

Pierce County Cause No.: 10-3-01083-1
Court of Appeals No.: 47643-6II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

KARA L. UNDERWOOD, n.k.a. KARA L. CUTLER,
Appellee,

v.

ROBERT E. UNDERWOOD,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAMES R. ORLANDO

BRIEF OF APPELLANT

TSAI LAW COMPANY, PLLC.

Emily J. Tsai
WSBA No. 211800
2101 4th Avenue, Suite 2200
Seattle, WA 98121
(206) 728-8000

Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II
2015 SEP 23 AM 10:37
STATE OF WASHINGTON
EMILY J. TSAI
TSALAW.COM

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....3

II. ASSIGNMENTS OF ERROR.....4

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....4

IV. STATEMENT OF THE CASE.....5

V. ARGUMENT

 1) The trial court failed to follow the remand instructions of the trial court by failing to recalculate the value of the community lien without consideration of the failed Montana property transaction.....13

 2) The trial court erred in stating that the Court of Appeals was speculating when it found the trial court relied on the failed Montana property transaction because the court’s letter ruling was incorporated into its findings of fact and the letter ruling made specific calculated findings related to the Montana property settlement.16

 3) The trial court erred in determining that a community lien could be imposed on separate property as part of a general property distribution; a community lien must be based upon direct and positive evidence of community contribution.19

 4. The trial court erred by failing to depreciate the value of the community lien based upon the depreciation of the value of the assets.23

 5. Robert should not have to pay interest on the community lien from the date of divorce because the Court of Appeals specifically vacated the community lien and directed that the lien be removed from the property records.....28

V. CONCLUSION.....29

Table of Authorities

A. Table of Cases

<i>Hamlin v. Merlino</i> , 44 Wn. 2d 851, 272 P.2d 125 (1954)	20
<i>Harp v. Am.Sur.Co of N.Y.</i> , 50 Wn.2d 365, 311 P.2d 988 (1957)	13
<i>In re Marriage of Chumbley</i> , 150 Wn. 2d 1, 74 P.3d 129 (2003)	16
<i>In re Marriage of Harshman</i> , 18 Wn. App. 116, 567 P.2d 667 (1977)....	20
<i>In re Marshall</i> , 86 Wn. App. 878, 940 P.2d 283 (1997)	21
<i>In re Marriage of McCausland</i> , 129 Wn. App. 390, 118 P.3d 944 (2005).....	13
<i>Lucker v. Lucker</i> , 71 Wn. 2d 165, 426 P.2d 981 (1967)	23
<i>Marriage of Elam</i> , 97 Wn.2d 811, 650 P.2d 213 (1982)	23
<i>Marriage of Kasesurg</i> , 126 Wn. App. 546, 108 P.3d 1278 (2005)	18
<i>Marriage of Miracle</i> , 101 Wn.2d 137, 108 P.3d 1278 (1984)	23, 26
<i>Marriage of Underwood</i> , 181 Wn. App. 608, 326 P.3d 793 (2014).....	6, 7, 8, 13, 14
<i>State ex. Rel. Smith v. Superior Court</i> , 71 Wash. 354, 357, 128 P. 648 (1912)	13

B. Other Authorities

Harry M. Cross, <i>The Community Property Law in Washington</i> (pt. 1), 61 Wash. L. Rev. 13, 71 (Revised 1985)	23
---	----

I. INTRODUCTION

The old adage stating “you can’t unring a bell, once it has been rung,” most commonly applies to juries but could also be true of a trial court. This appeal concerns remand of calculation of the imposition of a community lien on separate property owned by the husband. Throughout the trial, the wife asked to admit and the court did admit improper evidence which colored the court’s view of the character of property received in an earlier estate settlement. The findings of the court indicated that this evidence was not only considered, but, that the court felt the outcome of the prior litigation was somehow unfair and that the court redistributed assets in the divorce proceeding via a community lien. The Court of Appeals held this was error and remanded for recalculation.

On remand, the trial court did not recalculate the lien, but instead stated that his original calculation was based upon what he believed to be fair and equitable. The trial court did not recalculate the lien, instead asserting that the court did not rely on the prior improper evidence nor make the improper evidence part of his earlier findings. The trial judge asserted the Court of Appeals remand was based upon pure speculation. Because the trial court did not follow the mandate of the court of appeals, and the court’s

findings reflect an underlying bias regarding the outcome of the earlier litigation, the appellant requests that this matter be remanded for recalculation to a different trial judge. With this matter, it seems that you cannot unring the bell once it has been heard.

