

No. 36736-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

LEE GREELEY, Appellant

vs.

ROGER C. NISBET, Respondent

FILED
COURT OF APPEALS
DIVISION II
08 JAN 23 PM 1:03
STATE OF WASHINGTON
BY  DEPUTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in finding that the parties had an implied partnership or joint venture in the boat shed.
2. The trial court erred in finding that Roger had an equal interest in the boat shed.
3. The trial court's order allowing Roger to purchase the boat shed from Lee for half of its fair market value was an abuse of discretion, resulting in a windfall to Roger and a manifest injustice to Lee.

Issues Pertaining to Assignments of Error

Do co-tenants have an implied partnership or joint venture where there is no demonstrated business relationship or intent to engage in a for-profit enterprise?

How are the respective interests of co-tenants determined?

Does a trial court abuse its discretion by applying its own notions of what is fair and equitable in the absence of an equitable framework?

B. STATEMENT OF THE CASE

Lee Greeley and Roger Nisbet met in September 1997. RP 159. Lee's husband of twenty-seven years had died a year earlier. RP 160-61. Both parties were sixty-three years old at the time of trial in June 2007. RP 6. Lee and Roger vacationed together in Baja during the winter of

1997-98. RP 27. When they returned to Port Townsend in April 1998, Lee accepted Roger's invitation to live with him on his boat, the Crusoe. RP 28.

When they began living together, Roger owned his boat, the Crusoe, two late-model vehicles, and some tools. RP 102-03. He had no significant savings or retirement accounts. RP 103. Roger also had a leasehold interest in a boat shed, the ownership of which was the only issue at trial. Roger made his living building and repairing boats, earning approximately \$15 to \$20 per hour. RP 104. Roger testified that, while he earned \$30,000 per year during the time he and Lee lived together, he reported about half of that amount to the IRS, RP 105, identifying that practice as "real common in the boat thing." RP 106.

Lee, by contrast, owned a home in Portland, Oregon with her son and daughter-in-law, RP 160, was receiving contract payments for a home she sold in Alaska, RP 161, had a \$30,000 IRA account, RP 163, was a member of a land trust on Stewart Island, RP 163, and had approximately \$10,000 from the proceeds of a life insurance policy. RP 163.

Lee had income from a variety of sources. She was receiving \$605 a month from the sale of her home in Alaska, RP 162, and \$370 a month from her teacher's retirement. RP 163. She also earned income from performing census work, RP 169, being employed with a not-for-profit

organization, RP 167, and working with Roger on boat-related projects.

RP 166.

Lee and Roger continued to live together, on and off, from April 1998 until December 2004. RP 196. During that those six and one-half years, they kept their finances completely separate RP 35, 172, and each paid for their own living expenses. RP 112-13, 173.

The boat shed at issue at trial is a sixteen by thirty-six foot structure, RP 23, located in the lower Port Hadlock area of Jefferson County. Roger began renting the boat shed from Dennis Dignan in 1985 for \$50 per month. RP 90-91. In addition to the boat shed, Mr. Dignan owned two other structures on the same property. From 1985 until 1997, Roger made various improvements to the boat shed including installing a floor, RP 92, walls, RP 96, a door, RP 98, and electrical wiring. RP 98. All of these improvements were made with Mr. Dignan's permission but with no understanding between them that Roger would be reimbursed or compensated for the tenant improvements. RP 92, 99. Roger testified at trial that he estimated he had expended somewhere between \$12,000 and \$15,000 to improve the boat shed during his tenancy. RP 45.

In 1997, Mr. Dignan formed a condominium association comprised of the three structures on his property which were identified as Buildings A, B and C. RP 142. Mr. Dignan testified that his reason for forming the

condominium association was to give another tenant, Michael Hamilton, the opportunity to own his structure. RP 153. Roger, however, was not offered the opportunity to purchase the boat shed, RP 154, and he continued to rent the boat shed from Mr. Dignan after the condominium was formed. RP 39.

