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NO. 65328-8-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Marriage of:

Denise Babcock, Respondent,

v.

Allen Wayne Babcock, Appellant.

BRIEF OF RESPONDENT

Katherine E. Blaine, WSBA #20187
Law Office of Katherine E. Blaine, PLLC
P.O. Box 97
Eastsound, WA 98245
(360) 376-5234 (tel) / (360) 376-5235 (fax)

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A. INTRODUCTION

The trial court's characterization and distribution of the Orcas family home is the primary issue on appeal. Mr. Babcock contends that the trial court erred in finding that the Orcas family home was community property. This is not an accurate representation of the trial court's ruling. The trial court determined that the Orcas family home was presumptively community property because it was acquired during the marriage. It found that Mr. Babcock failed to rebut the community property presumption to establish the home as separate property. The court then determined that the language in the statutory warranty deed rebutted the community property presumption to establish that the parties owned the home as joint tenants, and awarded Mrs. Babcock an undivided one-half interest in the property.

This case turns on the burden of proof and whether substantial evidence supports the trial court's determination because Mr. Babcock failed to provide clear and convincing evidence that the parties used separate funds to purchase the home. Mr. Babcock disregards the community property presumption for the Orcas family home and incorrectly places the burden of proof on Mrs. Babcock. Instead of showing that he used separate assets to purchase the Orcas home, he

argues that Mrs. Babcock failed to show that parties used community assets to purchase the home. His argument is misplaced and the trial court's decision should be upheld.

B. STATEMENT OF THE ISSUES

Does substantial evidence support the trial court's determination regarding the character of the Orcas family home where Mr. Babcock failed to produce the amount of evidence necessary to convince the trial court that it was highly probable that the parties had only separate funds with which to purchase the home (1) because it is undisputed that the parties received community gift funds during the marriage, (2) because it is undisputed that the parties used \$50,000 from a joint account containing commingled funds towards the purchase of the home, and (3) because the community had an interest in the sale proceeds of Michigan property that were commingled with other funds to purchase the home, as shown from trial court's determination that a rezoning of the Michigan property was not entirely responsible for the increased value of the property, a factual determination that is entitled to deference.

C. STATEMENT OF THE CASE

The parties, Denise and Allen Wayne Babcock, were married on June 21, 1995 and separated on September 28, 2007. RP 34 (Vol. I). They have 3 children. RP 36; 134; 139 (Vol. I); Mrs. Babcock was age 19 and Mr. Babcock was age 44 when they were married. RP 149-150

(Vol. V). Mrs. Babcock was just out of high school degree and had completed only one year of college when they were married. RP 18-19 (Vol. I). Mrs. Babcock's only employment outside the home during the marriage was working for nine months at the preschool that her son attended. RP 67 (Vol. I). Mrs. Babcock was primarily responsible for taking care of the children during the marriage. RP 67 (Vol. I). Mr. Babcock wanted her to stay home to raise their children. RP 42 (Vol. I). Mr. Babcock worked only sporadically during the marriage. He did not work in 1996. RP 16 (Vol. VI). He didn't work much in 1997 or 1998. RP 16 (Vol. VI). In 1999, he began working as an outside contractor with Eastsound Water, helping with their computer system. RP 16 (Vol. VI). He was earning over \$50,000 a year as the office manager and information systems manager when his employment ended in June 2005. RP 130 (Vol. IV). He did not seek employment thereafter until the parties separated. RP 131 (Vol. IV).

The day before they were married, the parties signed an "Agreement in Contemplation of Marriage". RP 32 (Vol.I); Ex 96. Mrs. Babcock felt like she had didn't have a choice about it and it made her very uncomfortable and sad. RP 32 (Vol. I). Mr. Babcock's attorney informed the trial court that he was not asking for enforcement of the document. RP 132 (Vol. VI). Finding of Fact 2.7, which is unchallenged, establishes that there is no written prenuptial agreement. CP 13.

Mr. Babcock's parents gifted the parties approximately \$20,000.00 a year during the marriage. RP 126 (Vol. IV); Appellant's brief, pg. 9. This gifting began in 1995, the year when the parties married. RP 127 (Vol.IV). The amount of gifting was consistent each year. RP 43 (Vol. I). His parents wrote a check to both of the parties. RP 44 (Vol. I). In the beginning, his parents wrote it so that both of the parties had to sign it. RP 44 (Vol. I). Eventually, his parents wrote it to both of the parties, but only one of them had to sign it to put it into their checking or savings account. RP 44 (Vol. I). It was Mrs. Babcock's understanding that the gifts were to both of the parties. RP 44 (Vol. I). The parties deposited the gift income into their joint checking account. RP 45 (Vol. I). At this time, they also deposited funds received as monthly payments on a promissory note from Mr. Babcock's ex-wife, Mary Hammer, into their joint checking account. RP 45 (Vol. I). They received interest income earned on various bank accounts during the marriage. RP 43 (Vol. I). The parties deposited funds received during the marriage primarily into their joint checking or joint savings account. RP 81 (Vol. I). At some point during the marriage, their joint checking account contained funds from numerous sources, including gifting income, employment income, and other funds, all commingled together. RP 67-68 (Vol. V).

