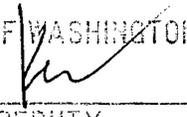


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

No. 43994-8-II

**STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II**

In Re the Marriage of

DEBORAH SHAWN TANNER, Appellant,

v.

ANTHONY DARRELL TANNER, Respondent.

**BRIEF OF RESPONDENT
ANTHONY DARRELL TANNER**

**Charles D. Creason
Attorney for Respondent**

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A. STATEMENT OF THE CASE

This appeal stems from a dissolution of marriage bench trial which was conducted in Kitsap County Superior Court before the Honorable Judge Jeannett Dalton in August 2012. The parties, Petitioner/Appellant Deborah Tanner (hereinafter DEBORAH) and Respondent Anthony Darrell Tanner (hereinafter DARRELL), were married for 10 years. RP 9, 12. The primary issue at trial was DEBORAH's claim that she was entitled to an equitable reimbursement lien against the marital home but, since that asset no longer existed at the time of trial, her allegation was that the lien should attach to remaining property which was before the Court. RP 215, CP 219-32.

Upon marriage, each party owned various items of separate property including realty, vehicles, businesses, financial accounts and pensions. RP 82-92; 128-134; 141, 146-47; 153-54; 179; 180-83; 185. CP 298. Within several months of marriage, DEBORAH sold her separate property residence which the parties had resided in prior to and did reside in at the time of marriage. RP 33. The proceeds were used to purchase the parties' new residence on Miller Bay Road in Poulsbo, Washington. *Id.* No evidence was offered at trial regarding the amount of DEBORAH's funds used as the down payment. RP 33-34. Indeed, no evidence of any

kind concerning the down payment was presented. The mortgage was in DEBORAH's name alone. RP 34. DARRELL executed a Quit Claim Deed in her favor (RP 34) which the trial court found "appeared to relinquish any interest in the residence" because DARRELL's credit "adversely impacted the communities ability to obtain a mortgage at the time". FF 2.8; CP 298, at 302. The parties lived in the home and paid the mortgage with community funds throughout the bulk of their time together until the property was sold four months prior to trial. RP 33-34; 41-42.

Several years into their marriage, DEBORAH took out a Home Equity Line of Credit (HELOC) against the residence in question to pay off current and future community debts. RP 44-45. The trial court found that this was a community obligation despite the fact that it was in DEBORAH's name only. CP 298, at 302. In April 2012, four months prior to trial and six weeks after the parties separation, the Miller Bay residence was sold and the *entirety* of the sale proceeds used to satisfy the \$48,639 amount still owing on the HELOC at that time. RP 41-42; 113-114. CP 298, at 302.

The trial court, noting that "the parties were very industrious in terms of acquiring and flipping property, as well as managing their accounts", characterized the Miller Bay residence as a community asset

despite the execution of the Quit Claim Deed because it was acquired during marriage, community funds paid the mortgage, and it was used as collateral for a community loan (the HELOC). RP 232; CP 298, at 302. The court also noted that DEBORAH offered no evidence concerning efforts on her part to identify this residence as her separate property. CP 298, at 302. The court found the home retained its initial character as a community asset and there were no other attempts by the community to keep the asset separate. *Id.* The court ultimately denied DEBORAH's claim for equitable reimbursement holding that any separate funds contributed to purchase of the residence were not traced and, that since the property no longer existed, there was no asset from which reimbursement would be proper. *Id.*

In disposing of the assets brought before it, the court awarded DARRELL 35% of the total assets (\$73,466 out of a total of \$204,714) including: (1) Real property located in Chico Way, Bremerton, brought into the marriage by DARRELL, characterized by the court as a community asset, and valued at \$41,336; (2) DARELL's enterprise brought into the marriage by him and known as Olympic Home Inspections, which the court characterized as a community asset but did not assign a value to; (3) 9 vehicle's or trailers, a majority of which were

characterized as DARRELL's separate property, with a total assigned value of \$28,700; and (4) a 1951 Chevrolet panel van purchased with DEBORAH's separate funds during marriage but improved with community funds, which the court characterized as a community asset, and assigned a value of \$3,400. CP 367.