II. ASSIGNMENTS OF ERROR

- 1) The trial court erred by failing to follow the mandate of the Court of Appeals requiring it to vacate the community lien against Robert's separate property and to recalculate the lien without consideration of the litigation from the failed Montana property transaction.
- 2) On remand, the trial court erred in stating that it didn't make lost profits part of its original findings, or part of its decree; the findings clearly incorporated the court's letter ruling and the letter ruling clearly identified the failed Montana property transaction and lost profits as a basis for its property determination.
- 3) On remand, the trial court erred in failing to recalculate the community lien based upon direct evidence of community contribution.
- 4) On remand, the trial court erred in failing to depreciate the value of the lien based upon the depreciation in value of the property.
- 5) The trial court erred in adding three years of interest to the original community lien and failing to follow the Court of Appeals mandate to remove the lien from the property records.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1) Whether the Court of Appeals mandate allowed the trial court the discretion to rewrite its findings to justify the existing community lien, without providing a basis for calculation of that lien or recalculation of the lien without consideration of the failed Montana property transaction?

2) Whether the Court of Appeals instruction to vacate the community lien and recalculate the lien without consideration of lost profits left the trial court discretion to modify its original findings and decree to hold that it did not incorporate the failed Montana property transaction and the speculative “lost profits” into the Original Findings where the trial court’s letter decision both referenced the failed property transaction and lost profits and the letter decision was incorporated into the original findings of fact?

3) Whether the imposition of a community lien can be based upon a “general property distribution” rather than direct evidence of community contribution.

4) Whether the court should depreciate the value of a community lien based upon the community contribution, where the value of the property has depreciated and fair market value of the property has decreased.

5) Whether it was error for the trial court to add three years of interest to the original community lien imposed by the trial court where the Court of Appeals mandated that the lien be vacated and removed from existing property records.

IV. STATEMENT OF THE CASE

This is an appeal of a remand following a dissolution of marriage. For purposes of clarity, the parties’ first names will be used, and this is not intended as a sign of disrespect to or familiarity with either party.

The Court of Appeals remanded this case to the trial court finding that the trial court abused its discretion in imposing a \$112,000 lien against Robert’s separate property. The findings of the trial court demonstrated that the trial court relied upon and admitted a lot of improper evidence concerning a lawsuit surrounding the husband’s inheritance as well as a failed property transaction that occurred in 2005. The Court of

Appeals directed the trial court to recalculate the value of a community lien against Robert's separate property without considering evidence surrounding the failed property transaction.

Marriage of Underwood, 181 Wn.App. 608, 613 (2014).

The Court of Appeals decision stated the facts found by the trial court as follows: "In 1995, Kara and Robert agreed to purchase property in Montana from Robert's grandparents and began making monthly payments. After Robert's grandparents died in 2005, the parties realized that the property was part of Robert's family trust and the parties sued the trust to gain access to the property. The result was that the trust was dissolved, the trust property, including the property the parties had supposedly purchased, was sold; the parties were refunded the money they had paid from the property and Robert received a payment for his share of the trust."

Marriage of Underwood, 181 Wn. App. 608, 613 (2014).

The trial court's original findings stated as follows:

This dissolution has some unique property issues. The Underwoods believed that they were buying ten acres from his grandparents in Montana. This was believed to be part of the Underwood Ranch property. They executed an agreement to buy the property at a price of \$275 per month, which was roughly the amount of the grandmother's medication cost. They paid on it for a number of years and when they attempted to get deeds to the property from the trustees, they discovered no deed existed. They initiated litigation and the case settled with the trust dissolving.

Robert received a 1/6 interest of \$2,100,000 or close to \$350,000. They were also compensated over \$14,000 for payments made and they recovered some attorney's fees. Kara has testified that the ten acres would have been worth \$85,000 to \$130,000 had the transaction been completed. Instead of the community recovering the value of the property it lost, Robert received the \$350,000 as his separate property.

With the proceeds the Underwoods purchased two parcels in Cheney Washington in April 2005, one at 4616 and the other at 4728 W Taylor Road as part of a tax exchange. They borrowed \$180,000 from USAA Federal. Also as part of the exchange they sold their home in Steilacoom to Jeanette Hallam and received net proceeds of \$42,000. This home had been titled in Kara's name. They did a lot line adjustment of 4728 making it a 15 acre parcel. They did a substantial remodel on it paying for repairs out of community funds. This included \$27,998.54 in materials. Kara did painting and other work on the home. It was sold in June 2008 for \$360,000. With the proceeds they purchased property at 330 Fire Lane, Anaconda, Montana for \$305,000 with a mortgage of \$160,000. It is now worth \$221,000. The property at 4616 is now worth \$112,000 and has been a rental.

