

NO 49576-7-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

In Re the Marriage of Burks and Burks

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....2

ISSUES AND ASSIGNMENT OF ERROR.....3

STATEMENT OF FACT.....4

ARGUMENT.....5

**ISSUE 1: The court erred in its determination on the nature of separate
property.....5**

**ISSUE 2: The court erred in its ruling on the motion for
reconsideration.....10**

CONCLUSION.....13

TABLE OF AUTHORITIES

STATE CASES

Oium v. Fillion, 129 Wn.37, 223 P.1060 (1924).....8

In re: Marriage of Konzen 103 Wn.2d. 470, 693 P.2d 97 (1985).....6

In re: Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997).....6-7

In re: Marriage of Chumbley, 150 Wn.2d 1, 74 P.3d 129 (2003).....6-7

In re: Marriage of Zier, 136 Wn.App. 40, 147 P.3d 624 (Div. III, 2008)....7

In re the Marriage of Doneen, 197 Wn.App 941 (Div III, 2017).....12

STATUTORY AUTHORITY

RCW 26.09.080.....6, 12

RCW 26.16.010.....7

INTRODUCTION

This appeal follows a trial on a petition dissolution of a marriage. The court determined that several items of property alleged to be separate by Petitioner were community property and ordered those assets distributed. A Motion for reconsideration was filed and denied. This appeal timely follows.

ASSIGNMENTS OF ERROR

1. The Petitioner asserts error in Finding and Conclusion 10.
2. The Petitioner asserts error in Finding and Conclusion 22.
3. The court abused its discretion in determining the inheritance of the Petitioner was community property.
4. There was insufficient evidence to support the court's finding at trial as to the nature of the inheritance and gift to the Petitioner.
5. The court abused its discretion in denying the motion to reconsider/motion for new trial.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue 1. Did the court abuse its discretion in determining that several financial transactions from the parents of the petitioner were community property and not separate property?

Issue 2. Did the court abuse its discretion in denying the motion for reconsideration based on insufficiency of the evidence and a misapplication of law regarding the distribution of assets in a long term marriage?

STATEMENT OF THE CASE

Judith Burks filed for divorce on October 29, 2014 to terminate a nearly 28 year marriage. The parties married in 1986, at 41 and 46 years respectively. Both parties had children from prior marriages and relationships when their marriage began. The case followed a protracted course, finally going to trial in April of 2016, spanning three days (26th-28th). The court made a written ruling on May 11, 2017 regarding the dissolution (CP 17-24) which was adopted in the findings of dissolution of marriage and the final decree of dissolution (CP 43-54).

Petitioner filed a motion for reconsideration or a new trial timely requesting the court reconsider its ruling on several items of separate property that were

determined to be community assets. (CP 55-115). The court denied the reconsideration in its ruling of September 22, 2016 (CP 116-119), and this appeal timely filed.

ARGUMENT

ISSUE I—The court abused its discretion in determining that several accounts containing gifts and inheritance were community property.

A trial court has broad discretion in making a just and equitable distribution of assets in a dissolution based on the factors enumerated in RCW 26.09.080. An appellate court will only disturb a lower court's ruling on the distribution of assets if it can be shown the lower court "manifestly abused its discretion." In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985). Manifest abuse occurs if the court makes their decision based on grounds that are manifestly unreasonable or based on untenable grounds. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) ("A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; if it is based on untenable grounds if the factual findings are unsupported by the record; it is

based on untenable reasons if it based on an incorrect standard or the facts do not meet the requirements of the correct standard.”)

For a marriage, the character of property is determined at the point of acquisition. RCW 26.16.010. A party claiming that property is separate has the burden to establish by clear and convincing evidence that the property is not community. In re Marriage of Chumbley, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). At that point the burden shifts to the other party to establish by the same standard that the property has been gifted to the community. In re Marriage of Zier, 136 Wn.App. 40, 45, 147P.3d 624 (Div. III, 2008)(“Once established [as separate], separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary. And the burden is on the spouse asserting that separate property has transferred to the community to prove the transfer by clear and convincing evidence...”)

At a trial, testimony is evidence. Even when testimony is contested, a court can find from testimony alone that a party has met their burden by clear and convincing evidence. Oium v. Fillion, 129 Wn.37, 223 P.1060 (1924)(“...the evidence being flatly contradictory, the trial court could well have found in favor of either side had he believed one side more entitled to relief than

the other.”)

At the trial in the present case, there was lengthy testimony by the Petitioner regarding the nature of a number of financial transactions that were claimed to be separate property. VRP of April 26, 2016 at 203-210. Ms. Burks identified that financial gifts from her parents were maintained by her separately in a separate account. *Id.* at 212. The account however was determined to be community property by the court. Mr. Burks acknowledged he had no idea of the amount of these gifts and that they were maintained as separate specifically to keep them away from him. VRP of April 27, 2016 at 125-26, 134 (A. “She always said everything was gifted money so she never would have to share anything.”)