To DEBORAH, the court awarded 65% of the marital property (\$131,248 out of a total of \$204,714) including: (1) proceeds from the sale of Montana property purchased during the marriage, which the court characterized as DEBORAH's separate property, and valued at \$11,635; (2) a community vehicle and motor home, characterized as community property and valued together at \$25,600; (3) two separate property financial accounts valued at \$59,500 and \$34,513. CP 367.

B. ARGUMENT

DEBORAH appeals the trial court's characterization of the Miller Bay property and 1951 Chevrolet panel van as community assets. She also appeals the trial court's (1) refusal to award her an equitable reimbursement, (2) ultimate property distribution, and (3) refusal to award her attorney's fees. The standard of review for each issue identified by DEBORAH is whether the trial court abused its discretion.

1. The trial court did not err in characterizing the Miller Bay property as a community asset because the Finding regarding the same is supported by substantial evidence and, even assuming, arguendo, that the court erred, remand is not justified under established Washington case Law.

DEBORAH claims the trial court erred in characterizing the Miller Bay property as community because, even though purchased during marriage, it was purchased with her separate assets and in her name alone and “there was insufficient evidence to establish she intended to change its character.” Brief at 14. This claim is without foundation in either fact or law and directly contradicts prevailing authority.

The trial court has the duty to characterize the property brought before it as either community or separate. *In re Marriage of Olivares*, 69 Wash.App. 324, 848 P.2d 1281, *review denied*, 122 Wash.2d 1009 (1993); *In re Marriage of DeHollander*, 53 Wash.App. 695, 700, 770 P.2d 638 (1989). To accomplish this the court *may* consider the source of the property and the date it was acquired. *DeRuwe v. DeRuwe*, 72 Wash.2d 404, 408, 443 P.2d (1967); *Glorfield v. Glorfield*, 27 Wash.App. 358, 361, 617 P.2d 1051, *review denied*, 94 Wash.2d 1025 (1980). However, assets acquired during a marriage are presumed to be community property. *In re Marriage of Short*, 125 Wash.2d 865, 870. 890 P.2d 12, (1995). This

presumption may be rebutted by showing the assets were acquired as separate property. *Id.*

A court's characterization of property as either separate or community is a question of law subject to de novo review. *In re Marriage of Skarbek*, 100 Wn.App. 444, 447, 997 P.2d 447 (2000). However, factual findings upon which the court's characterization is based may be reversed only if they are not supported by substantial evidence. *Id.*

"Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *In re Marriage of Griswold*, 112 WnApp. 333, 339, 48 P.3d 1018 (2002). As long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal and the court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." *In re Marriage of Shannon*, 55 Wn.App. 137, 142, 777 P.2d 8 (1989) (citing *In re Marriage of Rich*, 80 Wn.App. 252, 259, 907 P.2d 1234 (1996)).

Finally, even if the reviewing Court finds the lower Court erred in its characterization, the status of the property as community or separate is not controlling and "the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly

influenced by characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization.” *In re Marriage of Shannon*, 55 Wn.App. 137, 142, 777 P.2d 8 (1989).

Here, in its oral decision, the trial court addressed the characterization as follows:

It is clear that the [RESIDENCE] was purchased during the marriage, and according to the testimony, which I believe is credible . . . [the parties] intended to live in the Miller Bay Property for the remainder of their time on this earth [and that] they would live in that home for the benefit of the community during the course of their relationship. I find that testimony to be credible.

