

Cause No. 288901-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re Marriage of:

JUDITH WENDALL CORAM,

Petitioner/Appellant,

v.

ROBERT HUGH MAIR,

Respondent/Cross Appellant

BRIEF OF RESPONDENT/CROSS APPELLANT
ROBERT HUGH MAIR

Amy Rimov,
221 W. Main, Ste. 200
Spokane, WA 99201
509-835-5377
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I. INTRODUCTION

Ms. Coram's appeal is without merit. Although she cites 28 assignments of error, which boil down to six separate issues, the complaints are without substance. Any evidentiary conclusions cited as error are, in fact, within the range of evidence or supported with substantial evidence. Any claims of conclusions not being supported by law, in fact are. If any cited errors are actually errors – they are clerical in nature and immaterial.

In contrast, Mr. Mair appeals material error. The Black Lake property is community-like property, having been acquired during the meretricious portion of their relationship with no sound evidence to rebut the presumption of its community character. The court erred in finding it to be separate.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR

1. Because the parties stipulated to and the evidence supports that the meretricious relationship had begun in September 1990, and the Black Lake property in Colville was purchased after the start of the meretricious relationship, the property is presumptively community like property, and the presumption was not overcome with clear and convincing evidence. The court erred in finding the Black Lake

property was the separate property of Ms. Coram and the error was material to the property division.

APPELLANT'S ASSIGNMENTS OF ERROR,

RESTATED:

2. Appellant wife claims no factual or legal basis for granting the husband a 25k portion of community credit towards her 16th Ave. separate property home. The claim is non-sensical when testimony and exhibits clearly showed the great amount of the husband's efforts invested, spanning nearly the entire relationship, where Mr. Mair spent the vast majority of community vacation time, weekends, and sometimes evenings on repair and construction projects on the property and made vast repairs and improvements, Ms. Coram and Mr. Mair spent community funds on building supplies, and Ms. Coram spent community funds servicing her separate property mortgage of \$65k brought into the marriage, and increased amounts with repeated refinancing throughout the marriage, and which funds she testified she spent on separate interests, including large renovation projects for the 16th Ave home and her children's college.

3. Appellant wife likewise claims no factual or legal basis for granting the husband a 10k portion of community credit towards the Black Lake property cabin for the construction efforts of Mr. Mair and

the building materials purchased from community or community-like money.

4. Appellant wife claims error in assigning $\frac{1}{2}$ of the 2007 IRS tax refund to the husband, in the amount of \$3,000 because of a lack of a corresponding division of the husband's 2007 tax return, when in fact the husband's refund was used to offset a full 50% of Ms. Coram's refund, and the court only divided approximately 50% of the differences in the refunds. Any reference to a 2008 refund is referring to the year the tax refund was received, not the taxable year, and otherwise is a scrivener's error.

5. Appellant wife claims that the court erred when not assessing a value to the phantom list of property Ms. Coram compiled that she claimed she gave to Mr. Mair, to include but was not limited to what amounted to garbage and ruined personal property that Ms. Coram had requested that Mr. Mair remove, that she had piled near her home, both in and out of her garage, post separation, and which was severely weather damaged.

6. Appellant wife essentially claims that debt accumulated during the marriage is not community debt if the parties tacitly agreed or by habit, managed their earnings and accumulated debt separately, and thus the remaining \$62,872 loan against the Lake Cabin that Mr. Mair used to pay off other community debt should be Mr. Mair's if he

charged the debt – even as she ignores, among other evidence, the clear evidence that \$20,000 of the \$70,000 original loan was intended to pay off the \$20,000 IRS debt Ms. Coram had incurred from an approx. \$12,000 refund she spent on her separate property home.

7. Appellant’s final contention is with regard to the lack of equitable distribution in the property award. This argument is so without merit as to be sanctioned. The response is, in part, addressed in the standard of review section and elsewhere throughout the brief when addressing any part of the overall division of property and the court’s findings that the overall division is fair and equitable.

III. STATEMENT OF THE CASE

Bob Mair and Judith Coram began living together in September, 1990. CP 2 ln 15-16. The Black Lake property was purchased June of 1992. RP 182 ln. 19-20. They married May 1996. *Id.* Ms. Coram brought with her into the marriage over \$60,000 in debt from the house, RP 59 ln 6-20, having purchased the house in 1984 for about \$82,000, CP 60 ln 2-3, (not the \$29,813 of RP 76 cited by Appellant – as that was the 2nd mortgage at the time of this divorce) and Mr. Mair brought with him approximately \$10,000 in debt. RP – 299 ln 22-23. The court found the Black Lake Cabin to be the separate property of the wife. CP 62 ln 16, 275.

From the start of their relationship, both parties worked for the State of Washington. *See* Ex's R306, R308 and R312.

After the start of the meretricious relationship, Ms. Coram and Mr. Mair discussed, evaluated, visited, and planned regarding the purchase of lake front property and a cabin for their own enjoyment and the enjoyment of their respective families. RP 389 lns 3-10.

