

FILED

AUG 18 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 31918-1

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

SANDRA LYNETTE GUNKEL, *Appellant/Cross-
Respondaent,*

v.

DANIEL GEORGE GUNKEL, *Respondent/Cross-Appellant.*

Appellant's Reply Brief and Response to Cross-Appeal

Michael B. FitzSimons, WSBA No. 25054
JAQUES SHARP
PO Box 457 / 205 3rd Street
Hood River, Oregon 97031
(541) 386-1311

Attorney for Appellant/Cross-Respondent
SANDRA GUNKEL

Table of Contents

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
I. SUMMARY OF REPLY.....	1
II. ARGUMENT.....	2
A. There was a manifest abuse of discretion by the trial court in the property division and in denying spousal support to Wife.....	2
B. The trial court properly characterized Cherry Hill, LLC as community property because Wife contributed, through her labor, to the purchase of the Cherry Hill properties. (Response to cross-appeal).....	3
1. Husband has failed to prove, by clear and convincing evidence, that Cherry Hill was a separate asset.....	3
2. The trial court correctly ruled that Cherry Hill, LLC is community property because the purchase of the Cherry Hill properties was funded through Wife’s unpaid wages and the property was improved using community assets.....	4
C. The trial court abused its discretion in not awarding Wife the Dry Creek residence and indefinite spousal maintenance because the property division left Wife in a significantly worse financial position than Husband.....	5
1. Wife should have been awarded Dry Creek, the family residence, so that she does not have to spend her equalizing	

	judgement on a new residence and because Wife, unlike Husband, will not improve her financial position in the future.....	6
2.	The trial court abused its discretion in not awarding Wife lifetime maintenance in the amount of \$3500 per month because otherwise Wife will live the rest of her life in a significantly worse financial condition compared to that which the parties enjoyed during marriage and to that which Husband continues to enjoy.....	11
	(a) Lifetime maintenance awards are common and permissible methods available to courts, not an impermissible lien on future earnings.....	12
	(b) Neither Wife’s current employment nor her future job prospects will allow her to be self-supporting.....	13
	(c) Husband is financially capable of paying indefinite maintenance to Wife.....	14
	(d) Wife should receive spousal maintenance, in part, because she helped Husband develop his business fortune and now will not see the benefits of her years of sacrifice.	16
D.	The trial court abused its discretion in not granting Wife reimbursement for attorney fees and costs because Husband is in a better position to pay the attorney fees and Wife received disproportionately less in the property division.....	17
III.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Case Law:

<i>Glorfield v. Glorfield</i> , 27 Wn. App. 358, 617 P.2d 1051 (1980).....	2, 8, 9
<i>In re Marriage of Chumbley</i> , 150 Wn.2d 1, 74 P.3d 129 (2003).....	3
<i>In re Marriage of Davison</i> , 112 Wn. App. 251, 48 P.3d 358 (2002).....	17
<i>In re Marriage of Morrow</i> , 53 Wn. App. 579, 770 P.2d 197 (1989).....	15, 17
<i>In re Marriage of Pearson-Maines</i> , 70 Wn. App. 860, 855 P.2d 1210 (1993).....	5
<i>In re Marriage of Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984).....	16
<i>In re Marriage of Wright</i> , 179 Wn. App. 257, 319 P.3d 45 (2013).....	2, 6
<i>Morgan v. Morgan</i> , 59 Wn.2d 639, 369 P.2d 516 (1962).....	12, 13

Statutes:

RCW 26.09.080.....	7, 8, 10
RCW 26.09.090.....	12, 14, 15

I. SUMMARY OF REPLY

Husband and Wife were married for 30 years, during which time Wife supported Husband's business endeavors by working long hours for no compensation and raising their children. The couple was able to amass over two million dollars in assets, most of which was related to the family's businesses. The trial court awarded much of the business property to Husband as his separate property, and all of the remaining community property related to the businesses and real estate, including the family residence. Wife was left with a cash equalizing judgment, which she must use to purchase a residence and rely on to pay her monthly expenses.