The parties moved into Mr. Babcock's home in Portage, MI when they were married. RP 35-36 (Vol. I). In 1995, soon after they married, Mr. Babcock built a second story onto the Portage house that doubled the

size of the house. RP 37 (Vol. I). He completed construction before their son was born in August 1996. RP 70 (Vol. V). He produced little income from other employment during this time period. RP 70 (Vol. V); RP 16 (Vol. VI). The record does not contain evidence regarding whether the parties used funds, community and/or separate, for the improvements. The value of the Portage house went up before they sold it. RP 51 (Vol. I). They sold the Portage house in the summer of 1997, shortly before they moved to Washington. RP 52 (Vol. I). They received \$150,000.00 for the Portage property. RP 107 (Vol. IV). Mr. Babcock also removed and sold parts of the Portage house separately, with the permission of the purchasers. RP 13, 14 (Vol. VI). They deposited the Portage property sale proceeds first with the National Bank of Detroit and later with Washington Federal Savings bank. RP 107 (Vol. IV.).

At some point, Mr. Babcock received between \$100,000 to \$150,000.00 from the sale of another property located in South Haven, Michigan. RP 106 (Vol. IV). He first deposited these funds into a bank account at the National Bank of Detroit. RP 106 (Vol. IV). Mr. Babcock testified that the sale proceeds for both properties (the Portage, MI property and for the South Haven, MI property), somewhere between \$250,000 and \$300,000, went into Washington Federal Savings. RP 107 (Vol. IV). He testified that he deposited some additional money from art fairs and from savings at Washington Federal. RP 107 (Vol. IV). He did not identify whether these funds were community or separate assets. RP

107 (Vol. IV). He thinks that around \$340,000 to \$350,000 went to Washington Federal accounts when the parties moved to Washington. RP 107-108 (Vol. IV). The parties moved to Washington in August 1997. RP 52 (Vol. I). Mr. Babcock testified that most of these funds were used to buy the Orcas family home. RP 108 (Vol. IV).

Mrs. Babcock testified that the parties opened a KeyBank joint checking account no. x1698 on August 19, 1997 when they first moved to Orcas Island. RP 42 (Vol. IV); Ex. 35. The first bank statement for this account shows that the parties deposited \$12,949.18 that month, but the record does not establish the source of the deposits. Ex. 35. Mrs. Babcock also testified that the parties had another KeyBank account, no. x3289. RP 43 (Vol. IV). Mr. Babcock testified that they didn't open these accounts until later, after they had bought the family home. RP 119 (Vol. 119). However, on August 25, 1997, the parties wrote a \$50,000.00 check from the KeyBank joint checking account no. x1698 to InterIsland Escrow as a down-payment for the purchase of the Orcas family home. RP 62-63 (Vol. I); Ex. 3. The record does not establish the source of the \$50,000.00. The parties purchased the Orcas family home on September 30, 1997. RP 54-55 (Vol. I); Ex. 2.

The statutory warranty deed for the Orcas family home reflects that the parties took title as "Joint Tenants with Rights of Survivorship and not as Tenants in Common or community property." Ex 2. Mrs. Babcock

testified regarding her understanding of their ownership that it was the family home and that it “was both of ours”. RP 55 (Vol. I).

On April 2, 2010, the trial court entered the Findings of Fact and Conclusions of Law and the Decree of Dissolution in the Babcock case. CP 12-41. These pleadings were filed April 7, 2010. CP 12-41. In conclusion of law 3.8 (1), the trial court determined that the Orcas family home was presumptively community property because the parties acquired it during the marriage. CP 20. Mr. Babcock failed to rebut this presumption because the parties purchased the home with commingled funds and Mr. Babcock failed to trace the funds used to purchase the family home to a separate source. CP 20 . The court determined that the presumption of community property was rebutted by the language in the statutory warranty deed and that the parties held title as joint tenants. CP 20. Accordingly, the court found that Mrs. Babcock had an undivided equal interest with the husband in the Orcas family home. CP 14; FF 2.9.