July 3, 1992, Judith Coram purchased lake property on Black Lake at 2194 Alpine Way in Colville, WA. Ex's P24 - P25. At the time of the signing, she represented herself to be a single woman. *Id.* In fact, at the time the property was purchased, she was married, though separated, to John Snyder until divorced November or December 1993. RP 53 ln 14-15 and see RP 182 ln 20 - 24. And, at the time of the purchase, for nearly two years, she had been enjoying an exclusive marital like relationship with Bob Mair. See RP 51 ln 5-20 (Judith's testimony). The parties stipulated to having a meretricious relationship beginning in September 1990 and the court found the same. CP 56 at 3 lns 12-16 and RP 478 ln 8-11.

At the time the parties began living together, both parties were employed. Bob Mair was working for the state of Washington, having begun in 1983. See Ex R308. Judith Coram was also employed by the state, credited with continuous employment from 1986 through 2006. See Ex R312 (5th and 6th page of exhibit).

Judith Coram testified that she put a \$700 down payment on the Black Lake property, provided another \$6,521.90 at closing from a loan from the credit union, RP 183 ln24 – 184 ln 1, and owed a note to the previous owner for \$25,000, making monthly payments of \$227. RP 183 ln. 3 – RP 184 ln.4 She provided no tracing document showing from where the purchase funds came or if the funds in her bank account for the \$700 down payment were the result of the proceeds from recent employment or prior to Mr. Mair living with her, but only testified that they had come from her saving's account. *Id.*

The parties built the cabin before they were married, beginning in 1993 and continued building it through 1995. RP 184 ln 20 – 24. Most of the work was done by Bob Mair and his father. RP 184 ln 25 – 185 ln 1. Much of the materials were recycled. RP 185 lns 8 – 17. Ms. Coram purchased the materials. RP 185 lns 16-17. Mr. Mair also built the boathouse and dock. RP 393 lns 14-16.

The loan against the Black Lake property and the materials for the cabin and boat were presumably all paid off with community-like funds since no testimony was provided to the contrary. And see Ex R249. Bill Lewis assessed the reconstruction cost of the cabin was \$17,500, but assessed the improvements on the property at \$8,900 while assuming a 50% depreciation on only a 10 year old building. Ex

P-30, pg. 11, last para. The tax assessed value of the improvements on the property was \$50,465. RP 388 ln 10-12.

The parties were married May 1996. RP 36.

In 2005, Bob Mair took a loan out against the Black Lake property per a Deed of Trust for \$70,000. RP 191 ln 10 – 21 and Ex P27 and Ex R-248. Ms. Coram claimed that the loan proceeds did not go to her at all. See RP 193 lns. 5- 19 and Ex P-28. But in fact, some \$20k of that loan was used to pay outstanding IRS debt incurred during the marriage, from the year Ms. Coram removed funds from her retirement account and instead of paying the penalty and interest for those fund, received an IRS refund and indebted the community over \$20,000. See R-248; RP 65 ln 6 – RP 74 ln 10. The loan also paid back taxes that had accumulated on the property by 2005. Ex R248 and P28.

Bob Mair paid the insurance on the cabin. RP 394 ln 19-21.

The wife received a 2007 I.R.S. tax refund post separation for \$9782. See Ex's P-3 and R-322. The husband received \$2,157 of a 2007 refund after separation. See Ex R-206. The difference between these community property refunds was \$7,625. The husband requested an equitable distribution of that refund. RP 418 ln 22 – 419 ln 5. The court ordered the husband to receive \$3,000 of the difference between the two refunds which was close to 50% of the

difference, though she called it 50% of the refund. *See* CP -289 para 3.5.

During separation, the wife basically cleaned house and put in the garage or other places items from the home she did not want and apparently what she considered to be the husband's separate items brought into the marriage. RP-356 ln 19 – RP 357 ln2, RP-359. She did not adequately protect these items and they were severely water damaged and ruined by the time the husband was able to receive the items. RP 357 ln 20-25 and R265. The quality and value of the items was such that they were either thrown out, given away, or taken to a second hand store as a donation. RP 357 ln 2-16. The total items of value that Mr. Mair took or that he was awarded but remain in Ms. Coram's possession is \$4,235. *See* CP-293 at para (1).

Yet, the wife constructed a list of supposed property the husband took which was controversial as not actually in existence, not belonging to the parties, not in the appropriate format to present at trial, ruined by her lack of protecting it from the weather, the separate property of the husband, and having no value. Ex R-270 and RP 355 ln 2 – RP 361 ln 23. Though such testimony is hidden in the record if it exists, according to her counsel, she testified that the items on the list were worth \$10,000. *See* Appellant's trial brief at 30. Instead, the court valued and distributed the personal property appropriately

presented on the joint trial management personal property worksheet and considered with general equity, and including and with regard to the transfer payment, anything else. CP-63 lns 12-19 and CP 71 ln 13-22. In any event, most of the items on the wife's list were not in existence, so there is no way to distribute them and no further responsibility on the court.

The general testimony at trial showed that throughout the parties' relationship, each managed their community property earnings and community like property with substantial independence from one another. See eg. RP 291 lns 19-23, 297 ln 22-298 ln 16; but see RP 298 -300. But there was no community or separate property agreement between the parties that excluded the funds or debt from being community property. CP-274.