The trial court recognized the clear disparity between the parties positions in its ruling. Husband, with his business and land wealth, is on an "upward trajectory." RP (Vol V) 1093: 18. Wife, on the other hand is unlikely to improve her position in life. RP (Vol V) 1093-1094. Considering the disparities in the parties economic conditions and the statutory factors to consider in awarding spousal maintenance, it is clear that the trial court abused its discretion by awarding the Dry Creek home to Husband, not awarding indefinite spousal maintenance to Wife, and not awarding Wife her attorney fees.

II. ARGUMENT

A. **There was a manifest abuse of discretion by the trial court in the property division and in denying spousal support to Wife.**

The standard of review on appeal of a property distribution in a marital dissolution is whether there is a “manifest abuse of discretion” by the trial court. *Glorfield v. Glorfield*, 27 Wn. App. 358, 360, 617 P.2d 1051 (1980). There was clearly a manifest abuse of discretion in this case. In a long-term marriage such as the Gunkel’s, “the court’s objective is to place the parties in roughly equal financial positions for the rest of their lives. *In re Marriage of Wright*, 179 Wn. App. 257, 262, 319 P.3d 45 (2013). By awarding to Husband significant income producing separate property, all income producing community property, the marital home and half of the community property, the trial court manifestly abused its discretion. Wife was left with an equalizing judgment, which she must use to purchase a home and to cover her daily expenses.

The result of the property distribution is that the parties were not in “roughly equal financial positions” on the date the judgment was entered because the court found that a significant amount of the parties’ assets were Husband’s separate property. Furthermore, the parties are in nowhere near “equal financial positions for the rest of their lives.” Husband will continue to live comfortably, in the family residence, with a

steady income stream from the income producing assets. Wife, on the other hand, will be forced to liquidate a significant amount of her equalizing judgement to purchase a home, and the rest will dwindle away as she covers daily expenses. The trial court did not fulfill its objective; the property division and failure to award indefinite spousal support was a “manifest abuse of discretion.”

B. The trial court properly characterized Cherry Hill, LLC as community property because Wife contributed, through her labor, to the purchase of the Cherry Hill properties. (Response to cross-appeal).

1. Husband has failed to prove, by clear and convincing evidence, that Cherry Hill was a separate asset.

The standard of review on appeal of a trial court’s ruling regarding whether property is separate or community is *de novo*. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). It is presumed that all property acquired during the marriage is community property. *Id.* The party seeking to classify property acquired during marriage as separate property must prove, by clear and convincing evidence, that the property was acquired by gift, bequest, devise, descent or from a separate source. *Id.* at 5-6. Husband failed to prove, by clear and convincing evidence that Cherry Hill is separate property because he has failed to prove that Wife’s unpaid wages were not used to fund the purchase of the Cherry Hill

properties.

2. **The trial court correctly ruled that Cherry Hill, LLC is community property because the purchase of the Cherry Hill properties was funded through Wife's unpaid wages and the property was improved using community assets.**

Wife's uncompensated contributions to Gunkel Orchards provided the revenue needed to purchase the Cherry Hill properties. Wife contributed her services to Gunkel orchards, working ten to twelve hour days, for little to no compensation. RP (Vol I) 24-27. Through her contributions, as well as Husband's and the other Gunkel family members, the senior Gunkel's were able to purchase the Cherry Hill properties. RP (Vol 2) 325-326. Wife was not directly compensated for her work at Gunkel orchards. RP (Vol I) 22. She received minimal in kind benefits and Husband was compensated for some of her hours. *Id.* When Wife requested health insurance, Husband told Wife that she could not be compensated for her services because the money was needed to make payments on the Cherry Hill properties. RP (Vol 2) 325-326. Wife's uncompensated contributions to Gunkel Orchards, therefore, provided the additional revenue that was used, in part, to pay for the Cherry Hills properties.

