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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Case Number 69031-1-I

SHELLEY GOLLARD MIDKIFF, Respondent

v

STEVEN LINVEL MIDKIFF, Appellant

BRIEF OF APPELLANT

FEDERAL
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
2013 MAR 13 PM 4:28

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ASSIGNMENT OF ERRORS

1. The trial court failed to characterize the funds used to acquire the real property in question as community or separate at the time of the funds were expended.

The funds should have been characterized as a gift to the community to determine the nature of the funds originally paid and payments made towards the asset both before and after separation.

2. The trial court erred in valuing and awarding the wife's down payment on a home at a "current market value" of the equity purchased by the wife, as opposed to the equity actually existing in the asset at the time of separation.

The court made its award based on the sum made as a down payment on a home purchase by both parties. The court found that the current value of that down payment to be the basis for the award of a sum which is more than the current value of the asset itself due to a decrease in market value.

3. The judgment awarded the wife did not consider the decrease in value due to "market forces" to the separate property of the husband as was considered in the decrease in value to the wife.

While the court took into account the reduction in value of the home purchased by the parties hereto after marriage, consideration was only given to the reduction in value of the asset of the home purchased with wife's down payment wife and not the decrease in value of the husband's separate home. The wife was then given a judgment from the husband's asset. The husband suffered from the same loss of value in his separate property as did the wife.

4. The court valued the real property at its actual equity value, market value less the mortgage obligation. The court then awarded 100 per cent of the equity in the home to the wife. In addition the court then awarded more than the actual equity value of the asset to her. The additional award was based on the current market value of the down payment as opposed to the equity value of the asset itself.

The court thus made the husband an insurer of an investment made by the wife or the community when the investment decreased in value. The husband was obligated not only to compensate the wife for the actual mortgage payments but was also required to cover any losses she suffered from a declining asset. This was done with no showing of waste or abuse of community or separate assets.

5. The court has taxed the husband with reimbursement to the wife having benefitted "unduly" from the wife's investment.

The investment was made by both the husband and wife as the mortgage requirements could not be met without the income and credit of both spouses.

The husband met the obligations on the mortgage both during the marriage and after the separation benefitting from his contributions as did the wife from hers.

There is no evidence of undue benefit.

6. The court split equity of the family home and the husband's separate property equally awarding the wife both the entire equity from the family home and \$81,000.00 from the husbands separate property as a fair and equitable division. The court based that award on acknowledging the benefit enjoyed by both parties from the "wife's investment of equity."

The wife's investment of equity is based on the down payment she made and not the value of the asset which she was awarded in its entirety. Had the husband not pledged his credit and income the wife would not have been able to enjoy the home as the husband did.

7. The court did not consider the economic circumstances the parties will be left in post divorce nor could they put each into the same position they enjoyed prior to the short term marriage.

Though the wife has lost value in the home purchased with the husband the

husband has lost value in his home as well. The parties earned approximately the same amount and with the wife having several retirement investments and a pension while the husband has nearly nothing. This judgment leaves him in a substantially less advantageous position than the wife.

8. The award was not fair and equitable based on the law and facts presented to the trial court.

It is not fair and equitable to tax one party for losses incurred by a good faith investment whether the investment is made with separate funds or community funds when the cause of the loss is not controlled by either party and both parties suffer from the loss.

STATEMENT OF THE CASE

The Dissolution of Marriage of the parties was tried before the Honorable Suzanne Barnett in the King County Superior Court on February 23, and February 29, 2012. The Petitioner in the Superior Court and the Respondent in this appeal is Shelley Golard Midkiff the Respondent and Appellant is Steven Linvel Midkiff.

The parties were married on June 28 2008 and separated on March 18 2011. They were married for 32 months. At the time of the filing each party was 60 years of age.

At the time of trial the Respondent earned about \$59,400.00 per year RP at 5, I. 4, Ex. 1. Respondent in addition to her wages receives employment benefits and contributes to retirement plans, retirement savings and investment accounts and receives contributions to a pension. Ex. 5-10. Respondent also realizes the benefit of subsidized health care both medical and dental as well as a bus pass. RP at 19, I. 4-9, 15, 23. Appellant earns between \$60,000.00 and \$68,000.00 per year. RP at 80, I. 5-8, Ex. 51. He is self employed and owns his business and has no employment benefits or retirement benefits.

