

FILED

SEP 17 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31918-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

SANDRA LYNETTE GUNKEL,

Appellant/Cross-Respondent,

and

DANIEL GEORGE GUNKEL,

Respondent/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KLICKITAT COUNTY
THE HONORABLE BRIAN ALTMAN

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. CROSS-REPLY ARGUMENT

Clear, cogent, and convincing evidence proves that the property owned by Cherry Hill, LLC (“Cherry Hill”) is the husband’s separate property as it was gifted to him during the marriage by his parents, who alone purchased the properties. *Marriage of Chumbley/Beckham*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). The husband received his interest through a series of deeds from his parents. (Exs. 9, 10, 13) In each deed, the husband’s parents conveyed their interest to the husband as a “married man as his separate estate” “for and in consideration of love and affection.” (Exs. 9, 10, 13) Cherry Hill was therefore the husband’s separate property as a matter of law under RCW 26.16.010, which provides that property a spouse acquires during the marriage “by gift, bequest, devise, descent, or inheritance” is separate property.

The wife does not deny that the parties paid no money toward the acquisition or improvement of the property, which the husband’s parents purchased and titled in their names. (RP 130, 215, 615, 669-70, 671-72, 679) The wife also does not deny that the husband’s parents made no promises to her when they gifted the property to the husband “as his separate estate.” (RP 187, 194) Instead, the wife claims that Cherry Hill is community property,

because she was “working at the fruit stand” before the parents acquired the properties, and helped “generate the profits” that assisted the parents in acquiring Cherry Hill. (RP 131, 203) But the wife was compensated for her services at the fruit stand. (RP 745-46) The parents added her compensation to the husband’s paycheck, and gave the wife cash whenever she asked. (RP 745-46) The fact that the wife could not discern her hourly rate from the payments received by the husband, which were deposited into a joint account does not make her “unpaid” or “uncompensated” for her services. (Cross-Resp. Br. 3) Nor does it convert an acquisition by the husband’s parents as individuals into their son’s community property.

In essence, the wife argues that when the husband’s parents initially acquired the property, in the parents’ names, that it was being held in trust for the community, because the community allegedly contributed to its purchase through the wife’s fruit stand labors. A similar argument was rejected in *Engel v. Breske*, 37 Wn. App. 526, 529, 681 P2d. 263, *rev. denied*, 102 Wn.2d 1025 (1984), where the appellant claimed an interest in real property that respondents had acquired in their names. Appellant claimed that because she contributed the down payment on the property, a

resulting trust was formed and that she, not respondents, owned the property. The court held that because appellant acknowledged that she did not furnish all of the consideration for the property, “no presumption of intent to create a trust arises. In such cases, the person asserting the trust has the burden of proving its existence by clear, cogent and convincing evidence.” *Engel*, 37 Wn. App. at 529.

Likewise here, even if the community did contribute to the acquisition of the property through their labors, the wife concedes that the parents and the husband’s brother also contributed to the acquisition. (RP 131) The wife failed to meet her burden of proving a resulting trust by “clear, cogent, and convincing evidence,” as she presented no evidence that the husband’s parents intended to hold the property in trust for the husband and wife based on the parties’ alleged contributions towards the acquisition. The wife’s only evidence was her self-serving and disputed testimony that she was not adequately compensated for her services at the fruit stand.

Finally, there is no support for the wife’s claim that if this Court holds that Cherry Hill was the husband’s separate property, the community is entitled to any “increase in value since acquisition” because Gunkel Orchards, a part-community asset, improved the property. First, the wife presented no evidence of any

increase in value of the property since acquisition. Second, to the extent that the community's efforts contributed to improvement of the property, the community has already been compensated because the family farms the land without paying rent to Cherry Hill. (RP 689, 741)

Although the trial court erred in characterizing Cherry Hill as community property, the husband only raises his cross-appeal as a basis to affirm the trial court's property distribution as fair and equitable. In her appeal, the wife claims that the trial court should have awarded her a disproportionate share of the community property, but in fact she did receive a disproportionate share because Cherry Hill was erroneously included in the community property division.

II. CONCLUSION

This Court should affirm the trial court's fact-based, discretionary decision dividing the community estate and denying the wife additional spousal maintenance and attorney fees. To the extent the trial court committed any error, it was in characterizing Cherry Hill as community property. Rather than remand to correct this error, the husband asks this court to affirm and deny the wife's request for attorney fees on appeal.

Dated this 15th day of September, 2014.

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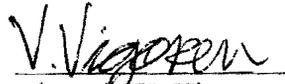
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 15, 2014, I arranged for service of the foregoing Reply Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of September,
2014.



Victoria K. Vigoren