For the total distribution, the court equally divided the parties’ interest in the following property: the Orcas family home, worth \$678,960.00; the real property parcel adjacent to the home worth \$220,130; the NTCA Benefit Savings Plan, worth \$32,095, and the parties’ IRAs, worth \$36,000 total. It also awarded Mr. Babcock an IRA worth \$55,625.95 as his separate property. CP 13; 34, 38, 39.

The court awarded Mr. Babcock the family home and the adjacent parcel, subject to a promissory note and deed of trust granted to Mrs.

Babcock, which remains unsatisfied. CP 37. The court also ordered Mr. Babcock to pay \$800.00 a month spousal maintenance for 2 years or upon the closing of the sale of the family home, whichever is later. CP 35. The trial court imputed Mrs. Babcock's income at \$10.00 an hour and Mr. Babcock's income at \$20.00 an hour. RP 176 (Vol. VI). The court found that "[t]he wife lacks the financial resources and ability to meet her needs independently because of her age, physical and emotional condition, and financial obligations and because of her difficulty in obtaining full-time employment." CP 14.

D. ARGUMENT

1. Standard of Review

A trial court's characterization of property is reviewed de novo. *See In re Marriage of Marzetta*, 129 Wn.App. 607, 616, 120 P.3d 75 (2005). However, the appellate court ". . . will not substitute its judgment for that of the trial judge in resolving factual disputes." *See In re Marriage of Janovich*, 30 Wn. App. 169, 171, 632 P.2d 889 (1981). ". . . [T]he factual support for the court's characterization requires only for substantial evidence." *See Marzetta* at 616. "The trial court has broad discretion with respect to property division in a dissolution action and will be reversed only upon a showing of a manifest abuse of discretion. A manifest abuse of discretion is present if the court's discretion is exercised on untenable grounds." *In re Marriage of Olivares*, 69 Wn. App. 324, 328, 848 P.2d 1281, review denied, 122 Wn.2d 1009 (1993) (citations omitted).

2. The trial court correctly applied the presumption that the Orcas family home is community property and that Mr. Babcock had the burden of proof to overcome the presumption.

The trial court correctly applied the presumption that Babcock family home on Orcas Island, WA is community property because the Babcocks acquired it during their marriage. “An asset acquired during marriage is presumed to be community property. . . .” *Janovich* at 171. Mr. Babcock contends that the parties used separate funds to purchase the family home and that the Orcas family home is separate property. The spouse asserting that property acquired during marriage is separate property has the burden of overcoming the presumption of community property by clear and convincing evidence. *See Id.* at 171. “The law favors characterization of property as community unless there is no question of its separate character.” *In re Marriage of Mueller*, 140 Wn. App. 498, 504, 167 P.3d 568 (2007). Mr. Babcock had the task of overcoming this heavy burden with clear and convincing evidence of the property’s separate character. *See Id.*

3. The trial court correctly determined that Mr. Babcock failed to rebut the community property presumption because he failed to trace the funds used to purchase the Orcas family home to a separate property source.

Mr. Babcock had the burden of proving the property’s separate character by clearly and convincingly tracing the funds used for the acquisition to a separate source. *See In re Marriage of Chumbley*, 150 Wn.2d 1, 6, 74 P.3d 129 (2003); *In re Marriage of Skarbek*, 100 Wn. App. 444, 448, 997 P.2d 447 (2000). However, Mr. Babcock made little or no

effort to trace the funds. He did not identify the bank account from which the parties drew the purchasing funds. Instead, he testified generally that they purchased the home with funds deposited at Washington Federal Savings. RP 107-108 (Vol. IV). However, he provided no bank statements and did not identify the actual account or account number. Moreover, his recollection is incomplete or faulty as the down payment came from a KeyBank joint checking account, not from Washington Federal. Ex 3; RP 62, 63 (Vol. I). It is not clear whether the parties paid the remaining amount owed for the family home with funds from Washington Federal or KeyBank, or some combination thereof, but Mr. Babcock's testimony that he "think[s]" the funds at Washington Federal included "some savings" illustrates that he didn't know the source of all the funds that he claims went into the family home. RP 107-108 (Vol. IV). Further, there is no documentation showing the purchase price of the home or the amount of funds that they used for the purchase. Mr. Babcock's "best recollection" that they paid \$290,000 is merely a guess. RP 113 (Vol. IV). Therefore, Mr. Babcock failed to adequately identify the funds used to purchase the family home, which made it impossible for him to trace the source of the funds to a separate source.

4. The trial court correctly determined that in absence of direct tracing, Mr. Babcock had the burden of rebutting the community property presumption with proof that separate assets were the only assets available to purchase the family home.

