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SUPREME COURT NO. 900442
C.O.A. No. 69031-1-I
King County Cause No. 11-3-02102-9

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

In Re the Marriage of:

SHELLEY GOLARD MIDKIFF
Respondent

v.

STEVEN LINVEL MIDKIFF
Appellant

RESPONSE TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Shelley Midkiff, by and through her attorneys of record, respectfully requests this Court deny review of the January 21, 2014, unpublished Court of Appeals Division I opinion in *Midkiff v. Midkiff*, No. 69031-1-I slip. op. (filed Jan. 21, 2014). This decision upheld the Trial Court's division of property when dissolving the parties' marriage.

B. COURT OF APPEALS DECISION

Court of Appeals, Division I, decision entered January 21, 2014 and decision denying Motion for Reconsideration entered on February 18, 2014.

C. ANSWERS TO ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court.
2. The decision of the Court of Appeals is not in conflict with a decision of another decision of the Court of Appeals.
3. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States.
4. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

D. STATEMENT OF THE CASE

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 marriage as an investment property. CP at 39, RP at 25.

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. CP at 39. The total equity in the husband's home was \$240,000. *Id.* The trial court awarded the husband possession and ownership of his home, and ordered an equalizing payment to the wife from the husband in the amount of \$81,200.00. CP at 39.

The trial considered the short duration of the marriage and that each party entered the marriage with one significant premarital property asset. *Midkiff v. Midkiff*, No. 69031-1-I, slip. op. at 3 (Jan. 21, 2014), CP at 39. The parties had agreed to sell the Wife's premarital home and the funds were used to purchase the marital home. RP at 24. The parties agreed to keep the Husband's premarital home and maintain it as a rental and investment property. RP at 24. In determining what a fair and

equitable distribution of the property would be, the trial court determined that an equal division of the remaining net equity in the two remaining homes was necessary. CP at 39. Distributing only the equity in the marital home would leave the parties in disparate positions, with Steven Midkiff retaining \$240,000 in equity on his premarital home while Shelley Midkiff would receive approximately only \$54,500.00. *Midkiff at 3*, quoting CP at 39.

It was a consideration that Steven had also enjoyed use of the marital home for his business, and would have “benefitted unduly from the parties joint decision to sell Wife’s home and keep Husband’s home for the benefit of the community” *Id.*, quoting CP at 39. Thus, the trial court awarded Shelley \$66,300.00, the anticipated proceeds from the sale of the marital home, and further ordered Steven to make a transfer payment of \$81,200.00, which was to be secured by a lien on his separate real property. *Id.* At 4, quoting CP at 39.

After the trial court denied Steven’s motion for reconsideration, he sought review by the Court of Appeals Division II. The Court of Appeals upheld the trial court’s decision, finding that based upon the record, the trial court’s order reflected its consideration of all the parties’ property, the duration of the marriage, and the economic circumstances. *Midkiff at 7*. The Court of Appeals found that the trial court did not abuse its discretion

in determining that a compensating transfer payment was appropriate nor in making that payment a lien on Steven's separate property. *Id.* At 6.

Petitioner moved for reconsideration of the Court of Appeals ruling. This motion was denied, and he filed the instant Petition for Review.

E. ARGUMENT

This Court Should Deny the Petition for Review, as Petitioner Fails to Meet the Standards of Review as Set Forth in Rule of Appellate Procedure 13.4(b).

RAP 13.4(b) provides that the Supreme Court will accept a petition for review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

It is unclear from the Petition for Review under which of the four conditions outlined under RAP 13.4(b) Petitioner seeks review. It seems as though Petitioner has focused his arguments on sections (1) and (2) of RAP

13.4(b). However, for the reasons set forth herein, the Petitioner does not satisfy the standards for review under any section of RAP 13.4(b).

1. *The Court of Appeals Decision is Consistent with the Supreme Court's Prior Rulings.*
2. *The Court of Appeals Decision is Consistent with prior Court of Appeals Rulings.*

The reviewing court's role is to simply determine whether substantial evidence supports the findings of fact and if so, whether those 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)). The higher courts will seldom modify a trial court's division of property and assets on appeal. *In re Marriage of Muhammad*, 153 Wn.2d 795, 808, 108 P.3d 779 (2005). The party who challenges such a decision bears a heavy burden to show that there was a manifest abuse of discretion. *Id.* at 808. A trial court abuses its discretion only if its discretion is outside the range of acceptable choices or based upon untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The Supreme Court, regardless of whether it tends to “incidentally agree or disagree with the trial court”, will not substitute its judgment for that of the trial court in a dissolution proceeding with respect to questions concerning property division unless the Court is persuaded that the lower court has manifestly abused its broad discretion. *Thoren v. Thoren*, 73 Wash.2d 671, 672, 440 P.2d 182 (1968). Here, the appellate court properly found that the trial court had correctly applied existing case and statutory law to ensure that the distribution of property and liabilities was fair and equitable. *Midkiff* at 7.