Despite Ms. Coram required to pay the loan on the cabin, the divorce left Mr. Mair in a financially difficult place. Apparently, because of all the individual debts he had to pay, as well as attorney fees, he had to file Chapter 13 bankruptcy. See CP 242-248; see RP 4 ln 14-16, 377 ln 5-15, 435 ln 10-21 and the list of debts in decree at CP 289. Yet, given the court's finding that all the real property was the wife's separate property and she had kept the majority of the community personal property too, the court had little other choice than to distribute to Mr. Mair more of the community portion of the

retirements than to Ms. Coram, as the only source of community property available as a transfer payment from Ms. Coram to Mr. Mair. See e.g. CP 71 ln 2-17; RP 24 ln 11-24. The court gave Ms. Coram all of the real property and the corresponding debt against it, RP 16 ln 16-24, and calculating from these figures, the total value of the assets minus debts awarded to Ms. Coram was about \$225,990, while the total value of the assets minus debts to Mr. Mair was \$137,590. This results in \$88,400 more assets awarded to Ms. Coram than to Mr. Mair following this 18 year marriage where it could be found that she had \$20,000 more equity than he coming into this relationship with her ownership of the 16th Ave. home. Mr. Mair received approx. \$4,000 more in community debt than Ms. Coram. CP 289. But during the marriage Ms. Coram had doubled the debt against her separate property home from approx. \$65,000 to roughly \$135,000, all spent on separate property interests, including her son's post-secondary education and upgrading the separate property home, leaving only \$45,000 in equity in the home at the time of trial. See CP 289 and e.g compared to RP 234 ln 17-235 ln 16, RP 59 ln 6-20.

Ms. Coram was un-cooperative and intransigent during the discovery processes and sanctioned with fees and no right to argue separate property at trial. CP 30-33, 49, 52-53. This loss of right to argue separate property rights should be extended through the appeal.

to include no right to argue or respond to Mr. Mair's claim of community property in the Black Lake property, or the lack of ability to argue error in a community right of reimbursement in her separate property – not only as a logical and necessary extension of the sanction, but also because the issue was not allowed to be argued by Ms. Coram at the trial court and thus her position is not ripe for review by the appellate court.

IV. STANDARD OF REVIEW (Summary and concise statement of standards of review for each issue)

As to any valuation that is disputed by appellant, the standard of review is “within the range of evidence.” *In re Marriage of Soriano*, 31 Wn.App. 432, 435, 643 P.2d 450 (1982) (stating that “[v]aluation of assets should be within the range of the evidence, and if it is, that value will not be disturbed on appeal.”)

As to the broad discretion afforded a trial court in making a just and equitable marital asset division, “manifest abuse of discretion” is the standard, which is the equivalent of considering that no reasonable judge would have reached the same conclusion. *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) and the following is oft quoted from that decision:

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such

decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97 (1985); *Baker v. Baker*, 80 Wash.2d 736, 747, 498 P.2d 315 (1972). The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

Id.

As to determining characterization of property as separate or community, that is a question of law. *In re Marriage of Mueller*, 140 Wn.App. 498, 167 P.3d 568 (2007); *In re Marriage of Skarbek*, 100 Wn.App. 444, 447, 997 P.2d 447 (2000), with the factual findings supporting the characterization, generally requiring substantial evidence, *Id.*, or clear and convincing evidence to overcome a presumption of community. *Berol v. Berol*, 37 Wn.2d 380, 381-82, 223 P.2d 1055 (1980).

V. ARGUMENT

- 1. Because the Black Lake property was purchased during the meretricious portion of the relationship, the property is presumptively community in character.**

Even though Mr. Coram was not yet divorced from her former husband at the time she purchased the Black Lake property, because the Black Lake property was purchased during the meretricious portion of the relationship, the

property is presumptively community like in character. See *Meretricious Relationship of Jeremy Long and David Fregeau*, 2010 WL 5071860 (Div. 3, Dec. 14, 2010); *Connell v. Francisco*, 127 Wn.2d 339, 351-52, 898 P.2d 831 (1995)(stating that “[p]roperty acquired during the meretricious relationship is presumed to be community-like, but the presumption is rebuttable.”)

Because the same community presumption applies to meretricious relationships (now also called equity relationships in *Fregeau*), the presumption must be overcome by clear and convincing evidence. See *Fregeau*, at 5, para 26 (stating that “[t]he court may characterize property as “separate” and “community” by analogy to marital property.”); See also, *Kolmorgan v. Schaller*, 51 Wn.2d 94, 98, 316 P.2d 111 (1957); *In re Marriage of Brewer*, 137 Wn.2d 756, 766-67, 976 P.2d 102 (1999) (explaining that the law favors characterization of property as community property unless there is no question of its separate character). The fact title has been taken in the name of one of the parties does not, in itself, rebut the presumption of common ownership. *Id.* See *In re Marriage of Lindsey*, 101 Wn.2d 299, 306-07, 678 P.2d 328 (1984); *Merritt v. Newkirk*, 155 Wn. 517, 520, 285 P.442 (1930). Neither does exclusive management by one spouse, of certain funds, change the character of that property. See *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954); *In re Marriage of Schweitzer*, 81 Wn.App. 589, 596-97, 915 P.2d 575 (1996).

As in *Connell*, Ms. Coram would have had to rebut the presumption

with evidence showing that the real property was acquired with funds that would have been characterized as her separate property had the parties been married. *See Connell*, 127 Wn.2d at 352 (explaining that the husband may overcome the presumption with evidence showing the real property was acquired with funds that would have been characterized as his separate property had the parties been married).

