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Washington State
Court of Appeals
Division Two

June 12, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of: JUDITH LEE BURKS, Appellant, v. WALTER G. BURKS, Respondent.	No. 49576-7-II UNPUBLISHED OPINION

LEE, J. — Judith Lee Burks appeals the trial court's distribution of property to her former husband, Walter G. Burks, following a dissolution proceeding. Specifically, Judith challenges the superior court's distribution of a series of financial deposits into her separate bank account. We affirm.

FACTS

Judith Lee Burks and Walter G. Burks[1] separated on October 23, 2014, following 28 years of marriage. On October 29, Judith filed a petition for dissolution of marriage.

A. TRIAL

During the dissolution trial, Judith testified that she had opened a separate bank account in her name only in January 2008. Between October 2010 and September 2014, a number of large financial deposits were made into Judith's separate account.

[1] This opinion refers to the parties by their first names because both parties share the last name "Burks." We mean no disrespect.

At trial, Judith and Walter disputed the character and distribution of the following deposits relevant to this appeal:

1. October 21, 2010, Deposit

On October 21, 2010, Judith deposited $15,000 into her separate account. Judith testified that this money was part of a $25,000 gift from her parents. Although the gift was for $25,000, her parents took back $10,000 because she and Walter still owed them for the $20,000 they borrowed from her parents in January 2006. Judith then used $10,000 of the amount she deposited to obtain a cashier's check to further pay her parents back for the money she and Walter had borrowed from her parents. This left Judith with $5,000 remaining of her parents' gift.

2. May 9, 2011, Deposit

On May 7, 2011, Judith deposited a $25,000 check from her parents into her separate account. Judith testified that her parents intended this check to be a tax-free deposit to her.

3. April 27, 2012, Deposit

On April 27, 2012, Judith deposited into her separate account a $25,000 check from her parents dated April 25, 2012. A note accompanying the check read, "Sweet Judy, here's to you from us. Have fun and enjoy life. Love Ted and Mom." Verbatim Report of Proceedings VRP (Apr. 26, 2016) at 206.

4. April 22, 2013, Deposit

Judith testified that she cashed in an Investment Retirement Account (IRA) for $3,962.79 on April 22, 2013, and deposited the funds into her separate account. Judith also testified that Walter told her that she could keep this deposit as her own because she "put so much money into

the truck out of [her] own gift money." VRP (Apr. 26, 2016) at 223. Walter did not controvert this testimony.

5. June 25, 2013, Deposit

Judith testified that she deposited a $3,000 check from her father into her separate account on June 25, 2013.

6. March 24, 2014, Bank Transfer

On March 24, 2014 Judith deposited a $50,000 check from her father. On the deposit slip admitted into evidence, Judith had written, "From Dad." Ex. at 38.

7. July 28, 2014, Deposit

Judith testified that on July 28, 2014, she deposited $25,000 from a different, separate checking account she had at a different bank to her separate account where the gifts from her parents were deposited.

8. September 2, 2014, Deposits from Father's Vanguard Account

Judith testified that after her father passed away, she received inheritance from his Vanguard account totaling $158,270.17. The trial court admitted Vanguard statements showing the transfer of funds from her father's account into her account. However, Judith could not produce any documentation showing that she was the beneficiary on her father's Vanguard account.

B. FINDINGS AND CONCLUSIONS ON SEPARATE PERSONAL PROPERTY

In its findings and conclusions, the trial court held that "[e]ach spouse should keep any separate property that s/he now has or controls. The spouses' separate personal property is listed in the attached Exhibit 'A' which is made a part of these findings." Clerk Papers (CP) at 44.

In Exhibit A, the trial court divided the property between Judith and Walter. The court awarded each party half the funds in Judith's separate account, which included the various deposits Judith testified were gifts or inheritance from her parents. With regard to the disputed deposits, the court found:

> Wife's Checking and Investment Accounts
>
> The most complicated asset of the parties is the Wife's Vanguard/S[m]ith Barney and U.S. Bank financial accounts. In order to properly characterize the funds, all of the various deposits into that account need to be analyzed. Initially, other than the Wife's testimony, there is little to qualify all of the less-than-$1,000 deposits as separate. Most, but not all, seem to line up in time with birthdays and Christmas, however there is nothing else to bolster that characterization.
>
> The parties stipulated that the one $7,500.00 life insurance policy proceeds were, in fact, separate from wife's parents' estate. The Court would find that to be the case.
>
> Things get a bit less clear on the other large deposits . . . .
>
> 1. October 21, 2010, deposit $15,000.00 – It is unclear exactly what this was. Apparently, the parents were making a $25,000 gift, but kept $10,000 as one-half payment of the community loan they had made to the Petitioner and Respondent. The note indicates in the Mother's name that the note was paid in full by Judy (the Petitioner) signed off by the Mother, Helen Gano. Clearly, the forgiveness of the community debt by the parents would indicate that gift was at least partially to the community. There being nothing else to indicate otherwise, it would normally be considered a gift in full to the community.
>
> 2. May 9, 2011, deposit $25,000.00 – Check from her mother (#2) signed by both mother and father. Would seem to indicate was from both to assure it fell under the gift tax exemption of $13,000 for 2011. No indication on the face of the document it was to her alone. No accompanying note.
>
> 3. April 27, 2012, deposit $25,000.00 – This deposit included a handwritten notation (#34-36) from her parents indicating it was from "Mom and Dad" to the wife. It was contemporaneous with the check. The check signed by both parents.

4. April 22, 2013 IRA deposit of $3,962.70 – There was uncontroverted testimony that the husband told the Petitioner/wife that "she could keep" these funds for herself. The statement was made at the time of the gift.

5. June 25, 2013, deposit $3,000.00 – Petitioner testified this was a gift. No indication on the documentation of it being a gift to her alone (#37).

6. March 24, 2014, U.S. Bank $50,000.00 deposit – indicated "from Dad" (#38) the wife testified this was a gift. The wife, however, consistently testified that the larger gift transfers were "tax free." The Court can take Judicial Notice that the maximum tax-exempt gift to one person from a community in 2014 would have been $38,000.00. This would tend to indicate the "gift" was to both husband and wife.

7. July 28, 2014, deposit – $25,000.00 – Wife testified this was a gift. This check would indicate "gifts" totaling $75,000 in 2014 as of that date.

8. September 2, 2014, deposit – $12,891.75 from Father's Vanguard.

9. September 2, 2014, deposit – $73,363.30 from Father's Vanguard.

10. September 2, 2014, deposit – $73,688.76 from Father's Vanguard –These three transfers (8-10) certainly bear all of the indications of either a) an on –death transfer; or b) a beneficiary transfer. There was no statement indicating that the transfer was such, nor any documentation from the father's account showing her as the beneficiary.

The above analysis would tend to indicate that of the amounts sitting in the wife's accounts, there is an indication that the wife's parents were gifting an annual financial gift of about $25,000 – most likely as an estate plan. There really is no convincing documentation to indicate such a plan. The presumption of community property is very strong. It would be a leap for the Court to find the presumption of a gift to the community without more compelling evidence than the Petitioner's self-serving statements. Of the money in the account, only the one stipulated item – the $7,500 from the parent's insurance policy appears to be convincingly separate property.

The Court will note that the tracing of assets on these accounts would be sufficient in the Court's view to maintain community or separate status if the Court were able to determine a separate status of each "gift" at the time of acquisition.

CP at 46-48.

At the end of its findings, the trial court ruled, "Neither party has enough in their relative incomes to pay their regular living expenses in full at their pre-separation levels without delving into their other assets." CP at 49. The trial court concluded, "It is the finding of [the] Court that this is a case where equity must overtake simple accounting." CP at 49.

C. MOTION FOR RECONSIDERATION

Judith filed a motion to reconsider based on CR 59(a)(1), (3), (4), (7), and (9). Under CR 59(a)(1), Judith argued that Walter submitted an illustrative exhibit indicating that he understood certain funds to be separate, which was a different position than he had taken in his pleadings. Judith argued this illustrative exhibit constituted an irregularity in the proceedings warranting relief under CR 59(a)(1). She also argued that relief under CR 59(a)(1) was warranted because the trial court took judicial notice of the maximum tax-exempt gift to one person from a community in 2014. This constituted irregularity because tax laws only apply to the donor and neither party had discussed tax law limitations for gifts.

Judith also requested relief under CR 59(a)(3). She argued that Walter's illustrative exhibit and the change in his trial position constituted accident or surprise.