The Appellant has agreed and indicated at trial that he is not seeking an award of

any of Respondent's wages, retirement employment benefits or anything of that nature. RP at 19-22. Respondent has agreed and testified to the fact that she is making no claim to the business owned by Appellant or to the home he owns in Bothell, Washington. RP at 51, ll. 18-25 and 52, l. 1.

The Appellant owned a home in Bothell, Washington prior to this marriage which is valued at about \$340,000 in the fall off 2010. RP at 106, ll. 2-3. There is presently owing on that home between \$90,000.00 and \$100,000.00. RP at 104-105.

Respondent owned a home prior to her marriage to Appellant, which she sold subsequent to their marriage in June of 2008. Respondent received \$201,000.00 from the sale of that home and in July of 2008 she and the Appellant purchased the home which was valued, characterized and sold as a result of the trial from which this appeal is being taken. Respondent placed a down payment on that home in the sum of \$195,000.00. RP at 24, ll. 24-25 and at 25, ll. 1-9. The purchase price of the home was \$650,000.00. RP at 26, ll. 7-8.

In order for the home to be purchased it was necessary for the Appellant to become obligated on the mortgage and to pledge his credit and income to allow the parties to qualify for the loan. RP at 27, ll. 7-14. The mortgage amount was about \$460,000.00 when assumed by the parties. The parties refinanced the loan in 2009 to obtain a lower interest rate. The mortgage balance at that time had reduced to

\$455,000.00 or \$456,000.00. RP at 28, II. 8-10.

The parties separated March 18, 2011 with Respondent leaving the family home after informing the Appellant on March 12 that she was separating. All her possessions were removed on March 18, 2011. Up to that time and until the home was actually sold Appellant had made all the mortgage payments on the house. RP at 47, II. 10-20.

At the time of trial an appraiser valued the home at a current market value of \$560,000.00. RP at 64, II. 6-7. The current mortgage balance is approximately \$442,000.00. RP at 31, II. 1-2. The home has reduced in value from the purchase price of \$650,000 to \$560,000 a reduction of \$90,000.00 or approximately 14 per cent of its value during the marriage according to the Findings of Fact CP 22 and Decree of Dissolution CP 21.

The court found that \$195,000.00 of separate property proceeds were put into the marital home. The husband's contributions to the marital home equity were made through monthly mortgage payments as community property. That market forces drove the value of the home down by 14 percent. The current market value of the wife's down payment is \$167,700.00. The husband's pre marital home has an equity value of \$240,000.00. The wife has traced her separate property contributions to the marital real property. She contributed 30 percent of the purchase price and under normal circumstances she should receive \$54,495.00. That the husband has benefitted unduly

from the sale of the wife's home. An award of the entirety of the equity left in the marital home and a judgment of \$81,200.00 should be entered against the husband as one half the equities in the marital home and the Appellants separate home. The court found this to be a fair and equitable award. CP 22 at 3.

Appellant appeals from the award of the sum of \$80,200.00.

ARGUMENT

The parties were married on June 28, 2008 and separated March 18 2011. In July of 2008 the parties purchased a home in Seattle paying \$650,000. \$195,000 from the sale of the wife's former residence was used for a down payment and a mortgage was obtained for the remainder of the purchase price based on the incomes and credit of the parties. Both parties agree that neither could afford the monthly mortgage payments from their incomes nor would they have been granted the loan without their combined incomes. The husband is purchasing a home in Bothell which he acquired prior to the marriage which is presently rented and is his separate property.

During the marriage the parties earned approximately the same amount of income, the wife about \$59,000 plus employment benefits and the husband between \$60,000 and \$67,000 from the business he owned. The husband paid each and every mortgage payment from his income and the wife paid for other community obligations.

The parties separated in March of 2011 and a Dissolution of Marriage was immediately filed by the wife who had vacated the home. The husband continued to pay the entirety of the mortgage payments and costs of the home.

The parties agreed to a division of all personal property, retirement benefits and investments as well as the separate ownership of the Bothell home by the husband. The husband agreed to remain in the home and make the mortgage payments for a

period of time awaiting sale. It was agreed that upon sale of the home the wife would receive any and all of the net equity value from the sale. The home was purchased for \$650,000 and was valued by appraisal at trial at \$560,000 a reduction in market value of \$90,000 or 14% of its value.

