

**FILED**

SEP 29 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 320413

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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SURESH PHILIP,

Appellant,

v.

JAYA PAULOUSE PHILIP,

Respondent

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AMENDED BRIEF OF RESPONDENT

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## **I. PRELIMINARY STATEMENT**

Two months before filing the underlying dissolution action, Dr. Philip secretly transferred \$251,000 in community funds to his parents. Dr. Philip testified at trial that the payment was made to satisfy loans for his educational and living expenses incurred some 20 years prior. Ms. Philip testified that these alleged loans did not actually exist, and argued that they were merely a pretext for pre-dissolution planning. The trial court resolved this issue by finding that Dr. Philip used the community funds to pay his separate debts, and by awarding Ms. Philip a correspondingly disproportionate division of assets.

For the first time on appeal, Dr. Philip raises a host of arguments related to whether the trial court properly awarded a “right of reimbursement” in favor of Ms. Philip. To be clear, the trial court never stated that it was awarding an equitable lien or right of reimbursement. Nor did the parties argue whether it would be appropriate to do so. Instead, Dr. Philip has simply manufactured this issue in an attempt to create a basis for appeal.

As argued below, the present appeal should be denied because the trial court did not award Ms. Philip a right of reimbursement either

expressly or in practice. The trial court simply awarded Ms. Philip a disproportionate division of assets as an offset against Dr. Philip's use of community funds to pay separate debts. Because Dr. Philip does not assign error to the trial court's overall division of assets and debts, the present appeal should be denied.

In the alternative, the present appeal should be denied even if the Court decides that Ms. Philip was in fact awarded a right of reimbursement. Dr. Philip's central argument is that the trial court was prohibited from considering the \$251,000 when ordering a right of reimbursement because he was acting within the scope of RCW 26.09.030. However, Dr. Philip's proposed division of property in closing arguments conceded that \$125,000 of these funds should in fact be considered by the court, and treated as an asset subject to division between the parties. By arguing a division of assets that necessarily required the trial court to account for \$125,000 of these funds, Dr. Philip's present argument that the trial court was barred from considering his use of these funds whatsoever is barred under the doctrines of both waiver and invited error.

Finally, and again assuming *arguendo* that the trial court awarded a right of reimbursement, the present appeal should be denied on the merits. The substance of Dr. Philip's argument is that the trial court was

precluded from awarding a disproportionate division of assets in the form of a right of reimbursement because he was acting within the scope of RCW 26.16.030. Even if Dr. Philip did act within the scope of RCW 26.16.030, however, the trial court was not prohibited from ordering a right of reimbursement as a matter of equity based on all of the circumstances.

## **II. STATEMENT OF THE CASE**

Several months before filing for divorce, Dr. Philip made a \$251,000 cash transfer to his parents living in India. Dr. Philip claimed that the payment was made in satisfaction of two loans for educational and personal expenses owing to his parents. Each loan would have been approximately 20 years old, and Dr. Philip had not made any payments prior to the transfer. *RP dated May 23, 2013* at 73.

Ms. Philip did not learn of the transfer until court ordered mediation. *RP dated May 23, 2013* at 113. She testified that she was unaware of the loans during marriage, and believed that they were a pretext for pre-divorce planning. *Id.* at 119.

In closing arguments at trial, Dr. Philip's attorney acknowledged that the trial court should consider the \$251,000 transfer when dividing property and debts. *RP dated May 23, 2013*, 163: 12-17. However, he proposed that the trial court should start by removing \$125,000 from the

equation to reflect his one-half community property interest in the original \$251,000. *RP* at 164: 20-24. He then argued that the remaining \$125,000 should essentially be treated as a prior distribution between the parties. Of this amount, he proposed that \$115,000 should be considered as a “distribution already paid to Doctor Philip.” The remaining \$10,000, he argued, should be reflected as a distribution to Ms. Philip based on the benefit she received from his medical education. *Id.* at 165: 1-5.

In its oral ruling, the trial court took the view it was entitled to considering Dr. Philip’s use of the \$251,000 in community funds to pay what it found were his separate debts. *RP May 24, 2013*, 214: 1-6, 11-12; 215: 24-25. The trial court’s remedy was to order a disproportionate division of a Vanguard account in favor of Ms. Philip’s, which was also used to offset payments owing under temporary orders for child support, spousal support, and mortgages. *Id.* at 214: 12-19, 215: 12-18.