Ms. Coram did not show that the real property was acquired with funds that would have been characterized as separate property had the parties been married. Ms. Coram only provided her own, self serving testimony and baseless legal assumptions that the \$700 down payment came from her savings account without testimony or evidence that the savings account was her separate property, and that the \$6000 at closing was from a loan. RP 183 ln24 – 184 ln 1. It is as if Ms. Coram believed that all of her earnings from her labor were separate property 1 ¾ years after the meretricious relationship had begun. As explained by our Supreme Court in *Berol v. Berol*, 37 Wn.2d 380, 381-82, 223 P.12d 1055 (1950), this is not admissible evidence. And, after facing a bald (self serving) statement from a benefiting party, that the funds were separate property funds the court in *Berol* stated:

“The burden rests upon the spouse asserting the separate character of the property acquired by purchase during the marriage status to establish his or her claim by clear and satisfactory evidence. . . . The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate

funds were available for that purpose. Separate funds used for such a purpose should be traced with some degree of particularity.”

Berol, 37 Wn.2d 381-382 *citations excluded*.

Absent other evidence, the claimed \$700 initial deposit on the land was community-like funds acquired sometime within the 1 yr and 10 months of the parties’ intimate co-habiting, meretricious, equity relationship. The remainder of the purchase, on credit, is also presumed to be community in nature. *See Oil Heat Co., of Port Angeles, Inc. v. Sweeney*, 26 Wn.App. 351, 353-54, 613 P.2d 169 (1980).

Clear and convincing evidence of its separate character does not exist when no evidence supported a finding that the money used for the down payment on the Black Lake property, the \$700, was separate in character when it was presumably earned from employment during the meretricious relationship. The court had properly recognized the community like nature of the state pensions from 1990 forward, which, then, as a logical and consistent conclusion, based on the very same evidence and legal standards, the court should have acknowledged the community like character of all employment earnings post September 1990 as they applied to purchasing the lake property. *See In re Marriage of Landry*, 103 Wn.2d 807, 810, 699 P.2d 214 (1985) (explaining that pension benefits which accrue during a term of employment are characterized in the same way as the income earned during that term of employment.)

As a discovery sanction, Ms. Coram was precluded from arguing separate property rights at trial, *See* CP 30-33, 49, 52-53, and should not be allowed to then argue against a community property right on appeal and argue it as separate property since she was precluded to argue it at the trial level.

The Black Lake property, an asset valued at \$185,000, was erroneously found to be separate property and provided to the wife with only \$10,000 in equitable community credit awarded to the husband from that asset. It is possible that the court would have divided the value of the Black Lake Property and awarded Mr. Mair \$82,500 more in property, or some portion thereof, had the characterization of the property been accurately deemed community. This court should remand for an equitable division of the Black Lake property as community property.

3. If the Black Lake Cabin was the separate property of the wife, a \$10,000 of cabin improvements community reimbursement given to the husband was within the court's broad discretion.

The trial court spoke of the \$10,000 of community credit for community improvements being awarded to the husband in various places in her decision as noted herein:

As to the improvement on the property, the Court accepts the \$10,000 value that was segregated and was part of the testimony of Mr. Lewis.

The overall asset, however, is given a \$185,000 value. It will remain the separate property of the wife, but here again, the husband is to be credited for the \$10,000 in efforts toward improvements.

CP 62, Court's Oral Ruling at 9.

Same thing with the \$10,000 on the lake cabin. There was at least \$20,000 of community effort put in the place to improve that facility. Of that, at least \$10,000 was contributed by the wife in materials and \$10,000 was contributed by the husband in labor, and that would be, that \$10,00 would be his portion, his one half of the community efforts to improve." *Id.*

CP 76 Ins 5-11.

The Amended Findings of Exhibit A at para 23 states that community property exists such as:

"\$10,000 of husband's efforts towards lake cabin improvements plus an equitable property adjustment in an additional transfer payment from wife to husband of \$14,863".

CP 286.

And page 4 of the Findings, Section 2 it states:

"d. the husband to receive a credit of \$10,000 in ½ the community efforts toward the improvements."

CP 276.

The Amended Decree of Exhibit A at 23 states that:

"20. The husband to receive 75% of the wife's PERS I pension from Sept. 1990 through January 2008 valued in an amount of \$103,509.10 through a QDRO, as well as an additional \$14,863 as equalization for his portion of the community improvement efforts in the wife's separate real estate and personal property transfer equalization payment."

CP 294.

The value of the cabin, as an improvement sourced exclusively from the community, at \$10,000, was within the range of evidence between Mr. Lewis' appraisal and the county property assessment and Mr. Mair's subjective value. See Ex P-19; Ex R-245; and RP 388 ln 16-20. And the court had discretion to provide the husband with this right to reimbursement within her broad discretion to do equity. As stated in *In re Marriage of Miracle*, 101 Wn.2d, 137, 139, 675 P.2d 1229 (1984):

In a dissolution proceeding, the trial court is required to "do equity." See RCW 26.09.080; *Baker v. Baker*, 80 Wash.2d 736, 498 P.2d 315 (1972). The trial court must take into account all the circumstances in deciding whether a right to reimbursement has arisen. The trial court *may* impose an equitable lien to protect the reimbursement right when the circumstances require it. See Cross, 49 Wash.L.Rev. at 776-77. We review the trial court's decision only for abuse of discretion. *Baker*, at 747, 498 P.2d 315, *emphasis added*.