The only significant question at trial was how much the wife would receive in a property settlement given the sale of the home. The husband's position was that the entirety of the sale proceed should be awarded to the wife. The wife claimed a right to be reimbursed for her down payment from the husband.

The court awarded the proceeds from the sale of the home to the wife and a judgment to the wife of \$81,200. The husband was to pay the mortgage and expenses on the home until sale. The home sold in September of 2011.

CHARACTERIZATION OF OWNERSHIP

The court must characterize the property as either community or separate before it makes an award. In re Marriage of Irwin 64 Wn. App. 38 XXXXXXXXXX and the court will only find reversible error if the ruling would have been different based on an erroneous characterization. The characterized the properties as follows

"Wife has clearly traced her separate property to the marital real property" and "Husband's contribution to the marital home equity, through monthly payments mortgage payments, was community property." CP 22

In re the Estate of Borghi 219 P3d 932 discusses at length the question of

whether real property acquired prior to marriage changed in character from separate to community by placing a spouses name on the asset at the time of acquisition. There is no question that the \$195,000 used as a down payment was the separate property of the wife due to her ability to trace the down payment to the separate funds. Cross, 61 Wash. L Rev at 29, 55-56 Weber, 19 Washington Practice, Family and Community Property Law sec 11.13.2.1997) In re Marriage of Skarbek 100 Wn. App. 444, 448 (2000). The question arises, however, in that not only was the wife's separate property used to obtain the mortgage but also the husband's income and credit. It was admitted at trial that without both the pledges for payment of the husband and wife the mortgage would not be granted. RP 46, II.12-18. It is arguable that the use of community funds and income in order to allow the purchase is an indication that the community was also to benefit from the down payment and that the purchase was made by community credit and income and therefore a community asset. The title was taken in both names as could afford the home or meet mortgage requirements alone.

Though there is no specific finding as to the character of the home itself the court has made the finding:

Wife has clearly traced the separate property contribution to the marital real property. CP at 3 I.16

VALUATION OF PROPERTY

The Seattle marital home was purchased for \$650,000. RP 26. I. 8. Testimony at trial from an appraiser set the market value of the asset at \$560,000. A real estate

broaker testified that she would list the home at \$575,000 and reduce it to \$550,000 if it didn't sell within three weeks. RP at 94 ll. 6-9. The Bothell property was not appraised. The debt on the home was established at \$100,000. RP at 104 ll.13-19. The market value was established at about \$340.000 RP at 137 ll.4-15. That leaves an equity value of \$240,000.

In evaluating the property in the findings of Fact the court made the following finding:

Market forces drove down the value of the marital home by approximately 14%. The current market value of the equity purchased with wife's down payment is thus \$167,000. CP 22 at p 3 ll. 11-12.

Appellant's Bothell home was valued in the Findings of Fact at the equity value of \$240.000. No actual Market value was specifically found for the Seattle home. No finding was made with regard to the loss in value of the Appellant's Bothell home due to "market forces" which had also reduced the value of the Seattle home." The court did, however, place a "market value" on the equity value of the wife's down payment and not the equity of the asset itself. By the time this dissolution action was commenced the market value had decreased by \$90,000. In addition the market and equity values of the Appellants home in Bothell had decreased by about \$60,000. RP at137 ll. 4-15.

The court set out the following as a Finding of Fact:

The wife has clearly traced her separate property contribution to the marital real property. She contributed 30% of the purchase price. In other circumstances, Wife would recover 26%of the equity (30% down payment from separate property funds less 14% decline in the property value before dividing the

community property portion of any remaining equity. The circumstances of this case, however, demand a different calculation in order to assure a fair and equitable distribution of property between the parties. Specifically the parties anticipate a net equity in the property of approximately \$86,500.00. Granting the first 26% to Wife and dividing the balance would result in an award to the wife of approximately \$54,495 ($\$22,490 + 1/2 (64,010) = \$54,495$). Husband would then be left with an equity in his pre marital residence of over \$230,000, having benefitted from the parties joint decision to sell wife's home and keep husbands home for the benefit of the community.

In fairness and equity, husband and wife should split the remaining equity in both properties. Wife should receive all the equity from the marital residence plus and (sic) award from the husband in the amount of \$81,200.00 effectively dividing the equity in both properties equally and acknowledging the benefit enjoyed by both parties from the wife's investment in the community real property CP 22 at Page 3 ll. 16-25.

