

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Marriage of

Shondalae BENSON,
Petitioner-Respondent,
and

Phillip BENSON,
Respondent-Appellant.

Lane County Circuit Court
151309273; A159887

Mustafa T. Kasubhai, Judge.

Argued and submitted August 18, 2016.

George W. Kelly argued the cause and filed the brief for appellant.

No appearance for respondent.

Before Ortega, Presiding Judge, and Egan, Judge, and Lagesen, Judge.

LAGESEN, J.

Reversed and remanded.

LAGESEN, J.

This dissolution case is before us for a second time following our remand in *Benson and Benson*, 263 Or App 554, 328 P3d 819 (2014). As it was in the first appeal, the issue is the proper distribution of the value of the house in which the parties lived during their four-year marriage. Husband purchased the house with his own separate funds and held title in his name alone. The parties agreed that the value of the house at the time of dissolution was \$220,000. Initially, the trial court awarded wife a quarter of that value in the form of an equalizing judgment for \$55,000. *Id.* at 556. Husband appealed, contending that the trial court, in awarding that amount, erroneously “did not evaluate the proper disposition of the house under the framework that applies where, as here, a party seeks to rebut the statutory presumption that both parties contributed equally to the acquisition of an asset acquired during the course of a marriage.” *Id.* We agreed, and remanded for the trial court to apply the correct legal framework. We explained the trial court’s task on remand as follows:

“Assessing whether husband has rebutted the presumption of equal contribution will require the trial court to differentiate between that portion of the home’s value at the time of dissolution that is traceable to husband’s premarital assets, and that portion that is attributable to appreciation or improvements to the property made after the acquisition of the property. That will require the court to make findings regarding what husband paid for the disputed property and the extent to which the value of the property increased during the parties’ marriage as a result of appreciation or improvements that are properly attributable to either party.”

Id. at 558-59 (internal citations omitted).

On remand, the trial court held a hearing at which the parties developed additional evidence regarding their respective contributions to the house. Husband maintained that the house should be treated as a separate asset and the entirety of its value awarded to him. In support of his position, husband pointed to the facts that the house had been purchased using funds from the sale of a home that husband owned separately before the marriage without

contribution from wife; that the property was titled in husband's name only and husband paid all of the property taxes and the homeowner's insurance on it from his own funds; that the marriage was short (four years) and the parties had no children together; and that the parties largely kept their finances separate. Wife's position was that the trial court's initial award of a quarter of the value of the house was the proper one. Wife did not dispute that husband had paid for the house, property taxes, and insurance, or that the parties largely maintained separate finances. However, she presented evidence of work that she had done on the house and the yard to improve it, as well as evidence of things she had done to make the lives of husband and his son better during the course of the marriage. Based on that evidence, wife contended that the trial court's initial award to her of a quarter of the house's value remained the just and proper allocation.

The trial court, after taking the matter under advisement, determined that wife should be awarded half the value of the house or \$110,000, twice the court's initial award. In reaching that conclusion, the court determined that husband had rebutted the presumption of equal contribution. However, the court concluded that wife's "sweat equity" warranted an award of half of the value of the house, although, as the court acknowledged, "not all of [wife's] efforts were met with apparent success," in terms of adding value to the house. The court then entered a supplemental judgment vacating the prior \$55,000 equalizing judgment and entering a \$110,000 equalizing judgment.

In reaching its conclusion, the court did not, as we had directed, differentiate between the portion of the home's value that was attributable to husband's premarital assets, and that which was attributable to appreciation or improvements. The court, thus, did not assess how to allocate those separate portions of the house's value as required under *Timm and Timm*, 200 Or App 621, 629, 117 P3d 301 (2005). *Benson*, 263 Or App at 559.

Husband has appealed again. He argues that the trial court did not conduct the inquiry on remand that we directed and urges us to decide the case *de novo* to avert

another remand. He further argues that the trial court's decision should be set aside for a number of reasons, including that neither party had ever suggested that half the value of the house would be a just and proper allocation of it, regardless of the effect of the presumption of equal contribution. Wife has not appeared on appeal.

Starting with the standard of review, we agree with husband that this is an "exceptional" case warranting the exercise of our discretion to decide this matter *de novo*. ORAP 5.40(8)(c) (providing that the Court of Appeals will exercise its discretion to review *de novo* only in "exceptional" cases). We do so because of concerns about judicial economy and the need to provide a final resolution to the parties, which are unique to this appeal. This is the second appeal in this matter and both parties have limited resources to spend on further litigation. This second appeal has been necessitated, in part, by the trial court's failure to apply the legal framework that we explicitly directed it to apply on remand. This appeal also has been necessitated by the fact that the trial court's ultimate award was far beyond what was contemplated by *either* party, and it finds little support in the record. Under those circumstances, we are not confident that further proceedings in the trial court will result in a timely resolution of the matter. Finally, we declined husband's request for *de novo* review in the first appeal because we concluded that additional factual development was required to evaluate the proper disposition of the house. *Benson*, 263 Or App at 558-59. On remand, the trial court sufficiently developed the factual record to permit *de novo* resolution of this appeal.