In absence of tracing, Mr. Babcock claims that separate assets were the only assets available for purchasing the family home. He must prove

this by clear and convincing evidence. *See Janovich*, at 171. “The requirement of clear and convincing evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose.” *In re Marriage of Berol*, 37 Wash.2d 380, 382, 223 P.2d 1055 (1950).

Mr. Babcock relies in part on the identification of assets set forth in the “Agreement in Contemplation of Marriage” to establish that he had sufficient separate assets for the purchase of the Orcas family home.

Ex.96. However, Mr. Babcock informed the court that he was not asking to enforce such document. RP 132 (Vol. VI). Finding of Fact 2.7 establishes that there is no written prenuptial agreement. CP 13. Further, the document only lists assets as of the date of marriage and does not answer the question of whether the parties had accumulated community assets over two years later. “Evidence that a spouse had adequate separate funds available to purchase property is insufficient to overcome the presumption that an asset acquired during marriage is community property unless separate assets are the only assets available.” *In re Marriage of Hurd*, 69 Wash.App. 38, 50, 848 P.2d 185, *review denied*, 122 Wn.2d 1020 (1993), *disapproved on other grounds by In re Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009) (emphasis added).

- a. **The trial court’s finding that community funds existed is a verity on appeal.**

Mr. Babcock did not assign error to the trial court's finding that the Babcocks had community assets, set forth in finding of fact 2.21(1).

Therefore, it is a verity on appeal. See *United Nursing Homes v. McNutt*, 35 Wn.App. 632, 635, 669 P.2d 476 (1983). This finding is set forth as follows:

Character of Family Home: The parties were married in 6/21/1995. On 9/30/1997, they purchased the family home located at 2232 Enchanted Forest Rd., Eastsound, WA. Exhibit #2, the Statutory Warranty Deed, sets forth that the parties "acknowledge their intent to acquire and hold title to the above-described real property as Joint Tenants With Rights of Survivorship and not as Tenants in Common or community property." Exhibit #3 shows that the parties applied \$50,000.00 from a joint bank account towards the purchase of the property. The testimony established that the remaining payment for the property also came from a joint bank account because the parties did not have any separate bank accounts at the time of purchase. The testimony established that the community received annual gifting of approximately \$10,000.00 in the form of checks written to both parties and endorsed by both parties during the approximately 2 ½ years of marriage prior to the purchase of the family home. The gifted funds were commingled with funds in the parties' joint account(s). During the marriage, prior to the purchase of the family home, the parties made substantial improvements to real property in Michigan and then sold such property. The improvements and community labor made to the Michigan property during marriage increased the value of such property. The Michigan property sale proceeds were commingled with funds in the parties' joint account(s) and applied to the purchase of the family home. The parties also sold the structure on the Michigan property during the marriage as salvage and commingled those sale proceeds with funds in the parties' joint accounts.

CP 18.

b. The trial court correctly determined that Mr. Babcock failed to prove that separate assets were the only assets available to purchase

the family home because substantial evidence supports the court's finding that the community received gift income during the marriage.

The court's finding 2.21(1) is a verity on appeal, but there is also substantial evidence supporting it. For example, it is uncontested that Mr. Babcock's parents gifted the parties approximately \$20,000.00 a year during the marriage. RP 126 (Vol. IV); Appellant's brief, pg. 9. This gifting began in 1995, the year when the parties married. RP 127 (Vol.IV). The amount of gifting was consistent each year. RP 43 (Vol. I). His parents wrote a check to both of the parties. RP 44 (Vol. I). In the beginning, his parents wrote it so that both of the parties had to sign it. RP 44 (Vol. I). Eventually, his parents wrote it to both of the parties, but only one of them had to sign it to put it into their checking or savings account. RP 44 (Vol. I). It was Mrs. Babcock's understanding that the gifts were to both of the parties. RP 44 (Vol. I). The trial court found that these gift funds were community. CP 18. The parties deposited the gift income into their joint checking account. RP 45 (Vol. I).

These gift funds are presumed to be community property absent a clear intent by the donor otherwise because the funds were given to both the husband and wife and acquired during the marriage. *See e.g. Olivares* at 331. The Babcocks had received over \$40,000.00 when they bought their Orcas family home after two plus years of marriage. This amount alone is a substantial amount of community property available for purchase of the Orcas family home.