If the court determines that Cherry Hill was Husband's separate

asset, then any increase in value since acquisition is a community asset because the increase in value is attributable to improvements made by Gunkel Orchards, a community asset. Cherry Hill was improved and developed by Gunkel Orchards, a community asset. RP (Vol 4) 916. Where separate property is improved using community assets, the increase in property value becomes community property. *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 869, 855 P.2d 1210 (1993). Gunkel Orchards, a community asset, operated the Cherry Hill land, expending capital to improve the properties. RP (Vol 4) 916. By using community property to develop and operate Cherry Hill, any increase in value of the Cherry Hill properties became a community asset.

The trial court properly held Cherry Hill to be a community asset because Wife's contributions to Gunkel Orchards helped fund the purchase of the Cherry Hill properties. Even if it were determined that Cherry Hill is Husband's separate property, any increase in value of the properties since acquisition is a community asset because Gunkel Orchards, a community asset, developed and operated Cherry Hill properties with community assets.

C. The trial court abused its discretion in not awarding Wife the Dry Creek residence and indefinite spousal maintenance because the property division left Wife in a significantly worse financial position than Husband.

The trial court's property division was a manifest abuse of discretion because it placed the parties in disparate financial positions, which will only diverge further over time. The trial court's objective in a property division for a long-term marriage "is to place the parties in roughly equal financial positions for the rest of their lives." *In re Marriage of Wright*, 179 Wn. App. 257, 262, 319 P.3d 45 (2013). To achieve the objective of placing the parties in "roughly equal financial positions for the rest of their lives, the trial court should have awarded Wife Dry Creek and indefinite spousal maintenance. While the trial court has broad discretion in making property divisions, it is a manifest abuse of discretion where the property division results in the parties being in substantially unequal financial positions for the rest of their lives. Since the court correctly decided to keep the family business under Husband's control by awarding Gunkel Orchards and Cherry Hill to Husband, the court should have awarded Wife Dry Creek and indefinite spousal maintenance in order to achieve the objective of placing the parties in "roughly equal financial positions for the rest of their lives."

- 1. Wife should have been awarded Dry Creek, the family residence, so that she does not have to spend her equalizing judgment on a new residence and because Wife, unlike Husband, will not improve her financial position in the future.**

The trial court abused its discretion in awarding Dry Creek to Husband. Husband inaccurately asserts that the trial court awarded Dry Creek to Husband because of the maintenance issues involved with the property and because it is the only asset Husband can use to obtain funds to pay the equalizing judgment. Resp. Br. 17. While the trial court did recognize the property maintenance issues as a reason for awarding Dry Creek to Husband, it did not expressly base its decision on Dry Creek being needed as security for a loan to pay the equalizing judgment. RP (Vol 5) 1094: 18-25. Contrary to Husband's assertion, the trial court stated only that Husband "may need to obtain monies out of that (property) to help pay his judgment." *Id.* Considering Husband's significant business assets, he is certainly capable of obtaining financing secured by other collateral besides Dry Creek.

The trial court abused its discretion by ignoring the statutory factors listed in RCW 26.09.080 and the objective of placing the parties in "roughly equal financial positions for the rest of their lives." Instead, the court based its decision on Husband's claim that only he could maintain the property. The statutory factors that the court must consider, together with other relevant factors, are (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the

duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective. RCW 26.09.080. Instead of taking into account the objective of putting the parties in “roughly equal financial positions,” the trial court based its decision to award Dry Creek to Husband on Husband’s assertion that he alone could handle the maintenance of the property.

Had the trial court considered the extent of Husband’s separate property, his award of all the community business assets, and the objective of placing the parties in “roughly equal financial positions for the rest of their lives” it certainly would have awarded Dry Creek to Wife. The trial court incorrectly applied RCW 26.09.080 to the facts of this case and abused in discretion in basing the award of Dry Creek to Husband on property maintenance needs instead of the statutory factors enumerated in RCW 26.09.080, and the objective in long-term marriages of placing the parties in “roughly equal financial positions for the rest of their lives.”

While the trial court is not required to make an unequal property distribution, it must do so when an equal property division would not be “just and equitable.” *Glorfield v. Glorfield*, 27 Wn. App. 358, 360, 617 P.2d 1051 (1980) (stating that “the essential consideration is not whether a property distribution is equal, but whether it is just and equitable”).

