

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of)	
DENISE BABCOCK,)	DIVISION ONE
Respondent,)	No. 65328-8-1
and)	
ALLEN WAYNE BABCOCK)	UNPUBLISHED OPINION
Appellant)	FILED: November 14, 2011
_____)	

Dwyer, C.J.—Allen Wayne Babcock (Wayne) appeals from the trial court’s decree dissolving his marriage to Denise Babcock, contending that the trial court erred in its characterization of the family home acquired during the marriage as community property. Because Wayne failed to establish by clear and convincing evidence that the home was his separate property, we affirm. We also find that Wayne’s appeal is frivolous and award attorney fees on appeal to Denise pursuant to RAP 18.9.

Wayne and Denise were married in 1995 and separated in 2007. At the time of the marriage, Wayne owned a house in Portage, Michigan and another parcel of real estate in South Haven, Michigan. Between the time of the marriage and the birth of the couple’s first child in August 1996, Wayne built a second story onto the Portage house. In 1997, Wayne sold the Portage house

and bought a house in Eastsound, Washington, where the family lived until separation.

Neither party worked while the couple lived in Michigan. Wayne received payments from a prior divorce settlement, and both parties received at least \$10,000 per year from Wayne's parents.

At trial, Denise presented exhibits including a check and a bank statement to demonstrate that Wayne paid \$50,000 to Inter Island Escrow on September 25, 1997, from a joint checking account at Key Bank. Denise testified that she believed that the payment was related to the purchase of the family home.

Wayne testified that he sold the South Haven property for between \$100,000 and \$150,000, and the Portage house for \$150,000, and deposited the money in his separate account at National Bank of Detroit. He testified that in addition to the proceeds of the real estate sales, he had some savings from before the marriage in the account for a total of between \$340,000 and \$350,000. Wayne testified that he transferred the total amount into an account in his own name at Washington Federal Bank in 1997 when the family moved to Washington. Wayne testified that he purchased the family home with a cashier's check for \$290,000. Wayne testified that he intended the house to be his separate property, "but I didn't do . . . a good job of keeping it that way I guess." Report of Proceedings (RP) (Feb. 22, 2010) at 108.

The trial court found that the parties purchased the Eastsound home in September 1997 as joint tenants with rights of survivorship. The court also

found:

Exhibit #3 shows that the parties applied \$50,000.00 from a joint bank account towards the purchase of the property. The testimony established that the remaining payment for the property also came from a joint bank account because the parties did not have any separate bank accounts at the time of purchase. The testimony established that the community received annual gifting of approximately \$10,000.00 in the form of checks written to both parties and endorsed by both parties during the approximately 2 ½ years of marriage prior to the purchase of the family home. The gifted funds were commingled with funds in the parties' joint account(s). During the marriage, prior to the purchase of the family home, the parties made substantial improvements to real property in Michigan and then sold such property. The improvements and community labor made to the Michigan property during marriage increased the value of such property. The Michigan property sale proceeds were comingled with funds in the parties' joint account(s) and applied to the purchase of the family home. The parties also sold the structure on the Michigan property during the marriage as salvage and comingled those sale proceeds with funds in the parties' joint accounts.

Clerk's Papers (CP) at 18.

Because Wayne failed to clearly and convincingly trace the source of the funds in the joint accounts used to purchase the family home, the trial court concluded that he failed to establish that the family home was his separate property.

Wayne appeals.

II

We review de novo the trial court's characterization of property as community or separate. In re Marriage of Skarbek, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). The time of the acquisition of a particular parcel of property, the method of the acquisition, and the intent of the parties, however, are

questions of fact for the trial court. In re Marriage of Martin, 32 Wn. App. 92, 94, 645 P.2d 1148 (1982). Unchallenged findings of fact are verities on appeal. In re Marriage of Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). The trial court is the judge of credibility of witnesses and we review challenged findings of fact only for substantial evidence in the record before the trial court. See Dodd v. Polack, 63 Wn.2d 828, 829, 389 P.2d 289 (1964). We do not weigh conflicting evidence or substitute our judgment for that of the trial court. In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). When no finding is entered on a material issue, it is a finding against the party having the burden of proof. Pacesetter Real Estate, Inc. v. Fasules, 53 Wn. App. 463, 475, 767 P.2d 961 (1989).

All property acquired during marriage is presumed to be community property. In re Marriage of Short, 125 Wn.2d 865, 870, 890 P.2d 12 (1995). A spouse may only overcome this heavy presumption with clear and convincing evidence of the property's separate character. Kolmorgan v. Schaller, 51 Wn.2d 94, 98, 316 P.2d 111 (1957).

The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose. Separate funds used for such a purpose should be traced with some degree of particularity.

Berol v. Berol, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950). "Evidence that a spouse had adequate separate funds available to purchase property is insufficient to overcome the presumption that an asset acquired during marriage

is community property, unless separate assets are the only assets available.” In re Marriage of Hurd, 69 Wn. App. 38, 50, 848 P.2d 185 (1993), disapproved on other grounds by In re Estate of Borghi, 167 Wn.2d 480, 219 P.3d 932 (2009).

