

No. 39887-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

ROBERT ROSS

Respondent

vs.

TONI HAMILTON

Appellant

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY *[Signature]*

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ON APPEAL FROM THE SUPERIOR COURT FOR WAHKIAKUM COUNTY  
The Honorable Michael Sullivan  
Superior Court No. 07-2-00002-9

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APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

- A. The trial court erred in finding the existence of a meretricious relationship between Mr. Ross and Ms. Hamilton.

The parties are not in serious disagreement about the controlling legal authorities regarding meretricious relationships, and the standard of review for a court's conclusion that a meretricious relationship exists. A trial court's conclusion that a meretricious relationship exists is reviewed *de novo*, using the tests set out in *Connell v. Francisco*, 127 Wn.2d 33, 898 P.2d 831 (1995) and *In re Pennington*, 142 Wn.2d 592, 14 P.3d 764 (2000). The relevant factors include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties. *In re Marriage of Lindsey*, 101 Wn.2d 299, 304-05, 678 P.2d 328 (1984); *In re Marriage of DeHollander*, 53 Wn. App. 695, 699, 770 P.2d 638 (1989).

Continuous cohabitation, length of relationship

In *Pennington*, the Supreme Court concluded that the facts overall did not support the existence of a meretricious relationship despite agreeing that some of the *Connell* factors did support the trial court's conclusions. The same is true of the present case. In the present case, the parties cohabited for a 15 year period but the evidence was disputed about whether the relationship was intimate during the entire time frame. It was

certainly undisputed that the parties were apart for significant periods of time, since Ross worked for three weeks and then had several weeks off.

The Pennington couple was together for 12 years, so it would appear that the 15 year relationship here meets the test of longevity. However, as the *Pennington* court observed, “a long-term relationship alone does not require the equitable division of property.” 142 Wn. 2d at 604.

#### Intent of the parties

In *Pennington*, Ms. Van Pevenage offered evidence that she wanted the relationship to be long term and to lead to marriage. Pennington, who was married when the couple began cohabitating, refused to marry her, even after his divorce became final. The Supreme Court found this to be a significant factor regarding the intent of the parties, and held that it did not support the trial court’s conclusion that a meretricious relationship existed. Similarly, Mr. Ross was still married when the cohabitation began in this case. After his divorce was final in the early 90’s, he asked Ms. Hamilton to marry him, three times. Ms. Hamilton refused his offer each time. Clearly, having been married once, she was quite leery of assuming the obligations of marriage with a man she did not consider to be “marriage material.” Ross argues that this fact should be ignored, despite *Pennington*, and argues that the length of the relationship by itself is enough to show there was mutual intent to continue in a long-term relationship. As noted above, however, that factor

was not sufficient to convince the *Pennington* court that a meretricious relationship existed.

#### Pooling of resources

This factor was the most sharply disputed in this case. Ms. Hamilton did not dispute that Ross provided an auxiliary source of labor<sup>1</sup> for work projects at the Valerian Street, Greenwood and Island View properties. There was evidence that they intended to run the bed and breakfast business together, and she conceded that he supplied capital for this business enterprise as well. What she did contest was whether he contributed to the initial purchase of these properties.

#### Purpose of the relationship

The relationship here began as a sexual one. The parties sharply disputed whether that aspect continued or not.<sup>2</sup> The relationship had some conveniences for both people. Ross gained a place to hang his hat when not working, and Ms. Hamilton obtained a steady tenant who had good labor skills. Ross argues that the purpose of the relationship was to prepare each for retirement. However, while Ross had his 401 K retirement plan to fall back on, Ms. Hamilton had only her real estate to fund her retirement. It was certainly not her battle plan to give this up to a man she did not consider to be “marriage material”, and her steadfast refusal to title any of her real estate in Ross’s name shows that although they did share the goal

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<sup>1</sup> She testified that contractors were utilized for many parts of the work done on both properties.

<sup>2</sup> Ms. Hamilton testified that she ended the sexual relationship because Ross was still married and had a “lot of girlfriends”. RP III 32.

of preparing for retirement, they did not have the same plan for arriving at that goal. It was when Ross tried to insist on imposing his vision of the future on Ms. Hamilton that she insisted he leave the house, and he did. It cannot be said here that there was a shared purpose for this relationship.

In *Pennington* the Supreme Court found that this factor supported the trial court's conclusion, but nevertheless disagreed that it supported the trial court's ultimate conclusion. Here, the factor does not support the trial court's conclusion that there was a meretricious relationship.