The parties created additional community property by comingling their community gift funds with other funds in their joint account(s). “Commingling occurs when: (1) A substantial amount of separate property is (2) intermixed with (3) a substantial amount of community property to the extent that (4) it is no longer possible to identify whether the remainder is the separate property portion or the community property portion. When commingling has occurred, all of the asset becomes community property, and any asset acquired from the commingled asset is community property.” *In re Marriage of Shui*, 132 Wn. App. 568, 584, 125 P.3d 180 (2005), *review denied*, 158 Wn.2d 1017 (2006).

Here, the parties deposited the gift funds into a joint account. RP 44 (Vol. I). They deposited other funds, such as the monthly payments from Mr. Babcock’s ex-wife, into their joint account(s). RP 45 (Vol. I). They received interest income earned on various bank accounts during the marriage. RP 43 (Vol.I). The pooled funds are community property because Mr. Babcock did not trace, distinguish or apportion the separate funds. *See Skarbek* at 448.

Any suggestion by Mr. Babcock that the parties paid their living expenses with the gift income is simply unsupported by substantial evidence. *See e.g., Pollock v. Pollock*, 7 Wn. App. 394, 404-405, 499 P.2d 231 (1972). Mr. Babcock’s brief, self-serving statement on this point fails to specify any expenses or provide an accounting, and actually refers to the time period *after* they bought the Orcas family home. Therefore, Mr.

Babcock failed to prove that the community property gift income was not available to the parties at the time when they bought the home.

c. The trial court correctly determined that Mr. Babcock failed to prove that separate assets were the only assets available to purchase the family home because substantial evidence supports the court's finding that the community had an interest in the proceeds from the sale of their Portage, MI home.

The existence of the parties' community property gift income and commingled funds defeats Mr. Babcock's argument that the parties had only separate assets with which to purchase the Orcas family home. Therefore, it is unnecessary for the appellate court to determine the character of the Portage, MI property sale proceeds.

Nevertheless, there is substantial evidence supporting the court's finding that the community had an interest in the sale proceeds because community labor was used to make substantial improvements to the house during the marriage. There is a community property interest in the increase in value to separate property when there is direct and positive evidence that the increase is attributable to community funds or labors. *In re Marriage of Elam*, 97 Wn.2d 811, 812; 816, 650 P.2d 213 (1982). In addition, any increase due to inflation is divided in proportion to community and separate contributions. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 869, 855 P.2d 1210 (1993).

Here, Mr. Babcock owned a home in Portage, MI before marriage. RP 106 (Vol. IV). In 1995, soon after they married, Mr. Babcock built a second story onto the Portage house that doubled the size of the house.

RP 37 (Vol. I). He completed construction before their son was born in August 1996. RP 70 (Vol. V). He produced little income from other employment during this time period. RP 70 (Vol. V). Rather, he used community labor to make improvements to the home. The value of the Portage house went up before they sold it. RP 51 (Vol. I). They sold the Portage house in the summer of 1997, shortly before they moved to Washington. RP 52 (Vol. I). They received \$150,000.00 for the Portage property. RP 107 (Vol. IV). Mr. Babcock removed and sold parts of the Portage house separately, with the permission of the purchasers. RP 13, 14 (Vol. VI). They deposited the Portage property sale proceeds first with the National Bank of Detroit and later with Washington Federal Savings bank. RP 107 (Vol. IV.). Mr. Babcock testified that these funds were used towards the purchase of the Orcas family home. RP 108 (Vol. IV).

This evidence is sufficient for the court to determine that community labor contributed to the increase in value to the Portage, MI house, which rebuts the presumption that the sale proceeds were entirely separate property. *See, e.g., In re Marriage of Brady*, 50 Wn.App. 728, 731, 750 P.2d 654 (1988). In *Brady* at 730, the court determined that the wife successfully rebutted the presumption that the increased value of the husband's separate property was entirely separate property. The facts supporting this determination are similar to the Babcock case where the *Brady* court states that “[s]ubstantial improvements were made after the

marriage which increased the size of the house and accordingly the market value of the property.” *Id.* at 730.

With the presumption removed, the burden shifted back to Mr. Babcock, as it did with the husband in *Brady*, to prove that increase in value was entirely separate property. *Id.* at 731. Mr. Babcock argues that the increase in the Portage property value was due entirely to a rezoning of the property and not attributable at all to community labor. He relies on Mrs. Babcock’s testimony, but Mrs. Babcock does not testify clearly that the entire increase in value was due to the rezone. RP 51-52 (Vol. I).

Like Mr. Babcock, the husband in *Brady* attempted to show that the increase in value was the result solely of separate activity. *Id.* at 731.

Unlike Mr. Babcock, who provided no documentation, the *Brady* husband produced tax assessment records showing values for the property over the course of several years. *Id.* In both cases, however, the husbands’ evidence did not convince that trial court that the increase in value was entirely separate property. *See Brady* at 731 (emphasis added).