In 2007 the joint tax return shows a profit for the rental of \$355. In 2008 the joint return shows a loss for 4616 of \$3814 and a loss for Fire Lane of \$6224, for a total loss of \$10,038. In 2009 the loss for 4616 was \$2520; the loss for Fire Lane was \$14,924. In 2010 the Underwood received a refund of \$6229 based upon the 2009 return. Robert received all of it. In 2010, Robert filed separately and claimed income of \$2484 on 4616 and a loss of \$13,137 on Fire Lane. His refund was \$10,257.

While the Cheney and Montana properties are titled in Robert's name, it is clear that there is a community interest in them that can be secured by an equitable lien. The community contributed funds, equity and incurred liabilities for those properties. I find from the evidence that Kara should receive an equitable lien of \$112,000 against the property at 4616 We4st Taylor road, representing her portion of the community property interest used to either acquire or improve the separate property of Mr. Underwood. Robert is awarded the Cheney and Montana properties, less the equitable lien. The Montana property is worth

\$221,000 and has a debt of \$140,000. The Cheney property is worth \$112,000 and is subject to her lien.

The Hilton timeshare was purchased in 2008 for \$14,000. It has a debt of \$8114. It should be awarded to Robert subject to the debt. I find that it is worth \$14,000.

I find that the horses, tack, tools and personal property in Montana are worth \$10,000. The personal property requested by Kara should be provided to her. The personal property of the children should also be provided. Each party will be left with \$5000 of personal property.

Each I awarded the vehicle in their possession subject to any debt. Robert is awarded his TSP. The unused leave payout that he will receive should be split equally when he retires. Robert shall pay the debt listed on Kara's proposed decree and the other accounts and values listed are adopted by me. She is awarded 50% of his military retirement that was earned during the marriage starting in 1991 to the date of separation.

(CP 279).

In considering the issue of the community lien, the Court of Appeals instructed the trial court as follows:

Robert argues that the trial court abused its discretion by imposing a \$112,000 lien against property awarded to him in favor of Kara. He claims that in awarding Kara the lien, the trial court improperly relied on evidence that involved lost profits on a failed property transaction. We agree.

Marriage of Underwood, 181 Wn. App. 608, 614 (Decision page 30)

(2014)

The Court of Appeals remanded to the trial court as follows:

“We reverse the trial court’s lien in Kara’s favor on property awarded to Robert insofar as the lien amount relates to evidence of the failed 2005 Montana property deal, and we remand

for recalculation of the lien, if any, without consideration of this evidence.”

Marriage of Underwood, 181 Wn. App. 608, 614 (Decision page 41)

(2014).

On remand, the trial court stated as follows:

In terms of the lien on the property, I don't know how the Court of Appeals made a determination in some sense that I relied upon lost profit. That was a very, very small portion of my letter ruling. It referenced that Kara Underwood testified as to what she believed profits from that property would be. I didn't include that. I didn't make that my ruling. I didn't include that in the findings or the decree. I think it's just pure speculation that was the basis for my ruling. It was not. . . [stress mine]

(April 17, 2015, RP 32-33)

The trial court refused to recalculate the amount of the community lien, stating as follows:

“No portion of the court's ruling or award to Kara Underwood (nka Cutler) was based on “lost profits” from the raw land held in the Underwood family trust. It is just pure speculation that this was the basis for the court's ruling. It was not.

The court drafted a ruling that was fair and equitable considering the economic circumstances of the parties, his earning capacity and potential, his other separate property that he had, which is basically all of the property was separate subject to the community interest. The court came up with an amount that accurately portrayed what she should be awarded. It was not based upon loss of profits and the court is clarifying its ruling for the Court of Appeals. I think the lien of \$112,000 is a fair and equitable division of the property, the community property interest and award that to her.”

(CP 428-429)

In the trial court's Findings of Fact, under paragraph 2.2, the trial court both attached and incorporated his letter ruling outlined above regarding the prior Montana litigation and lost profits to the Findings of Fact and Conclusions of Law. (CP463-65).

The court's original findings specifically reference the prior litigation and the improper evidence of lost profits as well as the statement by the trial court that it believed the Montana court awarded the community's interest to Robert as separate property. (CP 279) The court's original findings also demonstrate that the real property invested in by Robert had also depreciated in value between the date of acquisition and the date of trial. (CP 279).

