

**COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON**

<b>In re the Marriage of:</b>	)	<b>No. 27906-5-III</b>
	)	
<b>JEFF M. FUNKE,</b>	)	
	)	
<b>Appellant,</b>	)	<b>ORDER GRANTING MOTION</b>
	)	<b>FOR RECONSIDERATION IN</b>
<b>and</b>	)	<b>PART; ORDER AMENDING</b>
	)	<b>OPINION</b>
<b>WENDY D. FUNKE,</b>	)	
	)	
<b>Respondent.</b>	)	

THE COURT has considered the appellant's motion for reconsideration, and is of the opinion the motion should be granted in part. Therefore,

IT IS ORDERED, the opinion filed July 29, 2010, shall be amended as follows:

Page 6, third paragraph, second sentence shall read:

On reconsideration, the trial court gave Mr. Funke the opportunity to revisit the requirement to sell the home as long as he paid Ms. Funke her share of the equity before December 31, 2009.

IT IS FURTHER ORDERED, on page 10, third paragraph shall read:

*Attorney Fees:* Ms. Funke requests attorney fees for this appeal. As the prevailing party on appeal, she is entitled to statutory fees and costs. See RAP 14.2. Ms. Funke failed to comply with the requirement of RAP 18.1(c) to file an affidavit of financial need with this court. Thus, she may

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not recover attorney fees under RCW 26.09.140. *See in re Marriage of Holmes*, 128 Wn. App. 727, 742, 117 P.3d 370 (2005). Ms. Funke's other arguments for fees on appeal are without merit and are hereby denied.

IT IS FURTHER ORDERED, the motion for reconsideration on the other issues raised by appellant is denied and the court's opinion filed July 29, 2010 shall remain the same in all other respects.

PANEL: Judges Kulik, Korsmo, Siddoway.

DATED:

FOR THE COURT:

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TERESA C. KULIK  
CHIEF JUDGE

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>In re the Marriage of:</b>	)	<b>No. 27906-5-III</b>
	)	
<b>JEFF M. FUNKE,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	<b>Division Three</b>
<b>and</b>	)	
	)	
<b>WENDY D. FUNKE,</b>	)	
	)	
<b>Respondent.</b>	)	<b>UNPUBLISHED OPINION</b>

Korsmo, J. — Jeff Funke appeals the Spokane County Superior Court’s distribution of marital property. He contends that the trial court abused its discretion by: (1) ordering him to either sell the family home or refinance it in order to pay Wendy Funke \$100,000 representing her share of the equity; (2) characterizing the Bunke Road property as Ms. Funke’s separate property; (3) calculating the value of the General Electric (GE) stock on the date of trial instead of a later date, after the stock declined in value; and (4) ordering him to pay an equalization payment in the amount of \$75,000. Ms. Funke requests attorney fees on appeal. We find the trial court did not abuse its discretion and affirm.

**FACTS**

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The parties were married in 1988 and separated in 2007. They have three children, ages 20, 17 and 13. Mr. Funke is and was employed by General Electric; his net monthly income is \$4,480. Ms. Funke has not worked outside the home since 1999; prior to that she worked part-time as a bank teller.

*Family Home:* The Funkes built a home on acreage in Spokane, Washington. Prior to its completion, they resided in a mobile home which Mr. Funke had purchased in 1984. After moving into the partially completed family home, they sold the mobile home and used the proceeds to purchase building materials.

The family home was valued at trial to be \$380,000, with a mortgage of \$183,306. Mr. Funke was awarded the family home; Ms. Funke was granted a \$100,000 lien representing her one-half interest in the equity. Ms. Funke was awarded use and possession of the home until June and she was required to keep up the mortgage, taxes, insurance and utilities. Neither party desired to retain the home because it was too large. After June 2009, Mr. Funke was to prepare the home for listing and sale. Mr. Funke intended to live in the home, perform repairs, and ultimately sell the home for a greater amount than it was valued at trial. Upon reconsideration, the trial court ordered that Mr. Funke was relieved of the obligation to sell the family home if he paid the \$100,000 lien before December 31, 2009.

*Bunke Road Property:* This five acre piece of property belonged to Ms. Funke's father. She inherited a one-quarter interest upon his death. Ms. Funke used her inheritance and \$10,000 of community funds to buy out two of her siblings.<sup>1</sup> The property was quitclaimed to both parties. The trial court characterized the property as separate property and valued it at \$75,000.

*GE Stock:* At the time of trial, Mr. Funke had worked for GE for 18 years, both prior to and during the marriage. He acquired GE stock which was held both in an individual retirement account (IRA) and a separate investment account. The trial court characterized the stock as nearly one-third (5/18) Mr. Funke's separate property and two-thirds (13/18) community property. Mr. Funke was awarded all of the GE stock. At the time of trial, the stock was trading at approximately \$28 per share. At the time of Mr. Funke's motion for reconsideration the stock had decreased in value and was trading at \$19.27 per share.