As to CR 59(a)(4), Judith submitted as newly discovered evidence two documents from Morgan Stanley signed by Walter. The first document was dated July 24, 2014 and showed that Walter "transmute[d]" all his community property interest in the IRA to Judith. CP at 63. Judith also submitted a "Transfer on Death Agreement" dated May 11, 2013, in which Walter agreed to designate Judith's son as the beneficiary of one of the bank accounts. Judith further submitted as newly discovered evidence a statement from her stepfather's Vanguard account showing specific

transfers to Judith's account, a Vanguard letter showing that Judith's father had designated her as a beneficiary on his account, and a copy of her parents' will. Judith did not argue that any of these documents could not have been discovered and produced prior to trial with reasonable diligence.

Judith argued that under CR 59(a)(7), there was no evidence to justify the trial court's decision because her testimony at trial "was very clear about the gifts and inheritance she received" and that she maintained "a very clear and specific paper trail of her separate interest in these monies." CP at 65. Judith also argued that all of her testimony and admitted exhibits at trial supported her assertion that certain monies belonged to her as separate property.

Finally, under CR 59(a)(9), Judith argued that substantial justice had not been done because her testimony and the documents admitted into evidence "clearly supported" her position "as to the nature and characterization of the gift monies and inheritance as being her separate property." CP at 67. Judith also argued that there was no effective cross examination to weaken her claims to the gift money and inheritance.

The trial court denied Judith's motion to reconsider. The court ruled, "This is a long term marriage and with elderly litigants, the Court looks to putting them both in similar financial positions for the rest of their lives." CP at 116. As to the illustrative exhibit, the court stated that the illustrative exhibit Walter presented was not evidence and was never considered evidence. The court also ruled that the newly discovered evidence Judith submitted in support of her motion could have been discovered prior to trial. As to Judith's claim that there was no evidence to justify the trial court's decision, the court ruled that Judith had not provided any evidence aside from her testimony and bank statements showing the money transfers. The court then ruled that Judith's

uncontroverted testimony did not alone overcome the community property presumption. The court stated, "Had the Court been convinced that the Petitioner's assertions of separate property were clear and convincing, the Court still has the ability to divide and distribute separate property to effect a fair and equitable outcome in a long-term marriage case such as this." CP at 118. The court concluded:

> As stated above, these folks were married for 28 years and are both in their 70's. The principles of equity dictate they be put into positions that are roughly similar so they can live the remainder of their lives at a similar lifestyle. The award of property as set out in the Court's decision achieves the equitable end.

CP at 118.

Judith appeals the trial court's distribution of the deposits discussed above and denial of her motion for reconsideration.

ANALYSIS

A. ASSIGNMENT OF ERROR ON APPEAL

Judith assigns error to the trial court's findings and conclusions 10 and 22, which divided the parties' separate personal property and addressed the characterization of the parties' property. Judith's arguments only address the trial court's distribution of the deposits into her separate bank account. However, both findings and conclusions to which Judith assigns error address and characterize *all* property to be divided between the parties, not just the funds in Judith's separate account.

Walter argues that because Judith assigns error to the trial court's findings without specifying which portions of the findings are unsupported by substantial evidence, we should consider those findings verities on appeal. We disagree.

Judith provides argument as to which portion of the trial court's findings she challenges. Although her argument here is not extensive, she cites to legal authority and relevant portions of the record to support her argument that the trial court erred in characterizing "a number of financial transactions" as community property. Br. of Appellant at 7. Therefore, we conclude that Judith has provided sufficient specificity as to which particular findings she assigns error to on appeal.

B. CHARACTERIZATION OF PROPERTY

Judith argues that the trial court abused its discretion by characterizing certain funds in her separate bank account as community property. We hold that Judith's challenge to the trial court's characterization of property does not compel reversal.

