IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Matter of: JANE VAN ALLEN, Respondent, v. VERNON WEBER, Appellant.	No. 42169-1-II consolidated with No. 42569-6-II UNPUBLISHED OPINION

Van Deren, J. — Vernon Weber appeals the trial court's order and judgment distributing the assets and debts acquired during his 20-year committed intimate relationship with Jane Van Allen.[1] He challenges the trial court's (1) characterization of certain real property, (2) refusal to apply judicial estoppel to bar Van Allen from seeking an interest in properties she did not list as assets in her bankruptcy proceeding, and (3) denial of his motion for relief from judgment to revalue the chiropractic office. We affirm.

FACTS

Vernon Weber and Jane Van Allen maintained a committed intimate relationship for 20 years—from 1990 until March 2009.[2] During their relationship, Weber and Van Allen owned

[1] The remaining trial defendants do not appeal and there is no issue related to the trial court's disposition of the other named defendants raised on appeal.

[2] Neither party appeals the trial court's conclusion that a committed intimate relationship existed.

significant real property, which included an Alaska Street home, a Federal Way lot, a Spanaway home (15101 13th Avenue), a chiropractic office (3425 South Tacoma Way), and a Spanaway rental (14907 13th Avenue).

On March 3, 2004, Weber established an unsecured credit line with Washington Mutual Bank. On March 26, 2004, Weber took a $61,359.95 advance on his credit line, which he and Van Allen used to acquire the Spanaway rental from Van Allen's brother, Harry Phipps Jr. On July 6, 2004, Phipps conveyed his interest in the Spanaway rental to Earth Home Ministries under a sale agreement.[3] Van Allen was the only person connected with Earth Home Ministries. The property's value at the time of conveyance greatly exceeded the $61,000 purchase price. By May 30, 2006, Van Allen had paid down Weber's Washington Mutual credit line from $61,000 to approximately $37,000.

On October 11, 2005, Van Allen filed a Chapter 7 bankruptcy petition.[4] Van Allen filed incomplete or inaccurate bankruptcy schedules of assets and liabilities. She listed her interest in the Spanaway home as her sole real property. Van Allen did not list the chiropractic office, the Spanaway rental, or the Federal Way lot on her asset schedule.

The bankruptcy trustee investigated Van Allen's assets and asked a realtor to price the Spanaway home for sale. Before the property was put on the market, Van Allen and the trustee reached an agreement for Van Allen to purchase the non-exempt equity of the Spanaway home in exchange for the trustee abandoning the remaining assets of the estate. On May 30, 2006, Weber

[3] The trial court determined Earth Home Ministries was a sham corporation and disregarded it for purposes of characterizing and distributing the Spanaway rental. Earth Home Ministries was dissolved by the trial court.

[4] 11 U.S.C. §§ 301, 109(a)-(b).

took an $87,477.04 advance from his Washington Mutual line of credit and used it to pay a total of $89,556.08 to Van Allen's bankruptcy estate to protect the Spanaway home from liquidation to satisfy creditors. Van Allen's bankruptcy creditors were then paid in full.

In March 2009, Van Allen petitioned for dissolution of her relationship with Weber and distribution of their assets and debts. At trial, Weber argued that he and Van Allen did not have a committed intimate relationship and, further, that judicial estoppel should bar Van Allen from claiming an interest in any properties she did not disclose in her 2005 bankruptcy schedule of assets, including the Spanaway rental, the chiropractic office, and the Federal Way lot.

Van Allen's position was that her brother sold the Spanaway rental to her for less than market value because she was planning to make it a safe house for female victims of sexual assault and it was close to the home she shared with Weber. Weber testified that Van Allen made the deal with her brother, but she could not pay his $61,000 asking price; thus, he used his line of credit to purchase the Spanaway rental as a favor to Van Allen, who had bad credit. Weber expected Van Allen to repay the entire amount.