The Babcock trial court decided this factual issue in light of Mr. Babcock’s burden of proof. “The clear, cogent and convincing evidence burden of proof contains two components: (1) the amount of evidence necessary to submit the question to the trier of fact or the burden of production, which is met by substantial evidence, and (2) the burden of persuasion. As to the burden of persuasion, the trier of fact, not the appellate court, must be persuaded that the fact in issue is ‘highly

probable.” *Endicott v. Saul*, 142 Wn.App. 899, 909-10, 176 P.3d 560 (2008). Here, Mr. Babcock failed to produce substantial evidence sufficient to convince the trial court that it was highly probable that the rezone caused the Portage, MI property increase in value.

The trial court’s weighing of the testimony and determination of factual issues is entitled to deference: “In evaluating the persuasiveness of the evidence and credibility of witnesses, we (the appellate court) must defer to the trier of fact.” *Id.* at 909. “It is for the trial court, and not this reviewing court, to determine whether the evidence in a given case meets the standard of persuasion designated as “clear, cogent and convincing.” *Id.* at 910. “Thus, the appellate court’s role is limited to determining whether substantial evidence supports the trial court’s findings of fact.” *Id.* at 910. “Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true.” *Id.* at 909. “In determining the sufficiency of the evidence, an appellate court need only consider evidence favorable to the prevailing party.” *Id.*

Therefore, the appellate court in this case should not weigh the evidence by considering whether the rezone was responsible for the property increase in value. The appellate court simply needs to determine whether there is evidence sufficient to persuade a rational, fair-minded person that community labor contributed to the value of the Portage property. There is sufficient evidence of this fact because it is undisputed

that Mr. Babcock used community labor to make substantial improvements to the Portage property and that it went up in value.

Further, it was not necessary for the Babcock court to determine the *amount* of the increase in value attributable to community labor because the relevant determination is simply that a portion of the increase in value is attributable to the community. The community had an interest in the Portage property; therefore, a portion of the proceeds from the sale of the Portage property were community property. It is further evidence that the parties had community assets available for purchase of the Orcas family home.

This is especially true because the parties commingled the Portage sale proceeds with other funds, rendering all such funds into community property. They combined the Portage, MI sale proceeds with the sale proceeds from a South Haven, MI property in a deposit at Washington Federal Savings. RP 107-8 (Vol.IV). The total amount of the combined sale proceeds was \$250,000 to \$300,000. RP 107-8 (Vol. IV). They also pooled other funds with these sale proceeds for a total deposit of \$340,000 to \$350,000 at Washington Federal Savings. RP 107-8 (Vol. IV). Mr. Babcock made no effort to keep the separate and community funds separate. When he commingled the funds, he lost the benefit of the presumption that his separate funds remained separate and he assumed the burden of proving the separate character of the funds. *See Skarbek*, 100 Wn. App. at 449. However, he did not trace or identify the separate

funds. Therefore, the entire amount became community property, meaning that the parties had between \$340,000.00 and \$350,000 available for the purchase of the Orcas family home.

d. The trial court correctly determined that Mr. Babcock failed to prove that separate assets were the only assets available to purchase the family home because there is substantial evidence that the \$50,000.00 used as a down payment on the Orcas family home was community property.

Additional evidence of community property is the \$50,000.00 check that the parties wrote from a KeyBank joint checking account during the marriage and made payable to the escrow company for the down payment on the Orcas family home. RP 62-62 (Vol. I); Ex 3. The name of each party was on the account. Ex. 3. The parties opened the account during the marriage, after they moved to Washington in August 1997. RP 42 (Vol. IV). The funds in a joint bank account established during the marriage are presumed to be community property. *See, e.g., In re Marriage of Zahm* 138 Wn.2d 213, 225, 978 P.2d 498 (1999). “Joint tenancy interests held in the name of both spouses . . . are presumed to be their community property.” RCW 64.28.040(1). Mr. Babcock had the burden to rebut the presumption by tracing the separate deposits and showing that the funds were separate. *See Chumbly*, 150 Wn.2d at 5. This he failed to do. He cannot support his claim that the \$50,000 came from his separate accounts in Washington because (1) he failed to prove that he had any separate accounts in Washington and (2) because he failed to provide any testimony or documentation that he transferred any funds

from any separate account into the KeyBank joint checking account.

There is absolutely no evidence of the source of the \$50,000 in the KeyBank joint checking account.