1. Standard of Review

In a marriage dissolution proceeding, all property, both separate and community, is before the trial court for distribution. *In re Marriage of Zier*, 136 Wn. App. 40, 45, 147 P.3d 624 (2006), *review denied*, 162 Wn.2d 1008 (2007). The trial court is afforded broad discretion in distributing the marital property, and we will reverse only for manifest abuse of discretion. *Id.* A trial court abuses its discretion when its decision is based on untenable reasons or grounds. *Friedlander v. Friedlander*, 80 Wn.2d 293, 298, 494 P.2d 208 (1972). A trial court's decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Credibility determinations cannot be reviewed on appeal, as credibility determinations are solely for the trier of fact. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). We defer to the trier of fact on issues of witness credibility, conflicting testimony, and the

persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

A trial court's characterization of property as separate or community is a mixed question of law and fact. *In re Marriage of Schwarz*, 192 Wn. App. 180, 191-92, 368 P.3d 173 (2016). " 'The time of acquisition, the method of acquisition, and the intent of the donor' " are questions left to the trier of fact. *Id.* at 192 (quoting *In re Marriage of Kile*, 186 Wn. App. 864, 876, 347 P.3d 894 (2015)). Whether the rebuttable presumption of community or separate character of the property is overcome also is a question of fact. *Id.*

We review the factual findings supporting the trial court's characterization of the property for substantial evidence. *Id.* However, the ultimate characterization of the property as community or separate is a question of law we review de novo. *Id.*

2. The Trial Court did not Err in Distributing Property

"The character of property, whether separate or community, is determined at the time of acquisition." *Id.* at 189. Separate property includes property (1) acquired by a spouse before marriage, (2) property "acquired during marriage by gift or inheritance," or (3) "acquired during marriage with the traceable proceeds of separate property." *Id.* at 188. Property acquired during the marriage is presumed to be community property. *Id.* at 189. A party may rebut this presumption by offering "clear and convincing evidence that the property was acquired with separate funds." *Id.*

Here, Judith argues that the trial court's characterization of the financial transactions from her parents as community property was "manifestly unreasonable." Br. of Appellant at 8. The

issue Judith presents for review is whether "[t]he court abused its discretion in determining that several accounts containing gifts and inheritance were community property." Br. of Appellant at 5. From this argument, Judith appears to combine a challenge to the trial court's ultimate distribution of property, which is reviewed for manifest abuse of discretion, with a challenge to the trial court's characterization of the property, which is reviewed de novo. *In re Marriage of Zier*, 136 Wn. App. at 45; *In re Marriage of Schwarz*, 192 Wn. App. at 192.

The only legal support Judith provides for her entire argument is that the party challenging the community property presumption bears the burden of proof and that testimony at trial is evidence. Given the lack of clarity as to whether she seeks review of the trial court's characterization of the challenged deposits as separate property or whether she seeks review of the trial court's distribution of assets, we address each argument in turn.

a. Characterization of Property

Judith acknowledges she had the burden of establishing by clear and convincing evidence that the financial deposits were her separate property and not community property. *In re Marriage of Schwarz*, 192 Wn. App. at 189. Judith argues that she presented extensive, uncontroverted testimony that the transactions from her parents were gifts and inheritance and her separate property.

Ultimately, whether Judith's testimony was sufficient to rebut the community property presumption came down to credibility determinations, which we do not disturb on review. *Morse*, 149 Wn.2d at 574. In its Findings and Conclusions 22, the trial court set forth its findings and conclusions regarding the challenged deposits. The findings, including the finding that the

documentation failed to indicate that the deposits were a gift to Judith alone, support the trial court's conclusion that

> of the amounts sitting in the wife's accounts, there is an indication that the wife's parents were gifting an annual financial gift of about $25,000 – most likely as an estate plan. There really is no convincing documentation to indicate such a plan. The presumption of community property is very strong. It would be a leap for the Court to find the presumption of a gift to the community without more compelling evidence than the Petitioner's self-serving statements.

CP at 48.

However, even if the trial court did err in characterizing the challenged deposits as community property, this alone would not compel reversal. *In re Marriage of Schwarz*, 192 Wn. App. at 191. The trial court is not required to award property to an individual spouse or to the community based upon the property's classification. *Id.* We will remand based on a mischaracterization only "when it appears the trial court's division of the property was dictated by a mischaracterization of the separate or community nature of the property." *In re Marriage of Skarbek*, 100 Wn. App. 444, 450, 997 P.2d 447 (2000).

Here, the record shows that the trial court's division of property was dictated by "principles of equity," not the characterization of property. CP at 118. Therefore, even assuming without deciding that the trial court mischaracterized the accounts as community property, we hold that the trial court's characterization of property does not compel reversal.

b. Distribution of Property

Judith argues that the trial court abused its discretion in distributing the property because Walter failed to present evidence to counter Judith's testimony regarding the deposits into Judith's separate account. Judith further argues that "[n]o equity exist[ed] in that ruling" regarding Judith's

inheritance because the deposit occurred less than two months before the parties' separation. Br. of Appellant at 9. We disagree.