In response, Dr. Philip argued that the trial court’s ruling improperly gave him credit for having received the full \$251,000 as a prior distribution, asserting that he had a one-half community interest of these funds which should not have been considered. *Id.* at 215: 19-24. The trial court countered by noting that Dr. Philip used these funds to pay entirely separate debts. *Id.* at 215: 24-25.

At the conclusion of the trial court's oral ruling, Dr. Philip repeated opposition to the trial court awarding an offset equal to the entire \$251,000, followed by a concession that he would readdress the issue at a later date, to which the trial court agreed. *Id.* at 218: 1-20. The trial court's oral ruling occurred on May 24, 2013. A hearing for the entry of final orders was heard on October 3, 2013. At this hearing, Dr. Philip did not offer any additional arguments related to his previous objections. Dr. Philips also did not file a motion for reconsideration, instead opting to file the present notice of appeal on October 31, 2013.

### **III. STANDARD OF REVIEW**

A trial court has broad discretion in making a property division. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). A reviewing court will not reverse a decision dividing property absent a showing of manifest abuse of discretion. *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992). A manifest abuse of discretion is present if the court's discretion is exercised on untenable grounds or for untenable reasons. *In re Marriage of Olivares*, 69 Wn. App. 324, 328, 848 P.2d 1281 (1993).

### **IV. LEGAL ARGUMENT**

Dr. Philip offers two assignments of error in support of the present appeal. The first assignment of error is that the trial court erred by

awarding Ms. Philip's a right of reimbursement. Here, Dr. Philip argues that the trial court did not have authority to order a right of reimbursement because he was acting within the scope of RCW 26.16.030. He further argues that a right of reimbursement was barred under a theory of "reciprocal benefit." Alternatively, Dr. Philip's second assignment of error argues that the trial court should have divided any community right of reimbursement equally between the parties.

In response, Ms. Philips argues that the present appeal should be denied on grounds including waiver, invited error, and on the merits. Before addressing each of these issues in turn below, Ms. Philip leads with the argument that the trial court never actually ordered a right of reimbursement. Rather, Mr. Philip has simply inserted this issue into the trial court's ruling as grounds for the present appeal.

**A. Dr. Philip improperly characterizes the trial court's division of assets as including a right of reimbursement**

The record does not support Dr. Philip's claim that the trial court imposed an equitable lien based on a right of reimbursement. Not once did the parties or Judge Swisher refer to the terms "equitable lien" or "right of reimbursement." Rather, the trial court simply ordered an unequal division of assets on equitable grounds after considering Dr. Philip's use of \$251,000 in community funds to pay his separate debts.

The absence of the trial court's reliance on a right of reimbursement is not only evident from the record, but also supported by case law explaining that the principal is generally irrelevant to a division of assets. In *In re the Marriage of White*, 105 Wash.App. 545, 20 P.3d 481 (2001), the court stated:

Such a right can be important between heir and spouse, because it may be the only vehicle by which relief can be granted to the spouse. Such a right is rarely important in a dissolution action, because with or without it the court has broad discretion when distributing property and debts; a dissolution court can award property to either spouse in the absence of such a right, or a dissolution court can decline to award property to either spouse in the presence of such a right.

*In re White*, at 553-54. Furthermore, even when a trial court does award an equitable right of reimbursement, the trial court must attach the right “to a specific property on a specifically documented theory.” *In re Marriage of Marshall*, 86 Wash.App. 878, 881, 940 P.2d 283 (1997)(quoting Gordon W. Wilcox & Thomas G. Hammerlinck, *Washington Family Law Deskbook*, sec. 38.6 at 38-20 (1998 & Supp. 1996).

Based on *In re White*, the trial court was not required to award a right of reimbursement as the only remedy for Dr. Philip's use of community funds. None of the circumstances that make such a right important are present, i.e., disputes involving creditors or heirs. Instead, the trial court was entitled to rely on its broad discretion when awarding

Ms. Philip a disproportionate division of assets to offset Dr. Philip's use of community funds for separate debts.

In conclusion, Dr. Philip's claim that the trial court awarded Ms. Philip a right of reimbursement should be rejected. The trial court did not state that it was awarding such a right, nor was it required to do so in order to achieve a disproportionate division of assets. Further, Dr. Philip is unable to identify any specific property that was subject to an equitable lien. Instead, Dr. Philip has simply reconstructed the trial court's ruling so as to include a right of reimbursement as grounds for appeal.

**B. The present appeal should be denied on grounds of waiver and invited error**

Even assuming *arguendo* that the trial court did order a right of reimbursement, and assuming even further that it did so in error, the present appeal should be denied on grounds of waiver and invited error.