The court based its calculations on the equity value of the down payment made by the Respondent and never having found a value for the property nor cited the value of the mortgage balance due on the property. The case of In re Marriage of Greene 97 Wn. App.708 indicates that the failure to give an evaluation of the property in dispute is reversible error by making appellate review impossible. In this case all the calculations are based on the market value of the down payment made by the wife. In re Marriage of Dittmar 108 Wn. App. 1042 indicates that property values should be set at the fair market value of the asset. Though the case of In re Marriage of Zier 136 Wn. App.40. allows for discretion in valuing assets there seems to be no basis for valuing the current value of a down payment as opposed to the market value of the asset itself. The court concludes that the equity value of the home is \$86,500.00 and proceeded to award the Respondent the entirety of the actual equity value in the home plus an additional \$81,200.00. That award is based on what was found to be an equal split of the

combined equities of the two properties. CP at 3

PROPERTY DIVISION

Property acquired during marriage with the traceable proceeds of separate property funds is separate. In re Marriage of White 105 Wn. App. 545, 550 (2001) Property determined to be separate is presumed to retain that character until there is evidence to the contrary. In re the Marriage of Skarbeck 100 Wn. App. 444. Assuming that this is separate property and that the mortgage payments made on this house were from community funds the question arises as to the interest each party has in the value of the property and how should it be divided.

If the value of separate property increases that value is presumed to be separate as well. That presumption is rebuttable and by direct and positive evidence that an increase was attributable to community contributions. A spouse who contributes community funds or effort may be entitled to reimbursement for the portion of increase attributable to community contributions. The value of the increase may be determined by fixing the amount of the increase in the value to the sums contributed. Only the increase in value should be considered as the contributing spouse could pay or improve the other spouse completely out of the separate interest otherwise. In re Pearson-Maines 70 Wn. App 860 (1993), 855 P2d 1210, In re the Marriage of Elam 97 Wn. 2d 811(1982) 650 P2d 213. It is undisputed that all of the mortgage payments from the

signing of the mortgage to the separation of the parties to the time of sale were made by the Appellant. RP at 47, II. 6-15. The payments gave him a claim to some of the increase in the equity.

In the instant case the wife is entitled to any increase in the value of the Seattle home. Contributions from community sources which add value are reimbursable and are shared in proportion with the appreciation of the asset and the separate contributions. Increases due to inflation may be divided consistently with the proportion to the community and separate contributions. When community assets were used to make mortgage payments on the separate property home of the other spouse an equitable lien may be established. In re Pearson-Maines 70 Wn. App. 869. The court may, however, offset the right of reimbursement against any benefit a member of the community may have received from living rent free against that lien. In re the Marriage of Miracle 101 Wn. 2d 137 1984. The findings seem to take into consideration the fact that all mortgage payments were made by Appellant. Unfortunately instead of increasing equity the market caused a decrease in equity. The court ordered the entirety of the remaining equity awarded to the Respondent CP 22. That award was not contested and was agreed to by the Appellant.

These rules are reflected in not only the cases of home mortgages as delineated in the "mortgage rule" Cross, 61 WASH L. REV 80 In re Marriage of Zahm 138 W2d 213. but also in the case the purchase of stock options. The rules are the same with

any other asset acquired by the parties to a marriage. In re Marriage of Chumbley 150 Wn. 2d. 1 (2003), ruled that stock options acquired in much the same manner as the down payment and mortgage payments in the case at bar that the character of the stocks would be based and awarded on the rates of separate and community contributions of the parties.

It is clear from the entirety of the cases and circumstances cited that the Respondent believes there was not a gift from the separate property of the wife by way of the down payment on the home. Given the findings of the trial court the appellant is entitled to only a proportionate share of the increase in value attributable to his community contributions to the home in question. It is alleged and has been ordered that the Respondent is entitled to any increase in the value of the asset purchased with her down payment. It is also abundantly clear that she believes that down payment was made on behalf of her separately and for her own best interests. RP 51, 52 ll. 1-7, 55, ll.15-16, 57 4-11. Unfortunately and due to no fault of either party, instead of the asset appreciating it depreciated. All but \$86,500 of the equity which had once existed, whether from separate or community funds was dissipated. CP 22

The wife testified at trial under questioning by her counsel that she believed all the money was hers and that the Appellant had no interest in it. She did nothing and made no agreements to insure that if the investment decreased that someone other than herself would share in the loss or reimburse her.

