

FILED

OCT 31, 2016

Court of Appeals
Division III
State of Washington

COA No. 33863-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

MELISSA J. DICKERSON,

Respondent,

and

KENT E. DICKERSON,

Appellant.

BRIEF OF APPELLANT

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II. STATEMENT OF THE CASE

The Dickersons were married on June 30, 2007. (CP 321). They separated on September 7, 2014. (*Id.*). A petition for dissolution was filed on September 17, 2014. (CP 1). The case proceeded to trial, whereupon the court entered findings of fact and conclusions of law and decree of dissolution. (CP 321-28, 329-32).

The court found all the property of the parties was community and in essence split that property 50-50. (CP 322, 324,

325, 326, 327, 330). As reflected in findings 2.21.2 and 2.21.3, the parties agreed on the allocation of most property:

2.21.2 The parties have stipulated to the allocation of the majority of the property, and the court will generally follow this with just a few exceptions. Neither party requested spousal maintenance at trial and the court will order each party to pay their own attorney fees. The court will approve the agreement for ongoing civil restraint.

2.21.3 The parties have agreed that personal property and household goods will be divided as done previously, subject to husband's list provided at trial being subject to mediation/arbitration with James Hatch should the parties disagree about any final issues in this regard. The court finds this agreement serves the interests of the parties and court and adopts this agreement. (CP 323-324).

The court's characterization of all the parties' property as community and its resulting distribution of assets are the heart of this appeal by Mr. Dickerson. (CP 334). Further facts will be set forth as discussion of the issues necessitates.

III. ARGUMENT

A. The court erred by finding all the property of the parties was community property and, in particular, Mr. Dickerson's T. Rowe Price account.

The character of property, separate or community, is determined at the date of acquisition. *In re Estate of Borghi*, 167

Wn.2d 480, 219 P.3d 932 (2009). An asset is separate if it was acquired before marriage. *In re Marriage of White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001). Furthermore, it does not change its character thereafter regardless of whether the asset is improved, or its value enhanced, by property of a different character. *Id.* In exercising its broad discretion, the trial court characterizes each asset as separate or community property. *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). A court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

The only evidence before the court was that Mr. Dickerson's T. Rowe Price account was his separate property as it was opened in 1992, long before his marriage to Ms. Dickerson in 2007. (7/21/15 RP 87). He contributed to his T. Rowe Price account from 1992-2003, but had not made any outside contributions whatsoever to that account since 2003. (*Id.*). He made no contributions to it during the marriage. (*Id.* at 82-83). Everything was rolled over 100% inside the account, which retained its character as separate property. *White*, 105 Wn. App. at 150. By characterizing Mr. Dickerson's T. Rowe Price account as community property, the

court made a legal error and thus abused its discretion. *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001).

Rather than look at the uncontroverted tracing evidence produced by Mr. Dickerson that showed no commingling of community property with his separate property T. Rowe Price account, the court erroneously relied on Ms. Dickerson's testimony of her unilateral intent that all accounts were to be combined and thus community property. (7/21/15 RP 72, 77, 82-83, 88-92; 7/28/15 RP 116-17, 130, 146-47). No evidence showed commingling of Mr. Dickerson's T. Rowe Price account or her retirement accounts. (*Id.* at 148). Indeed, the court noted Ms. Dickerson was merely stating her position everything was combined. (*Id.*). But her position was not borne out by the facts.

Mr. Dickerson traced and identified the separate character of his T. Rowe Price account and there was no commingling. (7/21/15 RP 82-83, 87, 88-92). An expression of unilateral intent cannot change the character of that property. *In re Marriage of Mueller*, 140 Wn. App. 498, 505, 167 P.3d 568 (2007), *review denied*, 163 Wn.2d 1043 (2008). Mr. Dickerson neither expressed an intent nor acted in any way other than to keep his T. Rowe Price account

separate in character. The characterization of the account as community is not supported by substantial, much less any, evidence and cannot stand. *Spreen*, 107 Wn. App. at 346.

The trial court's characterization of property as community or separate is reviewed de novo. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). The court's failure to properly characterize property may be reversible error. *In re Marriage of Olivares*, 69 Wn. App. 324, 330, 846 P.2d 1281 (1993), *o'ruled on other grounds*, *Borghji*, 167 Wn.2d at 490. Reversal and remand is necessary if the court's reasoning indicates the property division was significantly influenced by the erroneous characterization and it is unclear if the court would have divided the property the same way in the absence of that mischaracterization. *Id.* That is the case here.

The court made it crystal clear that its characterization of all the property as community greatly influenced its division of the property. (FF 2.21.7, 2.21.8, 2.21.20, 2.21.33, 2.21.35, 2.21.36, 2.21.37; CP 323-26). In making its division of property, the court specifically found the property was community and its division of property was thus fair and equitable in light of that characterization. (FF 2.21.37, CP 326).

But Mr. Dickerson's separate property T. Rowe Price account comprised 33% of their assets and its mischaracterization as community clearly dictated the property distribution. The agreed value of his account was \$782,418.82 at the time of separation. (7/21/15 RP 56-57). Due to the mischaracterization of all property as community, the distribution failed to take into account the separate property automobile contributed by Mr. Dickerson in acquiring the new community vehicle. (*Id.* at 40). The court also completely discounted Mr. Dickerson's contributions during marriage by successfully managing and tripling Ms. Dickerson's community property T. Rowe Price account to a value of \$280,000. (7/28/15 RP 183, 198). And she acknowledged there were indeed two separate T. Rowe Price accounts. (*Id.* at 163). This warranted a right of reimbursement, but none was awarded due to the court's reliance on its incorrect characterization of all the property as community. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 869, 855 P.2d 1210 (1993). In these circumstances, the court's failure to properly characterize Mr. Dickerson's T. Rowe Price account as separate property is reversible error and the case must be remanded as the entire distribution was based on that error. *Olivares*, 69 Wn. App. at 330.

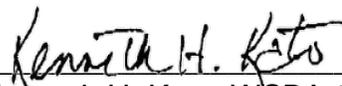
The court should strive to make an equitable division of property. RCW 26.09.080; *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002 (1990). Because of the court's mischaracterization of Mr. Dickerson's separate property, the court abused its discretion as the determination was based on a legal error and thus made for untenable grounds and reasons. *Kovacs*, 121 Wn.2d at 801; *Spreen*, 107 Wn. App. at 346. Reversal and remand is required. *Olivares*, 69 Wn. App. at 330.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Dickerson respectfully urges this Court to reverse the trial court, remand for further proceedings, and to award him attorney fees on appeal.

DATED this 31st day of October, 2016.

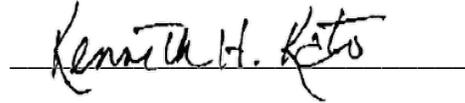
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 31, 2016, I served a copy of the Brief of Appellant by email, as agreed by counsel, on Douglas R. Hughes at douglasrhughes@gmail.com.

A handwritten signature in black ink, reading "Kenneth H. Kato", is written over a horizontal line.