According to the findings of the trial court, in 2006, Robert received an inheritance of over \$350,000.00 which he invested in land. Shortly thereafter, the community sold a home which netted them \$41,000.00. In addition, due to the failed property transaction, the community received settlement proceeds of approximately \$14,000.00. (CP 279) This was the ratio of separate property to community property in 2006. The parties lived a lavish lifestyle, including purchasing horses and tack, taking vacations, and traveling around Europe. (RP 229, 259 from 44068-7)

In the interim years, the value of real estate severely plummeted. At trial, the only assets remaining were 2 properties, one in Montana and one in Cheney, Washington. (CP 279) These lands had a gross real estate value of \$333,000.00 [\$112,000.00 (Cheney) and \$221,000.00 (Montana)]. There was a mortgage on the Montana property of \$140,000.00 for overall equity of \$193,000.00. (CP 279) Therefore, the net value of property depreciated from \$415,000.00 in 2006 to \$193,000.00 in 2012.

At trial, Robert presented evidence that in addition to the above \$350,000 inheritance he received, which was invested by 1031 exchange directly into the Cheney properties, he also received separate inheritance from his mother of \$20,000 and that the proceeds from the sale of the Steilacoom property were invested directly into horses, pay off of the prior divorce filed by Kara and other personal property (CP 372). Robert asserted that he had sufficient separate property to pay and maintain his separate property without community contribution. (CP372-373)

The Court of Appeals further mandated as follows: “We vacate the \$112,000 lien because it was based in part on the trial court's incorrect reliance on the failed Montana property deal. We also direct the trial court to remove this lien from the property records.”

On remand, Robert requested that any and all interest on the judgment for the community lien be vacated, in accordance with the Court of Appeals instruction to vacate the lien. The trial court refused to vacate interest, indicating as follows:

“No, because I think they vacated on their belief that I calculated in using the loss profits [sic], and that was not what I used to calculate it. I came up with what I believe to be an equitable amount of the marital lien. I proportioned that lien on that real property.” (RP 5-1-15 at 11)

Robert appeals the trial court’s failure to follow the mandates of the Court of Appeals. On remand, Robert presented additional evidence that the value of the Cheney property has depreciated even further since the date of trial, and he believes that the appraisal submitted by Kara at trial was grossly inflated. (CP 382)

Robert requests that this matter be remanded to a different judge with instruction that the calculation of a community lien be based only on the direct and positive evidence presented in support of the lien, and that any lien, if any, depreciate in proportion to the depreciation of the assets. In addition, Robert requests that no interest attach to the value of the lien based upon the improper evidence submitted by Kara resulting in the necessity for appeal and the highly prejudicial improper effect this evidence clearly had on the trial court.

V. ARGUMENT

1) The trial court failed to follow the remand instructions of the trial court by failing to recalculate the community lien without consideration of lost profits from the failed Montana property transaction.

It is a well settled principle that a Court of Appeals mandate is binding on the superior court and must be strictly followed. *Harp v. Am.Sur.Co of N.Y.*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957); *State ex. Rel. Smith v. Superior Court*, 71 Wash. 354, 357, 128 P. 648 (1912).

There is a distinction between what the superior court is obligated to do and what it could do in exercise of its discretion. *In re Marriage of McCausland*, 129 Wn. App. 390, 400 (Wash. Ct. App. 2005).

The Court of Appeals remanded to the trial court as follows:

We hold that the trial court abused its discretion when it imposed the lien in Kara's favor based in part on evidence of the projected lost profits from the parties' failed property transaction. We reverse and remand to the trial court to vacate this lien, and to recalculate the value of the lien against Robert's property without considering projected lost profits from the failed property transaction. We affirm on all other property distribution issues.

In re Marriage of Underwood, 181 Wn. App. 608, 614 (Wash. Ct. App. 2014).

From the above holding, the trial court did not follow the mandate instructions of the Court of Appeals. The Court of Appeals further stated on remand:

“We vacate the \$112,000 lien because it was based in part on the trial court’s incorrect reliance on the failed Montana property deal.”

Court of Appeals Decision page 31

The Court of Appeals further mandated:

“We also direct the trial court to remove this lien from the property records. Because it is unclear what portion (if any) of the lien related to the failed property transaction and because the trial court also based its decision to award the lien on the community nature of the properties and the community efforts used to finance and maintain the properties, we remand to the trial court to recalculate the amount of Kara’s lien without consideration of the projected lost profits from the failed Montana property deal.”