As to Judith's argument regarding the timing of the inheritance deposit from her father's Vanguard account, property acquired during the marriage is presumed to be community property. *In re Marriage of Schwarz*, 192 Wn. App. at 189. Even though the parties separated two months after this transfer, the property was still acquired during the marriage.

Further, even if the trial court had mischaracterized the deposits as separate property, the trial court was not required to distribute the proceeds solely to Judith. *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001) ("Under appropriate circumstances, [the trial court] . . . need not award separate property to its owner."). This is particularly true as "[i]n a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives." *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008). Any mischaracterization of property compels reversal only if "(1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way." *In re Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989).

Here, the parties were married for 28 years and both were in their 70s at the time of dissolution. In light of these circumstances, the trial court ruled that "[t]he principles of equity dictate they be put into positions that are roughly similar so they can live the remainder of their lives at a similar lifestyle." CP at 118. The trial court then distributed the property in order to

achieve this "equitable end." CP at 118. Given that the trial court's objective was to place the parties in roughly equal financial positions for the rest of their lives, such ruling was not manifestly unreasonable or based on untenable grounds. *In re Marriage of Rockwell*, 141 Wn. App. at 243.

Because the record shows that the trial court divided the property based on equity rather than the characterization of the property, and it is clear that the trial court would have divided the property in the same way, regardless of characterization, we hold that reversal is not required.

B. MOTION TO RECONSIDER

1. Standard of Review

We review the trial court's denial of a motion to reconsider for abuse of discretion. *Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015), *review denied*, 185 Wn.2d 1035 (2016). A court abuses its discretion if its ruling is manifestly unreasonable or based on untenable grounds. *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 403, 196 P.3d 711 (2008). The court's discretion may result in a decision upon which reasonable minds may differ, but it must be upheld if it "is within the bounds of reasonableness." *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991).

2. The Trial Court Did Not Err

Judith argues that the trial court erred in denying her motion to reconsider because its ruling on the motion was "legally inaccurate."[2] Br. of Appellant at 11. We disagree.

[2] Though Judith's motion to reconsider presented a number of arguments under CR 59, her only argument on appeal is that the trial court's ruling was legally erroneous based on *In re Marriage of Doneen*, 197 Wn. App. at 949. In fact, in Judith's argument, she does not cite to CR 59 once. Given that Judith's only argument here is based on *In re Marriage of Doneen*, we do not address

Judith contends that the trial court's ruling on the motion for reconsideration was legally erroneous because the ruling indicated "a clear impression" that equity under RCW 26.09.080 required a 50 percent split of the marital assets. Br. of Appellant at 11. In support, Judith relies on *In re Marriage of Doneen*, 197 Wn. App. 941, 950, 391 P.3d 594, *review denied*, 188 Wn.2d 1018 (2017)..

In *In re Marriage of Doneen*, the court held that in a dissolution proceeding, "[a]lthough the property division must be 'just and equitable,' it does not need to be equal." 197 Wn. App. at 949 (quoting *In re Marriage of Larson*, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013), *review denied*, 180 Wn.2d 1011 (2014)). The holding in *In re Marriage of Doneen* does not support Judith's argument here.

First, Judith incorrectly contends that the trial court's ruling on her motion to reconsider "indicat[ed] a clear impression" it was required to divide the property in a 50 percent split. Br. of Appellant at 11. Nowhere in the trial court's ruling does it state that "just and equitable" distribution under RCW 26.09.080 required a 50 percent split of property between the parties. CP at 118.

Second, the trial court correctly ruled that under RCW 26.09.080, the trial court must consider (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 party. The court then ruled that it had considered these four factors and fashioned relief that placed

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the propriety of the trial court's ruling on the various CR 59 arguments Judith made to the trial court in support of her motion to reconsider. RAP 10.3(a)(4), (6).

Judith and Walter in positions "that are roughly similar so they can live the remainder of their lives at a similar lifestyle." CP at 118.

We hold that the trial court's ruling was not manifestly unreasonable or based on untenable grounds. Therefore, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, A.C.J.

Lee, A.C.J.

We concur:

Worswick, J.

Melnick, J