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NO. 71167-9-I

**COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON**

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In re Marriage of:

BONNIE FAY AuBUCHON

RESPONDENT

v.

VAN AuBUCHON

APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
FOR SNOHOMISH COUNTY  
THE HONORABLE MICHAEL T. DOWNES

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RESPONDENT'S BRIEF

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SNOHOMISH COUNTY  
COURT OF APPEALS, DIVISION ONE

ORIGINAL

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A. TABLE OF AUTHORITIES

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### A. Introduction

Van and Bonnie AuBuchon were married on June 26, 1971. They purchased the marital home in 1983, where they raised a family of three boys, none are dependent on either parent at the time Ms. AuBuchon filed for Dissolution of Marriage. The parties separated on January 11, 2013. At that time the parties had no substantial property other than the marital home.

In 2006, the parties refinanced the marital home. Ms. AuBuchon was not on the loan, though she was named on the title of ownership of the home with Mr. AuBuchon. To date, only the mortgage of the marital home is solely in Mr. AuBuchon's name. No testimony or argument was made that the mortgage is the separate debt of Mr. AuBuchon.

At no time did Mr. AuBuchon issue any discovery during the course of the dissolution case, either in the form of interrogatories or requests for production. Counsel for Ms. AuBuchon mailed Petitioner's First Set of Interrogatories and Request for Production on June 11, 2013. Mr. AuBuchon never answered the discovery requests.

On May 1, 2013, Counsel for Ms. AuBuchon obtained a Comparative Market Analysis (CMA) on the value of the marital

home. This document and testimony from the wife was presented at trial on September 26, 2013. Mr. AuBuchon also presented a CMA and testimony supporting his value of the marital home.

On cross-examination, Mr. AuBuchon questioned Ms. AuBuchon about whether an appraisal was obtained for the home. Ms. AuBuchon's Counsel objected to the line of questioning as being attorney-work product. The objection was sustained.

In final ruling, the Court found the value of the home to be \$225,000 thereby adopting Ms. AuBuchon's Market Analysis as being more closely aligned with the condition of the home, most notable the finding of a rat infestation.

C. Assignments of error

1. There are none.

#### D. Statement of the Case

1. The Trial Court properly based its value of the residence at \$225,000 as supported by Petitioner's Exhibit No. 11, prepared on May 1, 2013. (Report of Proceedings, September 26, 2013, page 37, lines 5-11)

2. The Trial Court recognized the marriage of the parties was a long term marriage and that the property was owned by the parties for more than 30 years. (Report of Proceedings, October 1, 2013, page 2, lines 9-11)

3. The Trial Court properly divided the share of the asset in a 55/45 split. (Report of Proceedings, October 1, 2013, page 5, lines 6-16)

4. The trial court properly assigned the Wife to pay the mortgage on the marital home, even though the mortgage is in the Husband's name. (Report of Proceedings, September 26, 2013, page 31, 4-22)

5. It is within the Trial Court's discretion to order the Wife to remain in possession of the marital home for five years. (Report of Proceedings, September 26, 2013, pages 117-118 all)

6. The Trial Court correctly denied the Husband's request for a continuance (Report of Proceedings, October 23, 2013, page 17, lines 23-25)

E. Argument

**1. The Trial Court Property Set the Value of the Marital Home at \$225,000.**

The trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a manifest abuse of discretion. *In re Marriage of Rockwell*, 141 Wn.App. 234, 242, 170 P.3d 572 (2007). A manifest abuse of discretion occurs when the discretion was exercised on untenable grounds.

*Rockwell*, citing *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). If the decree results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred. *Rockwell*, citing *In re Marriage of Pea*, 17 Wn.App. 728, 731, 566 P.2d 212 (1977).

Ms. AuBuchon testified that the marital home had a rat infestation and was in need of repairs inside the home that began prior to Ms. AuBuchon filing for divorce. (Report of Proceedings, September 26, 2013, pages 33-34, all) The marital home did not have any modern upgrades or renovations in comparison to the homes used in the CMA provided by Mr. AuBuchon. (Report of Proceedings, September 26, 2013, page 34, lines 1-14) The marital

home did not have a view either. (Report of Proceedings, September 26, 2013, page 35, lines 15-16)