In October 1999, Lee and Roger asked Mr. Dignan whether he would sell them the boat shed. RP 48, 143, 175. Mr. Dignan agreed to sell them the boat shed for \$15,000, which he testified was a "fair price" that was not dependent upon his relationship with Roger or discounted for improvements made by Roger while he was renting the boat shed. RP 145. There is no dispute that the entire purchase price was paid by Lee who cashed in a portion of her IRA. RP 108.

The Quit Claim Deed executed in October, 1999 conveyed title to the boat shed to Lee Greeley and Roger Nisbet. Ex. 4. Roger testified that he assumed that he was an equal owner because of the pre-purchase improvements he had made. RP 59, 108-09. Lee testified that she agreed to place Roger's name on the Deed because she believed it was "the right thing to do." Both parties acknowledged, however, that the entire purchase price was paid by Lee's separate funds. RP 108, 176.

Between October 1999 and September 2002, the parties made additional improvements to the boat shed including partitioning a space in

the rear of the shed for Roger's tools, insulating the structure, dropping the ceiling , installing a stove and a sink, and building shelves. RP 124. At trial, Roger testified that he estimated he had contributed approximately \$2,000 for the improvements and that Lee had contributed approximately \$4,500. RP 52. Lee testified that the improvements cost only \$1,000 to which she and Roger contributed equally. RP 186.

Lee paid the taxes and insurance on the property, RP 178, and Roger continued to pay for the \$20 to \$30 per month electricity bill. RP 35, 114.

In September 2002, Roger dropped his health insurance because he could no longer afford it. RP 183. This concerned Lee who believed the government would "take" the property if Roger incurred medical expenses for which he could not pay. RP 57, 184. At Lee's request, Roger quit claimed the boat shed to her, stating that he did not want to be a "liability." RP 184, Ex. 5. Lee testified that she viewed her initial agreement to place Roger's name on the deed as a "gift" to him and that he later "gifted" it back to her so that she would not lose her investment in the property. RP 185-86. The real estate tax affidavit, signed by both of the parties, reflected that the transaction was considered a "gift." Ex. 6.

After September 2002, Lee continued to make improvements to the property to which Roger did not contribute. RP 128-30. She installed a

composting toilet, arranged for a water hook-up, installed a new roof, and installed new windows. RP 128-30. Lee's testimony was that the improvements totaled approximately \$12,000. Roger did not dispute the cost of these improvements and conceded that he did not contribute funds for the additional improvements. RP 128-30.

Sometime in early 2002, the parties moved into the boat shed and treated it as their primary residence, despite the fact that it was not zoned as residential property. RP 179. Roger also sold his boat, the Crusoe, and used the sale proceeds to pay his separate debts and for his living expenses. RP 86.

By late 2004, the parties' relationship had deteriorated and Lee told Roger that she no longer wanted to be involved with him. RP 192. According to Lee, Roger was unwilling to accept her decision and a domestic violence incident occurred, resulting in a protection order being entered against Roger. RP 197. From December 2004 until the trial in June 2007, Lee continued to reside in the boat shed and made additional improvements. RP 207-08.

Following a one-day trial in Jefferson County, Judge Jay Roof, a Visiting Judge from Kitsap County, found that the parties did not have a meretricious relationship. RP 270. Judge Roof nevertheless found that the parties had either an implied partnership or a joint venture in the boat

shed, RP 272, and that Roger was an equal partner because he had rented it for some years before its purchase, RP 271, he had made improvements to the property prior to its purchase, RP 271, and Mr. Dignan testified that he would not have sold it to Lee but for her involvement with Roger. RP 271. Judge Roof ruled that Roger should be afforded the opportunity to purchase the property from Lee for \$17,500 because the property is "uniquely suitable for his needs, given his vocation." RP 271.

