

Table of Contents

I. Statement of the Case.....	1
II. Argument.....	4
III. Conclusion.....	10

Table of Authorities

Washington Cases

<i>In re Marriage of Kraft</i> , 61 Wn. App. 45, 50, 808 P.2d 1176 (1991), aff'd, 119 Wn.2d 438, 832 P.2d 871 (1991).....	4
<i>In re Marriage of Olivares</i> , 69 Wash.App. 324, 328 (1993).....	4
<i>In re Marriage of Towers</i> , 55 Wn.App. 697, 00, 80 P.2d 864 (1989).....	4

Statutes

R.C.W.26.09.080	4
R.C.W.26.16.140	8

I. STATEMENT OF THE CASE

Amber Heath (Amber), formerly known as Chuck Heath, and Michelle Heath (Michelle) were married on November 13, 1998. The parties separated on or about December 15, 2006. RP 1, 20-22. This is a short term marriage. Prior to marriage Michelle had no debt and separate property consisting of at least two homes in Arizona. RP 2, 16. She also had separate property of a personal injury settlement that she received in September 2004. RP 4, 13-17.

The parties' Harstene Island home was purchased in September, 2004, for the price of \$37,730.42. RP 5, 11-12. The court found that Michelle's separate property, in the amount of \$24,230 and community assets of \$13,500 were used to purchase the home. RP 5, 12-14. After the date of separation Amber took out a line of credit that encumbered the parties' Harstene Island home. RP 10, 2-4. The Harstene Island home prior to this line of credit had been bought in September 2004 with primarily Michelle's separate property and was totally paid for when purchased and had no encumbrances. On February 8, 2007, Amber placed \$55,000 from the line of credit in her personal banking account. RP 10, 9-10. By February 9, 2007, Amber was spending the \$55,000 for everyday living expenses. RP 10, 15-18.

Amber paid \$22,604 in community debt with the line of credit. RP 11, 12-13. The court found the balance of the line of credit is Amber's separate debt. RP 11, 13-15. The parties' had other community debt in the total amount of \$5,034 that was assigned to Michelle. RP 11, 21-24 and RP 17, 14-16.

The court found that the Harstene Island home has an estimated fair market value at \$90,000. RP 12, 1-2. Using the fair market value and subtracting Michelle's separate property contribution the court estimated that once sold there would "only be enough to pay off the line of credit and the closing costs." RP 14, 2-7 The court used the balance of the line of credit, \$55,000 minus \$22,604, of \$32,396 as a benefit to Amber on the sale of the home and Michelle should have half of that amount as her the equity that "would normally be coming to Michelle, and it's not, because there is a large lien on the property." RP 16, 2-10.

The court distributed community property to Amber as follows: Truck, the Hobie Cat sailboat, the check that Amber wrote to herself from Michelle's account. RP 17, 9-12. The court awarded to Michelle the travel trailer, the Plymouth vehicle and the other sail boat. RP 17, 12-14.

The court determined that separate property and liabilities existed. The separate property of Michelle includes: her home in Arizona (owned

prior to marriage), a separate property lien on the community property Harstene Island home (separate funds from personal injury settlement used), and the real property known as the Shorecrest Lot (bought with proceeds from one of the Arizona homes). The court found no separate liabilities. RP 8, 18-19.

Amber's separate property and liability consisted of separate debt. The court found the "that all debt over the \$22,604.00 on the line of credit that was used to pay the above-stated community debts is Amber's separate debt, having been incurred by Amber following the separation." RP 11, 17-20. The court also found that Amber had "additional separate debt of just over \$11,000." RP 12, 22-23.

The court found "there was misrepresentation and fraud in Amber's actions with regard to the line of credit." RP 14, 13-15. "Michelle was under the understanding that the line of credit would be used to pay community debt and to buy a trailer." RP 14, 16-17. The court considered that "a significant amount of debt due to separate obligations that were run up by Amber" were not fair to require Michelle to pay since the parties have separated. RP 14, 11-13. Amber has previously filed two bankruptcies and with a tremendous amount of debt and few assets, Amber "was not a good candidate to say that she will take care of these debts by paying them, rather than using the bankruptcy process again."

