separate property; (2) concluding that Deborah was not entitled to equitable reimbursement for the amount of the community HELOC that she satisfied with the proceeds from the sale of the Miller Bay Road home, which was her separate property; (3) awarding Darrell 79 percent of the community assets; and (4) denying Deborah's request for her reasonable attorney fees and costs when Darrell had the ability to pay but employed intransigent tactics that caused lengthy discovery and trial delays. Consequently, this court should reverse and remand with instruction for the trial court to equitably divide the property. On remand, equitable division of the property could be accomplished either by honoring Deborah's right to equitable reimbursement for the exhaustion her separate property interest in the Miller Bay Road property in order to satisfy the community HELOC debt or by equally dividing the community property acquired during the parties' 10-year marriage.

///

A. *The Miller Bay Road house was Deborah's separate property.*

The presumption that property acquired during marriage is community property can be rebutted with clear and convincing evidence. *In re Estate of Borghi*, 167 Wn.2d 480, 484-85, 219 P.3d 932 (2009); chapter 26.16 RCW. The presumption that real property acquired during marriage is community property is rebutted by clear and convincing evidence when the evidence shows that the property was acquired with separate property funds or there is an acknowledged writing documenting the spouses' intent regarding the property's character. *See Borghi*, 167 Wn.2d at 485. A quit claim deed from one spouse to another can effect both a transfer and a recharacterization of real property. *Borghi*, 167 Wn.2d at 485.

Once the separate character of property is established, a presumption arises that it remains separate property. *Borghi*, 167 Wn.2d at 484. Indeed, "the right of the spouses in their separate property is as sacred as is their right in their community property" *Borghi*, 167 Wn.2d at 484 (*quoting Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911)). Accordingly, a court will maintain property's separate character until the party challenging the characterization meets his or her burden of producing "direct and positive evidence" that the spouse owning it intended to change its character to community property. *Borghi*, 167

Wn.2d at 484-85; *see also*, *Hamlin v. Merlino*, 44 Wn.2d 851, 857-58, 272 P.2d 125 (1954).

Here, Darrell did not meet his burden. The Miller Bay Road home was Deborah's separate property and Darrell failed to provide any "direct and positive evidence" to overcome that characterization. As Darrell acknowledges, Deborah used the proceeds from the sale of her separate property home in Miller Bay Estates to purchase the Miller Bay Road home, taking out a mortgage in her name alone, and Darrell even executed a quit claim deed conveying any interest in the Miller Bay Road home to Deborah. RP at 32-34; CP at 359-61. In his testimony, Darrell stated that he "didn't feel like any of [the Miller Bay Road house] was going to be [his]. . . . [W]e had a conversation about it that I would sign off on Miller Bay, quitclaim it." RP at 159-160.

Despite the direct and positive evidence clearly establishing that the Miller Bay Road home was Deborah's separate property, the trial court erroneously concluded that it was a community asset because it "was purchased during the marriage" and Deborah and Darrell intended that they "would live in that home for the benefit of the community during the course of their relationship." RP at 235-37. But the fact that Deborah and Darrell lived in the Miller Bay Road house does not transmute its character into a community asset. Similarly, the fact that Deborah

purchased the Miller Bay Road home during her marriage to Darrell does not mean that it was fixed as a community asset in light of the direct and positive evidence that Deborah purchased the Miller Bay Road home with her separate funds, taking out a mortgage in only her name, and that Darrell executed a quitclaim deed that conveyed any community interest in the Miller Bay Road home to Deborah. Br. of Resp't at 1-2; CP at 371-74, 367-77; RP at 42-50.

Instead, the court's misapplication of law and misconstruing the evidence resulted in an inequitable windfall for Darrell because Deborah sold the Miller Bay Road house and used all proceeds from its sale to extinguish the community's HELOC, which inured to the sole benefit of the community and to the benefit of Darrell's separate property (OHI). CP at 302-03, 362-66. Accordingly, based on the trial court's mischaracterization of the Miller Bay Road house as a community asset, which was sold and the proceeds were used to satisfy a community debt, the trial court did not consider restoring Deborah's separate property investment in the Miller Bay Road house to her. *See* RP at 236-55. In so doing, the trial court erred.

