

FACTS

Tim Erdman and Laurie Mohs married on May 20, 2000, and separated on May 21, 2007. Both have children from previous marriages. There were no children of their marriage.

Emerson Road Property. In 1998, the parties purchased 22 acres on Emerson Road in Ellensburg as single persons, but in contemplation of marriage. Mr. Erdman supplied the \$30,000 down payment. Both names were put on the contract carrying the balance of \$77,000. In September 1998, Ms. Mohs quitclaimed the property back to Mr. Erdman.

In March 1999, Mr. Erdman mortgaged a piece of property he owned on Airport Road and paid the balance on the Emerson Road property. As of April 1999, Mr. Erdman owned the Emerson Road property free and clear as his separate property.

On July 20, 2000, Mr. Erdman quitclaimed the Emerson Road property to himself and Ms. Mohs, listing the consideration on the deed as “to establish community property.” Pet’rs Ex. (PE) tab 5. The real estate excise tax affidavit also stated that the explanation for the transfer was “to establish community property.” PE tab 6.

Mr. Erdman claimed he executed the quitclaim deed to obtain a bank loan to

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purchase a triple wide mobile home to place on the Emerson Road property. Ms. Mohs believed that the purpose of the deed was to establish community property. Mr. Erdman executed the deed when he was at the title company to close on the sale of the Airport Road property. Mr. Erdman and Ms. Mohs obtained the loan for the mobile home on August 30, 2000.

Ms. Mohs was listed first on the loan because she had a good credit history. Mr. Erdman, who dealt mainly in cash over most of his life, did not have a credit history. Both parties contributed to paying bills, although the exact split of each party's contribution is in dispute. During the marriage, Ms. Mohs sold her separate property home on White Birch Avenue and used some of the proceeds to pay community debts and to reimburse Mr. Erdman for setting up the community home.

Subsequently, the parties subdivided their 22 acres into a 15-acre plot and a 7-acre plot, with the triple wide mobile home on the 15 acres. In January 2006, Mr. Erdman and Ms. Mohs sold the 15 acres with the triple wide mobile home. The parties used the proceeds to pay off their mortgage on the triple wide and purchased a double wide mobile home to place on the remaining 7-acre plot. Mr. Erdman and Ms. Mohs lived in this home from August 2006 until they separated in May 2007.

The trial court found that the Emerson Road property was community property and

awarded the property to Mr. Erdman.

Cash. Mr. Erdman testified that he saved \$35,000 in cash, which he kept in a metal can in the garage. This amount was accumulated by saving between \$400 and \$600 from nearly every paycheck over the course of the marriage. Mr. Erdman testified that this money was an emergency fund.

Mr. Erdman stated that he spent the following amounts in cash over the course of the marriage: \$15,000 on his daughter's tuition, \$15,000 in allowance for his children, \$4,800 in allowance for Ms. Mohs's children, \$1,500 to his son for a trip to Disneyland; \$500 to his children for odd jobs, \$4,000 to his daughter for a car, \$4,000 to his son for a car, and \$2,050 for a motorcycle—totaling close to \$50,000. Mr. Erdman kept the majority of his spending and saving a secret from Ms. Mohs.

Mr. Erdman and Ms. Mohs grew hay on the Emerson Road property. Ms. Mohs testified that Mr. Erdman was in charge of the hay proceeds and that he would reimburse himself through the hay money for things he purchased.

The trial court found that Mr. Erdman had surreptitiously skimmed \$80,000 in community property and \$10,000 in hay revenue and used those monies for unauthorized noncommunity gifts. The trial court awarded these amounts to Mr. Erdman in the property division.

Post-Separation Housing. After Mr. Erdman and Ms. Mohs separated on May 21, 2007, Yakima County² entered temporary orders and granted Ms. Mohs possession of the marital residence. Mr. Erdman stayed with friends for six or seven weeks, then bought and lived in a fifth-wheel trailer from July 2007 through July 2008, at which time he rented a house for \$1,100 per month. The court did not consider the fact that Ms. Mohs lived in the marital residence during the pendency of the dissolution as a factor in property distribution. The decree of dissolution granted possession of the Emerson Road property to Mr. Erdman.