Further, he cannot claim that the parties had only separate assets (and, therefore, that the \$50,000 was separate property) because the parties clearly had community property from gift funds, real estate sale proceeds, and commingled funds. On the contrary, Mr. Babcock concedes that the parties commingled funds in this KeyBank joint checking account in the process of purchasing the Orcas family home. *See Appellant's brief, Section 3(b), page 10.* By definition, commingling is the combination of substantial amounts of community and separate property such that the entire amount becomes community property. *See Shui*, 132 Wn.App. at 584. It is irrelevant whether the commingling is brief. *See Skarbek* at 448. Mr. Babcock cannot support his assertion that the community assets in the KeyBank account are minimal and that the parties only used the separate funds in the account because he failed to segregate the funds in the account. Therefore, his concession here that the parties had community assets in their KeyBank joint account shows not only that the \$50,000.00 check was community property; it conclusively contradicts his own argument that the parties had only separate assets with which to purchase the family home.

e. The trial court determined correctly that the parties acquired the property as joint tenants with right of survivorship.

The trial court applied the community property presumption because the parties acquired the family home during marriage, not because the parties took title in both names. Therefore, the issue of the parties' intent as addressed by the court in *In re Estate of Borghi*, 167 Wn. 2d 480, 219 P.3d 932 (2009) is not present in this case. The statutory warranty for the Orcas family home reflects that the parties took title as "Joint Tenants with Rights of Survivorship and not as Tenants in Common or community property." Ex. 2. The trial court correctly determined that the language in the deed itself rebutted the presumption of community property and that the parties took title to the home as joint tenants with right of survivorship. RP 168 (Vol. VI).

5. The appellate court should affirm the property distribution as fair and equitable.

The primary consideration in a dissolution case is whether the trial court's division of property is fair, just and equitable under all the circumstances. See *In Re Marriage of Zier*, 136 Wn. App. 40, 46, 147 P.3d 624 (2006), *review denied*, 162 Wn.2d 1008 (2007). Therefore, "... a dissolution court's mischaracterization of property is rarely a proper basis to reverse the court's property distribution." *Id.* "Where there is mischaracterization, the trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization." *Olivares*, 69 Wn. App. at 330.

Here, the court properly characterized the property, but its distribution is just and equitable under any circumstances. The court equally divided the property, except for one large account that it awarded to Mr. Babcock as separate property. After a 12 year marriage (as of date of separation), where Mrs. Babcock sacrificed her education and employment to work in the home and raise their children, it would be inequitable, punitive, and leave her in significantly compromised economic circumstances to distribute the property as requested by Mr. Babcock.

6. The court should award reasonable attorney's fees to Mrs. Babcock.

Mrs. Babcock requests attorney fees on appeal under RAP 18.1(a) and RAP 18.9(a) because this appeal is frivolous. "An appeal is frivolous 'if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.'" *In re Marriage of Zier*, 136 Wn. App. at 49. "In awarding attorney fees on appeal, the court should examine the arguable merit of the issues on appeal and the financial resources of the respective parties." *In re Marriage of Booth*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990).

The issues raised on appeal by Mr. Babcock have no arguable merit. Mr. Babcock's analysis is irreversibly flawed because he overlooks the community property presumption and improperly shifts the burden of proof to Mrs. Babcock with his incorrect assertion that a continuing

separate property presumption applies to the Orcas family home.

Appellant's brief, pg. 11. His analysis of the issues is further confused because he begins with a discussion of an entirely different piece of property, the Portage, MI family home. He also makes several crucial factual assertions that are unsupported by the record. For example, the following assertion by Mr. Babcock is completely false: "Wayne testified that his separate property investments and the proceeds from the sale of the Portage property were transferred into the joint checking account solely for purposes of purchasing the Orcas property." *Appellant's brief, pg. 8, citing RP (Vol. VI) 13-14.* An examination of the record reveals that Mr. Babcock identified separate property investments and the Portage sale proceeds as funds used towards the purchase of the Orcas home. RP 14-15 (Vol. VI). However, he did not testify that these funds were transferred into the joint checking account solely for purposes of purchasing the Orcas property. RP 14-15 (Vol. VI). Rather, he testified that the money from the promissory note was transferred to their joint account and eventually used to create two CDs in 1999 and 2000. RP 15 (Vol. VI). When Mr. Babcock speaks about the "money from the promissory note", he is referring to the final pay-off of the promissory note in the amount of \$196,610.84 that the parties received in 1999, after they bought the Orcas family home. RP 5-6 (Vol. V).

For these reasons, Mr. Babcock's appeal has no merit and the Court should award attorney fees to Mrs. Babcock.