The court ordered the home to be sold and did not make a final determination on distribution of assets, retaining jurisdiction to decide the final distribution pending the sale of the home as the court did not know what the house would sell for and did not know the “exact figure as to what the line of credit will be at the time of sale.” RP 14, 21-25

II. ARGUMENT

RCW 26.09.080 requires a “just and equitable” distribution of marital property. “A trial court has broad discretion in distributing property in a dissolution action and its decision will be reversed only upon a showing of a manifest abuse of discretion. *In re Marriage of Kraft*, 61 Wn. App. 45, 50, 808 P.2d 1176, (1991), *aff’d*, 119 Wn.2d 438, 832 P.2d 871 (1992). “A manifest abuse of discretion is present if the court’s discretion is exercised on untenable grounds.” *In re Marriage of Olivares*, 69 Wash.App. 324, 328, *In re Marriage of Tower*, 55 Wn.App. 697, 00, 80 P.2d 864 (1989).

Ms. Amber Heath assigns error to the trial that the court “failed to just and equitable [sic] divide the Harstene Island Property when issuing a judgment against Ms. Amber Heath for \$16,198.” Appellant’s Brief 1. Further Amber argues that the court further erred by not classifying the purchase price of the trailer as a separate debt. Appellant’s Brief 1.

Amber took out the line of credit after separation. Amber used the line of credit for separate debt and personal expenses as well as community debt and the purchase of the trailer. The court very clearly identifies the parties' property and liabilities and categorizes each as community or separate with their values, as indicated below.

Community Assets

Amber		Michelle	
Truck	\$8,000	Plymouth Breeze	\$500
Sailboat	\$800	Sailboat	\$800
Check	\$5,500	Trailer	\$10,000
<u>½ House Equity</u>	<u>\$22,500</u>	<u>½ House Equity</u>	<u>\$22,500</u>
	\$36,800		\$33,800

Community Debt

<u>½ Paid Comm. Debt</u>	<u>(\$11,302)</u>	<u>½ Paid Comm. Debt</u>	<u>(\$11,302)</u>
Total	\$25,498	<u>Other Comm. Debt</u>	<u>(\$5,034)</u>
		Total	\$17,464

Separate Assets

Amber

None

Michelle

Arizona home owned prior to
marriage no value given

Separate property lien on

Harstene Island home

\$24,604

Shorecrest Lot

\$22,000

Separate Liabilities

Amber

Line of Credit Minus payment of

community debt (\$55,000

- \$22,604)

(\$32,496)

Other credit debt

(\$11,000)

Michelle

None

The court divided the community assets and liabilities and with an equalizing lien against Amber of \$4,017 makes a distribution of 50 percent to each party. All of Michelle's separate assets were separate before marriage or from separate property before marriage. Amber's separate liabilities were after separation.

Amber is arguing both just and equitable distribution without any supporting information or showing any manifest abuse of discretion. As can be seen by the information above, the trial court can not be found to have manifestly abused its discretion to distribute property when making a 50 percent distribution of community assets and liabilities to each party.

The trial court also characterized the parties' separate property. Michelle's separate property either was from prior to marriage, was an asset exchanged or from the settlement of a personal injury claim and cannot be argued as anything other than separate property per community property standards. Amber's separate debt all came after separation and RCW 26.16.140 and the case law associated with this statute makes it clear that debts incurred during separation may be determined to be the separate debt of the party incurring the debt. The court found the portion of the line of credit that was used to pay community debt a community debt to be paid through the sale of the Harstene Island property.