Having elected to review *de novo*, we must determine the proper distribution of the value of the house. Applying *Timm*, we start by identifying that portion of the value fairly traceable to husband's premarital assets, and that portion fairly attributable to improvements or appreciation. We then assess the proper allocation of each of those portions of the value of the house. See *Lind and Lind*, 207 Or App 56, 66, 139 P3d 1032 (2006).

As noted, the parties stipulated that the value of the house at the time of dissolution was \$220,000. Husband

purchased the house for \$196,000. At that time, the property contained substantial timber resources that husband logged and sold for \$30,000. Although our valuation is necessarily rough, that suggests to us that the portion of the value of the property that is fairly traceable to husband's premarital assets is \$166,000—the \$196,000 purchase price less the \$30,000 in timber resources that were removed from the property. That means that the portion of the house's value attributable to appreciation or improvements is \$54,000—the value at the time of dissolution (\$220,000) less the value traceable to husband's premarital assets (\$166,000).

The next step is to determine the proper allocation of those two portions of the home's value. In doing so, we take into account the statutory presumption of equal contribution under ORS 107.105(1)(f), and husband's contention that he has rebutted it. *Kunze and Kunze*, 337 Or 122, 134-42, 92 P3d 100 (2004).

As to the \$166,000 attributable to husband's separate premarital assets, it is undisputed that the home was acquired with those assets, and that husband maintained the home as a separate asset during the parties' relatively short marriage. Those circumstances persuade us that husband has rebutted the presumption of equal contribution with respect to that portion of the home's value. As a result, "absent other considerations, it is 'just and proper' to award that marital asset separately to" husband as "the party who has overcome the statutory presumption." *Id.* at 135. Here, we see no "other considerations" indicating that a different disposition of that portion of the home's value would be just and proper. Therefore, we conclude that that portion of the home's value should be awarded to husband.

As to the \$54,000 attributable to appreciation or improvements, the presumption of equal contribution applies to that amount. *See Lind*, 207 Or App at 66 ("*Kunze* suggests that, when a disputed piece of real property is purchased during marriage with proceeds from one party's separately held asset, that party rebuts the presumption of equal contribution as to that portion of the property's value traceable to those proceeds."). That means that, "absent other considerations," that portion of the house's value

should be divided equally between the parties. *Kunze*, 337 Or at 134.

Here, we think such other considerations are present. Crediting wife's testimony, the trial court found that wife invested a significant amount of "sweat equity" into the property:

"Petitioner presented evidence at the remand hearing about the various improvements she made to both the home and its surrounding landscape during the marriage. These efforts included painting the interior of the home, cleaning carpets, and building shelves. Outdoor areas were also greatly improved with the addition of a goat pen, a vegetable garden, a gravel walkway implemented in response to flooding, and a door attaching the barn and goat pen. Petitioner testified to her responsibility for tending to the goats and collecting eggs from the chicken coop. She also made efforts to beautify the property by adding twenty-one varieties of daffodils, maintaining existing gardens, and establishing new ones."

Even on *de novo* review, we give "considerable weight" to the trial court's findings based on wife's testimony because of the court's opportunity to observe her demeanor as she testified. *O'Donnell-Lamont and Lamont*, 337 Or 86, 89, 91 P3d 721 (2004), *cert den*, 543 US 1050 (2005). Accepting those findings, we are persuaded that wife's extensive investment of "sweat equity" makes it just and proper to award wife 75 percent of the portion of the home's value attributable to appreciation or improvements, which is \$40,500. We conclude that such an award is further justified by the evidence in the record that wife used her own separate money to pay for some of her home projects, and we think it just that wife recover those expenditures as part of the unwinding of this relatively short marriage.¹ Husband is entitled to the balance of the portion of the home's value attributable to appreciation or improvements.

In summary, based on the foregoing analysis, we conclude that the proper allocation of the home's \$220,000

¹ Wife estimated that she used approximately \$30,000 of her own funds for family expenses during the course of the marriage, but it is unclear from the record how much of that went toward improving the house or the landscape.

value is \$179,500 to husband and \$40,500 to wife. We therefore reverse the supplemental judgment and remand for entry of an equalizing judgment awarding \$40,500 to wife.

Reversed and remanded.