Weber asserted that it was Van Allen's idea to put the Spanaway rental property in Earth Home Ministries—"she wanted to put it in her name so she had something of hers" and "so she would have a place to move to if she wanted to." Report of Proceedings (RP) at 253, 340. Weber said that taking title in Earth Home Ministries did not concern him because Van Allen had agreed to make payments on the credit line used to purchase the property. He agreed that he and Van Allen paid far less than market value for the property and that the difference between the sale price and its value at the time of sale was a gift from Van Allen's brother. Weber thought that Van Allen's brother intended that Weber would have partial ownership of the gifted property.

Thus, Weber expected to own the Spanaway rental even though the property was deeded to an entity in which he had no interest.

The trial court concluded that the parties had established a committed intimate relationship, refused to apply judicial estoppel to bar Van Allen from asserting an interest in properties not scheduled in her bankruptcy proceeding, and divided Weber and Van Allen's assets and liabilities.

The trial court calculated Van Allen's award by combining the values of (1) one-third of the chiropractic office, (2) 39 percent of the Spanaway home, (3) 75 percent of the Spanaway rental, and (4) a credit related to the Federal Way lot. Weber was awarded the remaining portions of those properties. By agreement of the parties, the trial court used the most recent Pierce County assessor's office's values for the real properties at issue.

After aggregating values of the portions of each property and offsetting her share of community-like liabilities, the trial court awarded Van Allen the Spanaway rental and a money judgment. Weber received full title to all other properties and remained liable for the outstanding balance on the credit line and the Internal Revenue Service debt. Weber appealed.

Following the distribution of property and liabilities, and after Weber filed his appeal, on June 27, 2011, the Pierce County assessor's office mailed its annual real property value change notices to Weber and Van Allen. The chiropractic office's assessed value was reduced from $182,200 to 79,800—a decrease of over 50 percent. The other real properties also decreased in value, but not nearly as much.

On August 2, 2011, Weber moved for relief from judgment based on the post-trial change in value for the chiropractic office.[5] Weber's counsel submitted a proposed statement from the

Pierce County commercial appraiser stating that the downward adjustment was substantial when compared to other properties in Pierce County. The appraiser's proposed statement also asserted that one reason for the change was a correction in square footage of the parcel. In addition, the appraiser noted that he adjusted the value due to the odd shape of the property, which affected its marketability. The trial court denied Weber's motion. Weber timely appealed the trial court's denial of his motion for relief from judgment, which we consolidated with Weber's appeal of the underlying order and judgment.

ANALYSIS

On appeal, Weber acknowledges his 20-year committed intimate relationship with Van Allen, but he challenges the trial court's division of property based on the trial court's characterization of the Spanaway rental as Van Allen's separate property, its refusal to apply judicial estoppel to Van Allen's property claims to properties not listed in her assets in her bankruptcy proceeding, and its denial of his motion for relief from judgment due to the reduction in assessed value of the chiropractic office.

I. Standards of Review

We review a trial court's characterization of property as community or separate de novo, but we review the findings of fact on which that characterization was based for substantial evidence. *In re Estate of Borghi*, 141 Wn. App. 294, 297, 169 P.3d 847 (2007), *aff'd*, 167 Wn.2d 480, 219 P.3d 932 (2009); *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). Unchallenged findings of fact are verities on appeal. *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

[5] Weber also moved for relief from judgment to reflect a post-judgment Internal Revenue Service refund to Van Allen. The trial court agreed, and that decision is not before us on appeal.

We review the trial court's distribution of property at the end of a committed intimate relationship, its decision about whether to apply judicial estoppel, and its decision on a motion for relief from judgment under CR 60(b) for abuse of discretion. *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007); *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 821, 225 P.3d 280 (2009); *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). "We may affirm on any ground the record adequately supports." *Skinner v. Holgate*, 141 Wn. App. 840, 849, 173 P.3d 300 (2007).