Court of Appeals Decision page 31.

In the concluding portion of the Court of Appeals decision, the court stated as follows:

“We reverse the trial court’s lien in Kara’s favor on property awarded to Robert insofar as the lien amount relates to evidence of the failed 2005 Montana property deal, and we remand for recalculation of the lien, if any, without consideration of this evidence.”

Marriage of Underwood, 181 Wn. App. 608, 614 (Decision page 41)

(2014).

On remand, Kara advised the trial court that the Court of Appeals just needed the trial court to “go on record” that if “no part of the failed property transaction was considered in the ruling, that ends the inquiry and the \$112,000.00 stands.” (CP 168) Kara further asserted that “I don’t believe that it was part of your consideration, but again, I don’t know what

you were thinking, but I never asked for that. I never argued that...”

(April 17, 2015 RP on remand 19-20.) In addition, Kara advised the court that “in the decree... the order states that the judgment of \$112,000 was given in order to obtain a fair and equitable distribution of assets and debts. That’s why it was given.” (April 17, 2015 RP 20) Of course, Kara is the party who presented all the improper evidence at trial, which the trial court directly referenced in its findings, property division, and calculation of a community lien. On remand, Kara improperly instructed the trial court as to the mandates of this court and again the court erred in failing to re-calculate the community lien in accordance with the mandates of the Court of Appeals on remand.

The trial court would not vacate the community lien per the instructions of the Court of Appeals, instead asserting that its original findings did not include or consider lost profits as a basis for its property distribution. The trial court on remand stated as follows:

“In terms of the lien on the property, I don’t know how the Court of Appeals made a determination in some sense that I relied upon lost profits. That was a very, very small portion of my letter ruling. It referenced that Kara Underwood testified as to what she believed profits from that property would be. I didn’t include that. I didn’t make that my ruling. I didn’t include that in the findings or the decree. I think it’s just pure speculation that was the basis for my ruling.”

(April 17, 2015 RP 32.)

The trial court failed to recalculate the lien instead stating: “I think the lien of \$112,000 is a fair and equitable division of the property, the community property interest, and award that to her.” (April 17, 2015 RP 33.)

The Court of Appeals did not remand the case to reconsider the distribution of property and liabilities and expressly stated that “we hold that the trial court did not abuse its discretion when it decided that Kara was entitled to a lien in some amount on property awarded to Robert to account for her community interest in properties that were purchased, maintained, and financed in part with community funds.” However, the calculation of the amount of community lien must be based on the law which states: Property that is “purchased with both community funds and clearly traceable separate funds will be divided according to the contribution of each.” *In re Marriage of Chumbley*, 150 Wn. 2d 1, 8, 74 P.3d 129 (2003). That calculation clearly did not occur in this case and the trial court did not follow the mandates of the Court of Appeals.

2. The trial court erred in finding that the Court of Appeals decision was based on “pure speculation” as to the court’s reliance on the failed property transaction and the trial court erred in stating that the lost profits from the failed property transaction were not a part of the court’s original findings.

On remand, the trial court misstated its earlier ruling and its earlier findings. (April 17, 2015, RP 32) The court's letter decision set the basis upon which it calculated a community lien and property distribution in the first paragraph. The trial court stated:

“This case has some unique property issues. The Underwoods believed that they were purchasing ten acres from his grandparents in Montana. This was believed to be part of the Underwood Ranch property. They executed an agreement to buy the property at a price of \$275 per month, which was roughly the amount of the grandmother's medication costs. They paid on it for a number of years and when they attempted to get deeds to the property from the trustees, they discovered no deed existed. They initiated litigation and the case settled with the trust dissolving. Robert received a 1/6 interest of \$2,100,000.00 or close to \$350,000. They also were compensated over \$14,000 for payments made and they recovered some attorney's fees. Kara has testified that the ten acres would have been worth \$85,000 to \$130,000 had the transaction been completed. Instead of the community recovering the value of the property it lost, Robert received the \$350,000 as his separate property.” [stress mine] CP 20

In addition, on remand, the trial court incorrectly stated that the letter ruling was not part of his findings. (April 17, 2015, RP 32) In paragraph 2.21 of the court's findings, the entire letter decision is incorporated into the findings, and a copy of the decision is also attached to the original findings. (CP 458-465) Thus, it is clear that it was not “pure speculation” by the Court of Appeals that the trial court relied upon the failed property transaction in the earlier Montana litigation in calculation of the community lien imposed.