RP 235-37. The Court continued:

This is where I [find] the testimony of Mr. Tanner credible on this issue. The testimony of Mr. Tanner is that this property was theirs, but that she would own it because he owned the Chico [other] property. It was intended by them to be their residence during the course of their marriage was his testimony. It was purchased during the marriage. It would, by default, be a communal asset. the Court can find, only if the evidence is clear, that it was intended to be a separate asset The deed could be helpful in that respect because it clearly has language in it that says that this is to be her sole and separate property, but even though he had executed that quitclaim deed I do not make a finding that that piece of property was intended to be her sole and separate property because it was clear to me from the testimony that it was intended to be their joint residence.

RP 239-40. The Court concluded:

Even though they executed the deed, which would, on its face, indicate that the intent was to create this separate asset, the way that they communicated about the house, the way that they lived in the house, what they were doing with the the home retained its communal affect or aspect as far as this court is concerned.

RP 240.

Upon presentation of the Findings of Fact and Conclusions of Law as drafted by DEBORAH, the Court continued stating:

“I deleted the phrase “petitioner/wife owned as her separate property” the family home.” And that’s because it was clear to me that . . . the history of the ownership of that property is as follows: That property was purchased by the two of them after the marriage, so, therefore, it is, presumptively, community property. The husband did execute a quit claim deed to the wife to reflect that it was being categorized as a separate asset, and that was in 2001. Since that time, the community paid the mortgage on the residence and supported the residence. There was no separate tracing of that particular asset, such as was done with the IRAs by [DEBORAH . . . and. . .] I do make this finding -- that despite the execution of the quit claim deed, subsequent to its execution, the property maintained a community character. It was supported by the community, the community used that asset, it was also used as collateral on a loan, on a HELOC, which then supported the business, which at the time was owned by both husband and wife.

RP 267-68. The Court then interlineated the following language into the actual Finding: “There was no testimony as to to the amount of separate funds used as the down payment.” CP 298, at 302. The Court also interlineated into the Finding “The Court finds this home retained its initial character as a community asset despite the execution of the Quit Claim Deed because community funds paid the mortgage, the asset was used as collateral for a community loan (the HELOC) and there were no other attempts by the community to keep the asset separate.” *Id.*

There was no error. First, the court’s Finding that “there was no testimony as to the amount of separate funds used as the downpayment” is not contested. This uncontested lack of tracing is determinative on the issue and creates a logistic impossibility to overcome the community presumption.

Second, substantial evidence clearly exists in the form of DARRELL’s testimony which the trial court specifically found credible. Under established case law, this credibility finding is not to be disturbed. *Shannon, supra*. In addition, although objecting to the finding, DEBORAH offers no argument rebutting the trial court’s grounds and instead claims only that she “established [the] separate nature by showing the separate source of the funds . . . [and] the quit claim deed under which

[DARRELL] conveyed any community interest.” Brief at 14. This has nothing to do with the trial Court’s analysis regarding lack of evidence regarding the amount of the separate contribution, the circumstances surrounding the parties’ business transactions, or the court’s finding that the evidence established the parties’ intent to treat the property as a community asset.

Finally, *assuming arguendo* that the trial court erred in its classification, which it did not, *Marriage of Shannon, supra*, is directly on point and clearly establishes that remand is not applicable here. In *Shannon*, the Court enunciated the rule cited above that “the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by characterization *and* (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization”. *Marriage of Shannon, supra* at 142 (emphasis added). Here, the court stated in its oral opinion that “even if this asset was considered to be her separate property I still make the same distribution.” RP 240. The court then made a specific Conclusion of Law (3.8; CP 298, at 306) regarding the issue: “The Court concludes 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.” The court’s reasoning mandates affirmance.¹

Although the *Shannon* court did, in fact, remand that case to the trial court, that action is creditable to facts that are not in the instant case. In *Shannon*, unlike here, the Court was presented with a short term marriage where there was tracing of separate funds used to acquire the asset. The Court of Appeals, finding that the trial court “explicitly stated in its oral opinion that it believed its characterization of the parties’ properties was critical to its decision”, held “we cannot say under these circumstances that the trial court’s division would have been the same had it properly characterized the asset [as] separate property.” *Shannon, infra*. In this case, the trial court explicitly stated “even if this asset was