II. Division of Property Following a Committed Intimate Relationship

Upon termination of a committed intimate relationship, the trial court evaluates the interest each party has in the property acquired during the relationship and then makes a just and equitable distribution of such property.[6] *In re Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). Property acquired by the parties' efforts during a committed intimate relationship is presumed to be community-like and the trial court may equitably divide it between the parties. *Soltero*, 159 Wn.2d at 434 (citing *Connell v. Francisco*, 127 Wn.2d 339, 351-52, 898 P.2d 831 (1995)). Unlike a marital dissolution, the trial court must award separate property to its owner. *Soltero*, 159 Wn.2d at 434 (citing *Connell*, 127 Wn.2d at 350).

[6] At the termination of a marriage or a registered domestic partnership, a trial court makes a just and equitable distribution of the property and liabilities of the parties, either community or separate. RCW 26.09.080. But here, we apply the standards for a committed intimate relationship. *See, e.g.*, *In re Meretricious Relationship of Long*, 158 Wn. App. 919, 925, 928-29, 244 P.3d 26 (2010) and *Tatham v. Rogers*, 170 Wn. App. 76, 81-84, 283 P.3d 583 (2012) (addressing the division of property at the termination of a committed intimate relationship).

The marital dissolution laws do not apply directly to a committed intimate relationship, but we may look to those laws for guidance. *Connell*, 127 Wn.2d at 349. The definitions of "separate" and "community property" found in RCW 26.16.010 to .030 apply by analogy and are useful in dividing property at the termination of a committed intimate relationship. *Connell*, 127 Wn.2d at 351. Separate property is property "owned by a spouse before marriage and that acquired by him or her afterwards by gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof." RCW 26.16.010. Community property is property other than separate property acquired during marriage by either spouse. RCW 26.16.030.

III. Characterization of the Spanaway Rental (14907 13th Avenue)

Weber asserts that "[t]he trial court erred when it [ ]characterized a substantial portion of the Spanaway [r]ental property as . . . Van Allen's separate property." Br. of Appellant at 1. He argues that the trial court should have characterized the property as community-like.[7] But Weber misunderstands the trial court's ruling. It did not expressly characterize the Spanaway rental as either community-like or separate property.[8] Instead, it made the following factual findings:

> 29. Van Allen and Weber purchased real property located at 14907 13th Avenue, Spanaway, Washington (hereafter "[Spanaway rental]") in 2004 from Van Allen's brother for $61,000. The market value of the [Spanaway rental] at that time was approximately $190,000; the current market value as of June 21, 2010, is $219, 400.
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> 30. Van Allen's brother had a donative intention to provide value to Van Allen, which was not equal to Weber's share, and was acquired by purchasing the [Spanaway rental] for below market value.
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> 31. Van Allen paid $23,000 (38%) of the $61,000 purchase price on the [Spanaway rental]; the remaining balance was a joint obligation of Van Allen and

[7] Weber does not argue, nor do the facts support, that the Spanaway rental is Weber's separate property.

[8] Counsel for both parties assumed the trial court awarded Van Allen a 75 percent separate property interest in the Spanaway rental.

Weber.

Clerk's Papers (CP) at 174. From those findings, the trial court concluded that Van Allen was entitled to credit for a 75 percent ownership interest in the Spanaway rental and that Weber was entitled to the balance.[9] In the property distribution, the only real property awarded to Van Allen was the entirety of the Spanaway rental.[10]

Even if, as Weber contends, the trial court characterized the property as Van Allen's separate property, substantial evidence supports that characterization.[11] Trial courts determine the character of property based on the date it was acquired. *Borghi*, 167 Wn.2d at 484. Here, the trial court found that Van Allen and Weber purchased the Spanaway rental in 2004, during their committed intimate relationship. Thus, the Spanaway rental is presumptively community-like property. *See In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003) (assets acquired during marriage are presumed community property). "To rebut the presumption, a party must present clear and convincing evidence that the acquisition fits within a separate property provision." *Chumbley*, 150 Wn.2d at 5.