Mr. AuBuchon states in his brief that the CMA offered by the Wife contained comparable sales of bank owned and otherwise distressed properties. Mr. AuBuchon never gave testimony that the comparable sales on the CMA were from bank owned properties, and it is precluded from being considered here. Mr. AuBuchon's testimony about his CMA confirmed that the individual who performed the analysis did not enter the marital home and was unaware of the interior condition, namely the damage from the rat infestation. (Report of Proceedings, September 26, 2013, page 83, lines 10-12) The individual was also unaware that the house had not been updated or maintained well. (Report of Proceedings, October 1, 2013, page 3, lines 15-24) Trial Court properly used its discretion in its valuation of the marital home based upon the evidence and testimony presented. (Report of Proceedings, October 23, 2013, page 11, lines 19-25 through page 12, lines 1-3)

The Husband's argument that an appraisal should have been before the Court and considered is without merit. ER 502(f) (2) states "work-product protection means the protection that applicable law provides for tangible material (or its intangible

equivalent) prepared in anticipation of litigation or for trial.” Though Counsel for the Wife, during the process of the divorce and in anticipation of trial, had an appraisal prepared, the appraisal was not disclosed to Mr. AuBuchon, it was not sought out during the discovery phase of the case, and it was not testified to or relied upon during testimony given at trial. (Report of Proceedings, October 23, 2013, page 11, lines 1-15) The appraisal was properly categorized as work product and the Trial Court properly sustained the objection. (Report of Proceedings, September 26, 2013, page 63, lines 1-15)

CR 26(b)(1) states “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...” At no time during the divorce proceeding did Mr. AuBuchon make any discovery requests. (Report of Proceedings, October 23, 2013, page 11, lines 9-15) The Trial Court explained to Mr. AuBuchon that “The rules require that discovery rules are supposed to be followed.” (Report of Proceedings, October 23, 2013, Page 11 lines 9-10) Information is supposed to be exchanged in advance. (Report of Proceedings, October 23, 2013, page 11, lines 10-11) Nothing would have prevented you from making a discovery request in advance of trial

with regard to appraisals that were done.” (Report of Proceedings, October 23, 2013, page 11, lines 9-13)

**2. The Trial Court Property Divided the Share of Assets by 55/45 Split and Recognized the Marriage of the Parties was a Long Term at Greater than 30 Years.**

Mr. AuBuchon cites in his brief that the Washington State Community Property Deskbook, Section 4.16 states “Generally, property is to be valued at the date of the trial rather than the date of the separation of spouses.” However, case law supports that the Trial Court has broad discretion to pick a valuation that is equitable even if the valuation of the property was done greater than four months prior to trial. *Koher v Morgan*, 93 Wn.App 398, 404, 968 P.2d 920 (1998). “Our Supreme Court has held that the dissolution statutes give courts in divorce proceedings broad discretion to pick an evaluation date that is equitable.” *Id.* In the case at bar, the CMA presented by the Husband was completed on September 4, 2013 which was closer to September 26, 2013 (the date of trial). However, the Husband confirmed that the evaluator did not enter the home, was not aware of the rat infestation and damage, and was not aware that no updates or renovations had been completed on the home. (Report of Proceedings, September 26, 2013, page

83, lines 10-12)

In all dissolutions, the Trial Court must consider the following factors when making distributions of property: 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 property is to become effective..." Wash. Rev. Code 26.09.080. The trial court in the AuBuchon's dissolution chose to assign a 55/45 split. (Report of Proceedings, October 1, 2013, page 4 lines 4-8) A just and equitable division 'does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties." *In re Marriage of Crosetto*, 82 Wn.App. 545, 556 (1996). In *Crosetto*, the Trial Court awarded the Wife 60% of the community assets due to a marriage of 19 years, in which the Wife put her own career on hold to raise the parties' children. *Id.*

Mr. AuBuchon further states in his brief that "The lending institution does allow assume ability of loans in dissolution actions when the individual can qualify for the loan which Bonnie could

not.” No new evidence may be presented at the appellate case level; the case is reviewed on the evidence presented only at trial.

Mr. AuBuchon mischaracterizes the testimony regarding the rat infestation. Ms. AuBuchon testified at trial that it did not simply begin 6 months prior to Mr. AuBuchon vacating the marital home. (Report of Proceedings, September 26, 2013, page 83, lines 10-12)

Mr. AuBuchon in his brief attempts to introduce evidence and argue points that were not presented at trial. The rat infestation was found when the CMA assessment was performed in anticipation of trial. (Report of Proceedings, September 26, 2013, page 62. Lines 17-19)

4. **The Trial Court Properly Assigned the Wife to Pay the Mortgage on the Marital Home.**

Debt that is incurred by one spouse is presumably community if it confers a community benefit. *In re Marriage of Manry*, 60 Wn.App. 146, 150, 803 P.2d 8 (1991). Since the Wife is awarded the house in the present matter, it is reasonable that the Wife would also be responsible for the debt associated with the asset she was awarded. (Report of Proceedings, September 26, 2013, page 62, lines 17-19)