Many factors may have influenced her equitable discretion including the prejudicial manner that discovery and valuations of the property were conducted by Ms. Coram, See CP 59 lns. 16-19, CP 30-33, 49, 52-53, or the acknowledged higher appraised assessment for taxes of \$50,465, Ex R-245; RP ln 9 – RP 388 ln 12, or perhaps acknowledgment that the building on the lake property was insured for \$75,000 and the loan against the Black Lake Property was supposed to be only a secured loan against that structure. RP 385 ln 15 – 25.

If the Black Lake property was considered separate property, any right of reimbursement to Ms. Coram for Mr. Mair's use and enjoyment of her separate property could have been reasonably set off by the payments made on its original cost paid with community funds (no clear and convincing evidence was presented that the lake property was paid by separate funds). *See In re Marriage of Miracle*, 101 Wn.2d at 139. In any event, this was not an issue raised by Ms. Coram at the trial court to have been addressed by the court specifically and there is no mandatory calculation to be made in any event – it's just an option. *See Id.*; *Connell v. Francisco*, 127 Wn.2d at 351-52.

Per Mr. Mair's Cross-Appeal, since the Black Lake Property should have been designated community property, the claimed error in awarding Mr. Mair any amount for community improvements should be moot. On remand, he would presumably just get \$10,000 in credit already awarded (as provided within the 75% of the PERS I DRO division at Findings pg 7 at 3.8 (i)) toward receiving an equitable portion of the \$185,000 value of the community property lake property awarded in full to Ms. Coram. Thus, the additional award for re-characterizing the Black Lake property as community property may result in an additional \$82,500 judgment in favor of Mr. Mair as 50% of the value remaining to be transferred, calculated like this: \$185,000 divided by 2 - \$10,000 = \$82,500.

4. If the 16th Ave home is Ms. Coram's separate property, the \$25,000 of reimbursement to the husband for community caused value from maintenance and improvements was within the judge's broad discretion.

A right of reimbursement to the community for a community source of improvements is authorized by law. *See Connell v.*

Francisco explaining:

Furthermore, "when the funds or services owned by both parties are used to increase the equity or to maintain or increase the value of property that would have been separate property had the couple been married, there may arise a right of reimbursement in the "community". *See, e.g., Pearson-Maines*, 70 Wash.App. at 869-70, 855 P.2d 1210; Harry M. Cross, *Community Property Law in Washington (Revised 1985)*, 61 Wash.L.Rev. 13, 61, 67 (1986)." A court may offset the "community's" right of reimbursement against any reciprocal benefit received by the "community" for its use and enjoyment of the individually owned property. *See In re Marriage of Miracle*, 101 Wash.2d 137, 139, 675 P.2d 1229 (1984); Cross, at 70.

Connell, 127 Wn.2d at 351-52.

As to the burden of proof regarding the community's right to reimbursement in the increase in the 16th Ave. home, the court need only be persuaded by direct and positive evidence that the increase in value of separate property (or the community value of the maintenance per *Connell*) is due to community labor or funds, and the court may provide reimbursement for the contributions that caused the increase.

If the court is persuaded by 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. The labor of each party during a committed intimate relationship is community labor.

Fregeau at para 27.

The court explained her reasoning on the \$25,000 community caused increase in value awarded to the husband at 22 and 23 of her oral ruling)CP 75-76) as a 50% percentage of the increase in value stating:

“The wife put in an incredible amount of materials and expense to launch these projects. Her portion of that was at least \$25,000. His was \$25,000 so the \$25,000 that the Court recognized was his one half of the community’s effort to improve the house, and through the course of this period of time, even the Lewis appraisal recognized that amount of appreciation.”

CP 75 ln 23 - 76 ln 4.

A review of the original purchase price and appraisals of the 16th Ave home shows direct and positive evidence of increased value for the community maintenance and construction efforts. Appellant errors to claim that all appraisals showing the increase in value of the property were made to include an assumption or credit that the improvements would be done. In fact, the historical appraisals were “as is” condition appraisals with devaluation for unfinished work. The January 30, 2006 Berg Appraisal valuing the home at \$250,000 at page 2 of Ex R-241, devalued comparables between 9% and 21% due to the unfinished state of the home. And also noted value added for updating:

“The updating over the years has helped to lower the homes effective age. A functional utility adjustment was made in the cost and market approaches to value for the cost to complete the above mentioned items [that are not complete]. No

external obsolescence was noted immediately surrounding the house. The estimated accrued physical depreciation is calculated by using the “age-Life” method.”

Ex R241 at 8.

The 2004 appraisal at Ex R14, likewise, was adjusted for unfinished area, as stated on pg 1 at about 1 inch from the bottom of the page. That value of the property was \$245,000. *Id.*

And the 5th page of the appraisal again states that the additions and remodeling have lowered the effective age – providing value, compared to other 1907 homes. *Id.*

At Ex R-243, Berg Appraisal Services provides another appraisal, this time valued at \$175,000 again in an “as is” state with reductions for anything unfinished. This 1999 appraisal lists in its comment addendum many of the very new improvements, including a new metal roof and completely remodeled kitchen, which were all installed during the marriage.