B. The trial court erred in its characterization and distribution of property of the parties.

Ms. Hamilton agrees with Mr. Ross that a remand is required if the trial court's decision was influenced by a mischaracterization of the parties' interest in property, and it is not clear that the court would have divided the property in the same way absent a proper characterization. Resp. Br at 28, citing *In re Marriage of Shannon*, 55 Wn. App 137, 142, 77 P.2d 8 (1989); *In re Marriage of Marzetta*, 129 Wn. App. 607, 622, 120 P.3d 75 (2005). A trial court's characterization of property as community or separate is reviewed *de novo* as a question of law. *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). It is clear that the trial court did mischaracterize the property which it divided in this case.

1. The Island View Property

Mr. Ross acknowledges, as he must, that the characterization of the Island View property, the main asset which was divided, depends on the characterization of the Valerian Street property, which furnished the bulk of the funds used to purchase the Island View Road property. Resp. Br. at 29. Ross claims Ms. Hamilton contributed only \$45,000.00 towards the purchase of Valerian Street. Resp. Br. at 29. In actuality, the contribution that she made was significantly more, \$58,000.00, as evidenced by the settlement statement offered in trial as Exhibit 38, CP 24-25, RP III 65-66. The source of these funds was her separate property, namely the proceeds of sales of her two properties in Cathlamet which she received in her divorce from William Hamilton. RP III 35, 68-69. Thus, although the Valerian Street property was acquired in 1992, it was clearly Ms. Hamilton's separate property from the beginning.

Ross bases his claim that the Valerian Street property became transformed into quasi-community property on four things: his unsubstantiated claim that he took out a loan to make improvements on the property; the contribution of his labor toward its renovation; that he made contributions from his paycheck toward the maintenance of the house; and the use of his tax refunds during the 1990s toward paying the Alaska property taxes for Valerian Street.

The trial court's memorandum decision relied heavily on Ross' 401K loan claim in making its characterization of the property.

Memorandum Decision, at 3-4. However, the documentation Ms. Hamilton acquired post-trial which was presented at the motion for new trial showed that this claim was false in two respects. First, Ross' records showed that he did not take out any loans from his 401 K plan. Second, to the extent that he provided any documentation of loans from his Merrill Lynch account (which he now states was what he meant to be the source of the loans), these were dated from 2000 and 2002. Clearly the money from the Merrill Lynch account played no part in the renovation of the Valerian Street property.

Ross' tax refunds during the 1990s were said to be \$1951.00 in 1993 and \$3343.00 in 1994. He admitted that he did not personally pay the Alaska taxes with these, and said instead that he merely turned these funds over to Ms. Hamilton. Assuming, *arguendo* that they were in fact used for the maintenance of Valerian Street, they constitute a traceable amount, and not the basis for a total transformation of the property from separate to quasi-community.

Ms Hamilton did not dispute that Mr. Ross provided labor toward the renovation of the Valerian Street property. She argued below that this was in lieu of room and board while he stayed there. Mr. Ross provided no documentation of the amount of time he spent, nor the dollar value of his contribution. This was in contrast to his testimony about the value of his work regarding the Greenwood Road property, which he estimated was worth \$30/hour.

Mr. Ross' final basis for his claim to interest in the Valerian Street property was based on his bald assertion, again without documentation, that he had deposited funds from his paychecks into a joint account the parties had created to pay his bills. However, he also admitted that during the first three years of the relationship, he had no money left over and did not even know whether he was getting a paycheck because of child support and the IRS lien against him which he estimated was about \$100,000. RP I 58-59. Sometime in the early 90's he filed for bankruptcy, which suggests he had no surplus funds to invest in the Valerian Street property. RP I 59.

Ms. Hamilton's testimony concerning the financial basis for the purchase of Valerian Street demonstrates that this was her separate property from the beginning. Ross' claim is that it became transformed into quasi- community property by his actions. However, if the property is separate property, then the burden is on the party asserting that separate property has transferred to the community to prove the transfer by clear and convincing evidence, usually by means of a writing evidencing mutual intent. *In re Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P.2d 8 (1989); *Skarbek, supra* at 448. Under *In re Marriage of Elam*, 97 Wn.2d 811, 650 P.2d 213 (1982), any increase in the value of separate property is also presumed to be separate. This presumption may be rebutted by direct and positive evidence that the increase is attributable to community funds or labors. The community receives that portion of the

increase attributable to community contributions. *Elam*, 97 Wn.2d at 816-17. In addition, any increase due to inflation is divided consistently with the proportion of community and separate contributions. See also *Marriage of Pearson–Maines*, 70 Wn. App. 860, 855 P.2d 1210 (1993). Ross provided no evidence that Ms. Hamilton intended to transfer the Valerian property to the “community”. Indeed the opposite was true, since she produced two rental agreements which Ross signed for this property. Ross also provided no direct and positive evidence that the increase in value of the property was due to his funds or labors, as opposed to inherent improvements in the real estate market. For these reasons, the Valerian property retained its separate character, and the trial court erred in characterizing it as a quasi–community asset at the time it was sold, and its proceeds applied to the purchase of the Island View property.

