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NO. 69031-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

IN RE THE MARRIAGE OF:
SHELLEY GOLARD MIDKIFF,
RESPONDENT

and

STEVEN LINVEL MIDKIFF,
APPELLANT.

RESPONSE BRIEF OF RESPONDENT

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COURT OF APPEALS DIVISION
STATE OF WASHINGTON

ORIGINAL

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I. INTRODUCTION

This case arises from a dissolution proceeding where after a trial on the merits, both parties were awarded an equal share in the equity remaining in the parties' two homes, their marital home, which was purchased by using a down payment of the wife's separate property contribution of \$195,000, and the husband's premarital home, which was retained during the marriage as an investment property. The husband also retained his business and separate financial accounts and the wife retained her separate financial accounts. In effecting the award, the trial court awarded the wife one hundred percent of the remaining equity in the marital home which was estimated to be \$86,500.00 and which had greatly depreciated in value from her original separate property investment. The total equity in the husband's home was \$240,000.00. The court awarded the husband possession and ownership and ordered an equalizing payment to the wife from the husband in the amount of \$81,200. Husband appeals the court's order of the equalizing payment. Husband's challenge to the trial court's distribution of property fails to demonstrate any abuse of discretion of the trial court. Husband fails to provide any legal or factual basis to overturn the decision of the trial court. The trial court decision was fair and equitable based on the entirety of the facts of the case. The husband's request for relief should be denied.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

In response to Appellant's Assignments of Error, Respondent responds as follows:

1. Did the trial court fail to characterize the funds used to purchase the marital home at the time of the purchase, and should they have been characterized as a "gift?"

NO: The trial court properly characterized the properties of the parties, including the separate property funds of the Respondent. Further, any mischaracterization is harmless and not grounds for remand or reversal.

2. Did the trial court err in valuing Respondent's down payment based on the equity actually existing in the asset at the time of separation and not at the current market value of the equity that Respondent purchased?

NO: The trial court properly valued both of the real properties of the parties and made a fair and equitable distribution based on the totality of the circumstances of the parties.

3. Did the trial court err by not considering the devaluation of Appellant's separate property in making a fair and equitable distribution of all of the property and debts between the parties?

NO: The trial court placed a value on the equity of Appellant's separate property which included the depreciation of the property since its purchase and made a fair and equitable distribution of the assets based on the totality of the circumstances of the parties.

4. Did the trial court err in awarding Respondent an amount based on the equity value of the asset itself?

NO: The trial court's decision was based on the current equity in both homes which included any depreciation which occurred and was a fair and equitable distribution of property and debts based on all the factors in the case.

5. Did the trial court "tax" Appellant unfairly by requiring him to reimburse Respondent for the loss she incurred to her investment in the community real property?

NO: The court's decision was not a "tax" against Appellant but an equalizing payment based on a fair and equitable division of the equity in both properties and in light of all the facts in the case.

6. Was the trial court's award to Respondent unfair and inequitable?

NO: The court considered all the property and debts before it, both separate and community, and awarded both parties that which it considered to be fair and equitable under the financial circumstances. The facts of the case, which include the parties' decision to sell Respondent's

pre-marital property and retain Appellant's pre-marital property and Appellant's business, warranted an equal division of the equity in both properties.

7. Did the trial court err in failing to consider the post-dissolution circumstances of the parties by ignoring Respondent's employment-related benefits while Appellant was self-employed and had no employment-related benefits?

NO: The trial court considered the income and property of both parties before, during and after the marriage and the benefits received by both parties from their employment and made a fair and equitable determination based on the totality of the parties' financial circumstances. Appellant's business was worth \$250,000.00 and had increased in value during the marriage. Appellant's business paid a variety of his personal expenses.

8. Was the distribution of property and debts fair and equitable under the circumstances?

YES: The court made a fair and equitable distribution of all the parties' property and debts based on the relevant statutes and case law and the facts of the case. The trial court carefully considered the financial circumstances of both parties in dividing the property.

III. REPLY TO RESTATEMENT OF THE CASE

Shelley Golard Midkiff, Respondent, and Steven Midkiff, Appellant, were married on June 28, 2008 and separated on March 18, 2011. RP at 16. Both Respondent and Appellant owned real property prior to their marriage. Prior to the marriage the parties discussed and agreed that Respondent would sell her home and acquire a larger home to be used by the parties. RP at 24. They agreed Appellant would keep his home in Bothell as a long term investment for the parties' future. RP at 24. Approximately eight weeks prior to the marriage, the parties began residing in Appellant's home. RP at 16. Within a couple of weeks of the marriage, Respondent sold her home and in late July 2008 used \$195,000 of the net proceeds from the sale of her home as a down payment to purchase the marital home. RP at 25. The purchase price was \$650,000. RP at 26. The parties acquired a mortgage in both their names for the remainder of the balance owing on the property. Appellant did not contribute funds to the purchase of the home. RP at 26.