¹ DEBORAH also claims the court erred in charactering the 1951 Chevrolet panel van as community property since it was purchased with separate funds. The trial court acknowledged the separate source stating “I do believe that asset was initially purchased with the wife’s separate funds, but that it was converted to a community asset, and I award that to the husband.” RP. 244. In so doing, the court was acknowledging the substantial community funds expended on repairing and upgrading the vehicle. No argument is made refuting the facts found by the trial court in making this characterization. Furthermore, *assuming arguendo* that the court erred in its characterization, affirmance is again mandated by *Marriage of Shannon* since the trial court specifically held that its characterization did not effect asset distribution. RP 240. CP 298, at 306.

considered to be her separate property I still make the same distribution.”

RP 240.

2. *The trial court did not abuse its discretion in denying DEBORAH's claim for equitable reimbursement.*

The Miller Bay residence no longer exists as a marital asset.

Despite this fact, DEBORAH insists that she is entitled to an equitable reimbursement award. However, as shown *infra*, no Washington case has ever held that such a right existed when the property on which the claim is based is no longer owned by the parties or either of them. DEBORAH claims that the trial court abused its discretion by denying her claim for a \$48,000 equitable reimbursement lien (stemming from financial details pertaining to the Miller Bay residence which had been sold by the time of trial) from assets remaining before the court for distribution. Her claim is based on the assertion that she satisfied the community HELOC line of credit debt with “proceeds from her separate property” (the Miller Bay property). Brief at 17. This argument ignores established case law.

An equitable lien is a remedy designed to protect a party's right to reimbursement. *In re Marriage of Miracle v. Miracle*, 101 Wash.2d 137, 139, 675 P.2D 1229 (1984); H. Cross, *The Community Property Law in Washington*, 61 Wash.L.Rev. 13, 67 (1986). Because a trial court is

required to "do equity" in a dissolution proceeding, it must take into account all relevant circumstances in deciding whether a right to reimbursement has arisen. *Miracle*, 101 Wash.2d at 139. This court reviews a trial court's decision to grant or deny an equitable lien only for abuse of discretion. *Id.*

Of extreme importance to the instant case, an equitable lien is not a general proposition available to trim the boat. Instead, it is a specific, limited remedy tied to a particular asset. As noted by learned counsel:

Equitable liens do not apply to property generally. They must attach to a specific property on a specifically documented theory. Equitable liens have principally been applied to favor the community, and not in favor of the separate property interest of either of the parties. Most importantly, equitable liens are applied by Washington courts to assist a party in need of equity.

Gordon W. Wilcox and Thomas G. Hammerlinck, Washington Family Law Deskbook, § 38.6 at 38-20 (1989 & Supp.1996). Since the Miller Bay property had been disposed of by the time of trial, there was no asset available to tie such a lien to and, hence, no lien possible. It is not necessary for the analysis to go further.

In denying DEBORAH's claim, the trial judge stated "[m]y categorization of the property is that it is a community asset [s]o in terms of the *Miracle* case, that distinguishes this fact pattern from the *Miracle*

case.” RP 276. The court then held that since the “asset was disposed of prior to the trial [and] doesn’t exist anymore”, . . . ***there was nothing from which to gain, to garner any reimbursement, except from the other assets.***” RP 277. (Emphasis added); See also CP 298, at 306; Conclusion of Law 3.8.