The 1993 appraisal at Ex R-244 valuing the home at \$158,000 within the additional features section at the last page of the appraisal notes the completed remodeling done in 1992 by Mr. Mair. There was no observation of renovations not completed.

The court noted that the home had been purchased by the wife with her prior husband in 1984 for \$82,000. CP 60 lns 2-3.

Thus, one can conclude just from the appraisals that Mr. Mair's renovations on the property during the first two years of their relationship, was a substantial part of the increased \$76,000 in value occurring between 1984 and 1993. And the additional \$22,000 in value netted between 1993 and the time of trial leaves an over all increase in value of about \$100,000 over the course of their relationship, despite the down turn in the housing market. Of this \$100,000 in increased value, the court provided Mr. Mair \$25,000 for a 50% share of the community efforts, labor and funds responsible for the increase.

Mr. Mair also provided direct and positive evidence that during the relationship, nearly the entire home was either repaired or re-built. See RP 238 – RP 303 ln 24; or with the inclusive testimony of the work done on the 16th Ave home at RP 280 ln 9 – RP 325 ln 21 as well as testimony at RP 328 ln 15 – 329 ln 5. See also Ex R-238. Even Ms. Coram admits that a 2001 joint IRS tax refund of \$12,000 went to building her bird room addition. RP 271 ln 4-11. And the large innovation from the insurance funds after the upstairs balcony collapsed got her a new metal roof and an 8 ft enclosed extension to her home due to Mr. Mair's construction efforts stretching the dollars. RP 233 ln 15 – RP 234 ln 1. As part of the husband's right to and valuing an equitable credit, the court may have noted that the home insurance would have been paid with community funds, and thus the insurance proceeds would have

been community money invested into her separate property home and would have contributed to the community right of reimbursement. Ms. Coram noted the salvaging of the carriage house previously in disrepair, was turned into an art studio for her. RP 234 ln 4-16. She thought \$20,000 was spent on the metal roof, RP234 ln 17-235 ln 16; RP 237 ln 6-20, which Mr. Mair testified came from the time of the insurance renovations and pre-dated Ms. Coram's \$20,000 re-financed home equity loan, which she testified at trial had paid for the roof. RP 284 ln 20-21 or 283 ln 1-285 ln 16 for context. A boat storage shed was built. RP 252 ln 7-12. And she noted other renovations generally. RP 232 ln 14-18.

In addition to increasing the properties' value, Mr. Mair provided substantial maintenance to the home, (see e.g. RP 287 ln 12-18) which is also a recognized equity grounds for credit. *See Connell*, 277 Wn. 2nd at 351-352. The dollar value in the maintenance does not appear as any line item in any of the appraisals, even though all the appraisals consistently recognizing that the maintenance and updating provided the home had decreased its effective age. *See generally*, the final page of the appraisals as Ex's R-241, 243, 244.

The court had discretion to recognize and assign a community value for the maintenance done by community labor. She called all the labor "efforts towards improvements" at CP 61 ln 15 of the trial

court's oral ruling, and commented further that "a lot of work was undertaken and that has value and the effort has value." *Id* at ln 18 -19.

Reimbursement to a party for the community use value of their separate property, apart from improvements and substantial maintenance, is often just calculated as a wash with the lack of credit for the use of community funds to service a separate property mortgage. *See e.g. In re Marriage of Mirracle*, 101 Wn. 2d 137, 139, 675 P.2d 1229 (1983). But this issue of off setting a right of reimbursement on appeal for Mr. Mair's use value of Ms. Coram's separate 16th Ave home was not requested at the time of trial and was precluded, in any event, as an argument related to separate property that Ms. Coram lost as sanctions. *See* CP 30-33, 49-53.

Ms. Coram's argument that the World Mark time share should have been treated in the same fashion via distribution as her 16th Ave. home makes no sense, since it was. Just as Ms. Coram received both the debt and the equity in the 16th Ave home, Mr. Mair received the debt and the equity with the time share. *See* CP 289 and 296. The World Mark time share was deemed community property and assessed to Mr. Mair with a value of \$5,000 and debt of nearly \$10,000. CP 289 and 293. The only thing amiss regarding the 16th Ave property in the Findings and Decree was not assessing Ms. Coram \$25,000 in

community equity for her share of the community improvements.¹

But this is an immaterial omission since she received the property and with the omission, her separate property portion just increased.

In conclusion, assigning a total community credit value of \$50,000 for improvements to the 16th Ave. home is well within the range of evidence whether by deductive reasoning when utilizing the 1984 sales price and ending value 20 yrs later and the progression of improvements noted throughout the marriage, or based on Mr. Mair's testimony regarding his services. There was direct and positive and substantial evidence to support the court's conservative finding a total of \$50,000 community value of maintenance and improvements over the 18 years of the relationship, and well within the range of evidence presented.

5. The trial judge factored in the husband's 2007 tax refund when she only provided an approximately 50% transfer to the husband of the difference between the two 2007 refunds.