Prior to the marriage both parties were employed and remain employed. Appellant is the sole owner of an audio services company. Appellant stated that said company was worth approximately \$250,000. RP at 111. Said company increased in value during the marriage. RP at 111; Ex. 27. In 2010, Appellant earned no less than \$80,000.00 as salary and sole shareholder distribution. RP at 117; Ex. 27. In 2011, Appellant

earned no less than \$98,000. RP at 117; Ex. 27. In addition, the business paid for Appellant's vehicles, vehicle maintenance, oil, gasoline, internet, cellular phone and land line. RP at 118. Appellant used the home purchased to advance his business. His only business office was in the home. RP at 107. He met with his employees at the home. His accountant worked at the home. He stored equipment in the garage. RP at 32; RP at 52. He parked his work vehicles at the home. RP at 32. In addition, for periods of time Appellant's adult children resided in the home. RP at 106-107.

Respondent worked at the University of Washington as a web specialist. RP at 17. She was and remains a salaried employee. Respondent makes \$59,400 per year. RP at 18. She receives health insurance and retirement benefits. RP at 19-20. Respondent had minimal premarital investment accounts. RP at 21.

During the marriage the parties divided the expenses for the home. They each had separate bank accounts. RP at 28. Appellant paid the mortgage while Respondent paid other expenses for the home at approximately the same amount as the mortgage. RP at 28-29; RP at 56. The parties maintained the home Appellant owned prior to the marriage and during the marriage rented it. The rental income on his home was approximately equal to the mortgage payments made during this time. RP

at 76. In addition, Appellant made improvements to the home and acquired a home equity loan. RP at 104-105.

Contrary to Appellant's statements, Respondent did request that Appellant's property be considered as part of the court's division of assets and debts. RP at 57; RP at 117. At the time of dissolution, Appellant testified that the value of Appellant's home was \$340,000. RP at 137. There was a mortgage and home equity line in the total amount of \$100,000. RP at 104. The equity in Appellant's home was \$240,000. CP at 39. In November of 2011, after separation, the market value of the home purchased during the marriage was appraised at \$560,000. RP at 64. The remaining mortgage was \$442,094. RP at 30-31. After closing costs the approximate net equity was \$70,000. RP at 74; RP 95. The court valued the net equity at \$86,500. CP at 39. Prior to the time of trial the parties had agreed to sell the home purchased during the marriage.

Other property owned by the parties included Appellant's business, Appellant's small investment account and cash value life insurance. Respondent owned a small Roth IRA, mutual funds and a pension. RP at 21.

On March 18, 2011, the parties separated. Appellant continued to reside in the home and pay the mortgage for the home. Appellant also continued to use the home for the benefit of his business. RP at 107.

Appellant's adult children resided in the home with him after separation.
RP at 106-107.

After considering all of the property of the marriage, both separate and community, the trial court found that it would be inequitable to simply award Respondent a recovery of her separate property down payment for the marital home, less the depreciation. CP at 39. Respondent would have received the sum of \$54,495.00. CP at 39. Appellant would have received \$32,000 plus all the equity in his premarital residence of \$240,000, even though he benefitted from the use of the marital residence as both home and office for the duration of the marriage. CP at 39. In effect, Appellant would have benefitted unduly from the parties' joint decision to sell Respondent's home and keep his home for the benefit of the community. The court recognized that both parties benefitted from the marital home. In light of all the facts of the case, the trial court ruled that the parties should equally divide the net equity in both remaining properties. CP at 39. To do so, the court ruled, Respondent should receive all of the equity from the marital residence plus an equalizing payment from Appellant in the amount of \$81,200, and Appellant would retain ownership of his property. CP at 39.

Appellant argues, essentially, that a spouse is not entitled to be reimbursed for the loss of value in an asset purchased during a marriage

with her separate funds. The trial court did not “reimburse” Respondent for the loss but rather took into consideration all the property of the parties, separate and community, and made a fair and equitable division of all of the property and the financial circumstances of the parties. CP at 39. The division of the property of the parties was well within the discretion of the court pursuant to RCW 26.09.080 and said property division was not an abuse of the court’s discretion. There is no legal or factual basis to overturn the decision of the trial court.

IV. ARGUMENT IN RESPONSE

A. Standard of Review

The trial court considered all the facts of the case and made a fair and equitable division of the property. The trial court did not abuse its discretion in dividing the property, both separate and community, of the parties. In this case, the findings of fact are supported by substantial evidence and even though the Court of Appeals might have resolved the factual dispute differently, it should not substitute its judgment for that of the trial court’s opinion. There is no basis for this court to reverse or alter the order of the trial court in this case.

Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge. *See* WASH. STATE BAR ASS’N, WASHINGTON FAMILY LAW DESKBOOK section 65.4(1), at

65-9 (2nd ed. 2006); *Perry v. Costco Wholesale, Inc.* 123 Wn.App. 783, 792, 98 P.3d 1264 (2004). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002)(quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)). *See also, Perry*, 123 Wn.App. at 792. “The fact finder measures the witness credibility, and we [Court of Appeals] do not review that determination on appeal.” *Miles v. Miles*, 128 Wn.App. 64, 70, 114 P.3d 671 (2005). The Court in *Miles* further stated, “if supported by substantial evidence, we do not reverse a trial court’s findings of fact on appeal.” *Id.* at 69. *See also In re Marriage of Zahm*, 138 Wn.2d 213 (Wash. 1999), citing *In re Marriage of Crosetto*, 82 Wash.App. 545,556, 918 P.2d 954 (1996).

The higher courts have gone on to find that where the trial court has weighed the evidence, the reviewing court’s role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court’s conclusions of law. *In re Marriage of Greene*, 97 Wn.App. 708, 989 P.2d 144 (1999). A court should “not substitute [its] judgment for the trial court’s, weigh the evidence, or adjudge witness credibility.” *Id.* At 714 (citing *In re Marriage of Rich*, 80 Wn.App. 252, 907 P.2d 1234 (1996)). In *In re Segó*,

the Supreme Court held that the witnesses are before the trial court and the trial court is “more capable of resolving questions touching upon the weight and credibility than we are.” 82 Wash.2d 736, 740, 513 P.2d 831 (1973). The Supreme Court further stated that “as an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of the witnesses even though we may disagree with the trial court in either regard.” *Id.* at 740.

The trial court, after hearing and seeing the witnesses and reviewing financial documents presented as exhibits, weighed the economic circumstances of the parties and the benefits they each received from the community estate. Based on the evidence, the trial court held that in fairness and equity, Respondent and Appellant should equally divide the equity in both remaining real properties. CP at 39. Respondent used all the equity from her premarital property to purchase the home the parties used during the marriage. Prior to the marriage Respondent owned a home with a mortgage she could afford, RP at 40, and with roughly \$200,000 in equity. RP at 25. After the marriage, Respondent owned a home that she could not afford to keep and her \$195,000 investment into that home had dwindled to less than half that amount. Respondent is a salaried employee making \$59,400 per year. RP at 18. She has some

retirement and investment accounts. RP at 19-21. She does receive subsidized medical insurance from her employer. RP at 19.

Appellant used the home purchased with Respondent's separate property as an office, storage space and parking facility for his business. RP at 32; RP at 52; RP at 107. Not only did Appellant use the residence but his adult children also lived in the home at various times. RP at 106-107. Appellant's business increased in value during the marriage. RP at 111. Appellant's income from his business increased during the marriage. RP at 117. Appellant received tax benefits for using the home as an office. Contrary to Appellant's statements, Appellant does receive benefits as several of his expenses are paid by the business. RP at 118. Appellant left the marriage with his business worth \$250,000. RP at 111.

Appellant owned a home in Bothell prior to the marriage. The parties agreed to retain that home as a long term investment. RP at 24; CP at 39. During the marriage, Appellant's Bothell property provided income which he used to pay the mortgage. RP at 76. It retained equity although there is no dispute that it too lost some equity. Both homes lost equity. Appellant also made improvements to the Bothell home during the marriage. RP at 104-105.

The court used the actual equity, or as close as possible to it, since the marital home had not yet been sold, for both homes in dividing the

property. CP at 39. The court did not “tax” Appellant with Respondent’s loss. The court looked at what the parties came into the marriage holding and what was remaining at the end of the marriage. The court fairly divided the remaining equity in both properties. As Appellant was granted possession of the Bothell property which had more equity, he was ordered to make an equalizing payment to Respondent. CP at 39. Appellant kept his business and Respondent kept her investment accounts. The court’s division of the property was fair and equitable. There is no basis for this court to remand or revise the order of the trial court.

B. Characterization of the Property

Appellant lists as one of the trial court’s errors that the court failed to characterize Respondent’s separate property contribution as community or separate property. Appellant goes on to state that the funds should have been characterized as a gift to the community. He raises the issue in his Assignments of Error, but does not argue why said contribution should be characterized as a gift. Later in Appellant’s brief he states the marital home was separate property and provides legal authority to support his position. Br. Appellant 15-16. The court found the funds to be separate property. CP at 39. There was no error in the lower court’s designation of the funds used by Respondent to purchase the marital home.

1) The Respondent's funds used to purchase the home were separate property

The trial court found that the funds used to purchase the home were the Respondent's separate property. CP at 39. "The character of property as community or separate is determined as of the date of acquisition." *In re Marriage of Janovich*, 30 Wn.App. 169, 632 P.2d 889 (1981). "Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary." *In re Marriage of Skarbek*, 100 Wn.App. 444, 447, 997 P.2d 447 (2000), citing *In re Estate of Witte*, 21 Wash.2d 112, 125, 150 P.2d 595 (1944). In *In re Marriage of White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001), the Court of Appeals held that property acquired during the marriage is separate if "acquired during the marriage with the traceable proceeds of separate property." Moreover, in *In re Marriage of Chumbley*, 150 Wn.2d 1, 6, 74 P.3d 129, 131 (2003), the Supreme Court held "[p]roperty acquired during the marriage has the same character as funds used to purchase it." The proceeds from Respondent's premarital home which were used to purchase the marital home were Respondent's separate property.