Because the court mischaracterized the Miller Bay Road house¹ as a community asset, its subsequent division of property was askew. Since it is not clear that the trial court's division of the assets would have been the same absent this mischaracterization, this court should reverse and remand.²

B. *Deborah is entitled to equitable reimbursement from community assets because she extinguished the community HELOC with proceeds from the sale of her separate property.*

A trial court is required to “do equity” in dissolution proceedings. *Miracle v. Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984). “Doing equity” may require a trial court to impose an equitable lien on community property in order to protect a spouse's separate funds used to acquire or enhance community assets. *In re Marriage of Marshall*, 86 Wn. App. 878, 883, 940 P.2d 283 (1997); *Farrow v. Ostrom*, 16 Wn.2d 547, 555-56, 133 P.2d 974 (1943).

¹ As discussed in Deborah's opening brief, the trial court also mischaracterized her separate property 1951 panel van as community property. However, because Darrell addresses the mischaracterization of the panel van in only a cursory manner in his brief, Deborah limits her reply to the Miller Bay Road home. See Br. of Resp't at 11, n. 1.

² Despite the trial court's erroneous characterization of the Miller Bay Road house and the panel van, Darrell argues that remand is not appropriate because the trial court included language in its findings and conclusions that it “would make the same distribution of assets and liabilities reflected in the Decree regardless of the characterization of any such assets and/or liabilities as community or separate.” CP at 306; Br. of Resp't at 10-11. Despite this language, the record demonstrates that the trial court was significantly influenced in effecting its distribution by its erroneous characterization of Deborah's separate assets as community property and, based on the record before this court, it is not clear that the trial court would have effected the same distribution absent its mischaracterization of assets. See *In re Marriage of Griswold*, 112 Wn. App. 333, 346, 48 P.3d 1018 (2002). Thus, this court should reject Darrell's argument that affirming the trial court is mandatory and, instead, should hold that the trial court's mischaracterization of Deborah's separate property did affect its ultimate, unequal distribution of assets here.

Here, Deborah alone took out an almost \$50,000 HELOC on the Miller Bay Road house, which was her separate property, and then used the HELOC funds for the community's benefit. RP at 32-35, 42-50, 55. Deborah and Darrell invested clearly traceable funds from the HELOC as follows: (1) at least \$24,500 into Darrell's business, (2) \$5,874.50 to pay off the purchase money loan on the 2003 Cadillac Escalade that Darrell used and that was ultimately awarded to Darrell, and (3) \$27,000 of the funds to pay other community expenses, including a VISA balance. CP at 367-77. As of April of 2011, the HELOC balance was \$48,500. CP at 377. Thus, the trial court correctly concluded that the HELOC was a community obligation. CP at 302-03.

But, when Deborah sold her separate property Miller Bay Road house, proceeds from that sale automatically went to the bank to pay off the community's HELOC obligation. CP at 362-66. After the sale, there were no funds left to restore Deborah's separate property to her or to reimburse Deborah for satisfying the community HELOC with her separate property asset. *Id.*

It is immaterial that Deborah had sold the Miller Bay Road house at the time the court entered its division of property, as the Miller Bay Road house should have been characterized as Deborah's separate property. And, as Deborah's separate property, the Miller Bay Road house would

not have been subject to an equitable lien. Instead, the trial court should have used the community's other assets, namely the Chico Way house, OHI, or the Cadillac Escalade, to equitably reimburse Deborah for having to satisfy the community HELOC with her separate property.

Accordingly, Deborah was inequitably forced to use her separate property funds to satisfy the community's HELOC debt that otherwise would have or should have been paid from community resources. Thus, Deborah had a clear and equitable interest in the restoration of her separate funds, and the trial court abused its discretion in depriving her of that right. Thus, this court should reverse and remand for a redistribution of the parties' marital property to protect Deborah's interest in equitable reimbursement and reasonable parity in Deborah's and Darrell's relative circumstances. This should include awarding the Chico Way property to Deborah.