It is noted that DEBORAH’s argument regarding an equitable lien precisely mirrors the argument used by the appellant in *Marriage of Marshall*, 86 Wn.App. 878, 940 P.2d 283 (1987). In *Marshall*, the appellant conceded “there are no Washington cases in direct support of her argument that her separate estate is entitled to an equitable lien against the community estate”. *Marshall*, at 883. Instead, the appellant, as DEBORAH does here, claimed the lien was permitted by “analogy” under *Marriage of Miracle*. The *Marshall* court dismissed the argument summarily stating

Rather than seeking reimbursement for contributions which enhanced the value of a specific item of community property, Ms. Marshall is seeking reimbursement against the community assets in toto for the general use of her separate property. Washington law does not support such a claim. "Equitable liens do not apply to property generally. They must attach to a specific property on a specifically documented theory.... The claim for an equitable lien must be supported by direct evidence of a contribution to the property on which the lien is asserted." Gordon W. Wilcox and Thomas G. Hammerlinck,

Washington Family Law Deskbook, § 38.6 at 38-20, 38-21 (citing *Guye v. Guye*, 63 Wn.2d 340, 352-53, 115 P. 731 (1911)).

Marshall, at 883-84.

3. *The trial court's property division was fair and equitable.*

DEBORAH claims reversal is required because the trial court manifestly abused its discretion in making the property distribution herein. Citing *In re Marriage of Pea*, 17 Wn.App 728, 566 P.2d 212 (1977), she claims the abuse of discretion occurred when the trial court awarded DARRELL “79% of the community property” which “created a patent disparity in the parties’ financial positions to [her] damage and detriment”. Brief at 19.²

RCW 26.09.080 sets forth relevant factors to be considered by the court when making a just and equitable distribution of the marital property in a dissolution trial. These factors are, “including but not limited to”

1. The nature and extent of community property;
2. The nature and extent of separate property;
3. The duration of the marriage; and
4. The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family

² DEBORAH repeatedly states DARRELL was awarded “79% of the community property”. However, she ONLY includes the property characterized by the court as “community” and ignores the fact that all property, both community and separate, is before the court for distribution.

home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

RCW 26.09.080. Although no single factor must be given greater weight than any other factor as a matter of law, the economic circumstances of each spouse upon dissolution is of "paramount concern". *In re Marriage of Olivares, supra* at 328. *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97 (1985), *cert. denied*, 473 U.S. 906 (1985). In a dissolution action, all property both community and separate is before the trial court for distribution. *Friedlander v. Friedlander*, 80 Wash.2d 293, 305, 494 P.2d 208 (1972). The court must dispose of all of the parties' property which is brought before it. *In re Marriage of Soriano*, 31 Wn.App. 432, 437, 643 P.2d 450 (1982).

A fair and equitable division by a trial court "does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of the parties." *In re Marriage of Zahm*, 138 Wash.2d 213, 218, 978 P.2d 498 (1999). A trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse thereof. *In re Marriage of Kraft*,

119 Wash.2d 438, 450, 832 P.2d 871 (1992). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds. *Marriage of Rockwell*, 141 Wn.App. 235, 243, 170 P.3d 572 (2007) (citing *Kraft and Olivares*). If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. *In re Marriage of Pea*, 17 Wn.App. 728, 731, 566 P.2d 212 (1977).

Upon presentation of the Findings of Fact and Conclusions of Law and specifically Conclusion 3.8, the court stated:

I am making a choice not to divide the assets pursuant to a percentage division either equal or unequal or disparate percentage division. What I have done is, for each asset that is distributed, I have categorized it, according to its character, either separate or community, I have assessed its value pursuant to the testimony, and then what I did was to take the assets and to distribute them in accordance with what each party talked about in terms of the habit and practice of the parties . . .

RP 273-74. The court continued:

I did consider percentage division, but I didn't utilize it, because, in this particular case, the categorization of the assets as separate or community and the value of the assets was important to do, but in terms of percentages, the manner in which I distributed the assets had more to do with what I felt was equitable, given the testimony, and who had contact with the asset the most. So It's not that I felt it wasn't necessary; it's that it gave way to a different type of award under what I felt was fair and equitable."

RP 274.