Appellant wife claims error in the trial court awarding her ½ of the 2007 IRS tax refund to the husband without a corresponding division with her of his refund. It appears that at trial, the wife did not

¹ Ms. Coram actually received \$35,000 more in community property value than what is listed in the findings and decree, since the 25k and 10k of her share of the community property right to reimbursement in the two properties got absorbed into her separate property award and were not specifically independently listed in the decree and findings. See lack of inclusion at CP 273-297.

ask to share the husband's refund. Nevertheless, the court ordered approx. ½ of only the difference between the two community property tax refunds in the amount of \$3,000. The court subtracted the value of the husband's refund of \$2,157. See Ex R-206. If the joint trial management report had been properly filed so it could be designated, citation to that report would show the husband's refund as being subtracted from the wife's \$9,782 refund before the court approximately divided the remainder. If the court had actually awarded the husband 50% of the wife's tax refund to the husband, rather than just an approximate 50% difference between the refunds, the amount of the award and transfer would have been much higher at \$4,891. See Ex R-322.

Any reference to a 2008 tax refund being shared or awarded in the final documents is a scrivener's error. The trial issue was with regard to the 2007 tax refunds being shared, when received in 2008 after separation. No testimony or oral ruling addressed splitting a 2008 tax refund. The award of \$3,000 of the wife's 2007 (2008 sic.) tax refund was well within the court's broad discretion and the appeal of this issue is frivolous.

6: The trial judge did not error when she did not assess a value to the wife's additional list of property.

If personal property has been sent to the dump, does not exist, is ruined, or belongs to someone else the court has no ability to distribute it. When exercising its broad discretion, a trial court focuses on the parties' assets then before it-i.e., those existing at the time of trial. If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial. *In re Marriage of White*, 105 Wn.App. 545, 549, 20 P.3d 481 (2001) (citing .RCW 26.09.080; *Brewer*, 137 Wash.2d at 766, 976 P.2d 102; *Friedlander*, 80 Wash.2d at 305, 494 P.2d 208; *In re Marriage of Olivares*, 69 Wash.App. 324, 328-29, 848 P.2d 1281, *review denied*, 122 Wash.2d 1009, 863 P.2d 72 (1993)).

Ms. Coram had prepared a 21 page listing of things she claimed Mr. Mair had without assigning or testifying as to their value. Mr. Mair testified regarding this list at RP 355 ln 4 – RP 361 ln 23. Using Respondent's exhibit Ex R-270, Mr. Mair explained how he had reviewed the list and highlighted in yellow the things he actually had. RP 355 ln 4 – 20. He highlighted in pink those things destroyed in the driveway when Ms. Coram did not adequately protect them from the weather. RP 356 ln 1 – 10; RP 357 ln 20 - 25. As to the other items, they either did not exist or belonged to others or Ms. Mair could not identify where they were – and Mr. Mair provided comment and

commentary to the right of Ms. Coram's original list as to what he knew about them. RP 357 ln 2 – 16.

The items on the list of any value and in existence were listed in the Household Goods Distribution List, attached to the missing Joint Trial Mgmt Report. The items from the house that Mr. Mair received were chosen and thrown in boxes by Ms. Coram, left to the winter weather, damaged and destroyed. RP 356 ln 19 – RP 361 ln 12; R 265. The quality of any community items received was the equivalent of a Ms. Coram house cleaning and getting rid of everything she did not want. RP 359 ln 19; RP 356 ln 19 – 357 ln 1.

The court limited valuation and her ordered distribution of household goods to those items listed in the household goods distribution list attached to the joint trial management report. And if the JTMR had been filed properly, in order to be available to the Court of Appeals, that would be clear to compare. See CP 280-86.

On motion for reconsideration, the court ordered disposal of any remaining items not included on the joint trial management report by assembling them and allowing the parties to take turns picking any items that remain. CP 296 between 3 and 4 and CP 293 between 2 and 3. Thus, the court disposed of all remaining property if it existed. It did not abuse its discretion. The appeal on this point is frivolous.

7. **Ms. Coram's claim that because the parties generally managed their earnings separately therefore they must have been separate, is contrary to law and completely without merit.**

As stated in *Connell v. Francisco*, 127 Wn.2d at 315-52 an agreement to turn community property into separate property requires clear and convincing proof to overcome the strong presumption of community property. *Id.* (citing *Kolmorgan v. Schaller*, 51 Wash.2d 94, 98, 316 P.2d 111 (1957); *In re Marriage of Janovich*, 30 Wash.App. 169, 171, 632 P.2d 889, *review denied*, 95 Wash.2d 1028 (1981)). The communities' method of managing the funds does not supply the proof. The *Connell* court states:

Simply placing one's own earnings into a bank account in that spouse's name for management purposes is not sufficient to change the legal character from community to separate property. *Hamlin v. Merlino*, 44 Wash.2d 851, 862, 272 P.2d 125 (1954). Likewise, one spouse's control over community funds does not change the character of the property. *Schweitzer*, 81 Wash.App. at 596-97, 915 P.2d 575 (citing RCW 26.16.030).

There was no evidence establishing that the separate earnings and debts of the parties were their separate earnings and debts by agreement. To the contrary, both parties agreed that the parties' respective pensions contained community property from during the entirety of their relationship, even though, obviously, they were in

each of the parties' separate names and only funded with the individual parties' earnings and work history. *See e.g.* RP 478 ln 8-11.