Q: At any time was it your intent to just give this money to the Respondent or give him any portion of this money?

A: No I always figured if anything happened, that was my money and I would get that back.

Q: And did you sign anything saying that he was going to be entitled to this money?

A: No.

Q: Did you at anytime take the money from the sale of the home and put it into a joint account with the respondent?

A: No. RP 25, II17-25 and 26, II1-3

The Appellant made no representations as to insuring the success of this investment and Respondent made no demands or any contractual agreements either verbally or in writing as to who or what would be responsible for a loss.

Upon cross examination of the Respondent the following questions and answers were given.

Q: Are there any obligations other than the home mortgage that you would ask Mr. Midkiff to pay, what we would consider community obligations?

A: No.

Q: And you're not claiming any interest in his Bothell home?

A.: No.

Q: And no interest in any kind of retirement or pension or anything of that nature?

A: No.

Q: When you purchased the home, there was no discussion with regard to him guaranteeing anything other than his obligation to make the mortgage payment?

A: No. RP 51at II.14-25 and 52 at II1 and 5-7.

According to her testimony it is clear that she was making this investment on her own with the belief that regardless of what happened that she would get her money back.

She made a poor assumption that, somehow, if anything happened the money would

come back to her. Nowhere in the record is there any indication that she relied on her husband to reimburse her for losses. The question then becomes, from where will the money come? Unfortunately "anything" did happen and the real estate market depressed reducing the value of the home and therefore the equity in the home. This is something that happened to thousands and probably millions of individuals across the country. Respondent did not suffer the worst of the disaster as the home retained some equity and by the Appellant assumed the mortgage payments during the marriage, after the separation and until the sale, the home did not go into foreclosure.

The value of the home owned by Appellant was losing equity as well due to the same "market forces" that caused the decline in the value of the marital home. The ruling of the court increases the losses Appellant has suffered on three bases. The first due to his inability to recover community contributions on the marital home. That loss was self imposed and agreed to at trial. The second concern is the loss in market and equity value suffered on his separate property due to the same "market forces" faced by the wife and the rest of the country. The third is the taxing of his separate property to pay for the losses from his wife's separate investment. The last consideration amounts to \$81,200.00.

ECONOMIC CONDITIONS OF THE PARTIES

In dividing property the paramount concern is the economic condition in which it would

leave each of the parties. In re Marriage of Mathews 70 Wn. App.116, In re Marriage of Gillespie 89Wn. App 390, 948 P. 2d 1338. The factors to be considered are found in RCW 26.09.080 Those pertinent to the case at bar are:

1. The nature and extent of the community property.
2. The nature and extent of the separate property
3. The duration of the marriage. . .
4. The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective.

Mathews ibid, also indicates the relative health, age, education, work history, and employability may be considered.

1. The nature and extent of community property is of little or no consequence in this cause of action. The marriage was of short duration about 32 months. The parties stipulated to the fact that they had divided any and all of their community property and the decree and findings made no distinction between community and separate property awarded to each party. In fact testimony of the Respondent shows that she is making absolutely no claim on the separate property of the Appellant including his home in Bothell, his business or any other community or separate property. RP at 51 ll.14-25. Appellant likewise made no claim on any separate or community property of the Respondent. RP 21 at ll.23-25.

2. The nature and extent of separate property is an issue in this case. The wife came into the marriage with the funds from the sale of her former residence and

immediately invested it (\$195,000) in the home she purchased with the Appellant. The Appellant also has a separate home which he continues to maintain. Both homes have lost value due to the general downturn in the real estate market. The value of the marital home has gone from \$650,000 to \$560,000. The value has decreased about \$90,000.00 in value. The Appellant's home has gone from near \$400,000 to about \$340,000 or a reduction of about \$60,000.00. RP at 104 ll.13-19 and 137 ll. 4-15. Both homes have lost value due to the real estate market forces and both parties have lost funds from their separate property.

3. The duration of the marriage is of little or no significance as it was less than three years.

4. The economic condition of each spouse at the time the division of property is to become effective is of import. Both of the parties are gainfully employed at incomes they were earning prior to marriage. The Respondent at \$59,400 and the Appellant at between \$60,000 and \$68,000 depending on the year.