C. ARGUMENT

1. The trial court erred in finding that the parties had entered into an implied partnership or joint venture.

In *Creasman v. Boyle*, 31 Wash.2d 345, 196 P.2d 835 (1948), the Washington Supreme Court held that "in the absence of any evidence to the contrary, property acquired by a man and a woman, not married together, but living together as husband and wife, must be regarded as belonging to the one in whose name the legal title stands." *Id.* at 358, 196 P.2d 835. Although *Creasman* was subsequently overruled in *In re Marriage of Lindsey*, 101 Wash.2d 299, 304, 678 P.2d 328 (1984), Washington courts in the meantime developed numerous exceptions to avoid inequitable results from rigid application of the *Creasman* presumption. These means of avoidance include tracing source of funds, *West v. Knowles*, 50 Wash.2d 311, 313, 311 P.2d 689 (1957),

resulting/constructive trust, *Omer v. Omer*, 11 Wash.App. 386, 523 P.2d 957 (1974), co-tenancy, *Shull v. Shepherd*, 63 Wash.2d 503, 387 P.2d 767 (1963), contract theory, *Dahlgren v. Blomeen*, 49 Wash.2d 47, 298 P.2d 479 (1956), and implied partnership/joint venture, *In re Estate of Thornton*, 81 Wash.2d 72, 79, 499 P.2d 864 (1972).

Even after the Lindsey court held that courts must make a just and equitable disposition of property following a meretricious relationship, *Lindsey*, 101 Wash.2d at 304, 678 P.2d 328, Washington courts continued to recognize the other equitable theories as a basis for recovery in cases where a meretricious relationship did not exist. *Soltero v. Wimer*, 159 Wash.2d 428, 435, 150 P.2d 552 (2007); *Vasquez v. Hawthorne*, 145 Wash.2d 103, 107, 33 P.3d 735 (2001); *In re Marriage of Pennington*, 142 Wash.2d 592, 607, 14 P.3d 764 (2000).

In this case, the trial court held that the parties did not have a meretricious relationship, thereby precluding a just and equitable distribution of property pursuant to the framework set forth in *Connell v. Francisco*, 127 Wash.2d 339, 349, 898 P.2d 831 (1995) ("[T]he property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship.")

The trial court did, however, find that the parties had an implied partnership or joint venture. RP 272. The appellant assigns error to this finding.

In *In re Estate of Thornton*, 81 Wash.2d 72, 499 P.2d 864 (1972), the Washington Supreme Court reviewed the elements of an implied partnership as an equitable basis for an award a property during a long-term relationship. In the *Thornton* case, the parties had operated a cattle-raising business over the course of sixteen years preceding the death of one of the parties. Citing *Nicholson v. Kilbury*, 83 Wash. 196, 202, 145 P. 189, 191 (1915), the court stated the law of implied partnership as follows:

The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence of the partnership may be implied from the circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common purpose, but is in the main inconsistent with any other theory. It is well settled that no one fact or circumstance will be taken as the conclusive test. Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill, and experience, or some of these elements on the one side and some on the other, for the

purpose of joint profits, a partnership will be deemed established.

In a subsequent case, the Washington Supreme Court cited the *Thornton* case in declining to find the existence of an implied partnership between two parties who co-habitated for 15 years prior to marriage during which time a residence was purchased. The Court held that no partnership existed because the petitioner failed to offered proof that he and the respondent entered into a "partnership to operate a business for profit." *Latham v. Hennessey*, 87 Wash.2d 550, 554, 554 P.2d 1057 (1976). The *Latham Court* also noted that the petitioner failed to establish by clear, cogent and convincing evidence that a trust relationship existed. *Id.* (citing *Humphries v. Riveland*, 67 Wash.2d 376, 390, 407 P.2d 967 (1965)).

The cases which have found the existence of an implied partnership or joint venture have all involved business enterprises, not the mere acquisition of property. *In re the Estate of Thornton*, 81 Wash.2d 72, 499 P.2d 864 (1972) (cattle-raising business); *Poole v. Schrichte*, 39 Wash.2d 558, 236 P.2d 1044 (1951) (hair salon/tavern); *Nicholson v. Kilbury*, 83 Wash. 196, 145 P. 189 (1915) (boardinghouse/hotel). In *Omer v. Omer*, 11 Wash.App. 386, 390, 523 P.2d 957 (1974), the Court of Appeals, Division 2, stated:

Without intending to unduly generalize, it appears from our review of the cases that if the joint efforts of the meretricious spouses relates to a business enterprise of some kind, an implied partnership affords the viable theory of recovery. *Poole v. Schrichte*, 39 Wash.2d 558, 236 P.2d 1044 (1951); *In re Estate of Thornton*, *Supra*. Otherwise, the party seeking to establish the claim usually must rely on either a constructive trust theory with its requirement of fraud, overreaching, or inequitable conduct, *Humphries v. Riveland*, *Supra*, or a resulting trust theory with its requirement that the parties must have intended one party would hold the property in trust for the other who furnished the consideration for its purchase.

Finally, the Washington Supreme Court has noted that

"Washington case law indicates that a joint venture is in the nature of a partnership and the rights, duties and liabilities of joint venturers are generally subject to the rules applicable to partnerships." *Malnar v. Malnar*, 128 Wash.2d 521, 524, 910 P.2d 455 (1996).

In this case, neither party offered any evidence that theirs was a "business relationship," or that they were engaging in a for-profit enterprise. To the contrary, the parties gave no indication that either intended to sell the boat shed or that the improvements were being made for the purpose of subsequent profit or income. For these reasons, the trial court's finding that the parties entered into an implied partnership or joint venture was not based on substantial evidence and constituted error as a matter of law.

2. The trial court erred in finding that Roger had an equal interest in the boat shed.

Lee and Roger were not partners, express or implied. Nor were they joint venturers. Instead, their relationship was that of co-tenants. In a case with facts remarkably similar to those in this case, a man and a woman lived together for ten years, during which time they acquired real property in the names of both of the parties. *West v. Knowles*, 50 Wash.2d 311, 311 P.2d 689 (1957) At the conclusion of the relationship, the man contended that he had an undivided one-half interest in the property because it stood in both their names. The court rejected his argument, stating:

Property acquired with contributions from both parties is held as tenants in common, and courts will presume they intended to share the property, in proportion to the amount contributed, where it can be traced, otherwise they share it equally.

West v. Knowles, 50 Wash.2d at 313, 311 P.2d 689. The *West* Court declined to award the man any interest in the real property, noting that "the plaintiff traced the acquisition of the property to her separate funds, which had been derived from the sale of her separate real estate in Othello, Washington, her own earnings, which, of course, were separate because no community existed, and her separate postal savings account." *Id.* at 314, 311 P.2d 689. These facts are virtually indistinguishable from the facts

here. There is no dispute that Lee paid the entire purchase price for the boat house and neither party indicated that she intended to make an overt gift of the property to Roger.

In another case decided that same year, the Washington Supreme Court held:

The presumption that tenants in common hold equal shares when the instrument under which they claim is silent in that regard, is subject to rebuttal. That presumption is rebutted in the present case. When in rebuttal the purchasers of property are shown to have contributed unequally to the purchase price, the general rule is that a presumption arises that they intended to share the property in proportion to the amount contributed by each.

Iredell v. Iredell, 49 Wash.2d 627, 631, 305 P.2d 805 (1957). Again, the facts in the *Iredell* case are strikingly similar to the facts here. A couple living in a meretricious relationship purchased real property, taking title in both their names. The woman paid the \$1,800 down payment and the closing costs from her separate funds and the parties gave a purchase money mortgage for the balance. The court subsequently rejected a creditor's attempt to execute on the man's one-half interest in the property. Instead, the court held that the parties' interests in the property were proportionate to their relative contributions to its purchase price and to the reduction of the principal mortgage balance during the relationship. *Iredell*, 49 Wash.2d at 631, 305 P.2d 805 (1957).

The Supreme Court again applied this rule of apportionment in *Shull v. Shepherd*, 63 Wash.2d 503, 387 P.2d 767 (1963). In the *Shull* case, the court held that parties respective interests in the real property acquired in both their names was in proportion to their respective contributions. *Shull*, 63 Wash.2d at 504, 387 P.2d 767 (1963).