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[9] Findings of fact are determinations of "whether the evidence show[s] that something occurred or existed"; while conclusions of law are determinations "made by a process of legal reasoning from . . . the evidentiary facts." *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wn. App. 194, 197 n.5, 584 P.2d 968 (1978). Where a conclusion of law is mislabeled as a finding of fact, this court reviews it as a conclusion of law. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

[10] Ultimately, the trial court aggregated Van Allen's share of each real property and awarded her full title to the Spanaway rental ($219,400 value) and an equalizing payment ($28,090) for a total distribution of $247,490. Weber was awarded the remainder of the property and joint debts for a net value of $232,910. This represents a 48.5 percent to 51.5 percent split in favor of Van Allen.

[11] If the trial court treated or characterized the property as community-like, Weber's assignment of error alleging that the trial court erred by not characterizing the Spanaway rental as community-like property is immaterial.

The trial court indicated in its findings that Van Allen and Weber acquired the Spanaway rental partially by purchase and partially by gift. "Property acquired during marriage has the same character as the funds used to purchase it." *Chumbley*, 150 Wn.2d at 6. The trial court found that Weber and Van Allen purchased the Spanaway rental for $61,000 when the market value at that time was $190,000. Of the $61,000 purchase price, Van Allen paid $23,000, and the remainder ($38,000) was a joint obligation. The trial court also found that the value of the Spanaway rental in excess of the purchase price ($129,000) was a gift from Van Allen's brother to Van Allen. *See* CP at 174 ("Van Allen's brother had a donative intention to provide value to Van Allen, which was not equal to Weber's share, and was acquired by purchasing the [Spanaway rental] for below market value."). The donor's intent at the time he gives a gift controls whether the gift is community or separate. *See Borghi*, 167 Wn.2d at 487; *In re Estate of Deschamps*, 77 Wash. 514, 518, 137 P. 1009 (1914). Thus, the trial court indicated that it treated the $129,000 value in excess of the purchase price as Van Allen's separate property.

Weber did not assign error to any of the findings of fact on which a separate property characterization would have been based; thus, they are verities on appeal. *See Brewer*, 137 Wn.2d at 766. The trial court's unchallenged findings that $23,000 of the $61,0000 purchase price was paid by Van Allen and the property was purchased for $129,000 below market value (which represented a gift to Van Allen) supports the trial court's conclusion that Van Allen owned 75 percent of the Spanaway rental as her separate property.[12] Therefore, we affirm the trial court's division of property and deny Weber's claim that the characterization of the

[12] The $129,000 separate property gift and the $23,000 Van Allen paid represent 80 percent of the value of the Spanaway rental at the time the parties acquired it from Van Allen's brother. Therefore, the trial court's conclusion that Van Allen owned 75 percent of it was actually conservative in favor of Weber.

Spanaway rental requires a new division of property and debts.

Moreover, an erroneous characterization of the Spanaway rental property as Van Allen's separate property would not require remand unless "'(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 the same way.'" *In re Marriage of Shui*, 132 Wn. App. 568, 586, 125 P.3d 180 (2005) (quoting *In re Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989) (remand appropriate when the court explicitly states characterization was important factor in its division of property)).

In *Shui*, the court remanded for distribution because the trial court's division of property was predicated on the classification of the parties' assets. 132 Wn. App. at 586-87. The trial court determined that each party should be awarded his or her separate property and that Shui should receive 75 percent of the parties' community property and Rose should receive 25 percent. *Shui*, 132 Wn. App. at 586-87. Unlike the *Shui* court, which made a global division of separate and community property, it appears that this trial court determined the division of each piece of property and debt based on the nature of its acquisition, but without articulating the resulting character of each.

Here, the record is clear that the trial court did not expressly characterize the Spanaway rental as either community-like or separate, its character did not significantly influence the trial court's division of the property, and the trial court did not err in awarding it entirely to Van Allen. Further, if the trial court had stated its characterization of the Spanaway rental specifically, the unchallenged factual findings support that it was largely Van Allen's separate property, and that the trial court would have divided the property the same way regardless of its

characterization.[13] Thus, we hold that the trial court did not err in awarding the Spanaway rental property to Van Allen.