**1. Dr. Philip waived his first assignment of error by failing to raise the issue of a right of reimbursement at the trial level**

Dr. Philip's first assignments of error should be rejected pursuant to RAP 2.5(a) because he is raising the issue of a right of reimbursement for the first time on appeal. Generally, this Court will not review a claim of error that was not raised at the trial level:

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. The reason for the rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.

The same rationale requires parties to inform the court acting as trier of fact of the rules of law they wish the court to apply. While a party has the right to assume that the trial court knows and will properly apply the law, this does not excuse failure to seek correction of an error once the complaining party becomes aware of it. If by no other means, this can be done by a motion for a new trial. Failure to make such a motion when it would enable the trial court to correct its error precludes raising the error on appeal unless the error was pointed out at some other point during the proceedings.

*Stork v. International Bazaar, Inc.*, 54 Wn.App. 274, 282, 774 P.2d 22 (1989), quoting *Smith v. Shannon*, 100 Wn.2d 26, 37-38, 666 P.2d 351 (1983)(internal quotations and citations omitted).

In the instant case, Dr. Philip's use of community funds to pay his separate debts received considerable attention at trial. Not once, however, did Dr. Philip raise his present arguments related to a right of reimbursement. This is particularly true with respect to his reliance on RCW 26.16.030 as essentially a defense to the trial court awarding such a right.

Furthermore, the holding in *Stork* emphasizes that a party has an obligation to raise any claimed misapplication of the law at the trial level when possible. *Id.* The oral ruling of the Court was issued on May 24, 2013. The final documents were entered on October 24, 2013. Dr. Philip

filed his notice of appeal one week later on October 31, 2013. The fact that there was a five-month gap between the trial court's oral ruling and the entry of final documents shows that Dr. Philip had sufficient time to file a CR 59 motion for a new trial or reconsideration as contemplated by *Stork*. And, it would be hard for him to claim otherwise when he filed the present notice of appeal prior to the deadline under CR 59.

In summary, Dr. Philip simply failed to raise the present arguments related to a right of contribution at the trial level despite a significant opportunity to do so. Allowing him to raise these arguments for the first time on appeal is contrary to both RAP 2.5(a) and the rationale of *Stork v. International Bazaar, Inc.*, 54 Wn.App. 274 (1989). Review should therefore be denied.

**2. Dr. Philip's first assignment of error should also be rejected under the doctrine of invited error**

According to Dr. Philip, the trial court abused its discretion by awarding a right of reimbursement because he was acting within the scope of RCW 26.16.030 when using community funds to pay his separate debts. Even assuming *arguendo* that the trial court did order a right of reimbursement, and it did so erroneously, Dr. Philip invited this error and the present appeal should be denied.

Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *In re the Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995), citing *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984).

Dr. Philip alleges that the trial court erred as a matter of law by considering the \$251,000 transfer when ordering a division of property and debts. However, Dr. Philip acknowledged in his closing argument that the trial court did in fact have the authority to consider his use of the funds when dividing property. RP dated May 23, 2013, 163: 12-18, 164: 23-25, 165: 1-6. This is further evident from his proposed distribution of property where \$115,000 of these funds were credited as a “distribution already paid to Doctor Philip” and \$10,000 credited to Ms. Philip. *Id.* at 165: 1-3. Dr. Philip concluded by stating that this proposal could be “soundly supported by findings, conclusions, and sufficient evidence.” *Id.* at 207: 3-5.

The only difference between Dr. Philip’s proposal and the trial court’s ultimate ruling is that the trial court assigned a higher value to the “distribution already paid” to Dr. Philip. Under the doctrine of invited error, Dr. Philip cannot now claim that the trial court abused its discretion by even considering his use of the \$251,000 because he was acting within

the scope of RCW 26.16.030. The present appeal should therefore be denied.

**C. Dr. Philip's two assignments of error should be denied on their merits**

Even assuming *arguendo* that the trial court did award Ms. Philip a right of reimbursement, the present appeal should be denied on the merits. The thrust of Dr. Philip's argument is that the trial court was precluded from awarding a right of reimbursement because he was acting within the scope of RCW 26.16.030 when using community funds to pay his separate debt. However, this argument is based on the false pretext that a right of reimbursement may only be awarded when one spouse acts outside the scope of RCW 26.16.030.