All property is before the court for a just and equitable distribution of the parties’ assets and liabilities, whether community or separate. RCW 26.09.080. See also *Farmer v. Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). In making a disposition of the property, “the court shall, without regard to misconduct, make such disposition of the property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage or domestic partnership, and (4) the economic circumstances of each spouse or domestic partner at the time the division of property is to become effective [...]” See, e.g., *In re Marriage of Rockwell*, 141 Wn.App. 235,

242, 170 P.3d 572 (Wash.App. Div. 1 2007), quoting RCW 26.09.080.

A just and equitable division of assets and liabilities “does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, *both past and present*, and an evaluation of the future needs of parties.” *In re Marriage of Crosetto*, 82 Wn.App 545, 556, 918 P.2d 954 (1996), emphasis added. 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). Further, a court may award the separate property of one party to the other if doing so would be fair and equitable. *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).

Here, Petitioner contends that the trial court’s decision to order a transfer payment in addition to the equity in the marital home yielded an inequitable property division. However, with respect to the premarital conditions of the parties, the evidence “clearly established that the wife realized more than \$200,000 in net equity when she sold her Seattle home in 2008.” *Midkiff* at 6. It would be vastly inequitable to then shift all the loss from the purchase and sale of the community residence to her, while Petitioner’s separate real estate equity remains completely untouched.

Further, use of an equitable lien to guarantee payment from one spouse to another is a widely accepted remedy that is intended to protect one party's right to reimbursement. *In re Marriage of Miracle*, 101 Wn.2d 137, 139, 675 P.2d 1229 (1984), citing *In re Marriage of Harshman*, 18 Wash.App. 116, 567 P.2d 667 (1977), and Cross; *The Community Property Law in Washington*, 49 Wash.L.Rev. 729, 776 (1974). The trial court may impose an equitable lien to protect the reimbursement right when the circumstances require it. *Id.*, citing Cross, 49 Wash.L.Rev. at 776-77.

Petitioner contends that the trial court awarded property at the value it had at the time of acquisition instead of separation or trial, and ordered him to reimburse the wife for the decrease in value over the period of their marriage, their separation, and after the decree. See Petition for Review at 5. This contention is incorrect and contrary to the record. In fact, the trial court used the current market value of both properties in making its decision. CP at 39.

The trial court in this case took into account the loss of value in the real property assets in making a determination of what would be a fair and equitable distribution, considering not only the premarital position of the parties as this was a very short marriage, but also the position in which the decree would leave both parties. While it is true that the court determined

and discussed the current value on the Respondent's initial investment, its decision was based entirely on the actual equity in both remaining properties. CP at 39.

Petitioner points to *Lucker v. Lucker* to support his position that the case at hand is somehow at odds with prior rulings of the higher courts. This contention simply does not make sense in light of the record. In *Lucker v. Lucker*, this Court found that the formula employed by the trial court considered only the value at the time of trial and ignored depreciation during the seven-year period in which the parties had been separated. *Lucker v. Lucker*, 71 Wn.2d 165, 167, 426 P.2d 981 (1967). The Supreme Court stated that appreciation as well as depreciation should be considered in making an equitable division of property. *Id.* at 168.

Here, the trial court did, in fact, consider the value of the properties at the time of acquisition and the time of trial, and adjusted the award of property to each party for depreciation accordingly. CP at 39. The decisions of the trial and appellate court are in line with the principles outlined in *Lucker*.

Petitioner contends that the court ignored the characterization of assets as separate or community in contravention of case law and statutes. This argument is without merit when considered in light of relevant

precedent. Here, the trial court found the funds used to purchase the marital home were the wife'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 the character of a separate asset is established, it retains its separate character unless change by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary. *In re Marriage of Skarbeck*, 100 Wn.App. 444, 447, 997 P.2d 447 (2000). Further, the Supreme Court held that property acquired during the marriage has the same character as the funds that were used to purchase it. *In re Marriage of Chumbley*, 150 Wn.2d 1, 6, 74 P.3d 129 (2003).

Applying these standards to the present case, it is clear the real property at issue was properly characterized by the trial court. The court found the parties agreed that they would sell the wife's premarital home and use the proceeds from that sale to purchase a marital home. CP at 39. The court further found the wife had clearly traced her separate property contribution to the marital real property. CP at 39.

Even if the nature of the property is mischaracterized, this is not grounds for setting aside the 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). This Court has held that it “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 (1985). This 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.