Apart from alleging a mischaracterization of the Spanaway rental, Weber does not assert

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[13] During its oral decision and during the parties' motions for presentment, the trial court indicated that its focus was on making a 75 percent allocation of the Spanaway rental to Van Allen. The trial court's emphasis on the 75 percent division rather than on the amount and character of the gift or funds used to acquire the property supports a conclusion that the trial court would have awarded Van Allen 75 percent of the Spanaway rental whether it characterized it as her separate property or as community-like property. The following exchange occurred among counsel and the trial court:

> [Weber's Counsel]: . . . I don't think there was any real competent non-perjured testimony of the gift from the brother. . . . Weber was honest and said I don't know what the deal was. . . .
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> . . . .
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> The Court: . . . I'm not going to modify that. Some donative element was there. He sold it to them, . . . for a lot less than the value. He also said it was to this Earth Ministries . . . but to Van Allen and Weber, they got some property for quite a bit less than it's worth.
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> [Weber's Counsel]: . . . You say $23,000 was paid toward the $61,000 on this property, and you did that using Exhibit 2, and that's where the Washington Mutual line of credit was used to buy the property, but that was paid down by Van Allen, but that's when she was working for Earth Home Ministries, so that would be quasi-community property paying that down, assuming we have a quasi-community situation here. So if you look at Exhibit 2, that shows that although Van Allen paid down Exhibit 2, where did she get the money? She got it from her earnings during that time, so that wasn't a separate interest.
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> [Van Allen's Counsel]: I think the easiest way to address that, Your Honor, is I think there was kind of a mistake on that because you had found that $61,000 was the purchase price of which you said hey, half of that is Van Allen and half of that is Weber, so we're apportioning it in this quasi-community way. $61,000 is about a third of the total value if we say it's about $190,000, in which case I think you just had said 75 percent ownership interest goes to Van Allen. That's the important number.
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> The Court: I agree with [Van Allen's counsel]. I kind of agree with [Weber's counsel] on the first point, but *the ultimate thing is 75 percent.* That's what I'm finding because there was a big donative element, I believe, so I'm going to decline to change that over [Weber's counsel's] objection. *75 percent is the important number there.*

RP (Apr. 15, 2011) at 23-25 (emphasis added).

that the trial court's division of property is unjust or inequitable. Because no abuse of discretion is alleged by Weber and none is apparent on the record,[14] we affirm the trial court's division of property.

IV. Judicial Estoppel

Next, Weber challenges the trial court's refusal to apply judicial estoppel to bar Van Allen from asserting a property interest in the properties she did not disclose in her 2005 bankruptcy.[15] The trial court found that Van Allen submitted an inaccurate list of assets to the bankruptcy court, but it concluded that judicial estoppel did not apply. Weber argues that the trial court abused its discretion by not applying judicial estoppel because (1) the record supports judicial estoppel, (2) the trial court's decision was improperly based on lack of unfair detriment to Weber, and (3) Van Allen's omission of assets in her bankruptcy harmed him. We disagree.

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams*, 134 Wn. App. at 98). "'The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior

[14] The trial court did not render its decision in terms of percentages and did not consistently characterize property in its findings of fact and conclusions of law. Often, the trial court appeared to have considered facts that usually form the basis for characterization of property solely as reasons for its division. Even so, the division of the parties' assets and liabilities was well within the trial court's discretion.

[15] Bankruptcy debtors must "disclose all assets, including contingent and unliquidated claims." *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999) (emphasis omitted); *accord* 11 U.S.C. § 521(a)(1).

judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time.'" *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001) (quoting *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982)). In deciding whether to apply the doctrine of judicial estoppel, a trial court is guided by three core nonexclusive factors:

> (1) whether "a party's later position" is "clearly inconsistent with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Arkison, 160 Wn.2d at 538-39 (internal quotation marks omitted) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)). Although guided by the non-exhaustive factors, this court has repeatedly held that "judicial estoppel applies only if a litigant's prior inconsistent position benefitted the litigant or was accepted by the court." *Johnson*, 107 Wn. App. at 909; *see also DeVeny v. Hadaller*, 139 Wn. App. 605, 621-22, 161 P.3d 1059 (2007); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230-31, 108 P.3d 147 (2005).