**1. Dr. Philip incorrectly argues that RCW 26.16.030 bars a right of reimbursement**

Dr. Philip argues that the trial court abused its discretion by ordering a right of reimbursement because he was acting within the scope of RCW 26.16.030. Essentially, then, Dr. Philip is arguing that as a matter of law, a trial court cannot order a right of reimbursement without finding that a spouse has acted outside the scope of RCW 26.13.030. *Appellant's Brief*, 13. While consideration of RCW 26.16.030 may certainly be appropriate, it is not the exclusive basis for a trial court to order a right of

reimbursement. This is evident from numerous decisions that are silent regarding RCW 26.16.030 when considering whether a right of reimbursement is appropriate.

The actual standard for whether to order a right of reimbursement is grounded in the principal of equity. “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.” *In re the Marriage of Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984), citing Cross, *The Community Property Law in Washington*, 49 Wash. L. Rev. at 776-77. Because a trial court is required to consider all circumstances, it is clearly not limited solely to consideration of RCW 26.16.030.

This conclusion is consistent with other decisions that ignored RCW 26.16.030 when addressing whether a right of reimbursement is appropriate. For example, the Court has held that using community funds to pay off a mortgage on separate property will give rise to a right of reimbursement. *Merkel v. Merkel*, 39 Wn.2d 102, 114, 234 P.2d 857 (1951); *In re Marriage of Johnston*, 28 Wn.App. 574, 576, 625 P.2d 720 (1981). In both *Merkel* and *Johnson*, the Court upheld a right of reimbursement based solely on the use of community funds to pay a

separate debt, without any consideration of whether the payments violated RCW 26.16.030. Similarly, in *Lindemann v. Lindemann*, 92 Wash.App. 64, 74, 960 P.2d 966 (1998), the Court upheld a right of reimbursement when community labor used to increase value of husband's separate property, again without any consideration of RCW 26.16.030.

Accordingly, Dr. Philip incorrectly argues that as a matter of law the trial court was required to find that he acted outside the scope of RCW 26.16.030 before ordering a right of reimbursement. Rather, the trial court was required to consider all of the relevant circumstances, including whether either party committed misconduct under RCW 26.16.030. A lack of misconduct alone is not determinative, however, and Dr. Philip's first assignment of error should therefore be denied.

**2. Dr. Philip's argument related to a reciprocal benefit does not support reversal**

Although not discussed in the above sections related to waiver and invited error, the same principals apply to Dr. Philip's argument of "reciprocal benefit." Here, Dr. Philip argues that the trial court abused its discretion by failing to reduce any right of reimbursement based on Ms. Philip receiving a reciprocal benefit.

Dr. Philip values the trial court's alleged award of reimbursement at \$251,000, and argues that Ms. Philip's corresponding reciprocal benefit

should cancel any award whatsoever. In practical effect, then, Dr. Philip argues that the value of any reciprocal benefit equals or exceeds \$251,000.

In closing arguments at trial, however, Dr. Philip argued that Ms. Philip's resulting benefit from his medical education should be valued at \$10,000. *RP dated May 23, 2013*, 165-66. Based on the doctrines of both waiver and invited error, Dr. Philip should not be allowed to argue that the trial court erred by failing to value a reciprocal benefit \$240,000 more than what he claimed at trial.

Furthermore, whether to discount a right of reimbursement based on reciprocal benefit is reviewed for abuse of discretion. *In the Marriage of Miracle*, 101 Wash.2d 137, 139, 675 P.2d 1229 (1984) (citing *Baker v. Baker*, 80 Wash.2d 736, 747, 498 P.2d 315 (1972)). In the event that the trial court did in fact order a right of reimbursement, the record does not show that it abused its discretion by failing to reduce the award based on a reciprocal benefit.

For example, even Dr. Philip's recitation of the facts on appeal acknowledges that Ms. Philip supported him financially while he was living in Canada and preparing for his medical exams. *Appellant's Brief*, at 4, citing *RP dated May 22, 2013*, 74:22-7:2. This period fell in-between the two loans in question. Therefore, just as Dr. Philip claims that Ms.

Philip ultimately benefitted from these loans, she can claim a corresponding financial contribution to his medical degree.

Finally, whether a right of reimbursement should have been discounted based on a reciprocal benefit should be decided in the context of *In re the Marriage of White*, 105 Wash.App. 545, 20 P.3d 481 (2001). According to the Court, an award of a right of reimbursement, and by extension a reduction based on a reciprocal benefit, is largely unimportant to a trial court's distribution of property and debts. Accordingly, the trial court did not abuse its discretion by failing to discount any award of reimbursement based on a reciprocal benefit.