The trial court further stated that its findings with regard to determining lost profits from the failed Montana property transaction “was a very, very small portion of my letter ruling.” (RP 32 4-17-15) The trial court amended its findings without recalculating the lien as follows:

“No portion of the court’s ruling or award to Kara Underwood (nka Cutler) was based on “lost profits” from the raw land held in the Underwood family trust. It is just pure speculation that this was a basis for the court’s ruling. It was not.

The court drafted a ruling that was fair and equitable considering the economic circumstances of the parties, his earning capacity and potential, *his other separate property that he had, which is basically all of the property was separate subject to the community interest.* The court came up with an amount that accurately portrayed what she should be awarded. It was not based upon lost profits, and the court is clarifying its ruling for the Court of Appeals. I think the lien of \$112,000 is a fair and equitable division of the property, the community property interest, and award that to her.” [stress mine]

CP 207- 208

The mandate of the Court of Appeals was that no part of the community lien could be based upon the parties’ failed real estate transaction, as Kara’s opportunity to recover on that claim had to occur during the 2005 litigation pursuant to *Marriage of Kaseburg*, 126 Wn. App. 546 (2005). The trial court erred in its disregard of the Court of Appeals mandate to mean that it could not rely upon “projected lost profits,” but this is not all that the

Court of Appeals directed. The mandate was that the court was not to allow a re-litigation of the outcome of the Montana property litigation in awarding a community lien.

On remand, the trial court stated that in addition to considering the economic circumstances of the parties, it considered “his other separate property, which is basically all the property was separate subject to the community interest.” CP 207-208) The court’s findings on remand echo the court’s earlier findings which took issue with the outcome of the Montana property transaction wherein the court’s sentiments are clear: “instead of the community recovering the value of the property it lost, Robert received the \$350,000 as his separate property.” (CP 279). Substantial evidence simply does not support a community lien calculation of \$112,000.00 and this was the earlier determination of the Court of Appeals. The trial court did not follow the Court of Appeals mandate.

3) The trial court erred in determining that a community lien could be imposed on separate property as a general property distribution- a community lien must be based upon direct and positive evidence of community contribution.

The calculation of a community lien is based upon equitable principles that monies or labors spent by the community to improve separate property can be recouped by the community. *Hamlin v. Merlino*, 44 Wn. 2d 851, 857-58 (1954); *In re Marriage of Harshman*, 18 Wn. App. 116, 125-126 (1977). The issue was cited from *Hamlin v. Merlino* as follows:

“Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.”

Hamlin v. Merlino, 44 Wn.2d 851, 857-858 (1954).

In such cases, where the community has contributed labor, or mortgage payments, it is within the purview of the court to calculate the value of the lien based upon the direct and positive evidence presented. *Id.* Washington law does not support a general imposition of an equitable lien. The purpose of an equitable lien has been cited as follows:

Equitable liens do not apply to property generally. They must attach to a specific property on a specifically documented theory. Equitable liens have principally been applied to favor the community, and not in favor of the separate property interest of either of the parties. Most importantly, equitable liens are applied by Washington courts to assist a party in need of equity. [stress mine]

GORDON W. WILCOX & THOMAS G.
HAMMERLINCK, WASHINGTON [882] FAMILY
LAW DESKBOOK, § 38.6 at 38-20 (1989 & Supp. 1996).

In re Marshall, 86 Wn. App. 878, 881-882 (Wash. Ct. App. 1997).

On remand, the trial court did not recalculate the value of the lien but instead stated that the value of the lien was based on “the economic circumstances of the parties, his earning capacity and potential, his other separate property that he had, which is basically all of the property was separate subject to the community interest.” CP 207-208.¹ . The court’s amended findings demonstrate that rather than calculate the community lien, the lien was imposed in response to the improper evidence presented to him regarding the Montana litigation where he found that “instead of the community recovering the value of the property it lost, Robert received \$350,000 as his separate property” which appears to have simply been rephrased that the court imposed the lien based upon “...the other separate property he had, which is basically all of the property was separate subject to community interest.”

¹ It should be kept in mind that the trial court also awarded Kara ongoing spousal support “until four months after Robert retires” to offset Robert’s earning capacity. RCW 26.09.090. CP 219.

In determining whether substantial evidence supports a \$112,000 lien, the court should consider the other findings made by the trial court. (CP 279) In 2005, Robert inherited \$350,000.00 by way of a 1031 property exchange. At that same time, the community recovered \$14,000 as part of the failed property transaction, which was a complete recoupment of its investment. (CP 279) The community also sold a home and recovered \$41,000.00. (CP 279) Thus, in 2005, the ratio of community property to separate property was at most \$55,000 to \$350,000, or 13% of the overall equity held by the parties in real property.