Here, the evidence at trial showed that the bankruptcy court did not adopt Van Allen's erroneous or incomplete asset listing, Van Allen was not benefitted by listing her assets inaccurately, and the inaccuracy did not unfairly prejudice the bankruptcy creditors or Weber. Also, Weber's argument that the trial court abused its discretion when it considered unfair detriment to the opposing party is without merit.

In the dissolution and distribution proceedings, Van Allen asserted an interest in three properties that she did not disclose in her 2005 bankruptcy proceeding. Her inconsistent positions

are not disputed. But because Van Allen's creditors were paid in full, the bankruptcy court did not have occasion to accept Van Allen's inaccurate asset list. "[I]n and of itself, a bankruptcy debtor's failure to schedule an asset does not sufficiently involve the court so that the debtor's position becomes a position accepted by the court." *Johnson*, 107 Wn. App. at 910.

In *Cunningham*, the court interpreted the *Johnson* court's conclusion as being based on the fact that Johnson was not required to schedule the asset, so that his omission of it on the schedules had no effect on the court's valuation process or subsequent decision to confirm his Chapter 13 plan. 126 Wn. App. at 232. Even the *Cunningham* court's narrow interpretation shows that for a court to "accept" a litigant's position, the court needs to have taken some action based on the position.[16]

If Van Allen's creditors had received less than full payment, the bankruptcy court's discharge of a portion of those creditors' claims would implicitly have relied on Van Allen's inaccurate asset schedule. Because Van Allen's creditors were fully satisfied, the inaccurate asset schedule had no affect on the bankruptcy court's action or liquidation analysis. Therefore, the court did not "accept" Van Allen's inaccurate position.

Furthermore, Van Allen did not benefit in her bankruptcy proceeding by omitting assets because her creditors were paid in full. When the bankruptcy trustee began to investigate Van Allen's interest in the Spanaway home—presumably for liquidation purposes—Weber increased

[16] For example, when a court closes a debtor's bankruptcy case as a "no asset" case, the court has implicitly accepted that the debtor has no assets to liquidate. *Johnson*, 107 Wn. App. at 909; *see, e.g., Cunningham*, 126 Wn. App. at 233 ("[T]he bankruptcy court's discharge of Cunningham's debts was an implicit acceptance of his position that he had no assets that could be liquidated for the benefit of his creditors [and he] received the benefit of a complete discharge of debts."). "By not disclosing the asset, the debtor keeps an asset that may have created a dividend for the debtor's unsecured creditors." *Johnson*, 107 Wn. App. at 909.

his credit line and paid enough to the bankruptcy estate to cover all Van Allen's debts and fees.

Weber argues that Van Allen benefitted because he paid her bankruptcy debts to protect the Spanaway home, which was the only real property asset Van Allen disclosed in the bankruptcy. But the benefit to Van Allen must stem from Van Allen's inconsistent position before the court to serve as the basis for judicial estoppel, not from the ancillary action of a third-party, here, Weber. Moreover, the trial court determined that the bankruptcy debts were jointly incurred during Weber and Van Allen's relationship and allocated to each party one-half of the credit line debt used to pay creditors. Therefore, Van Allen was ultimately responsible for her share of the bankruptcy debt even though initially Weber paid the bankruptcy debts from his personal credit line. Van Allen received no benefit from her omission because the bankruptcy creditors were paid in full and she was allocated her share of the debt used to satisfy them.