**D. The trial court did not manifestly abuse its discretion by refusing to equally divide an alleged right of reimbursement**

Dr. Philip's second assignment of error is that any right of reimbursement should have been split equally between the parties. Essentially, Dr. Philip argues that because a right of reimbursement exists in favor of the martial community, he held a one-half community interest that was improperly awarded to Ms. Philip. This argument is not grounded in logic or equity.

It is well settled in Washington that a trial court is not required to divide all assets equally. *Chavez v. Chavez*, 80 Wash.App. 432, 436, 909

P.2d 314, *review denied*, 129 Wash.2d 1016, 917 P.2d 576 (1996). Dr. Philip has not offered any authorities that support treating an award of a right of reimbursement any different. A reviewing court will not reverse a decision dividing property absent a showing of manifest abuse of discretion. *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992).

It is undisputed that Dr. Philip received and retained the full benefit of \$251,000 in community funds used to pay his separate debts. In order to equally compensate Ms. Philip based on her one-half community interest (\$125,500) in the same funds, the trial court could have looked to either Dr. Philip's separate property or the parties' community property.

If the trial court were to have used Dr. Philip's separate property as the source, the equalizing payment would have been \$125,500. This gives him a credit for his one-half community interest in the \$251,000. However, because the trial court used community funds, it must be remembered that Ms. Philip already possessed a one-half community interest in the source of payment. Therefore, to fully compensate Ms. Philip for her \$125,500 interest in the funds used by Dr. Philip, an equalizing payment using community funds would be \$251,000.

This point is lost on Dr. Philip. While he received \$251,000 in community funds, he argues is that Ms. Philip should only receive an

offsetting award of \$125,500 in community funds. This would only compensate her for \$62,500, when her one-half interest in the funds used by Dr. Philip equaled \$125,000. The trial court did not manifestly abuse its discretion when ruling that Ms. Philip was entitled to an offsetting award of community assets that was approximately equal to \$251,000.

**E. Request for attorney fees and costs on appeal**

Ms. Philip requests attorney fees and costs under RAP 18.9(a) on grounds that the present appeal is frivolous. An appeal is frivolous if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *Mahoney v. Shimpoch*, 107 Wash.2d 679, 691, 732 P.2d 510 (1987).

Dr. Philip has not raised any reasonable arguments. The entirety of the present appeal results from Dr. Philip's mischaracterization of the trial court's division of property and debts. The trial court was never asked to award a right of reimbursement, nor did it state that it was doing so. Instead, Dr. Philip inserted this issue at the trial level after the fact in an attempt to create an issue for appeal.

Even if it were as Dr. Philip claims, however, there would still be no basis for appeal. Based on Dr. Philip's characterization of the trial court's ruling, it was an error for the court to consider his use of

community funds when ordering a right of reimbursement. However, Dr. Philip's own proposed division of assets acknowledged that he should be charged with receiving the benefit of \$125,000 of these funds as a "distribution already paid." His present claim that the trial court was prohibited considering his use of these funds whatsoever is frivolous.

Therefore, attorney fees and costs are warranted pursuant to RAP 18.9(a).

**V. CONCLUSION**

Based on the foregoing facts and arguments, Ms. Philip respectfully requests that this Court dismiss the present appeal in its entirety, and award reasonable attorney fees and costs.

A handwritten signature in black ink, appearing to read "Ben Dow", with a long horizontal flourish extending to the right.

Ben Dow, WSBA #39126  
Attorney for Respondent

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

In re:

SURESH PHILIP,	)	COA No. 320413
	)	
Petitioner	)	Benton County Superior Court
v.	)	No. 10-3-01133-2
	)	
JAYA PHILIP,	)	DECLARATION
	)	OF MAILING
Respondent	)	

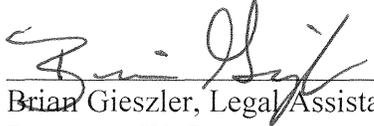
I, Brian Gieszler, have personal knowledge about the facts alleged as follows:

On September 24, 2014 a complete copy of the Amended Respondent's Brief including the Table of Contents and Table of Authorities were mailed to the parties listed below in the United States mail at Richland, Benton County, Washington, with first class postage prepaid to:

George Telquist  
Telquist Ziobro McMillen, PLLC  
1321 Columbia Park Trail  
Richland, WA 99352

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 24 day of September, 2014 at Richland, Washington.

  
 Brian Gieszler, Legal Assistant to  
 Benjamin W. Dow, Attorney for Respondent