Conclusion of Law 3.8 states

The Court concludes that consideration of the percentage division of assets and liabilities is not the preferred method of distribution. The Court took into account in its division of the fact that the wife is awarded a substantial amount of cash assets by virtue of the IRA so awarding the husband the chico property is equitable. The division of the assets is fair and equitable.

CP 298, at 306.

The trial court did not abuse its discretion. The court did precisely as directed by statute and established case law. The court characterized, valued, and disposed of each asset brought before it and the distribution did not result on a “patent” financial disparity. DEBORAH was *in fact* awarded 65% of the total property brought before the court including, as specifically stated in the Conclusions of Law, \$94,000 in a disposable cash accounts. DARRELL was awarded 35% of the total property before the court none of which was represented by disposable cash accounts. In light of this, to argue manifest abuse of discretion exercised on untenable

grounds is disingenuous at best and flies in the face of the trial court's articulation.³

4. *DEBORAH is not entitled to attorney's fees.*

DEBORAH claims the trial court erred in failing to award her a judgment for attorney's fees. She claims she had the need and DARRELL had the ability because "DARRELL received 79% of the community" assets. She further claims that regardless of the "need versus ability" analysis, the trial court erred in failing to find DARRELL was intransigent and such intransigence justified her request for an award. Finally, DEBORAH claims she is entitled to attorneys fees on appeal.

The Washington Courts have consistently held that an award of attorney's fees in a dissolution action rests in the sound discretion of the trial court and will not be disturbed on appeal absent abuse thereof. *Fite v. Fite*, 3 Wn.App. 726, 479 P.2d 560 (1970). In making such an award, the trial court considers the need of the one party and the other parties' ability to pay. *Valley v. Selfridge*, 30 Wn.App. 908, 639 P.2d 225 (1982). Neither

³ DEBORAH, without argument, also claims the trial court manifestly abused its discretion in awarding the OHI home inspection business to DARRELL. Brief at 19. The trial court found that although DEBORAH acquired an "interest" in the business through her labors, "neither party presented evidence valuing the business" and awarded the business to DARRELL with no valuation. RP 232-33. DEBORAH does not assign error to the valuation and the issue is moot.

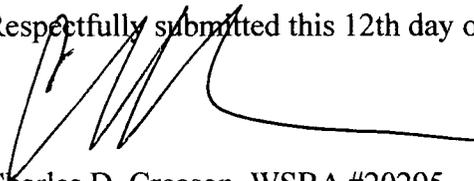
party is entitled to attorney's fees as a matter of right. *Id.* A showing of intransigence may support an award of attorney's fees without the "need versus ability" analysis. *In re Marriage of Crosetto*, 82 Wn.App. 545, 918 P.2d 954 (1996).

Here, the court found each party had the means to pay their own fees. As shown *supra*, DEBORAH received 65% of the assets with a majority being in the form of disposable cash accounts. The court's finding was clearly based on tenable grounds and well within the bounds of permitted discretion.

The trial court also found no basis for a finding of intransigence and made a specific Finding regarding the same (Finding of Fact 2.13; CP 298, at 304). A cursory review of the trial hearing transcript and the court's oral decision clearly establishes the appropriateness of the lack of an intransigence finding. The court plainly enunciated its reasoning and the decision was well within permitted discretion.

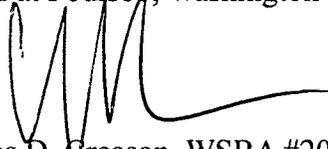
There was no abuse its discretion. DEBORAH was not entitled to an award of attorney's fees at trial nor is she entitled to such an award here.

Respectfully submitted this 12th day of July, 2013.

A handwritten signature in black ink, appearing to be 'C. Creason', written over the text 'Respectfully submitted'.

Charles D. Creason, WSBA #20295
Attorney for Respondent

Signed at Poulsbo, Washington this 12th day of July, 2013.

A handwritten signature in black ink, appearing to be 'C. Creason', with a long horizontal flourish extending to the right.

Charles D. Creason, WSBA #20295
Attorney for Respondent