There biggest difference in their economic situations is the fact that appellant is self employed and has no employment benefits except for what he can pay for himself. That consists of a \$1,500 IRA which is his separate property and which was awarded to him in the decree CP 21 and 22. H also testified that he had a life insurance policy with

a cash value of about \$17,000 that he has had for many years. RP at 119 l.18. Appellant's only financial resource for retirement or disability is the equity in his Bothell home.

The Respondent however works for the State of Washington and has significant employment benefits and investments she has made for retirement. She receives a Uniform Medical Health Plan which she pays \$87.00 per month. Ex.1 Appellant was covered by this insurance but now is not. Her dental is covered and she pays nothing with the employer paying \$79.17. Basic life insurance is covered and she pays \$5.07 for \$25,000 plus AD&D coverage of \$5.000. Optional life insurance is covered in the amount of \$60,000.00 for which she pays \$24.72. Long term disability is covered by the state at \$2.00 per month and Respondent pays \$28.26 for optional LTD. Ex.5

Respondent is entitled to a pension from the PERS 2 plan for which she pays \$115.00 per month and the employer pays \$179. Supplemental retirement and savings are paid at \$50.00 per month and a Vanguard plan is paid by the University at \$50.00 per month Ex. 6. The PERS 2 plan will pay her \$1,360 per month if she retired today. Ex. 7. She has a Roth IRA with a value of \$3,661 as of September 30 2011. Ex. 8. As of 12/31/2011 her Vanguard balance was \$17,223.57. Ex.9. An AIM Investment statement shows a balance as of \$30,516. Ex. 10. In addition to the sums set out above the home in question has been sold and the proceeds have been given to the

Respondent. These funds were not contested and that portion of the judgment is not a part of this appeal. Her benefits and investments total \$68,623 which are all her separate property.

The Mathews criteria are almost identical as between the parties and do not mitigate in favor or against either party. Both parties are healthy and are the same age, neither is significantly more educated than the other, and both have been steadily employed for the recent past and probably for their entire working lives and certainly during their short marriage. Both are employed currently.

With the investments and pensions that Respondent has testified to and the funds received from the sale of the home it is difficult to understand how the economic circumstances of the Respondent could be determined to be worse than those of the Appellant and worthy of an equitable award of \$81,200.00. RP at 19 – 21. Respondent's salary with benefits far surpass anything available to Appellant from his self employment. She is insured for both medical and dental and disability. She has a pension she may draw now or wait until a later time. She has separate property investments and the funds from the sale of the home. Respondent has a business that pays him about \$60,000 per year.

DISPOSITION OF PROPERTY

All property of the parties is before the court for distribution both separate and community. Friedlander v. Friedlander 80 Wn. 2d 293 (1972). The division need not be equal but should be just and equitable. Unjustifiable disproportionate awards are subject to reversal In re Marriage of Tower 55 Wn. App. 697.

"In the case of a short marriage [approximately 5 years or less] the marriage has in fact not been the significant event that is normally presumed. Particularly there has not been a long reliance on the marital partnership. Therefore, the emphasis should be to look backwards to determine what the economic positions of the parties were at the inception of the marriage and then seek to place them back in that position, including provisions for interest and inflation, if feasible. After doing that if there are properties left over, they would presumably be divided about equally. Presumably in a short marriage maintenance would not be paid except in extraordinary circumstances or perhaps for a very brief adjustment period." Winsor "Guidelines for the Exercise of Judicial Discretion in Marriage Dissolution." Washington State Bar News, vol. 14 page 16 (Jan. 1982)

The trial court and appellate courts have set out a myriad of requirements to identify characterize, evaluate, divide, determine economic conditions (both past and future) and ultimately award any and all property to the spouses in a dissolution. Those considerations have been set out above and analyzed based on the circumstances of this particular case. After all the determinations have been made and all of the circumstances have been reviewed the court is obligated as follows:

". . . the court shall , without regard to marital misconduct make such disposition of the properties and liabilities, either community or separate, as shall appear just and equitable after considering all relevant factors. . .RCW 26.09.080.

Once that determination has been made the decision will not be overturned unless the trial court abused its discretion. The ruling may be overturned if the decision is based

on untenable grounds or for untenable reasons. Marriage of Tower 56 Wn. App. 697.