*Equalization Payment:* After finding the separate property division was about equal, the trial court ordered an equalization payment of \$75,000 to Ms. Funke.

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<sup>1</sup> The parties dispute whether the community contribution was 25 or 50 percent toward the property.

## ANALYSIS

All property, both community and separate, is before the court for distribution in a dissolution. *Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972); *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002), *review denied*, 148 Wn.2d 1023 (2003). In dividing property, the trial court must consider all relevant factors in determining “what is just and equitable, taking into account the economic circumstances of the parties.” *In re Marriage of Washburn*, 101 Wn.2d 168, 177, 677 P.2d 152 (1984). The goal is a just and equitable distribution of the marital property. RCW 26.09.080.

“The [trial] court has broad discretion in awarding property in a dissolution action, and will be reversed only upon a showing of a manifest abuse of discretion.” *In re Marriage of Stachofsky*, 90 Wn. App. 135, 142, 951 P.2d 346, *review denied*, 136 Wn.2d 1010 (1998). Such deference is appropriate because the trial court is “in the best position to assess the assets and liabilities of the parties and determine what is ‘fair, just and equitable under all the circumstances.’” *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999) (quoting *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977)). Discretion is abused if the trial court’s decision is “manifestly unreasonable” or based on “untenable grounds” or “untenable reasons.” *In re Marriage*

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*of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

*Family Home*: Mr. Funke contends that the trial court abused its discretion by ordering him to sell the family home without reducing its value by the costs associated with the ordered sale. Whether to award or deny a deduction for the costs of sale is within the trial court's discretion. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 811, 866 P.2d 635 (1993). The only other published cases addressing the issue of the denial or deduction of costs of sale are *In re Marriage of Martin*, 32 Wn. App. 92, 645 P.2d 1148 (1982) and *In re Marriage of Berg*, 47 Wn. App. 754, 737 P.2d 680 (1987).

In *Martin*, the trial court determined the value of the family home and deducted the costs of sale. The wife appealed this deduction, arguing her lien should be increased by half the value of the estimated costs of sale. *Martin*, 32 Wn. App. at 94, 97. On appeal, the court held the deduction for sale costs was improper because “[t]here was no evidence that the property was going to be sold; indeed, the evidence suggested a strong desire to keep the land in the family.” *Id.* at 97.

In *Berg*, the trial court refused to deduct sale costs from the family home's value. On appeal, the wife argued she would be forced to sell the home to satisfy a lien held by the husband. The court reaffirmed and clarified its holding in *Martin*, stating: “In order to justify a deduction for costs of sale, there must be evidence in the record (1) showing

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that the party who will receive the asset intends an imminent sale, and (2) supporting the estimated costs of sale.” *Berg*, 47 Wn. App. at 759 (citing *In re Marriage of Kopplin*, 74 Or. App. 368, 703 P.2d 251, *review denied*, 300 Or. 162 (1985); *Aaron v. Aaron*, 281 N.W.2d 150 (Minn. 1979)). The court characterized these questions as factual ones, requiring evidence to be presented at trial. *Berg*, 47 Wn. App. at 759. It then determined that the evidence presented was not sufficient to support a deduction of sale costs, because “Appellant’s intention to sell the house was not sufficiently definite to require a deduction, nor was it clear that a sale was imminent.” *Id.* at 759-760 (footnote omitted).

In *Stenshoel*, the trial court did not reduce the value by the costs of sale. The court focused on the fact that the sale of the home, while imminent, was at the discretion of the wife. The court stated:

It was within the trial court’s discretion to deny a deduction for the costs of sale. There was no evidence, and Peggy does not argue, that she needed to move because of financial concerns. As the trial court noted, Peggy’s decision to sell the house and move to Idaho was a personal one. Under these circumstances, it was reasonable for the trial court to conclude that Peggy should pay the costs of sale and that such costs should not affect the equitable distribution of the property.

*Stenshoel*, 72 Wn. App. at 811.

Here, Mr. Funke contends that since the court ordered him to sell the home, the sale was imminent. On reconsideration, the trial court gave Mr. Funke the opportunity to



revisit the requirement to sell the home as long as he paid Ms. Funke her share of the equity before December 31, 2009. Mr. Funke testified he intended to live in the home, fix it up, and pay himself through a higher selling price. Verbatim Report of Proceedings (VRP) (Sept. 2, 2008) 30-31. Similar to *Berg* and *Stenshoel*, the sale was not sufficiently definite or imminent since it was uncertain when the home would be placed on the market and at what price. Mr. Funke retained the option not to sell the property. The trial court did not abuse its discretion when it declined to offset the value with the costs of sale.