Ms. Burks further testified that financial transactions comprising an investment account were an inheritance from the estate of her father. VRP of April 26, 2016 at 196, 213-216, 237. Mr. Burks provided no testimony refuting the nature of these transactions. The court noted that the deposits of September 2, 2014 from the Vanguard account of the Petitioner’s father “certainly bear all of the indications of either a) an on death transfer; or b) a beneficiary transfer.” CP at 47, line 22. The Court nonetheless found the assets

to be community property subject to division at the time of trial. CP at 48.

The evidence at trial was uncontested that the money received as a gift by the Petitioner was separate property. The evidence goes beyond uncontested, with the Respondent acknowledging that he had no information about the gifts from Petitioner's family and that she was always identifying the monies received as separate gifts to her alone.

It was further uncontested that the property received in the Vanguard Account by the Petitioner was resulting from a death benefit. That is sufficient to establish the nature of the property as separate property and the Respondent presented no testimony or evidence to the contrary.

The failure of the court to identify the property as separate was manifestly unreasonable given the lack of any evidence to the contrary and the acknowledgement of the Respondent as to the separate nature of the property. It is further unreasonable and inequitable for the court to determine that a death benefit received by the Petitioner On September 2, 2014 was community property in a marriage that resulted in separation on October 28, 2014. The property existed as a benefit to the Petitioner for less than two months according to the order of the court, before the court determined that her former

husband was entitled to 50% of her inheritance. No equity exists in that ruling.

ISSUE II—The Court abused its discretion in denying the Motion for Reconsideration on the basis of the requirement to equitably distribute property.

After trial, the Petitioner timely filed for reconsideration of the court's ruling. The same legal standards apply here as above, but some additional facts come to light that result in some concern with the reasonableness of the court's ruling.

The Petitioner identified factually that the Respondent in his trial aid conceded that the monies held in the Morgan Stanley account was separate property. CP at 55. Petitioner requested a new trial on the basis of surprise based on that concession and contrary arguments by trial counsel. Id.

The court identified that it reviewed the trial aids of the parties, which contained information not introduced at trial. CP at 117. The court concluded that it was not evidence, and as such was not before the court for consideration. Trial counsel argued in the motion for reconsideration that, all of the evidence presented, when taken together, clearly identifies the property as separate. CP at 65-67. It is unreasonable for the court to disregard uncontested testimony at

trial that is supported by other information known to the court from trial aids and other extraneous materials. This is especially true in a situation where the court took judicial notice of other legal principles not addressed at trial to determine the credibility of the testimony of the Petitioner. CP at 47 line 6 (adopting directly the language of the court's written order, the Findings and Conclusions states "The Court can take judicial notice" regarding the tax free gift limits).

The court further identifies in its ruling on reconsideration that it "must order a just and equitable distribution of the parties property and liabilities. CP at 118. It determined that, even if it were satisfied the property were separate, the court still had the ability to divide and distribute separate property to effect an equitable outcome. Id.

In re the Marriage of Doneen, 197 Wn.App 941 (Div III, 2017) addresses this issue. The court in Doneen recognized initially that "all property, both community and separate, is before the court for distribution [in a dissolution]. Id. at 948, citing In re Marriage of Larson, 178 Wn.App 133, 137, 313 P.3d 1228 (2013). The issue raised by the Petitioner in Doneen was that the court abused its discretion in distributing the total assets of a long term

marriage inequitably in favor of the Respondent. Id.

The court held that the trial court properly exercised its discretion when it gave the Petitioner some of the separate assets of the Respondent, but avoided a true 50% split. Id. at 950-51 (The trial court gave some percentage of separate asset, 22% “explaining that it did not want to totally invade [his] separate property but wanted to invade it enough to make the distribution slightly more equitable.” The Court of Appeals found that “in doing so, the trial court declined to utilize an inflexible rule, but rather **properly considered all the circumstances of the marriage and exercised its discretion to attain a result in accordance with RCW 26.09.080.**”(emphasis added).

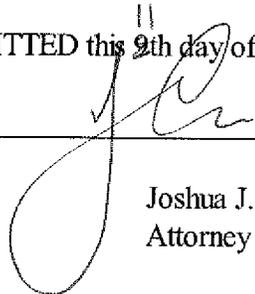
In the present case the court indicates a clear impression from the ruling on the reconsideration motion that it was required to do a 50% split of the assets to have a fair and equitable determination. This is legally inaccurate under Doneen and the matter should be remanded for a ruling consistent with the facts of the case and the ruling in Doneen.

CONCLUSION

The court significantly erred when it failed to recognize the uncontested

testimony of the Petitioner was sufficient to establish the nature of various financial transactions as separate property. The court further erred in ruling that, even if the property were separate it would be required to distribute evenly under the law. Petitioner respectfully requests the court find that the uncontested evidence establishes as a matter of law that the monies received by her are separate property. Further, the Petitioner asks this Court to either order her exclusive right to maintain the property, or to remand for proceedings consistent with Doneen.

RESPECTFULLY SUBMITTED this ¹¹9th day of May, 2017.



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WALSTEAD MERTSCHING
May 11, 2017 - 1:45 PM
Transmittal Letter

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