This dissolution presents a problem that is not directly addressed by the authority cited above. Does the spouse in a dissolution have an obligation to reimburse or insure his wife for separate funds invested in a declining asset? I would suggest that if the funds were invested in anything but a home and the spouse were to contribute to the investment be it a car a mutual fund or any other asset the answer would be no.

In researching both before and after this trial no authority has been found to answer the question as to whether the wife is entitled to be compensated for separate funds which were lost due to a depreciating asset. It is clear that if the asset appreciates she is entitled to any increase contributed but does she also take the risk of a loss on a separate investment? If indeed the asset depreciates is the husband obligated to reimburse her for the loss. Is the husband entitled to a set off against the loss for both community and separate contributions to the value of the asset?

Since no authority has been found which deals directly with these questions, but only authority dealing with the increase in the value of the asset it is impossible to determine the fair and equitable nature of the judge's ruling based on precedent. The entire question then comes down to what is fair and equitable given the information we have from the available authorities which are analogues but not on point.

The most important general rule is that community funds that are used by one party to enhance the separate property of the other party create a presumption of a gift to the separate property owner. Estate of Hickman 41 W 2d 519,526 (1952). Other cases allow for an equitable lien to be applied especially in the cases of mortgages but allow those liens to be set off against the use and benefit of the home and its rental value. In re Marriage of Miracle 101 Wn. 2d. 137. Both these cases deal with assets which are appreciating because of separate property contribution and community contributions. By analogy does the wife bear not only the benefit of an appreciating asset as well as the detriment from a depreciating asset based on an investment of separate funds? The Winston article set out above, mentions taking into consideration both inflation and interest, but does not specifically address losses.

Without being able to argue from authority it is possible only to try to place these facts and figures in context with the authorities available. Regarding Windsor article supra it is impossible to place both parties "back into the position they were in at the inception of the marriage." The reason for that impossibility is that the wife has expended \$195,000 on an asset which is now worth \$90,000 less than at the inception and the husband has contributed \$156,457 in mortgage payments on the same depreciated asset. The court seemed to try to return the parties to the inception of the marriage by awarding the wife the remaining equity in the home and taxing the husband an additional \$81,200. CP 22 at 3. In fact in trying to place the wife back to where she was she has depleted the husband of \$240,800. \$81,200 of that sum is directly from his

separate funds. CP 22 at 3. The remainder is from both separate and community funds but all funds were used in payment not to enhance the value of the wife's separate asset but to preserve the equity which still remained. In returning the wife to her former position the court has moved the husband even farther away from his than position than the wife has returned.

Without authority to determine whether the wife should or should not suffer the consequences of the decrease in value of the asset and therefore no basis to determine by precedent what is a fair and equitable award. RCW 26.09.080. It is the position of the husband that requiring him to insure that an investment made by the wife does not decline or by requiring him to reimburse her is inherently unfair and not equitable. He is obligated on this investment as well and has taken losses because of it.

The \$195,000 down payment was the wife's contribution to an asset that lost \$90,000. Since that payment was made the Appellant has made every mortgage payment on that property. Payments from July 2008 to March 2011 were of a community nature and totaled \$ 98,983. The characterization as community precludes him from claiming that he obtains a lien in that sum. Miracle v. Miracle Ibid. I would suggest the fact that we are dealing with a burden of showing that the ruling was fair and equitable but there is no authority available on the particular point makes decision as to what is fair and equitable a new standard for these cases and therefore subject to closer scrutiny as to the burden of what is fair and equitable and what is an abuse of

discretion.

From March, 2011 to September, 2012 Appellant contributed \$57,474 to the mortgage and to the depreciating asset, after separation and before the home was sold. Because of the separation the funds came from his separate property. RCW 26.16.140. Upon separation Respondent did nothing to protect the declining equity and obligated herself to a new lease.

Respondent contends that when she entered into this marriage and home purchase that she was somehow insured that she would be entitled to all her money

Q: At any time was it your intent to just give this money to the Respondent or give him any portion of this money?

A: No I always figured if anything happened, that was my money and I would get that back.

Q: And did you sign anything saying that he was going to be entitled to this money?

A: No.

Q: Did you at anytime take the money from the sale of the home and put it into a joint account with the respondent?