Husband incorrectly relies on *Glorfield* as an analogous case in which the wife was awarded less than half of the community estate. In *Glorfield* the husband, like here, received the farm property and business which he operated with his siblings. *Id.* at 359. The wife in *Glorfield*, contrary to Husband's assertion, received a greater share of the community estate. *Id.* (Mr. Glorfield received \$373,729 and Mrs. Glorfield received \$403,729 of the community estate); *See* Resp. Br. 18. Further, *Glorfield* is distinguishable from the present case in that the wife in *Glorfield* sought to have business/farm assets awarded to her at trial and on appeal. *Glorfield*, 27 Wn. App. at 359. The *Glorfield* court, as well as the trial court in the present case, correctly found that a division of the business assets is inappropriate. *Glorfield* is not analogous to the present case and does not support Husband's assertions because the wife in *Glorfield* was awarded more than 50% of the community property and because the trial court correctly denied the wife's appeal to have the business assets divided between the parties. Here, unlike *Glorfield*, Wife is seeking the family residence and spousal maintenance, not a division of the business assets.

Wife does not contend that she should be awarded part of Gunkel Orchards. In the present case, Wife contends that she should have been awarded Dry Creek, the family residence, because by awarding Dry Creek to Husband, together with the rest of the property division awarded to

Husband, would be an abuse of discretion. It is not a “just and equitable” result where Husband leaves the marriage with “great prospects” and “an ever increasing upward trajectory in terms of his various enterprises.” RP (Vol 5) 1093: 15-19. Husband was awarded all the income producing assets, roughly half the community estate, significant separate property and on top of that, Dry Creek. Wife, on the other hand, “is basically where she is going to be now.” RP (Vol 5) 1094: 4-5 (indicating that, unlike Husband, Wife’s assets will not appreciate in value and she will not improve her situation.) The trial court clearly failed to place the parties in “roughly equal financial positions for the rest of their lives.” Considering the parties future prospects and the statutory factors in RCW 26.09.080, awarding Dry Creek to Husband is not just and equitable; it is a manifest abuse of discretion on the part of the trial court.

Husband’s income will likely increase over time, while Wife’s will stay stagnant. Husband, without citing any supporting evidence in the record, states that Wife will earn “at least \$3,201” per month in investment income. Resp. Br. 22-23. It is not clear how Husband determined that this will be Wife’s investment income. Wife will have to use cash received from her judgment to purchase a new residence since Dry Creek was awarded to Husband. This will require a significant amount of her equalizing award. After purchasing a new residence, Wife will then need to use part of her equalizing award to cover monthly

expenses as her salary is insufficient to meet her basic living expenses. While Wife may earn investment income on the remaining equalizing award, the specific amount is unclear. Further, in the court's ruling it found that Husband's prospects for increased earnings in future years are "great," and that the court expects Husband's "upward trajectory in terms of his various enterprises" to "continue." RP (Vol 5) 1093: 15-19. On the other hand, the court found that Wife will have no more than what the court leaves her with in the property division and equalizing judgment. RP (Vol 5) 1094: 4-9. Based on the court's ruling and the facts presented, it is inaccurate for Husband to make an assertion regarding his monthly income and expenses remaining stagnant for the next 15 years, with an excess income after expenses are paid of just \$1,200. Resp. Br. 22-23. At the same time, Husband inaccurately calculates Wife's earnings and expenses by assuming an investment income of \$3,201, without any supporting evidence, and assuming that her expenses will remain stagnant into the future. The evidence on record indicates that Husband will increase his earnings over time, while Wife's earnings will remain stagnant.