When “separate funds are commingled with community funds so that they cannot be traced or identified, the commingled funds, or assets acquired therefrom, become community property.” Mumm v. Mumm, 63 Wn.2d 349, 352, 387 P.2d 547 (1963).

Without assigning error to the trial court’s findings of fact, Wayne claims that the trial court erred by characterizing the proceeds of the sale of the Portage property, the source of the funds used to purchase the Eastsound home, and the Eastsound home as community property. He claims that Denise failed to meet her burden to prove that the character of his separate property had changed. Wayne’s arguments are based on a flawed premise.

The only disputed property at issue before the court was the Eastsound family home. It is undisputed that the Eastsound property was acquired during the marriage. It is therefore presumed to be community property, unless Wayne overcomes the heavy presumption with clear and convincing evidence of the property’s separate character.

The trial court found that Wayne failed to clearly and convincingly trace the funds used to purchase the home to a separate source. Wayne testified that his “best recollection” of the purchase price was \$290,000, but he failed to produce a single document associated with the transaction. RP (Feb. 22, 2010)

at 113. Wayne claimed that he bought the property with a cashier's check drawn on his separate account at Washington Federal Savings where he had deposited his separate funds, but he failed to produce any paperwork from the transaction or any bank statement or account number. He also failed to provide any explanation or evidence to rebut Denise's claim that the couple had only joint accounts in Washington at the time of the purchase of the Eastsound home or her evidence indicating that a \$50,000 down payment on the house was drawn on the Key Bank joint checking account. Cf., Skarbek, 100 Wn. App. at 449-50 (after losing benefit of presumption of separate property by putting his separate money into account where it was commingled with community funds, former husband met burden of establishing and tracing, clearly and convincingly, the separate source of the funds "by exhaustively documenting the details of the bank account activity").

Similarly, Wayne failed to establish that the community had no significant funds or that his separate funds were not comingled with community funds when deposited into joint accounts. It is undisputed that the couple deposited cash gifts from Wayne's parents into a joint account in Michigan before the purchase of the Eastsound property. Denise testified that Wayne also received annual payments from his ex-wife and deposited the funds into their joint account. Wayne failed to offer any testimony or documentary evidence to trace or distinguish any funds in the joint accounts, either in Michigan or in Washington, as separate.

And substantial evidence supports the trial court's unchallenged finding that "substantial improvements . . . and community labor made to the Michigan property during marriage increased the value of such property," such that the community had an interest in the proceeds of the sale. CP at 18. Denise testified that Wayne's addition to the house doubled its size. And as the trial court observed, Wayne "testified that by agreement with the buyers of the Portage house he took salvage out of the home and sold it and produced income as a result." RP (Feb. 24, 2010) at 171. See, e.g., In re Marriage of Brady, 50 Wn. App. 728, 750 P.2d 654 (1988) (evidence of substantial improvements made after marriage to increase size and accordingly market value of separate property rebutted presumption that increase in value was separate property). Given Wayne's failure to provide any evidence to show that the improvements to the property during the marriage did not impact the total proceeds from the sale of the Portage property and salvage, as well as his failure to trace any separate funds after depositing them into joint accounts with community funds, the trial court did not abuse its discretion by resolving the factual disputes in the manner suggested by Denise to find that the couple used commingled community funds from joint bank accounts to purchase the Eastsound home. Under these circumstances, Wayne fails to establish error in the trial court's characterization of the family home.

Denise requests an award of attorney fees for being forced to respond to a frivolous appeal. See RAP 18.9(a). An appeal is frivolous "if the appellate

court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal.” In re Marriage of Foley, 84 Wn. App. 839, 847, 930 P.2d 929 (1997).

The trial court entered detailed findings of fact and conclusions of law regarding its characterization of the family home. A key finding was that Wayne “was unable to clearly and convincingly trace the funds in the joint accounts and the funds used to purchase the family home to a separate source.” CP at 20. Without addressing this finding or the presumption that property acquired during marriage is presumed to be community property, Wayne’s appeal is limited to an attempt to shift the burden of proof to Denise by focusing on the proper characterization of the Portage property, despite the fact that it was sold ten years before the end of the marriage and Wayne produced no evidence at trial to support his self-serving claim that he kept the proceeds of the sale of that property separate from community funds or accounts. Wayne also fails to present any cogent argument to suggest that the trial court would not have divided the property in the same way if it had come to a different conclusion on characterization. See In re Marriage of Olivares, 69 Wn. App. 324, 330, 848 P.2d 1281 (1993) disapproved on other grounds by In re Estate of Borghi, 167 Wn.2d 480, 219 P.3d 932 (2009). Because Wayne’s appeal so lacked merit that there was no possibility of reversal, an award of sanctions for a frivolous appeal is appropriate. Denise is awarded attorney fees on appeal, subject to

No. 65328-8-1/9

compliance with RAP 18.1(d).

Affirmed.

Dupe, C. S.

We concur:

Appelwick, J.

Grosse, J.