*Bunke Road Property*: Mr. Funke contends the trial court abused its discretion in characterizing this property as separate, as it was acquired during the marriage with community contributions. Property acquired during the marriage is presumed to be community property, but the presumption can be rebutted by clear and convincing evidence. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Separate property is defined as property acquired before marriage or after marriage by gift, bequest, devise, or descent. RCW 26.16.010, .020. Separate property remains separate property as long as it remains traceable. Once the property becomes so commingled that it can no longer be distinguished, it becomes community property. *Chumbley*, 150 Wn.2d at 5-6.

The appellate court reviews *de novo* the trial court's characterization of separate

and community property. *Id.* at 5. The underlying factual findings will be reversed only if substantial evidence does not support them. *Griswold*, 112 Wn. App. at 339.

“Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (citing *In re Welfare of Snyder*, 85 Wn.2d 182, 185-186, 532 P.2d 278 (1975)), *cert. dismissed*, 479 U.S. 1050 (1987).

The Bunke Road property previously belonged to Ms. Funke’s father and upon his death she inherited a one-fourth undivided interest in the land. Ms. Funke used \$10,000 of her inheritance and \$10,000 of community funds to purchase the property from two of her siblings. The property remains traceable to her inheritance. The trial court did not err in characterizing it as separate.<sup>2</sup>

*GE Stock*: Mr. Funke contends the trial court erred in not reconsidering the property distribution after the value of the GE stock declined. He contends that since the court intended to divide the property equally, he unfairly had to bear the entire risk of the stock, especially in light of its decline. We review a trial court order on reconsideration for a manifest abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004).

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<sup>2</sup> The trial court took into account the community contributions when making the entire property distribution between the parties. Clerk’s Papers 49-50.

Market fluctuations do not justify modifications of a decree. *In re Marriage of Knutson*, 114 Wn. App. 866, 872, 60 P.3d 681 (2003). The value of a stock is not definite until the stock is actually sold. The stock was valued at the time of trial. Mr. Funke fails to show this was inaccurate or that the stock value has changed permanently and will not increase in the future. The court has broad discretion to award property, is not required to divide property equally, and will be reversed only on a showing of manifest abuse of discretion. *Stachofsky*, 90 Wn. App. at 142. The trial court did not abuse its discretion by awarding Mr. Funke the GE stock or denying his request to reconsider its property distribution.

*Equalization Payment:* Mr. Funke contends the trial court erred by ordering an equalization payment of \$75,000. He contends the only asset available to him to pay this lien was an IRA account which has penalties for early withdrawal. A trial court is not required to divide community property equally. *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). Under RCW 26.09.080, the court need only “make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors.” RCW 26.09.080. The court may consider the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial

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abilities, their foreseeable future acquisitions and obligations, and whether ownership of the property is attributable to the inheritance or efforts of one or both spouses.

*Friedlander*, 80 Wn.2d at 305.

The trial court specifically found that an equalization payment as well as maintenance were necessary because “this [was] a marriage where . . . one party . . . makes good money, and then another party who is not capable of making that same income, even if she goes to work tomorrow.” Clerk’s Papers (CP) 60. Mr. Funke was not required to liquidate an IRA to pay this lien. The court was mindful that Mr. Funke might have to “liquidate [some assets] or look elsewhere, or get a loan in order” to pay the lien. CP 54-56

Review of the entire property distribution shows that the trial court awarded a large portion of the community assets to Mr. Funke, especially the assets which historically appreciate substantially over time. CP 18. Ms. Funke was without income, without ability to earn substantial income, in need of retraining, and required to maintain the family home, pay the mortgage, insurance and taxes for the next eight to nine months. “Spouses are entitled to receive their share of community property within a reasonable time.” *In re Marriage of Foley*, 84 Wn. App. 839, 844, 930 P.2d 929 (1997). The trial court did not abuse its discretion by ordering the equalization payment.

*Attorney Fees*: Ms. Funke requests attorney fees for this appeal. As the prevailing party

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on appeal, she is entitled to statutory fees and costs. *See* RAP 14.2. Ms. Funke failed to comply with the requirement of RAP 18.1(c) to file an affidavit of financial need with this court. Thus, she may not recover attorney fees under RCW 26.09.140. *See in re Marriage of Holmes*, 128 Wn. App. 727, 742, 117 P.3d 370 (2005). Ms. Funke's other arguments for fees on appeal are without merit and are hereby denied.

CONCLUSION

The trial court did not abuse its considerable discretion when it divided the property. Ms. Funke is entitled to attorney fees on appeal. We affirm the trial court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.