The remainder of the purchase funds for the Island View property came from the Merrill Lynch account into which Ms. Hamilton had poured the proceeds of her sale of her Nichols Street condominium, which was unquestionably her separate property. App. Br. at 30. Thus although the Island View property was acquired during the time that the parties were living under the same roof, it was purchased with funds traced to Ms. Hamilton’s separate property. Property acquired during a meretricious relationship has the same character as the funds used to buy it. *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999); *In re Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995). The burden

is on the party claiming separate property to clearly and convincingly trace the funds used to purchase the asset to a separate property source.

*Skarbek*, 100 Wn. App at 448. Ms. Hamilton's testimony, and the documentary evidence which supported it, met this burden. The Island View property should have been characterized as separate property at the time of its purchase.

Ross argues that part of the purchase price of the Island View property came from a loan. He produced no documentary evidence of this loan. He argues, again without any documentary evidence, that this loan was repaid out of funds from his paychecks, Ms. Hamilton's separate funds, and money from the ill-fated bed and breakfast venture that Hamilton and Ross tried to establish at the Island View property.

Ms. Hamilton readily conceded that Mr. Ross had provided labor toward the renovation of the Island View property. She also conceded that he had provided a loan of \$25,000.00 for the start up expenses of the bed and breakfast business. In exchange for this, he was able to claim the tax write offs for the losses suffered by the business. These losses produced tax refunds for him totaling approximately \$22,600.00 for the years between 2000 and 2005. RP I 164, RP II 8-9. However, this loan did not affect the ownership of the real estate. It was related only to the business venture which the parties were trying to conduct there.<sup>3</sup> As argued above,

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<sup>3</sup> Ross testified that he was supposed to contribute \$1,000 month toward the maintenance of the bed and breakfast business, but did not do so every month. He also testified Ms. Hamilton gave him a credit toward this

since the purchase funds for the real estate were derived from Ms. Hamilton's separate property, it became Mr. Ross' burden to show by clear and convincing evidence that the property had been transformed from separate property to quasi-community property. See argument above at 4.

As noted above, the trial court's characterization of the Island View property as being quasi-community property subject to an equitable division depended heavily on the trial court's belief that Ross had contributed approximately \$90,000.00 in loans from his 401 K to the Valerian Street property and to the Island View property. However, the documentary evidence acquired after trial, and after the memorandum decision had been rendered, showed that Ross had not taken out any loans from his 401 K at all. The evidence he had taken out loans from his Merrill Lynch account was from the year 2000, and this was the \$25,000.00 taken out after the purchase of Island View to start up the bed and breakfast. The second loan supported by the Merrill Lynch documentation was from 2003, during the period that Ross lent money to his son-in-law. RP III 170. To the extent that the trial court relied on the "loan" testimony from Ross, it clearly erred in making its characterization of the Island View property. In the event that this court upholds the part of the court's judgment finding the existence of a meretricious relationship, this court should vacate the judgment and remand to the trial

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obligation for work he did on the Greenwood Road property. RP I 175-177.

court with directions to reconsider its distribution of the Island View property.

2. The Judgment for \$17,500.00 for Ross

The court found in its memorandum decision that the purchase price of the Island View property was \$230,000.00, with \$195,000.00 of this amount coming from the sale of the Valerian Street property, and \$35,000.00 from a loan. As part of its property division, the trial court awarded a cash judgment in favor of Ross, reflecting one half of this loan. This was clearly error, and this portion of the judgment should be vacated.

Ross' own testimony was that the purchase money for Island View came from the proceeds from Valerian, and "Toni came up with the rest of it, the additional \$35,000.00" He believed this came from the funds derived from her Nichols Street condominium. RP I 88. The trial judge's confusion about the nature and extent of any loans is understandable, given Ross' fluctuating testimony about the amounts and sources of the alleged loans for the two main properties, Valerian and Island View. RP III 159, 165-173. However, even Ross himself did not attribute the \$35,000 for the purchase to be from a loan. Even if the trial court was correct in its apparent conclusion that part of the Island View purchase was funded by a loan from *someone* for \$35,000, it was clearly error to award Mr. Ross a cash judgment for half this amount, given the fact that the court also awarded Ross an undivided one half interest in the property which the supposed loan was used to purchase. Ross argues that this was

“fair and equitable” to “balance out a contribution...made by Ross”. Resp. Br. at 31. While appellant submits it was error on the part of the trial court to give Ross any interest in the Island View property, this error was compounded by giving Ross a cash judgment for \$17,500.00 for an undocumented loan, when the proceeds of the loan supposedly went into the same property in which the court had also given Ross an undivided half interest. Ross’s argument is that this cash award was to “balance” Ross’s contributions to the property. However, this “balance” was already taken into consideration by the 50% interest the trial court gave him. This court should vacate this part of the judgment as part of its remand to the trial court.