Further, the Supreme Court recognized the "mortgage rule" which occurs when property is purchased with separate funds and the remainder is

secured by a mortgage. 150 Wn.2d 8. In such a case the value of the property “will be divided according to the contribution of each.” *Id.* At 8. In this case, the trial court discussed the application of the mortgage rule but recognized that in this case, sole application of the rule would not be a fair and equitable division of the parties’ property. CP at 39. To simply provide the Respondent her portion of the equity in the marital home ignores the other factors in this case and leaves only the Respondent in a worse situation than when she entered into the marriage.

There is no factual or legal basis to find that Respondent’s separate property funds were a gift to the community. The Washington State Supreme Court in *Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (Wash. 2009), rejected the erroneous joint title gift presumption which had previously been put forth in *Hurd and Olivares*. See also *In re Marriage of Hurd*, 29 Wash.App. 38, 848 P.2d 185 (1993); *In re Marriage of Olivares*, 69 Wn.App. 324, 848 P.2d 1281 (1993). *Borghi* involved a case in which real property acquired by the wife was brought into the marital community and the husband’s name was added to the title of it. *Borghi* at 483. The court held that to the extent *Hurd* and *Olivares* established a joint title gift presumption arising when one spouse places the name of the other spouse on the title to separate property, they are disapproved. *Borghi* at 490. The court noted, citing *Guye v. Guye*, 63 Wash. 340, 114 P. 731 (1911), that “the right of the

spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.” *Borgi* at 484 (citing *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731). Significantly, the evidence must show the intent of the spouse owning the separate property to change its character from separate to community property. *Guye* at 349. There was no evidence presented at trial nor does Appellant point to any evidence that indicates there was an intent on the part of the Respondent to make a gift of her separate funds. In fact, there is ample evidence in the record to effectively rebut the presumption that Respondent’s contribution of her separate property to the purchase price of the marital home was intended as a gift. RP at 14; RP at 25-26.

2) Mischaracterization of the property is not a basis to change the lower court’s decision

While a trial court must determine the nature and extent of the parties’ community and separate property prior to making a division of the property, RCW 26.09.080, mischaracterization of property is not grounds for setting aside a trial court’s allocation of liabilities and assets, so long as the distribution is fair and equitable. *In re Marriage of Brady*, 50 Wash.App. 728, 731, 750 P.2d 654 (1988). Where there is

mischaracterization, the reviewing court will remand if the reasoning of the lower court indicates that the property division was “significantly influenced by characterization and (2) that it is not clear had the court properly characterized the property, it would have divided it in the same way.” *In re Marriage of Shannon*, 55 Wash.App. 137, 142, 777 P.2d 8 (1989). Moreover, the Supreme Court has held, “this court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors”. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (Wash. 1985). The Court found that “the statute directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property.” *Id.* at 478. “The character of the property is a relevant factor which must be considered, but is not controlling.” *Id.* at 478 (citing *In re Marriage of Hadley*, 88 Wash.2d 649, 656, 565 P.2d 790 (1977)).

In *Marriage of Worthington*, the Washington State Supreme Court ruled that even though the trial court may not have properly characterized the land in dispute, the court’s approach was correct in light of the facts of the case, the statute, emphasizing the necessity of a just and equitable division of the property, and the law which provides that all property of the parties, whether it be community or separate in nature is subject to the

jurisdiction of the court. *In Re Marriage of Worthington*, 73 Wn.2d 759, 440 P.2d 478 (Wash. 1968). The foregoing ruling makes clear that the characterization of the property is not necessarily controlling. *Id.* at 768. It is unnecessary to consider in detail whether certain property involved is to be characterized, piece by piece, as community or separate property. *Id.* at 769.

Even if the separate funds used by Respondent to purchase the marital home were mischaracterized, such mischaracterization does not affect the decision of the court. The parties entered the marriage with equity in two properties. At the end of the marriage the court looked at all the facts of the case and determined that the fair and equitable course of action was to equally divide the equity in both of the properties. CP at 39. Appellant offers no argument that had the court determined the marital home was strictly community property, the trial court would have divided the property differently. The trial court focused on the economic circumstances of the parties after the divorce. The trial court even mentioned during the trial that because this was a short term marriage, the goal was to put the parties into a similar situation as prior to the marriage. RP at 103-104. The significant loss of equity in the marital home made that a challenging task. Ultimately, there was no basis to leave one party with a lesser division of property.