Furthermore, the loan against the Lake Cabin, which Ms. Coram contends should have been awarded to Mr. Mair, originated in large part from the need to pay off the IRS debt that accumulated from the 2001 joint income tax return that Ms. Coram had incorrectly done after withdrawing retirement funds that year from her state account. This error originally caused an \$11,000 or \$12,000 tax refund (which Ms. Coram spent on her bird room addition on the 16th Ave. home RP 271 ln 4 -11), but when the error was noted, the parties were assessed a \$20,000 tax penalty. *See* RP 261 ln 14-21; RP 262 ln 15 – RP 263 ln 8; RP 270 ln 7-9; RP 271 ln 4-11; RP 274 ln 10-14. Ms. Coram received \$10,000 from the loan against the Black Lake property to pay off her 50% portion of that debt, but did not use it for that purpose. RP 274 ln 10 – 14. Mr. Mair used \$10,000 from the loan to pay off his portion of ½ of the IRS debt. *Id.*; RP 15 -24. Ms. Coram did not pay her debt until 2007, upon receipt of her back pay settlement from the state, when her portion of the debt had increased by over \$6,000 in additional penalties and interest. RP 261 ln 14 – 25; RP 262 ln 25 – 9 and R265 ln 12 and Ex R-319.

No evidence was presented or established that the debts paid by the Black Lake property mortgage were solely for Mr. Mair's benefit.

No evidence Respondent has found established the purpose of the debts paid off. And if there was, there was also competing evidence that Mr. Mair often purchased supplies for the home repairs. RP 375 ln 4, 291 ln 9-18, 302 ln 16-18, and 318 line 1-13. The presumption of community debt can not be overcome with this argument of Ms. Coram's at 31 of Appellant's opening brief.

Finally, the Black Lake Property debt assessed to Ms. Mair and a secondary WSECU debt of \$2,215 is the only community debt Ms. Coram was awarded. That debt offset the community debt Mr. Mair was awarded, which was reasonable. *See* CP 273 - 277. Mr. Mair received approx. \$4,000 more community debt than Ms. Coram. CP 277. If anything, it was highly beneficial to Ms. Coram to receive the debt all in two loans rather than the multitude of smaller loans at higher interest rates given to Mr. Mair. There was no abuse of discretion or unjustness done to Ms. Coram. The award of this debt to Ms. Coram was within the court's discretion.

VI ATTORNEY FEES ON APPEAL PER RAP 18.1

Ms. Coram's appeal is without merit. She assigns errors to findings of facts clearly within the range of evidence. She claims no basis in law or fact for reimbursement to the community as credit from separate property substantially improved by community and



community-like labor, when such a theory is long standing and clear. She essentially requires the court to not consider the economic circumstances in which the division of property and debt leaves the parties. And, she apparently asks the appellate court to set aside a community property and debt presumption during marriage or meretricious relations (or equity relationship), and consider the accumulation of debts and assets, other than the pensions, as separate in nature where no community or separate property agreement exists – just because the parties tended to manage their community property and earnings in that fashion. All such theories of Ms. Coram are in strong opposition to existing law and Ms. Coram does not argue for an extension of such law, she seems to just ask the court to ignore all applicable and existing law, as well as the range of evidence. Ms. Coram’s appeal is without merit and Mr. Mair requests attorney fees. See RAP 18.9.

It appears that Ms. Coram’s appeal was brought for the purpose of intransigence and to harass Mr. Mair who does not have funds to pay for an attorney on appeal. He is in bankruptcy. Attorney fees may be ordered as punishment for intransigence and for a frivolous appeal. See RAP 18.9 and *In re Marriage of Greenlee*, 65 Wn.App. 703, 829 P.2d 1120 (1992).



Attorney fees may be awarded from time to time from one spouse to another based on need and ability to pay. RCW 26.09.140. Because Mr. Mair's unsecured debt blossomed during separation far beyond what was divided as community debt at trial, due in large part to attorney fees nearing \$40,000 at the time of trial (See RP 376 In 16-377 In 15, 435 In 10-21, and Ex R337) that he is now making payments for his debt through Chapter 13 bankruptcy, CP 242-248, 258-264, this shows prima facie need by Mr. Mair, and Ms. Coram has the ability to pay, especially since Ms. Coram was awarded a net value of \$88,000 more in total property than Mr. Mair and Ms. Coram's debts at the time of trial were consolidated into only two debts.

VII CONCLUSION

In attempting to understand what Ms. Coram's issues are with her 28 assignments of error, Mr. Mair has summarized and re-stated her issues as, essentially, six, and brings one of his own. All of Ms. Coram's claimed errors are so obviously not errors, within the range of the evidence, not material, or within the court's wide discretion that Ms. Coram's appeal is frivolous. On the other hand, the legal error in mischaracterizing real property valued at \$185,000 from community-like to separate is material and that finding, conclusion, and the division of property based on that characterization must be reversed and remanded for an equitable division affected by that property.

Respectfully Submitted this 18th day of February 2011.

A handwritten signature in cursive script that reads "Amy Rimos". The signature is written in black ink and is positioned above a horizontal line.

AMY RIMOS, WSBA 30613
Attorney for Respondent/Cross Appellant