2. **The trial court abused its discretion in not awarding Wife lifetime maintenance in the amount of \$3500 per month because otherwise Wife will live the rest of her life in a significantly worse financial condition compared to that which the parties enjoyed during marriage and to which Husband continues to enjoy.**

Husband argues that Wife should not receive maintenance because (a) any maintenance award would be a an impermissible lien on future earnings of Husband, (b) Wife is self-sufficient, (c) Husband cannot afford to pay maintenance, and (d) Wife was fully and fairly compensated for all services she performed for Gunkel Orchards during the course of the marriage. Resp. Br. 26-35. Husband’s argument fails to fully address the statutory factors enumerated in RCW 26.09.090 and inaccurately applies judicial precedent by mistakenly relying on *Marriage of Morgan* as authority for his assertions.

(a) Lifetime maintenance awards are common and permissible methods available to courts, not an impermissible lien on future earnings.

Husband argues that a maintenance award would amount to a “perpetual lien on the future earnings” of Husband, and that “courts may not grant” such lien. Resp. Br. 27. Husband incorrectly relies on *Marriage of Morgan* in making the mistaken assertion that courts “may not grant” a maintenance award to be paid with future earnings of Husband. *Morgan v. Morgan*, 59 Wn.2d 639, 642, 369 P.2d 516 (1962). The *Morgan* court ruled that, “when the physical income-producing property of each party is substantial, and when each party is trained in a profession and has the ability to earn and is earning a living,” it is not the policy of the court to provide one party with indefinite maintenance. *Id.*

Morgan is distinguishable from the present case in two key ways. First, in *Morgan*, the wife was awarded nearly sixty percent of the community estate. *Id.* at 640. Second, in *Morgan*, the wife had a master's degree and well paying job. *Id.* In the present case, Wife was awarded just fifty percent of the community assets, which are not income producing assets, and Husband received significant income producing separate assets. This leaves Wife with far less than 50% of the total community and separate assets and no income producing assets. Further, Wife's education and job prospects will not allow her to gain employment that is self-supporting. *Morgan* is clearly distinguishable from the present case and does not, as Husband argues, stand for the proposition that a trial court "may not grant" indefinite maintenance, especially where the Wife does not have a job that is self-supporting and does not have significant income-producing assets.

(b) Neither Wife's current employment nor her future job prospects will allow her to be self-supporting.

The trial court, in its ruling, stated that career improvement is unlikely for Wife. RP (Vol V) 1093-1094. The court went on to state that Wife "is basically where she's going to be now." *Id.* Wife's current position is precarious and clearly not self-supporting. Her monthly net income from work is \$1,148 and her monthly expenses are about \$2,600. RP (Vol I) 34: 15; RP (Vol III) 622: 1. Wife, therefore, must turn to her

equalizing judgment to cover the difference between her monthly expenses and income. Where Husband was awarded income producing property, both community and separate, Wife received only cash. RP (Vol V) 1094-1098. Wife must now use that cash to pay monthly expenses. The trial court abused its discretion in not awarding lifetime maintenance.

While there is a possibility that Wife can use investment income from her equalizing judgment to cover the difference between her monthly income and expenses, this will only be possible if she is “prudent.” RP (Vol V) 1093: 22. If Wife continues to live at the same standard she became accustomed to during the latter years of the marriage, and the standard at which Husband continues to live, her equalizing judgment will likely not support her through her retirement years. Only by living frugally can Wife be somewhat assured that she will have assets sufficient to last her through retirement. Wife’s equalizing judgment and salary do not make her self-sufficient.

(c) Husband is financially capable of paying indefinite maintenance to Wife.

Husband is financially capable of paying indefinite maintenance to Wife, in the amount of \$3500, because Husband’s business ventures have reserve/operating funds of \$1.3 million, no debt, and Husband could modify his salary and/or distributions to increase his personal income. Husband is correct in his assertion that the trial court must consider

Husband's ability to pay spousal maintenance. Resp. Br. 32; RCW 26.09.090 (f). Husband was awarded all of the parties business assets in the property division, including both community property as well as his separate property. RP (Vol V) 1094-1097. While Husband claims to have only about \$1000 in disposable income with which to pay spousal maintenance, the record indicates that Husband could have a greater amount if he chooses. RP (Vol III) 806: 15-16 (Husband testified that his income from business ventures could be more if he, his brother, and the CPA agreed). Further, Husband testified that he takes distributions from his business ventures for tax purposes and land acquisition, not to maximize his personal earnings. RP (Vol IV) 943: 7-11. Husband has the power to modify his personal income so that he can afford to pay Wife spousal maintenance in the amount of \$3500 per month.