C. The trial court manifestly abused its discretion in effecting an inequitable division of property.

While a trial court has broad discretion to divide separate and community property during a dissolution of marriage, an appellate court will reverse the division if there is a manifest abuse of discretion. *Urbana v. Urbana*, 147 Wn. App. 1, 9, 195 P.3d 959 (2008). Although a trial court need not divide community property equally, trial court manifestly abuses its discretion when its division of property causes a "patent

disparity in the parties' economic circumstances.” *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1977); *Urbana*, 147 Wn. App. at 10. In such circumstances, an appellate court will reverse the trial court's division of property. *Urbana*, 147 Wn. App. at 10.

Additionally, even though a trial court's characterization of property as separate or community is not controlling in its subsequent division of property, “the court must have in mind the correct character and status of the property . . . before any theory of distribution is ordered.” *Brewer v. Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999) (quoting *Blood v. Blood*, 69 Wn.2d 680, 682, 419 P.2d 1006 (1966)). Then, absent special factors, a trial court should divide community property more equally than two-thirds to one spouse and one-third to the other spouse. See 3 Family Law Deskbook §65.2 at 65-63.

Here, the trial court ignored Deborah's and Darrell's relative economic positions in effecting its property division and made an inequitably high award of community assets to Darrell. Indeed, the trial court awarded more than two-thirds of the community assets to Darrell. In doing so, the trial court erred because it failed to restore Deborah and Darrell to the positions that they were in before they married. See *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007.) Instead, the trial court both refused to equitably reimburse Deborah for using her separate

property to extinguish the community's HELOC and then compounded the inequity by also awarding Darrell 79 percent of the community property. CP at 300-13.

Thus, the trial court's division caused a patent disparity in Deborah's and Darrell's financial positions. Because the trial court's division created a patent disparity in the parties' financial positions to Deborah's damage and detriment, the trial court manifestly abused its discretion by implementing a division of property that was neither fair nor equitable. *Pea*, 17 Wn.App. at 731. Thus, this court should reverse and remand for the trial court to equitably redistribute the property.

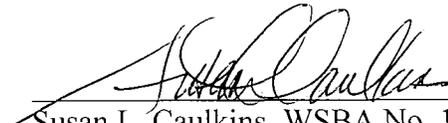
D. *This court should award Deborah her reasonable attorney fees and costs below and on appeal.*

This court should award Deborah her reasonable attorney fees and costs at trial because Darrell's intransigence occasioned lengthy discovery delays and required trial continuances, Darrell violated the court's temporary orders by liquidating his IRA account, and Darrell had the resources to pay. *Bay v. Jensen*, 147 Wn. App. 641, 660, 196 P.3d 753 (2008); *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997); RCW 26.09.140. Similarly, this court should award Deborah her reasonable attorney fees on appeal in accordance with RAP 18.1.

IV. CONCLUSION

Although Deborah and Darrell's marriage was brief—only 10-years—the trial court went out of its way to apply principles that apply to long-term marriages—those over 25-years—in dividing the property by strengthening Darrell's financial position and Deborah's expense. In order to reach its inequitable distribution, the trial court ignored Darrell's wrongful conduct, disregarded the parties' intent in characterizing the Miller Bay Road house and the panel van as Deborah's separate property, denied Deborah's request for equitable reimbursement for the amount of her separate property that she used to satisfy the community's HELOC debt, awarded Darrell both OHI and 79 percent of what it identified as the community assets, and denied Deborah's request for her reasonable attorney fees and costs. Under the facts here, the trial court manifestly abused its discretion.

DATED this 14 day of August 2013.


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SUBSCRIBED AND SWORN to before me this 15 day of August, 2013.

Becky Parker

Name: Becky Parker
Notary Public in and for the State of
Washington, residing at Tacoma, Wa
My Commission expires: 7-1-17.