5. **It is within the Trial Court's discretion to order the Wife to remain in possession of the marital home for five years.**

Pursuant to RCW 7.52.440, the Court has it within its discretion to award offsetting compensation to one party when a partition of property cannot be made equal between the parties. RCW 7.52.440. This also follows from the ancient doctrine of owelty, and the Trial Court can award an owelty lien against property awarded to one party in favor of the opposing party to assure payment of debt. *In re Marriage of Wintermute*, 70 Wn.App. 741, 745-746, 855 P.2d 1186 (1993) citing *Hartley v. Liberty Park Assocs.*, 54 Wash. App. 434, 437, 774 P.2d 40, *review denied*, 113 Wash. 2d 1013, 779 P.2d 730 (1989). In *Wintermute*, the Husband was properly delayed eight years from enforcing his lien against the house that was awarded to the Wife.

In the case at bar, the Court ordered did not abuse its discretion by rendered an owelty lien in favor of the husband to be delayed in its execution for five years when the Wife's income is based upon a studio located in the home where she teaches classes and makes jewelry to sell. (Report of Proceedings, September 26, 2013, page 114, lines 22-24) The Wife further testified as to the difficulty and cost associated with her obtaining

studio space outside of the home. (Report of Proceedings, September 26, 2013, page 14 through page 15, lines 1-15)

**6. The Trial Court Granted the Motion to Continue the Date for Presentation of Final Orders.**

The Husband submitted a motion for continuance of presentation of the final orders. (Report of Proceedings, October 11, 2013, page 2, lines 8-9) He requested an additional two weeks. (Report of Proceedings, October 11, 2013, page 2, lines 14-18) The Trial Court granted his request for continuance of presentation and set the matter on for October 23, 2013. (Report of Proceedings, October 11, 2013, page 2, lines 19-20)

However, on October 23, 2013, instead of presenting what he believed was inconsistent between the drafted final orders and the Trial Court's oral ruling, the Husband attempted to re-argue and resubmit his evidence on the ruling made on the marital home. (Report of Proceedings, October 23, 2013, page 17, lines 19-25 through page 18, lines 1-15)

Mr. AuBuchon clearly misunderstood the order of continuance of presentation, by stating to the Trial Judge, "The motion, I thought was approved, and in that I asked the Court for the opportunity to

be heard on the evidence of fact and testimony, which was not consistent with claims made by the petitioner.” (Report of Proceedings, October 23, 2013, page 17, lines 19-22) The Trial Court asked to look at the motion that Mr. AuBuchon was referencing. The Trial Court responded, “That motion was denied. We had a trial. The time to deal with all these things was at the trial, not after the trial is over and I’ve already ruled. That’s essentially a motion for a new trial.” (Report of Proceedings, October 23, 2013, page 17, lines 23-25 through page 18, lines 1-2) The Husband had the opportunity to present all of his evidence and testimony, and respond to the Wife’s testimony and evidence. (Report of Proceedings, October 23, 2013, page 18, lines 11-15)

The Husband fails to state how the Trial Court abused its discretion and how the ruling is not based upon tenable grounds. The Husband references a Certified Appraisal that was not made a part of the record and was properly excluded. He fails to argue why or how the Work Product Doctrine is overcome in this case. Furthermore, the Husband had ample opportunity to obtain an appraisal of the property but failed to engage in any discovery, either by issuing requests or responding to the Wife’s requests.

F. **Conclusion**

In conclusion, the Trial Court did not error in:

1. Setting the value of the marital home at \$225,000 by adopting the Comparative Market Analysis presented in the Wife's exhibits and by her testimony;
2. Awarding the property to the Wife, ordering that the Wife pay the debt on the marital home for five years while giving the Husband lien for his interest, by awarding the Wife 55% of the value of the community assets and the Husband 45%. The Respondent respectfully requests that the Court affirm the value of the home and the awarding of the property to the Respondent.

Dated this 12<sup>th</sup> day of January, 2015.

Respectfully submitted,



Tresa A. Sadler, WSBA No. 32307  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby declare under penalty of perjury under the law of the State of Washington that on January \_\_, 2015, I caused to be served by certified mail a true and correct copy of the foregoing pleading upon the pro se appellant at the address stated below:

Van D. AuBuchon  
P.O. Box 121  
Lynnwood, WA 98043

And caused to be filed a true and correct copy of the foregoing pleadings upon the court:

Court of Appeals, Division I  
600 University Street  
Seattle, WA 98101-4170

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