The Cheney property, upon which the lien was imposed, was acquired by 1031 exchange and held no mortgage, generated rental revenues during marriage, no work was done to that property, nor evidence presented of work done, and five acres of that property was sold to acquire the Montana property. (CP 372-373) There was no evidence that the community expended funds or resources on Cheney which would support a \$112,000.00 lien. (CP 373)

The property in Anaconda, Montana, was purchased in part with proceeds from the sale of separate property acquired by Robert by inheritance, and in part with a mortgage. The parties lived in that property

for years and did some minor painting, but, the value of the property depreciated significantly between the time of purchase and the date of trial. There is no indication the trial court considered the reciprocal benefit the community received in that property which should have offset any community lien pursuant to *Marriage of Miracle*, 101 Wn.2d 137, 139 (1984). The reduction of mortgage paid by the community was far below the \$112,000 lien imposed. However, it appears the lien imposed was based upon generalized findings and not “direct and positive evidence” as required by law. This was error.

4. The court erred by failing to depreciate the value of community lien in its calculation in accordance with the depreciation in the value of the assets.

Where property has depreciated in value, the court should consider depreciation of the value of property in imposing a community lien. *Lucker v. Lucker*, 71 Wn. 2d 165 (1967). *Marriage of Elam*, 97 Wn.2d 811, 816 (1982). In the context of valuing the contribution of labor to separate property, Harry Cross wrote that only the increased value of property should be compensable in the form of a lien, otherwise, one spouse would be able to “improve the other out” of their separation property.

Harry M. Cross, *The Community Property Law in Washington* (pt. 1), 61 Wash. L. Rev. 13, 71 (Revised 1985).

In this case, it is clear that the trial court failed to depreciate the community contribution in proportion to the depreciation of the property. In fact, the lien imposed far exceeded any community investment that could be found, necessitating that the court improperly appreciated the value of the lien even while the value of the property depreciated. The trial court's calculation of community lien is not supported by substantial evidence. Any lien should depreciate in proportion to the depreciation in value of the property.

The trial court found that Robert received \$350,000 from the settlement of his inheritance, and that the community received \$14,000 returned as reimbursement of monies they had paid to the grandmother thinking they were purchasing acreage. (CP 279) In addition, the trial court noted that the parties received \$41,000 for sale of a home in Steilacoom.² Thus the separate and community investment was \$405,000 into real property- (\$350,000 separate and \$55,000 community). (CP 279) The value of that same real property at trial was \$333,000 [Cheney was valued at \$112,000³ and Montana was valued at \$221,000] except there

² Robert asserts the proceeds of sale were spent on personalty, but, for purposes of this analysis, we are using this as a basis for calculating a lien.

³ It is noteworthy that the Cheney property was appraised and valued at \$86,000 as of the date of the hearing on remand. (CP 382).

there was a \$140,000.00 mortgage against the Montana property. Thus, the total remaining equity available at trial was \$193,000, a significant reduction from the \$405,000 investment made. Given that the community had no greater than a 13% interest in the combined value of property owned by the parties in 2006 (\$55,000.00 (community)/ \$360,000.00(separate) /= \$405,000 total equity, community portion 13% \$55,000/\$405,000.00, and the value of real property depreciated to less than half of what it formerly was, how could the community portion have appreciated to represent 58% of the total equity in the properties (\$112,000.00(community)/ \$81,000.00(separate)? How could any efforts of the community have increased in value when the overall value of the property depreciated over 40% in the years between 2005 and 2012? Even if we assume the community property acquired in 2005 was invested rather than spent, why, in fairness and equity, wouldn't that value also have depreciated?

There is no evidence or testimony that the painting done by Kara or the yard upkeep done by the parties improved the value of the properties. (RP 51-53, RP 58) In fact, the testimony was that the increase in value of the Cheney lot sold in 2008 in which Kara did some painting, was more likely the result of a simple lot line adjustment increasing the size of the property and decreasing the size of Robert's other Cheney lot.

(RP 53 from Appeal #44068-7). Nevertheless, the value of both the remaining Cheney lot and the Montana property depreciated by 40% between the time of acquisition and trial. CP 279.