In addition and/or in the alternative, Mrs. Babcock also seeks attorney fees for this appeal under RCW 26.09.140, which provides that a court may award costs and fees on appeal after considering the financial resources of the parties. Mr. Babcock was awarded the family home and the adjacent parcel subject to a promissory note and deed of trust granted to Mrs. Babcock, which remains unsatisfied. The IRAs awarded to Mrs. Babcock, the only “liquid” assets awarded to her, are impractical and expensive to liquidate. The court ordered Mr. Babcock to pay spousal maintenance because of Mrs. Babcock’s lack of financial wherewithal. In finding of fact 2.12 (1), the court found that “[t]he wife lacks the financial resources and ability to meet her needs independently because of her age, physical and emotional condition, and financial obligations and because of her difficulty in obtaining full-time employment.” The trial court imputed Mrs. Babcock’s income at \$10.00 an hour. RP 176 (Vol. VI). Therefore, Mrs. Babcock lacks the ability to pay her attorney fees related to this appeal. Mr. Babcock has substantial assets and the court imputed his income at \$20.00 an hour. RP 176 (Vol. VI). He also has the ability to borrow large sums of money from his parents, which he received in lieu of the gifting during the pendency of this action. RP 119 (Vol. IV). Mr. Babcock has the ability to pay Mrs. Babcock’s attorney’s fees.

A third basis for an award of attorney’s fees to Mrs. Babcock is the unnecessary delay in this appellate process caused by Mr. Babcock and his lack of compliance with the Rules of Appellate procedure.

On August 3, 2010, the Clerk of the Court of Appeals notified the parties of its motion to dismiss because the clerk's papers were not of record in the Court of Appeals as required by RAP 9.7(a). On August 12, 2010, the Clerk's Papers and Exhibits were forwarded to the Court of Appeals. The San Juan County Clerk notified the Court that it identified where Appellant designated exhibits in the Appellant's Designation of Exhibits that were not offered nor admitted at trial. This is an unusual and confusing irregularity caused by Mr. Babcock.

On September 27, 2010, the Clerk of the Court of Appeals notified the parties of its motion to impose sanctions and/or dismiss in accordance with RAP 18.9 because the appellant's brief was not of record at the Court as required by RAP 10.2(a). Mr. Babcock's brief had been due the week before, on September 20, 2010 (45 days after the court reporter filed the Verbatim Report of Proceedings on 8/5/10). The Court did not accept Mr. Babcock's attempt to file a motion for extension of time electronically on October 7, 2010 for lack of written stipulation regarding electronic filing. The Court granted an extension of time at the hearing on the Court's motion on October 8, 2010. Mr. Babcock's brief did not file appellant's brief until November 12, 2010.

Mr. Babcock caused further delay by failing to timely provide a copy of the verbatim report of proceedings to respondent with service of the appellant's brief as required by RAP 9.5(a)(1). Respondent received the appellant's brief on November 15, 2010 and notified Mr. Babcock's

attorney on November 17, 2010 of its request for a copy of the report of proceedings. Respondent did not receive the report of proceedings until November 22, 2010. This delay caused further delay in that it caused Respondent to have inadequate time to prepare Respondent's brief, necessitating a motion to extend time. These facts are sworn to in the declaration of counsel submitted with the motion, which was granted by the Court.

The Court may impose terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply the rules. RAP 18.9(a). Mrs. Babcock has incurred additional attorney fees as the result of Mr. Babcock's lack of compliance with the rules and has been harmed by the delay in resolution of this matter. The Court should award attorney's fees to Mrs. Babcock.

E. Conclusion

Substantial evidence support the trial court's determination regarding the character of the Orcas family home because Mr. Babcock failed to produce the amount of evidence necessary to convince the trial court that it was highly probable that the parties had only separate funds with which to purchase the home. It is undisputed that the parties received community gift funds during the marriage. It is undisputed that the parties used \$50,000 from a joint account containing commingled funds towards the purchase of the home. The community had an interest in the sale proceeds from Michigan property that were commingled with other funds

to purchase the Orcas home because the trial court's determination that the increase of value to Mr. Babcock's separate property was not entirely due to a rezoning of the property is entitled to deference. This is substantial evidence supporting the trial court's determination regarding the character of the family home. The appellate court should affirm the trial court's decision and award attorney's fees to Mrs. Babcock for the reasons set forth herein.

Respectfully submitted this 21st day of January, 2011.



Katherine E. Blaine
Attorney for Respondent / WSBA #20187
Law Office of Katherine E. Blaine, PLLC
P.O. Box 97
441 North Beach Road, Suite A
Eastsound, WA 98245
(360) 376-5234 (tel) / (360) 376-5235 (fax)