In *Marriage of Worthington*, the Supreme Court ruled that even though the trial court may have not properly characterized the property in dispute, the court’s approach was correct in light of the facts of the case and Washington statute. The Court emphasized the necessity of a just and equitable division of property, and the law which provides that all property of the parties, whether separate or community, is subject to the jurisdiction of the court. *In re Marriage of Worthington*, 73 Wn.2d 759, 440 P.2d 478 (1998).

Applying these standards to the present case, it is apparent the appellate court was correct in upholding the trial court’s characterization and distribution of the parties’ community and separate property. The trial court engaged in a thoughtful analysis of the particular facts of the case. CP at 39. The trial court noted that only providing the wife the remaining

equity in the marital home would leave the husband with an equity in his pre-marital residence of \$230,000, after he had benefitted from the use and enjoyment of the marital residence as both his home and office during the marriage, as well as while this case was pending. CP at 39. The husband would have benefitted unduly from the parties' decision to sell the wife's premarital home and keep his premarital home. CP at 39.

Pursuant to the findings of fact entered by the trial court, not only were all assets and debts characterized, they were properly characterized. The trial court found, and the Court of Appeals agreed, that it was a fair and equitable decision in light of all the relevant circumstances and the particular facts of this case that the parties should equally divide the equity in both remaining properties. CP at 39, *Midkiff* at 7.

3. *This case does not involve a significant question under the Constitution of the State of Washington or of the United States.*

Petitioner makes no allegation this matter involves any significant question under the Constitution of the State of Washington or of the United States, and as such, Petitioner has no basis for review of this case under section of RAP 13.4(b)(3).

4. This case involves no issue of substantial public interest that has not been adequately addressed by the Supreme Court.

There is no legal issue of substantial public interest requiring Supreme Court review in this case. It appears that Petitioner is claiming because there is no case exactly like this one, there is no authority for the court to follow and so the trial court's decision and the subsequent Court of Appeals decision must have been in error, or that this case somehow takes on more importance. This argument is without basis in fact or law. Although there may not be a case that mirrors the exact facts of the case at hand, this in and of itself does not mean that the precedent set by the higher courts is insufficient or inadequate to guide the lower courts in determining what is fair and equitable when distributing property and debts in a dissolution proceeding. There are numerous higher court cases which address the division of property and debts in a dissolution. There are even numerous higher court cases that address the division of real property.

Petitioner consistently argues genuine issues of material fact to this Court. It is not the duty of the Court of Appeals or the Supreme Court to re-decide every decision of the trial court. *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671 (2005). The trial court is in the best position to view all evidence, testimony, and exhibits before it and make an adequate

determination of the facts in its findings. *In re Sego*, 82 Wash.2d 736, 640, 513 P.2d 831 (1973). Only when there is a complete absence of findings or a clear and obvious manifest abuse of discretion on the part of the trial court in making conclusions of law based upon those findings, will or should the higher courts remand for re-determination. *In re Miles* at 69.

In this case, the record clearly supports the findings of fact and rulings of the trial court, as well as the decision of the Court of Appeals to uphold the trial court's determinations. The existing legal framework in regard to property distribution in a dissolution is more than adequate to provide clear guidance and discretion to the trier of fact.

There is no basis for this Court to carve out a new set of rules that apply only in the narrowest of circumstances and create exceptions to longstanding laws where none existed and should not exist, as this would create uncertainty for trial courts and impede upon the broad discretion that has been afforded to them as a matter of necessity.

F. CONCLUSION

The trial court heard and reviewed the evidence, considered the financial circumstances of the parties, and made a fair and equitable division of the property. The burden rests on Petitioner to prove to this Court that his Petition for Review falls within the provisions of RAP

13.4(b). He has failed to do so. Respondent respectfully requests this
Court DENY Petitioner's Petition for Review.

DATED the 18th day of April, 2014.

RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script that reads "Laurie G. Robertson". The signature is written in black ink and is positioned above the printed name and title.

Laurie G. Robertson, WSBA#32521
Attorney for Respondent

OFFICE RECEPTIONIST, CLERK

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Dear Clerk of the Supreme Court,

Attached please find copies for filing of the following documents in Cause No. 900442, Shelley Midkiff v. Steven Midkiff:

Respondent's Response to Petition for Review
Affidavit of Service

These documents are being filed by Sarah E. Hovland, WSBA # 42609 on behalf of Laurie G. Robertson, WSBA # 32521, Attorneys for Respondent Shelley Midkiff.

If further information is needed to ensure timely filing of these documents, please contact me at sarahh@washingtonstateattorneys.com, or at (206) 624-3644. Thank you.

Sincerely,

Sarah Hovland

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