The trial court's findings and conclusions do not state the reasons the trial court declined to apply judicial estoppel. But the trial court's oral decision reasoned:

> So there is some temptation to apply estoppel here since she didn't claim any interest in the property she now claims during bankruptcy. That was, I think, part of a scam to try to avoid [Internal Revenue Service] debt she owed and probably to defraud some creditors that she bought a lot of things from.
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> However, between the two parties, I don't see that [judicial estoppel] is appropriate here. . . . Weber, I don't think, was particularly injured by her statements in the bankruptcy. He did, of course, have to apply some money to the line of credit or expand it, but we can address that here, so there's no ultimate injury to him. So between the two of them, whatever their intent was with the outside world, I don't think estoppel applies here, so I'm not going to apply it.
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> And . . . Weber could be seen also to have been involved to some extent in these shams or scams, whatever you want to call them, these phony—the only word I can think of—trust and corporations that were set up to try to hide assets. They both, during the relationship, owed the [Internal Revenue Service] a good deal of money and were trying to avoid paying it . . . But between the two of them, they were both involved in it.[17]

[17] Evidence adduced at trial showed that the numerous other party defendants were sham entities Weber and Van Allen formed to avoid Internal Revenue Service obligations and potential

RP (Apr. 6, 2011) at 69-70. The record shows that Van Allen's omissions did not harm Weber because the bankruptcy debts were incurred during the course of his relationship with Van Allen and he received credit at trial for his payment to Van Allen's bankruptcy estate.[18]

Weber argues that lack of harm or prejudice to the opposing party is an improper consideration for denial of judicial estoppel. He cites no Washington case that has so held. In *Johnson*, Division Three discussed eliminating traditional estoppel elements from the judicial estoppel doctrine, including prejudice to the opposing party. 107 Wn. App. at 907-08. The *Johnson* court concluded that judicial estoppel "may be applied even if the two actions involve different parties[, and] even if there is no reliance, no resultant damage, and no final judgment entered in the first action." *Johnson*, 107 Wn. App. at 908.

Although the unfair detriment factor was questioned in *Johnson*, the decision does not constrain subsequent trial courts from considering, among other factors, the prejudice or harm to the opposing party in determining whether to apply judicial estoppel. Moreover, the unfair detriment factor was impliedly authorized by our Supreme Court six years later in *Arkison*, which restated the factors for judicial estoppel, including the unfair detriment factor. *See Arkison*, 160 Wn.2d at 539. Thus, the trial court here did not abuse its discretion in considering the lack of unfair detriment to Weber in deciding not to apply judicial estoppel, particularly when other factors also weighed in favor of not applying judicial estoppel.

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creditors of Weber's uninsured chiropractic practice.

[18] The trial court found that Weber's line of credit, including the amount paid to Van Allen's bankruptcy estate ($87,477), and Weber's Internal Revenue Service debt ($91,000) were incurred during the course of their relationship, and the court imposed on the parties equal liability for these debts.

Although Van Allen maintained inconsistent positions related to her property holdings, the evidence at trial showed that she received no benefit from doing so, the bankruptcy court did not "accept" her inaccurate statement of assets, and Weber did not suffer an unfair detriment. The record supports the trial court's decision not to apply judicial estoppel. Weber has not proven that the trial court abused its discretion.

V. Motion for Relief from Judgment

Weber also challenges the trial court's denial of his CR 60(b) motion for relief from judgment based on a newly assessed value of the chiropractic office following trial. He argues that the trial court abused its discretion when it refused to vacate and recalculate the property division to reflect the chiropractic office's 2012 tax assessed value. Weber argues that the value of the chiropractic office must be adjusted downward, thus, eliminating the money judgment awarded to Van Allen to prevent an unfair division of assets based on erroneous calculations. Again, we disagree.