Pursuant to the findings of fact that the trial court made, all assets and debts before it were not only characterized, but properly characterized. Furthermore, regardless of the characterization of the property, as cited above, any improper characterization is not grounds for remand because the trial court did not abuse its discretion in subsequently dividing the property in a fair and equitable manner.

C. Valuation of the Properties

1) The trial court did value the properties in determining the current equity and the court of appeals may look to the record for the actual market values of both properties

Appellant lists as assignments of error numbers two, three and four failure of the trial court to properly value the real properties in question. Appellant seems to find fault with the trial court focusing the findings on the current equity in the property. CP at 39. Obviously the trial court had to make a finding of the value of the properties in order to determine the equity in the properties. However, even if the trial court failed to value property, the appellate court may look to the record on appeal, which is complete, to determine the value of the assets, unless the values are in dispute. See *In re the Marriage of Hadley*, 88 Wash.2d 649, 656, 565 P.2d 790 (1977). The Supreme Court in *Hadley* stated, “the purpose of requiring that the trial court set forth its valuation of the property in a

dissolution action is to provide the appellate court with the opportunity to discover whether there has been an abuse of discretion.” *Id.* at 657. In fact the Court of Appeals in *Greene*, which Appellant cites, stated “the appellate court may look at the record to determine the value of the assets.” *In re the Marriage of Greene*, 97 Wn.App. 708, 712, 986 P.2d 144 (1999); citing *Hadley*. The Court goes on to state that it is only if the values are in dispute such that the appeals court cannot determine if the property division is equitable, the case should be remanded. *Greene* at 712; citing *In re Marriage of Martin*, 22 Wash.App. 295,298, 588 P.2d 1235 (1979).

In this case, the testimony and evidence provided the court with the market values of the properties which the trial court used to determine the equity. There was no dispute as to the value of the properties. As to the marital home, the appraiser testified as to the market value of the home to be \$560,000. RP at 62. Subsequently the real estate agent testified that she would list the home between \$570,000 and \$550,000. RP at 95. The remaining mortgage was \$442,094. RP at 30-31. The real estate agent further testified that closing costs would be paid by the seller and could be approximately nine percent of the sales price. RP at 95. The trial court took those values and determined the equity which was stated specifically in the findings. CP at 39.

The Appellant testified as to the current value of the Bothell property as being \$340,000. RP at 137. He testified that an appraisal had been done in late 2010 and the value was \$346,000. RP at 106. There was no disagreement or challenge to Appellant's valuation of the property. Appellant testified that the Bothell property had previously been valued in the "high 300s". RP at 137. The current value of the property was after said loss. Appellant also testified that the outstanding mortgage and home equity loan totaled \$100,000. RP at 104. Again, the trial court used the values provided by Appellant himself and determined the equity in the property. CP at 39.

The trial court then equally divided the equity in both properties between the parties. CP at 39. While it is true the court determined and discussed the current value of the Respondent's initial investment, its decision was based on the actual equity in both properties. CP at 39. The trial court's determination of value and equity included the loss incurred by both properties.

The trial court did properly value the properties when it determined the current equity in both properties. The record reflects the market values of both properties. The record also reflects the outstanding mortgages on both properties, as well as anticipated closing costs for the marital home. Neither party challenged the testimony regarding the values of either

property. It was not error for the court to specially state the current equity without detailing its calculation when the record was clear and unrefuted on the market values of the properties.

2) It was proper for the trial court to deduct for costs of sale from the value of the marital home

The trial court may award a deduction for the costs of sale of an asset but there must be a factual basis for said deduction. *In re Marriage of Martin*, 32 Wash.App. 92, 645 P.2d 1148 (1982). In *In re the Marriage of Berg*, the Court of Appeals held that “in order to justify a deduction for costs of sale, there must be evidence in the record (1) showing that the party who will receive the asset intends an imminent sale, and (2) supporting the estimated costs of sale.” *In re Marriage of Berg*, 47 Wash.App. 754, 759, 737 P.2d. 680 (1987), *reaffirmed*.

The record properly reflects that the parties intended an imminent sale of the marital home. RP at 40-42. They both agreed to the sale. Both parties testified they could not afford to keep the home. The chosen real estate agent testified as to the sale of the home. RP at 89. The agents further provide testimony as to the cost of the sale being approximately nine percent of the sales price. RP at 95. There was, however, no testimony or evidence that Appellant intended to sell the Bothell property in the imminent future. It was therefore proper to deduct sales costs from

the value of the marital home but not the Bothell property. *See In re Marriage of Berg*, 47 Wash.App at 759.

D. Property Division

The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors include (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective. RCW 26.09.080. In weighing the above factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080. In doing so, the trial court has broad discretion in distributing all marital property, including separate, and its decision will be reversed *only if there is a manifest abuse of discretion* [emphasis added]. *In re the Marriage of Griswold*, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002) (citing *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992)). A manifest abuse of decision is based on untenable grounds or reasons. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 770 (2005); quoting *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). In this case, based on the totality of the financial circumstances and property of each party, the trial court's division of the

property was fair and equitable. Contrary to Appellant's assertion, Respondent did request that the trial court consider the Bothell home in making its decision. RP at 57. Respondent also presented evidence regarding Appellant's business.