3. The Greenwood Road property

The court also awarded Ross an interest of 30% in the portion of that Greenwood Road property that Ms. Hamilton had purchased from her former husband for \$40,000.<sup>4</sup> Ross bases his claim for ownership of the Greenwood Road property on the assertion that the purchase loan in the amount of \$25,000, for which Ms. Hamilton was the sole obligee, RP III 51, was repaid by funds he placed in their joint account, and by his labor for improvement of the property.

As with many of Ross’s claims that his money was used to bankroll Ms. Hamilton’s purchases, this one was without documentation.

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<sup>4</sup> In their divorce, she had already been given a partial interest in this property. The purchase for \$40,000 gave her full control of the property.

Moreover, his assertion that Ms. Hamilton was taking his money to pay off her loan obligation makes no sense. If he had the money to supply for the purchase of the property, as he implicitly claims, there would have been no need for any loan from an outside source.

Nor can the trial court's award of a 30% interest be justified on the basis of his labor contribution. He estimated the value of his labor on this property to be either \$720 or \$5,000 based on his hourly rate for cat work. RP I 182-84. Even if the court was correct in its characterization of this property as quasi-community, Ross's share in it should not have been assessed at 30%, including any net proceeds from sales of the lots on this property. At most, the evidence supports an award to Ross of \$5,000 to reimburse him for the value of his labor.

#### 4. The Big Lake property

The trial court granted Ross a 40% interest in the 15-acre parcel located at 5813 South J. Sedor Road in Big Lake, Alaska. The property was purchased in 2000, during the time that Ross and Hamilton were living under one roof but were not intimate. Assuming that this court affirms the trial court's conclusion that a meretricious relationship existed, this property would be presumptively quasi-community in nature. It was thus Ms. Hamilton's burden to show that the property was separate in character.

The property was purchased with funds from a loan which Ms. Hamilton took out with "Curly" Cochrane. She was the sole obligee. RP

III 31. She testified that Ross did not make any of the payments on the loan. RP III 31. Ross agreed that a loan was the source of the purchase money. RP I 117. He conceded he had not done any work to improve this property. RP I 117. His claim rests on his testimony as follows:

I don't know how long that went on, but I know we were making payments and *if she needed money*, I always made it available to make the payments if she was short or whatever. So again, in a roundabout way, I *probably* paid for the 15 acres. RP I 117.

Ms. Hamilton met her burden to show that the Big Lake property was separate in character. Because she was the sole obligee on the loan, and no claim could have been made against Mr. Ross for reimbursement, as he was not a co-signer on the loan, the funds for this purchase were Ms. Hamilton's separate property. Since property acquired during a meretricious relationship has the same character as the funds used to buy it, *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999); *In re Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995), the property at Big Lake should have been characterized as separate property.

Ross's testimony quoted above does not establish that his funds were actually used to pay off the loan. At most it shows that they *might* have been used, if Ms. Hamilton was "short". Ross's testimony that he "probably" paid for the loan, unaccompanied by any documentary evidence of such payments does not transform the separate property into quasi-community property. Unlike his claim to the Greenwood property, which was bolstered by the admitted contribution he made of his labor, no such aid was rendered here to bolster his claim. Ross's argument on

appeal that he need not provide any documentary evidence of payment on his part, when the purchase was made through Ms. Hamilton's separate funds, should be rejected. There was simply no evidence of the size or significance of his alleged contributions to allow the court to make a 40% award of this property, as opposed to 10% or 25%. This number simply comes out of the air. The trial court erred in characterizing the Big Lake parcel as quasi-community property, and in granting Ross a 40% interest in it. This court should vacate that portion of the judgment.

C. The court erred in denying the motion to reconsider and for a new trial.

As argued above, the memorandum decision, which was filed July 17, shortly after the trial ended, demonstrates that the trial court was heavily influenced by Ross's testimony that he had taken out loans against his own retirement account (401 K account) in order to finance the purchases or refurbishment of both the Valerian Street property in Alaska, and the property in Cathlamet on Island View Road. He did not produce documentary evidence of these "loans" from his 401 K plan at the time of trial.