The only remodel done on the Montana property in Anaconda was that Kara helped remove some carpeting that had gotten destroyed from flooding. (RP 286 from Appeal # 44068-7) Other than that, her father did some work while he lived there rent free for which she makes no claim. (RP 281 from Appeal #44068-7) For the remodel of the Cheney house that was sold, specifically the portion that the parties lived in, there was a mortgage, and she claimed she painted the house. (RP 51 from 44068-7) She does not assert a dollar value for these services, nor does she demonstrate that the mortgage paid by the community outweighed the community benefit of living in the homes. (RP 52 from 44068-7) In fact, Robert clearly testified that the community received a benefit by being able to reside in his separate property at a cost considerably less than the market value. (RP 492-493 from Appeal #44068-7) *Marriage of Miracle*, 101 Wn.2d 137, 139 (1984). The “services” outlined above in combination with the original investment are not sufficient to support a \$112,000.00 lien.

Substantial evidence does not support such a significant community lien against Robert’s separate property. In addition, Robert

testified that the proceeds from the sale of Steilacoom and monies reimbursed for the failed land purchase were spent on personal items including horses, tools, horse tack, horse items and a new horse trailer upon moving to Cheney. (RP 485, 561 from 44068-7) There would be no basis to charge the community's expenditures on personal property against Robert's separate property. Robert's testimony concerning the acquisition of horses, tack and other personal property was confirmed by Kara. (RP 694 from 44068-7) Kara acknowledged horses are an expensive hobby and attested to no other source with which to purchase these items. (RP 229 from 44068-7) These monies were not used to purchase or improve either parcel of property.

Robert received significant other separate property funds during the marriage, (\$22,000.00) which, along with rental income, was spent maintaining the properties. (RP 551 from 04668-7). Additionally, Robert received a \$20,000 gift from his mother as his separate property between 2005-2008. (RP 560 from 04668-7) Kara acknowledges Robert received these separate source funds during the marriage. (RP 277 from 04668-7) Robert's separate property resources were sufficient to support and maintain his separate property.

No monies from settlement of the community lawsuit against Robert's family existed at the time of the dissolution in 2012. (RP 74 from

04668-7) The court accepted testimony from Kara as to the value of 10 acres that she and Robert never purchased or acquired title to. (EX 44, RP 74 from 04668-7). The only dollar value that could have formed a basis for the lien imposed by the court was to collaterally attack the earlier settlement and speculate that Robert received as his separate property monies due the community. (CP 279). This was error.

We ask that recalculation of the value of the community lien be remanded to a different judge. Robert further requests that the new judge be directed to consider the depreciation in value of both properties and to depreciate the value of the lien accordingly.

5. Robert should not have to pay interest on the community lien from the date of divorce because the Court of Appeals specifically vacated the community lien and directed that the lien be removed from the property records.

The Court of Appeals did not conditionally vacate the community lien. The Court of Appeals specifically stated “We vacate the \$112,000 lien because it was based in part on the trial court’s incorrect reliance on the failed Montana property deal. We also direct the trial court to remove this lien from the property records.”

Given that the Court of Appeals vacated the community lien, there should be no interest accumulating until the lien becomes a liquidated

sum. The trial court erred in refusing to recalculate the lien and refusing to remove it from the property records.

V. CONCLUSION

Robert respectfully requests that the court remand this matter to a new trial judge for calculation of a community lien based upon the direct evidence presented. He further requests that the new judge be ordered to consider the depreciation of the property value between the date of acquisition and the date of the divorce, and the ratio of separate to community property at the time the property was acquired as well as any reciprocal benefit received by the community during such time as the mortgage was paid in imposing any lien.

Respectfully submitted this 22nd day of September, 2015.

TSAI LAW COMPANY, PLLC

A handwritten signature in black ink, appearing to read "Emily J. Tsai", written over a horizontal line.

Emily J. Tsai, WSBA #21180

Attorney for Appellant

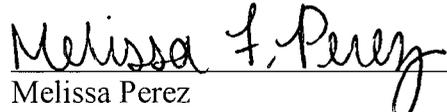
DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on September 22, 2015, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals-Division II 950 Broadway, Suite 300 M/S TB-06 Tacoma, WA 98402-4454	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Ms. Rebecca Reeder Faubion, Reeder, Fraley and Cook 5920 100 th St. SW. Ste. 25 Lakewood, WA 98499-2751	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Mr. James Cathcart P.O. Box 64697 University Place, WA 98464-0697	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

Dated at Seattle, Washington this 22nd day of September, 2015.



Melissa Perez
Legal Assistant to Emily J. Tsai, Counsel for
Appellant