Appellant seems to argue that the marital home was Respondent's separate property. Further that based on case law, she was only entitled to the increase in value of said property. It would appear that Appellant argues that because the marital home lost value, the wife should get the reduced equity and nothing else. Appellant characterizes the trial court's division of the property as a "tax" against the Appellant and that he was required to "reimburse her for losses". He complains that the court did not consider the mortgage payments he made or the decline in value to the Bothell property. None of those statements are true.

First, Appellant's contributions to the marital home by way of mortgage payments during the marriage were clearly offset by his use and enjoyment of the property. The Appellant repeatedly states that he made the mortgage payment before and during the marriage and is somehow "losing" all that money. Both parties equally contributed to the marital community during the marriage. RP at 28-29. Appellant paid the actual mortgage while Respondent paid other household bills of equal monthly value. RP at 28-29. Further, Appellant enjoyed use of the marital home not just for living but also

for his business. In *In re Marriage of Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229, 1235 (1984), the Supreme Court held that a community can be denied a lien on property if “the community had been adequately compensated for its expenditures by its beneficial use of the premises.” One factor the court considered was the rental value of the property. *Id.* Testimony was presented that rental value of the property was fairly close to the actual mortgage of the home. RP at 97. Appellant enjoyed the use of the marital home as his place of business, for which he was able to claim income tax deductions. CP at 39. The evidence reflected that the business grew during the marriage. RP at 111; Ex. 27. The gross revenue and Appellant’s income increased. RP at 111; Ex. 27. The Appellant shared their marital residence with his adult children for their own rent-free enjoyment. RP at 106-107. Appellant enjoyed the same benefits of the property after the parties’ separation. Appellant’s mortgage payments during the marriage and after separation were not a “loss” to him as the evidence showed he enjoyed great benefit from the property.

Next, Appellant claims that the court did not consider the loss in value of the Bothell home. The court used the current value of the Bothell home based on Appellant’s own testimony. RP at 137. The current value included the reductions from the previous value of the home. Appellant’s assertion is false.

Lastly, the court did not “tax” Appellant’s separate property to pay for the loss of Respondent’s separate property. The court took into consideration the total financial circumstances of the parties. In *In re Marriage of White*, the Court of Appeals held, “under appropriate circumstances, it (the court) need not divide community property equally, and it need not award separate property to its owner.” 105 Wn.App. 545, 549, 20 P.3d 481 (2001). In this case, the trial court considered the agreement the parties had made to sell Respondent’s home and retain Appellant’s home as a long term investment. CP at 39. The trial court determined that it was fair and equitable to equally divide the equity in both of the properties. CP at 39. Because Appellant retained possession of the Bothell property, he was required to make an equalizing payment to Respondent.

The trial court in its findings and after considering all of the relevant facts presented to it, made a fair and equitable distribution of the property by equally dividing the remaining equity in the properties of the parties.

E. Economic Circumstances of the Parties

RCW 26.09.080 sets forth the factors to be considered by the court in making its property distribution. RCW 26.09.080. The trial court has broad authority to award all property before the court. *Griswold*, at 339;

RCW 26.09.080. “Although no single factor is dispositive, the economic circumstances of each spouse upon dissolution is of paramount concern.” *In re Marriage of Harrington*, 85 Wn.App. 613, 633, 935 P.2d 1357 (1997); *In re Marriage of Olivares*, 69 Wn.App. 324, 848 P.2d 1281 (1993). The court may consider additional factors such as “the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial stabilities, their foreseeable future acquisitions and obligations, and whether the property to be divided should be attributed to the inheritance or efforts of one or both of the spouses.” *Olivares*, 69 Wn.App. at 329 (citing *Friedlander v. Friedlander*, 80 Wash.2d 293, 305, 494 P.2d 208 (1972)). However, if the decree results in a “patent disparity” in the parties’ economic circumstances, a manifest abuse of discretion has occurred. *In re Marriage of Pea*, 17 Wn.App. 728, 732, 566 P.2d 212 (1977). For example, although distinguished on other grounds by *Borghi*, the court in *Hurd* found the trial court in error for failure to consider Mr. Hurd’s higher salary figure in calculating the community share of the present value of his monthly pension. *Hurd* at 46; *In re the Estate of Borghi*, 167 Wn.2d 480 (Wash. 2009), 219 P.3d 932.