If the court were to order Michelle to be responsible for any of Amber's separate liabilities, this would be in opposition to the principle of debts and assets of parties becoming separate at time of separation embodied in RCW 26.16.140. In addition, public policy would be gravely damaged as spouses would run up debt prior to the finalization of the dissolution with the result of injuring the other innocent spouse.

Amber argues that the court did "not consider all facts and make a fair judgment in its findings of fraud and misrepresentations." In fact the court laid a solid foundation for the finding of fraud. The court found that Amber had engaged in misrepresentation and fraud in the acquisition and use of the line of credit as indicated here using the nine elements of fraud.

1) Amber misrepresented to Michelle the amount of the line of credit. Michelle believed that the line of credit was only to pay off community debt, which both parties would benefit from and purchase a trailer; 2) The previously unencumbered community property was now encumbered by Amber's use of the line of credit beyond what it was to be used for, for her personal benefit. This deprives Michelle of her community equity in the home; 3) The court found that not only did Amber use the line of credit for personal expenses and separate expenses, this was not what Michelle understood and therefore encumbered a community asset under false representation; 4) Amber knew she was

taking more than the amount Michelle understood. On February 8, 2007, Amber deposited \$55,000 in her personal bank account and began to pay her personal expenses with it on February 9, 2007; 5) Amber fully intended that Michelle sign the documents to encumber the house; 6) Michelle had no access to the line of credit and did not know that Amber had taken such a large amount against the equity in the community property; 7) Michelle had a separate property interest and a community interest in the Harstene Island property and relied on the fact the Amber was only taking an amount to pay the community debt and travel trailer; 8) Michelle had the right to rely on the fact that Amber would not encumber community property upon separation; 9) As Amber argues that the property has an offer of only \$72,000, the resulting damage is that Michelle will not get her separate property interest from the Harstene Island home, nor will she get her community property interest as the sale will go to cover the line of credit and closing costs.

The court found that the oral agreement between Michelle and Amber is “not effective as a [sic] agreement for the division of property upon separation because it involved the transfer of real property, and as such, that must be in writing, signed and acknowledged.”. RP 9, 20-23.

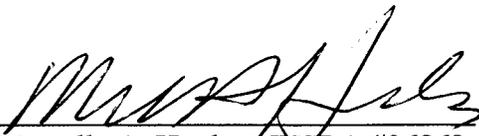
III. CONCLUSION

When the parties separated, the Harstene Island home was the primary asset. Michelle was awarded what the court found to be her original separate property interest in the home and considered the remaining equity community. The court fairly and equitably divided the assets and liabilities of the parties. The court characterized property as community and separate, with the reasoning behind each separate property determination. The court considered and weighed all the factors under RCW 26.09.080 in its order.

The court stated its finding of misrepresentation and fraud by Amber and its reasoning. Although the court did not number its findings for the nine elements, all elements are present. The previous two bankruptcies present a pattern by Amber and the innocent spouse, Michelle, needs to be protected.

Attorney fees should be awarded to Michelle for this appeal. The trial court in no manner abused its broad discretion to distribute property, nor has Amber stated any legal reasoning that the distribution should not be affirmed.

RESPECTFULLY SUBMITTED this 11TH day of August 2009.



Marcella A. Hughes, WSBA #36862
Attorney for Respondent

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**WASHINGTON STATE
COURT OF APPEALS**

AMBER HEATH,

Petitioner,

**Case #38567-8/In re Marriage of
Heath Re: Mason County
No. 07-3-00199-6**

and

MICHELLE HEATH

Respondent.

Declaration of Mailing

I, Marcella A. Hughes, do hereby declare and state as follows:

I am the attorney for Respondent, Michelle Heath, and am not a party to this action.

On August 11, 2009, I deposited into the US mail, postage prepaid, a true and correct copy of the document described below:

Respondent's Brief in Response to Appellant's Opening Brief

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 11th day of August, 2009 at Olympia, Washington.


Marcella A. Hughes, WSBA #36862