Morrow is similar to the present case. In *Morrow*, the court found that the husband controlled his own salary through distributions and payments made between his business ventures. *In re Marriage of Morrow*, 53 Wn. App. 579, 587, 770 P.2d 197 (1989). The *Morrow* court awarded indefinite maintenance to the wife, relying in part on the fact that the husband's ability to pay was within his control because he could take larger distributions if he changed the accounting practices in his businesses. *Id.* The present case is similar to *Morrow* in that Husband controls his distributions from his business ventures. Husband, together

with his brother and business partner, has the ability to take larger distributions or salary, especially considering that Gunkel Orchards has a reserve/operating fund of \$1.3 million and no debt. RP (Vol III) 805-806. Since Husband can take home more income, like the husband in *Morrow*, Husband's ability to pay spousal maintenance is significantly higher than the \$1000 disposable income that Husband alleges.

(d) Wife should receive spousal maintenance, in part, because she helped Husband develop his business fortune and now will not see the benefits of her years of sacrifice.

Husband argues that Wife should not be compensated with maintenance based on the support she provided to Husband and his family's business during the marriage. Resp. Br. 32-36. Wife does not seek compensation based on unpaid services rendered to Gunkel Orchards. Instead, Wife seeks lifetime spousal maintenance, in part, because she helped Husband amass a land and business fortune that will no longer benefit her. It is well established that a court may consider whether one spouse has contributed to the professional development of the other spouse in deciding whether maintenance is just. *See In re Marriage of Washburn*, 101 Wn.2d 168, 170-172, 677 P.2d 152 (1984). Wife contributed to the business and land fortune which was awarded to Husband. Wife lived modestly during most of the marriage, and must live modestly now so that her equalizing judgment can support her living

expenses through retirement. Wife, therefore, has not enjoyed the benefit of her work in supporting Husband as he developed his businesses. This is a relevant factor that should be considered in deciding whether spousal maintenance is just and equitable.

D. The trial court abused its discretion in not granting Wife reimbursement for attorney fees and costs because Husband is in a better position to pay the attorney fees and Wife received disproportionately less in the property division.

In assessing whether an award of attorney fees is appropriate, the court should primarily consider “the need of the party requesting the fees, the ability to pay of the party against whom the fee is being requested, and the general equity of the fee given the disposition of the marital property.” *In re Marriage of Davison*, 112 Wn. App. 251, 259, 48 P.3d 358 (2002). “A spouse’s receipt of substantial property or maintenance does not preclude the spouse from also receiving an award of attorney fees and costs when the other spouse remains in a much better position to pay. *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). As explained above in relation to Husband’s ability to pay spousal maintenance, Husband was awarded all the parties income producing business assets and is able to pay Wife’s attorney fees. Wife earns significantly less than Husband and Husband’s wealth will continue to grow, while Wife must live frugally for her cash judgment to last her into the future. Under these facts, it was not just and equitable for Wife to pay

her attorney fees. The trial court abused its discretion in not ordering Husband to pay Wife's attorney fees.

IV. CONCLUSION

Based upon the evidence presented at trial, the laws and decisions of the State of Washington cited in this brief and in the Brief of Appellant, and the abuse of judicial discretion by the trial court, Wife respectfully requests that the Findings of Fact, Conclusions of Law and the Decree of Dissolution be modified to award Wife indefinite maintenance in the amount of \$3500 per month, to award Wife the Dry Creek home as part of the property division, and to award Wife attorney fees at the trial level and on appeal.

Dated this 11th day of August, 2014

Respectfully submitted,

JAQUES SHARP



Michael B. FitzSimons, WSBA # 25054
of Attorneys for Appellant
P.O. Box 457 / 205 Third Street
Hood River, OR 97031
541-386-1311