In *Marriage of Olivares*, the Court of Appeals refused to substitute its judgment for that of the trial court where the court had divided the

community property at issue fifty-fifty. *Olivares* at 335. The court found that notwithstanding the short duration of the marriage and the source of the property at issue, the wife was in difficult financial circumstances and the husband had other significant assets, including an unencumbered home worth \$225,000. *Id.* In contrast, the wife had few assets, and “those that she had brought into the marriage had been expended for the benefit of the community.” *Id.*

Similarly to the facts in *Olivares*, Respondent was awarded fifty percent of the equity in the real property before the court in order to equalize the parties’ financial circumstances and to make the best possible effort to place them back into the positions they were in before the marriage. CP at 39; *See Olivares* at 335. Contrary to Appellant’s assertion, Respondent specifically requested the court consider the Bothell property in its ruling. RP at 57. As in *Olivares*, Respondent was in more difficult financial circumstances and Appellant had other significant assets, including the Bothell property and a business, which had appreciated during the marriage. CP at 39; RP at 111; *Olivares* at 335.

Moreover, in considering all the property and factors, the court in *Marriage of Nuss*, found that the trial court did not abuse its discretion in awarding an unequal share of the home to the husband. *In re Marriage of Nuss*, 65 Wn.App. 334, 342, 828 P.2d 627 (1992). In doing so, it was held

that the division was “reasonable in light of the short duration of the marriage, the younger age, health and economic prospects of the wife, and especially in light of the fact that the wife retained full equity in the Everett home she owned prior to the marriage.” *Id.* at 342. The court awarded all of the equity in the marital home in order to equalize the parties’ overall community property awards. *Id.*

In this case, in light of the financial circumstances of the parties, the trial court properly awarded Respondent an equal share of the equity in both the marital home and the Bothell property. CP at 39. Based on an agreement of the parties, Respondent had sold her pre-marital home and invested the proceeds in a larger more expensive home which could accommodate Appellant’s business needs. CP at 39. Respondent could afford her pre-marital home on her own salary. RP at 40. After the marriage, she had a home she could not afford to keep. RP at 31. And, she had a fraction of the equity from her pre-marital home. CP at 39.

Appellant tries to claim that Respondent was in a better position financially and the evidence shows otherwise. Appellant had a business worth \$250,000. RP at 111. That business showed an increase in revenue during the marriage. RP at 111; Ex. 27. The business clearly benefitted from the use of the marital home. Appellant’s claim that he made only \$60,000 to \$68,000 was shown to be false. Tax and business records

showed that in 2010 he made no less than \$80,000 and in 2011 Appellant received no less than \$98,000 from the business. RP at 117; Ex. 127. Further, Appellant's claim that he receives no benefits from the business are false. Appellant testified to the numerous personal expenses which are paid by the business. RP at 118.

During the marriage, the rent collected from the Bothell property paid for the mortgage and expenses. RP at 76. Appellant not only maintained the Bothell property during the marriage but also made improvements to the property. RP at 104-105. Further, there were no indications that Appellant would be unable to maintain the property after the divorce.

If the trial court had adopted Appellant's property division, Respondent would have been financially devastated. She would have received less than \$90,000.00 and have no property. Appellant would have left the marriage in a better position than he entered with a property in better condition than prior to the marriage, with \$230,000 in equity, and a business worth \$250,000. The trial court had an obligation to consider the financial circumstances of both parties and that is exactly what it did. It is true that the trial court could not place each party perfectly back into the positions they were in prior to the marriage, but an equal division of

the equity in both properties was the closest solution. The court made a fair and equitable division of the property.

F. Disposition of Property

Appellant's final argument to the court is difficult to discern. It would appear he is claiming that because there is no case exactly like this one, there is no authority for the court to follow and so therefore the trial court's decision must have been in error. There is no legal or factual basis for this argument. Appellant restates arguments which he has already tried to make under other sections of his brief. Appellant claims the sole question is whether the Respondent is entitled to reimbursement or insurance for her separate funds. In fact, the real question is what is the fair and equitable division of the parties' property based on the facts of the case and financial circumstances of the parties. RCW 26.09.080.

Appellant makes the same arguments about mortgage payments and how the Bothell property lost value as he made in prior sections of his brief. He limits the facts to make himself look the victim in this scenario when, in fact, he benefitted most from the use of the marital home. Appellant misrepresents his financial picture. This section offers nothing new and offers no basis for the court to overturn or revise the trial court's decision.

In his argument, Appellant mistakenly misjudges the scope of review of the appellate court. He consistently argues genuine issues of

material fact to this court that the trial court was best suited to decide, and did in fact already decide. It is not the duty of the appellate court to re-decide the decisions of the trial court. *Miles v. Miles*, 128 Wn.App. 64, 70, 114 P.3d 671 (2005). Nor is it the duty of the appellate court to always remand issues of fact back to the trial court to re-determine. It is the view of the appellate court that the trial court was in the best position to view all of the evidence, testimony and exhibits before it and make an adequate determination of the facts of the case in its findings. *In re Sego*, 82Wash.2d 736, 740, 513 P.2d 831 (1973). Only when there is a complete lack of findings, or a clear and obvious manifest abuse of discretion of the trial court in making its conclusions of law based on those findings, will the appellate court remand for re-determination. *Miles* at 69. In this case, the record on appeal clearly supports the lengthy and adequate findings of fact and determinations by the trial court. The trial court made a fair and equitable division of the property in this matter.