The parties and the trial court relied on the Pierce County assessed tax values for all real property the parties owned. Neither party hired an appraiser or presented evidence of contrary values. At the time of trial and entry of the court's order and judgment, the chiropractic office's assessed value was $182,000—based on the 2011 tax assessment. When Weber was asked about the $182,000 assessed value at trial, he testified, "I think it's probably high now." RP at 276. Shortly after trial, Pierce County mailed its annual value change notices to real property owners. The "new" 2012 assessed value for the chiropractic office was $79,800—a decrease of $102,400 or 56 percent. Because Van Allen's approximate one-third share was calculated using the 2011 value, her share of the chiropractic office was valued at $61,000, which represents over three-

quarters of the 2012 value. Weber moved for relief from the judgment to recalculate Van Allen's share of the chiropractic office[19] using the 2012 tax assessed value on the basis of CR 60(b) for:

> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
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> . . . .
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> (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
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> . . . .
>
> (11) Any other reason justifying relief from the operation of the judgment.

To support his motion, Weber provided an e-mail, declared to be a true copy by his counsel, from a Pierce County appraiser confirming that the downward adjustment from 2011 to 2012 for the chiropractic office was substantial when compared to other properties in Pierce County. The e-mail also confirmed that one reason for the change was a correction to the square footage of the parcel and recognition of the odd shape that significantly affected its marketability. But the county did not issue a correction of the 2011 tax assessed value; it merely conducted its annual reassessment of the property and issued a corresponding annual value change for 2012. The 2011 tax assessment value the parties and the trial court relied on remained unchanged.

The trial court denied Weber's motion and refused to change the property division based on the 2012 tax assessed value for the chiropractic office. The court reasoned that Weber was not entitled to relief based on surprise or an inadvertent mistake about the value of the chiropractic office, that the value change notice does not represent newly discovered evidence, and that the degree of change is not an extraordinary circumstance justifying relief because Weber could have and should have known of a potential reevaluation based on his 20-year ownership of

[19] Although all of the parties' real properties decreased in value in 2012, Weber moved to recalculate the value of only the chiropractic office because it was the largest change. The parties' other properties' values decreased between 10 and 22 percent.

the property.[20]

Although we recognize that Weber was disproportionally affected by the substantial decrease in the value of the chiropractic office, the trial court's refusal to vacate and recalculate the property division is reasonable and the record supports it. It was reasonable for the trial court to refuse to vacate and revise the property division when its original division of property was based on undisputed values agreed to by both parties and relied on by Weber at trial, Weber had an opportunity to present contrary evidence, and Weber knew or should have expected an annual value change. Because Weber does not show that the trial court abused its discretion when it denied the motion for relief from judgment, we affirm.

Even assuming the trial court should have considered the "new" 2012 tax assessed value for the chiropractic office, Weber does not specifically argue how the new valuation made the property division unjust or inequitable. The record before us shows that the change in value to the chiropractic office (holding all other values constant) creates a property division of about 65 percent to 35 percent in favor of Van Allen. That is a sizable departure from the nearly equal division using the original 2011 values. But the trial court has broad discretion to fashion an equitable property division and we will reverse only for manifest abuse of discretion. *In re Marriage of Fiorito*, 112 Wn. App. 657, 667-68, 50 P.3d 298 (2002).

Weber asserts that the 2012 assessed value results in a division of assets that is inequitable, unfair, and prejudicial, but he does not explain why the property division is inequitable or unjust given the parties' circumstances. Without more, we hold that Weber did not show that

[20] Although not part of the order denying Weber's motion for relief from the judgment, the minutes of the proceeding indicate that the court also denied the motion because "the[ ] facts [establishing value of chiropractic office] were relied on at trial and not disputed." CP at 266.

the trial court abused its discretion by denying his motion for relief from judgment based solely on the diminution of value of one property.

VI. Attorney Fees on Appeal

Van Allen requests attorney fees under RAP 18.9(a), which permits such an award against a party who files a frivolous appeal. "An appeal is frivolous under RAP 18.9 if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal." *Andrus v. Dep't of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005). Because the issues raised here are debatable, Weber's appeal was not frivolous. Thus, we decline Van Allen's request for attorney fees.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Bridgewater, P.T.J.