A: No. RP 25, II17-25 and 26, II1-3

The wife testified as follows:

Q. And the nature of the . . . When the home was purchased were there expectations discussed?

A. No.

Q. So did the respondent tell you that he expected you were giving all the money and the house to the marriage?

A. No.

Q. To him?

A. No

Q. And it was your expectation that the money would remain your money?

A. Absolutely. RP at 57 20-25, 58 1-6.

These assumptions are erroneous and show that there was no agreement that the husband would insure that the value would not decrease or if it did that she would somehow get her money back. RP 52 II. 5-8. At no time has the Respondent claimed an interest in any of the appellants separate property, particularly his home. RP 51-52, 55 and 57

During the entire time of the marriage the home of appellant, his separate property, was losing value of about \$60,000 due to the same circumstances as the marital home. RP 137 II4-15. At no time did the court take that fact into consideration in either valuing the property of the Appellant or in the award to Respondent. This is particularly egregious to the Appellant as the court found that the reason for retaining his home was to benefit the community and in fact the loss was a detriment to the community As was the loss in value of the marital home. CP 22 II.6-8.

The sums paid by Appellant and the financial conditions of the parties are set out above. The court, however, ignored the prediction of imminent financial strain to the appellant when he was ordered to continue the mortgage payments from April of 2012 to the sale of the home thus causing him to contribute fifteen months of mortgage payments over and above what he has paid some. CP 22.

There is no reason that Respondent should be reimbursed for the loss on her property. Neither party has done anything to cause the other to suffer a loss in value.

The loss is simply a reflection of the “market forces” in play at the time. CP 22. Had Respondent invested in any other home or dwelling at the time she invested as she did herein result would have occurred. That is true whether she was married or single. It may have even happened that other investments would have lost value as well as did her mutual fund. Ex. 10. Appellant suffered the same consequences by losing value in his home and expending \$156,000 on a depreciating asset. Certainly both parties enjoyed the use and benefit of the home during marriage but after separation Appellant was ordered to continue to pay on an declining asset and to save the equity therein. He was then required to pay an additional \$81,200 to make up the losses of the Respondent had suffered in the same asset. The decision is neither fair nor equitable on its face. I find no authority to guide the parties their attorneys or the court as to what how we reach a fair and equitable resolution of this matter.

CONCLUSION

The question as to whether a spouse is entitled to be reimbursed for the loss of value in an asset purchased during a marriage with her separate funds is the seminal question of this case. Should the husband's separate property or any property be taxed to reimbursement the spouse for separate property losses. If the wife is entitled to reimbursement was the reimbursement fair and equitable and was the decision to reimburse fair and equitable?

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It is clear that the spouse to whose asset contributions are made is entitled to the increased value of those contributions. Does the opposite apply? Does the spouse also bear the losses from the diminishing assets purchased with her separate funds? Appellant argues that through no fault of either party the asset lost value and that is not fair and equitable to require him to reimburse or insure against the loss in value of a separate property asset. If indeed he must any reimbursement should take into the calculations that his separate property was also diminished by the same market forces that caused the spouses asset to decline.

The appellant requests that the property settlement provisions of the decree dealing with the requirement for appellant to make mortgage payments from the time of trial to the sale of the home and the requirement that he pay the Respondent \$81,200 dollars be vacated and remanded to the superior court for entry of an award of the property in question.

Signed and dated this 13th day of March 2013



Dan Eovich WSBA 5615
Attorney for Appellant
Post Office Box 1715
Edmonds, WA 98020
425-712-8177 phone
425-712-0465 fax
Eovich23@earthlink.net

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Case Number 69031-1-I

SHELLEY GOLLARD MIDKIFF, Respondent

v

STEVEN LINVEL MIDKIFF, Appellant

PROOF OF SERVICE OF

I Am Dan Ewich the attorney for the Appellant Steven Linvel Midkiff. I
served a copy of the Brief of Appellant upon Laurie G.Robinson by leaving said
Brief of Appellant at her office at:

Law Office of Jason S. Newcombe
1218 3rd Ave.
Suite 500
Seattle WA 98101

ORIGINAL

on Wednesday March 13, 2003.

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

I am making this statement pursuant to the laws of the state of Washington and subject to the penalties for perjury there under and swear the same to be true.

Signed and dated this 13th day of March 2013



Dan Eovich WSBA 5615
Attorney for Appellant
Post Office Box 1715
Edmonds, WA 98020
425-712-8177 phone
425-712-0465 fax
Eovich23@earthlink.net