Ms. Hamilton's motion for new trial was based on the discovery that Mr. Ross had not, in fact, taken out loans from his 401 K as he had testified under oath. Whether he intended to mislead the court as to the nature, extent, timing and origin of the loans is not the important factor here. It is the fact that the court was misled as to the amounts, timing and

source of the loans and this false testimony materially affected the court's decision.<sup>5</sup>

Ross argues that his testimony was not perjured. However, RCW 9A.72.080 provides as follows:

Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false.

Ross did not qualify any of his statements about the source of the alleged loans to Ms. Hamilton. During the trial, these were always attributed to his 401 K plan. He also said that the 401 K loan was taken out during the time that the parties were living at the Valerian Street property. The financial records show this was also not true. The Merrill Lynch records show a loan taken out in 2000 which agrees with both parties' testimony that these were the operating funds for the ill-fated bed and breakfast. The second Merrill Lynch loan was the one for Ross' son in law.

Ross surely had the opportunity before trial to review his own records to know where the "loans" had come from and when they were made. The only logical conclusion to draw from his testimony is that he either lied deliberately, or made his statements about the loans without making any effort to know whether they were accurate or not. His unqualified statements that the source of the loans was his 401 K, and as to their timing were perjured under the definition from the statute outlined above.

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<sup>5</sup> The court did not make any oral ruling on the motion to reconsider/for new trial, and hence the record of his rationale remains the memorandum decision.

The source and timing of funds for the acquisition of the real estate at issue in this case was a crucial issue for the court's decision. Ross' testimony was shown, after trial, to have been materially incorrect on the amounts of loans, their source, and when they were obtained. Despite this significant post-trial information, the trial court denied the motion for a new trial or for reconsideration. In so doing, the trial court abused its discretion. This court should vacate the judgment and remand to the trial court for a new trial.

## II. CONCLUSION

The trial court erred in its conclusion that a meretricious relationship existed between Mr. Ross and Ms. Hamilton which required an equitable division of their assets. Their cohabitation was not continuous. They did not share the goal of living in a marriage-like relationship, since Ms. Hamilton never intended to marry Mr. Ross. They did not share the same goals for retirement, although they did cooperate on the failed business venture at the Island View property. This court should conduct *de novo* review using the *Pennington* and *Connell* factors and reverse the trial court's conclusion that a meretricious relationship existed.

Assuming without conceding that the trial court correctly concluded that there was a meretricious relationship between the parties which empowered the court to make an equitable distribution of "quasi-community" property, the court erred in its characterization of the nature of the real estate and in the awards it gave to Mr. Ross. The trial court did

not follow the rule that the source of the funds for the purchase of a property determines its character. The source of the funds of the Island View property was the proceeds of Ms. Hamilton's sale of the Valerian Street property and the Nichols Street condominium. That made the Island View property her separate property. Ross's contribution to the operation of the business entity the two tried to establish on the property did not affect the character of the real estate.

Similarly, the Greenwood Road property and the Big Lake property in Alaska were purchased with Ms. Hamilton's separate property. Even though acquired while the couple was cohabiting, this evidence met Ms. Hamilton's burden to establish their separate character. While Mr. Ross's labor contribution to the improvement of the Greenwood property would support a judgment in his favor for the value of his services there, there was no similar basis for an award to him of an interest in the Big Lake property, since he did not work on it at all. His testimony that he *might* have paid for the loan payments on the property is not sufficient to change its character.

The trial court clearly erred in awarding Mr. Ross a cash judgment of \$17,500. There was no documentary evidence of a \$35,000 loan as part of the purchase of the Island View property. Even if there had been, the value of the loan inhered in the property itself as part of its purchase price. Since the court awarded Mr. Ross a 50% interest in the property, there was

no basis in the record to give him an additional award regarding this property.

Post-trial, the trial court was confronted with documentary evidence which called into serious question Ross' trial testimony concerning the source, timing, and amount of the loans he allegedly obtained. The court did not change the result or the rationale set out in its memorandum decision despite this apparently perjured testimony. The court abused its discretion in denying the motion for reconsideration or for a new trial in the face of this post-trial evidence.

Appellant respectfully requests that this court vacate the trial court's judgment and remand for further proceedings regarding the existence of the alleged meretricious relationship or alternatively for further proceedings regarding the trial court's distribution of property.

Dated this 5 day of May, 2010

LAW OFFICE OF MARK W. MUENSTER

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of: Appellant's reply brief upon the following attorney of record at the address shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 5th day of May 2010 with postage fully prepaid.

DATED this 5th day of May, 2010



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