In part, Appellant seems to argue that the award of his separate property to the Respondent is him being “punished” for no reason. An equitable division of property is not a “punishment” to anyone. Both parties have lost equity and money during the marriage. In Appellant’s eyes it is equitable for Respondent to solely bear that loss. In *In re the Marriage of Konzen*, 103 Wn.2d 470, 693 P.2d 97 (1985), the Supreme

Court affirmed the trial court's award of thirty percent of the husband's pension, which was clearly his separate property, to the wife. The property division was based on "the economic circumstances of the parties." *Id.* at 472. The husband tried to claim that the court could only award separate property in exceptional circumstances. *Id.* at 477. The Supreme Court pointed to the current statute which clearly states the court shall make an equitable division of all property, separate and community. *Id.* at 477.

The trial court heard and reviewed the evidence in this case. The court considered the financial circumstances of the parties. The trial court made a fair and equitable division of the property. That decision should remain in full force and effect.

G. Respondent Midkiff Requests an award of Attorneys' Fees on Appeal

The court has the discretion to order a party to pay the other party's attorney fees and costs associated with the appeal of a dissolution and modification action. RCW 26.09.140; RAP 18.1. RCW 26.09.140 states in pertinent part that: "Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." RCW 26.09.140. The decision to award fees under RCW 26.09.140 is

discretionary and must be based upon a consideration that balances the needs of the spouse seeking fees against the ability of the other spouse to pay. RCW 26.09.140; *In re Marriage of Terry*, 79 Wn.App. 866, 871, 905 P.2d 935 (1995). A party to a dissolution action is not entitled to attorney fees as a matter of right. *Id.* at 871. The court may also award costs of the appeal. RAP 14.1 et. seq. In order to seek an award of attorneys' fees and costs on appeal, an affidavit of financial need must be filed with the court. RAP 18.1(c). *See also In re Marriage of Crosetto*, 82 Wn.App. 545, P. 2d 954 (1996). Absent a showing of need, however, the Court of Appeals will not allow an award of attorney's fees. *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97 (1985).

Respondent Midkiff has properly submitted her affidavit of financial need and, given the disparity of her economic circumstances to those of Appellant, as well as the unanticipated costs involved in defending this appeal, she should be awarded attorney's fees and costs.

V. CONCLUSION

In this case, the trial court carefully reviewed the testimony of the witnesses and the evidence presented in the case. The court considered the agreement of the parties to sell the Respondent's home and purchase a new home. The court considered the separate property investment of the Respondent into the marital home. The court considered the Appellant's

use of the marital home for his business. The trial court considered Appellant's Bothell property. Based on all the facts, especially the financial circumstances of the parties, the trial court made a fair and equitable division of the property. The court found it was fair and equitable to equally divide the equity in both the marital home and the Bothell property. Pursuant to RCW 26.09.080, all the property of the parties, separate and community, was before the court. The court had the right to award any of the property as it saw fit to achieve a fair and equitable division. The court found it was fair and equitable to equally divide the equity in both the marital home and the Bothell property. To effectuate said division, Respondent would keep the net equity from the sale of the marital home and would receive an equalizing payment from Appellant.

Appellant is correct in that there is only one issue before the court but Appellant mischaracterizes the issue. The issue is whether the trial court made a fair and equitable division of the property of the parties. The answer is yes, in light of the facts of the case and the financial circumstances of the parties, the trial court made a fair and equitable division of the property. The decision should be affirmed.

The Respondent, Shelley Golard Midkiff, respectfully requests that this court affirm the trial court's decision and issue an award of attorney's fees and costs in her favor.

DATED the ____ day of April, 2013.

RESPECTFULLY SUBMITTED,

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

Laurie G. Robertson, WSBA#32521
Attorney for Respondent

No. 69031-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUPERIOR COURT OF THE STATE OF WASHINGTON, KING COUNTY

In re Marriage of:)
)
SHELLEY GOLARD MIDKIFF)
)
Respondent,)
v.)
)
STEVEN LINVEL MIDKIFF)
)
Appellant.)

AFFIDAVIT OF MAILING

AFFIDAVIT OF MAILING

I certify that on the 12th day of April, 2013, I caused a true and correct copy of the following documents:

RESPONSE BRIEF OF RESPONDENT

to be served on the following by U.S. Mail:

Dan Evich
Counsel for Appellant
P.O. Box 1715
Edmonds, WA 98020-1715

2013 APR 12 PM 2:13
COURT OF APPEALS DIV I
STATE OF WASHINGTON

ORIGINAL

By: Laurie G. Robertson 4-12-13
Laurie G. Robertson, WSBA#32521 Date