In this case, the parties agreed that the entire \$15,000 purchase price for the boat shed was paid for with Lee's separate funds. The evidence also reflected the fact that the purchase price was "fair" and that no credit, discount, or reimbursement was afforded Roger for the improvements he made while renting the property.

The evidence also reflected the fact that the parties subsequently expended an additional \$13,000 in improvements, to which Roger contributed \$500 and Lee contributed \$12,500. Based on the Court's decisions in *Iredell*, *Shull* and *West*, the trial court should have concluded that Lee had a greater than 98% interest in the boat shed, while Roger's interest was less than 2%.

3. The trial court's order allowing Roger to purchase the boat shed from Lee for half of its fair market value was an abuse of discretion, resulting in a windfall to Roger and a manifest injustice to Lee.

Trial courts have broad discretion when fashioning equitable remedies and those remedies are reviewed for an abuse of discretion.

Sorenson v. Pyeatt, 158 Wash.2d 523, 531, 146 P.3d 1172 (2006) A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *Havens v. C & D Plastics, Inc.*, 124 Wash.2d 158, 168, 876 P.2d 435 (1994).

In this case, the trial court held that Roger had acquired a one-half interest in the boat shed by virtue of the following factors: (1) Roger rented the property "for more than 20 years."¹ (RP 271); (2) Roger made his living by using the property; (3) the property is uniquely suited to Roger's needs; (4) Roger improved the property while he was renting it; (5) Roger continued to contribute to improvements made to the property after its purchase; (RP 271) (6) Roger was the means by which the parties were able to purchase the property. (RP 271)

The appellant, Lee Greeley, respectfully submits that these facts do not constitute legally supportable grounds for awarding Roger an ownership interest in the property and the trial court's decision was therefore based on untenable grounds.

It is well-settled that a trial court's exercise of its equitable powers, while broad, is not unfettered. *In re Marriage of Shoemaker*, 128 Wash.2d 116, 123, 904 P.2d 1150 (1995). Rather, the trial court's power

¹ This finding of fact was in error. The evidence showed that Roger rented the boat shed from 1985 until its purchase in 1998 -- a period of thirteen years.

can be exercised only within the framework of established equitable principals. *Id.*

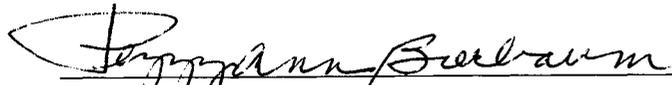
Lee contributed \$27,500 of her own funds, along with her labor, to purchase and improve the property. Roger, on the other hand, contributed a mere \$500. Although Roger concededly contributed his labor to some of the improvements, the value of that labor is more than offset by his rent-free living situation after the purchase of the property. The effect of the trial court's decision is to return to Lee a fraction of what she contributed to the boat shed, while providing Roger with a windfall. Pursuant to the trial court's decision, Roger was afforded the opportunity to, and did, purchase real property valued at \$35,000 for \$17,500.

The trial court abused its discretion by applying its own notion of fairness without regard to any tenable equitable framework to support its conclusions. The Appellant contends that this failure constitutes reversible error and respectfully requests that the trial court's judgment be vacated.

D. CONCLUSION

The trial court improperly applied the equitable theory of implied partnership/joint venture to the facts of this case, improperly awarded Roger a one-half interest in the boat house, and failed to identify any other equitable framework that would afford the relief granted.

Respectfully submitted this 21st day of January, 2008.

A handwritten signature in cursive script, reading "Peggy Ann Bierbaum". The signature is written in black ink and is positioned above a horizontal line.

PEGGY ANN BIERBAUM, WSBA#21398

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LEE GREELEY,

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DECLARATION OF MAILING

I, Peggy Ann Bierbaum, declare that on January 22, 2008, 2003, I
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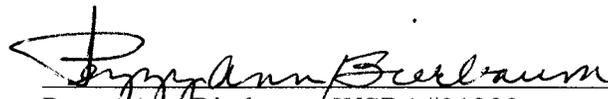
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of January, 2008 in Port Townsend, Washington.


Peggy Ann Bierbaum, WSBA#21398
Attorney for Appellant