Retirement Accounts. In 2007, both parties withdrew \$10,000 from their respective retirement accounts. Ms. Mohs was granted permission by the court to withdraw \$10,000 from her retirement account, which was part community and part separate property, to pay medical bills she incurred during the marriage as the result of a skiing accident. Mr. Erdman withdrew \$10,000 out of his retirement account and paid \$7,000 to his parents for money they loaned him to put a well on the Emerson Road property, \$2,000 to his son for auto insurance (or \$1,500 for Disneyland, the record is unclear), and the remaining \$1,000 to pay the early withdrawal penalty. The court awarded each party their own retirement accounts. Ms. Mohs' retirement benefits were

² Ms. Mohs originally filed for dissolution in Kittitas County, but the parties agreed to change the venue to Yakima County.

valued at \$51,660, which was the value of her retirement minus the \$10,000 she withdrew. Mr. Erdman's retirement benefits were valued at \$20,000, which included the \$10,000 he withdrew.

Property Sold During the Marriage. Ms. Mohs testified that Mr. Erdman sold a table saw, treadmill, gun, motorcycle and colt, which were all community property. She states Mr. Erdman kept these monies. Mr. Erdman testified that the treadmill, table saw, and gun were sold during the marriage and the proceeds were placed either in community funds or in the \$35,000 emergency fund. Mr. Erdman stated that he received a check for \$90.50 for the colt, made out to both parties, but that Mr. Erdman still owed \$400 for feeding and boarding. In the property division, Mr. Erdman was awarded the following property that was sold before separation: treadmill sale (\$250), table saw sale (\$250), .45 handgun sale (\$250), sale of motorcycle (\$3,750), and a colt (\$500).

Mr. Erdman appeals, arguing the trial court erred by: (1) finding that he converted his separate property on Emerson Road to community property, (2) not giving him credit for paying \$107,000 to purchase the property, (3) finding that he skimmed \$90,000 in cash, (4) failing to consider that Ms. Mohs lived in the marital residence during the pendency of the dissolution, (5) distributing the couple's retirement benefits unfairly, and (6) distributing property that had been sold prior to the couple's separation.

ANALYSIS

Emerson Road Property. Upon dissolution, the trial court must make a just and equitable division of all community and separate property. RCW 26.09.080. A trial court's distribution is reviewed for a manifest abuse of discretion. *In re Marriage of Wright*, 78 Wn. App. 230, 234, 896 P.2d 735 (1995). A manifest abuse of discretion occurs when a trial court's decision is based on untenable grounds. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

The determination to characterize property as either separate or community is reviewed de novo. Property acquired during the marriage is presumed to be community property. 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, the amount becomes community property. *Chumbley*, 150 Wn.2d at 5-6.

Spouses may contractually agree to change the character of their separate property

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into community property. *Volz v. Zang*, 113 Wash. 378, 381-84, 194 P. 409 (1920). To recognize such an agreement, courts require written evidence of the mutual intent of the parties to change the character of the property. *In re Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P.2d 8 (1989).

A controversy exists regarding the significance of having both parties' names on a deed and whether the presence of both names should give rise to a presumption of community property. In *In re Deschamps' Estate*, 77 Wash. 514, 516, 137 P. 1009 (1914), a husband and wife traded the wife's separate interest in apartments to obtain another piece of property, which they titled in both their names. There was evidence that the wife wanted both names on the deed and that she stated, "the property belongs equal between us both." *Id.* at 518. The Washington Supreme Court held that the property was the wife's separate property, stating: "The mouth of the wife is closed in death, and there is no one to speak for her unless it be the law, so often declared, that where property standing in the name of either spouse or in the name of both spouses is presumed to be community property, that such presumption is rebuttable, and that courts will not be bound by the terms of the deed but will look beyond it and ascertain, if possible, the true intent and purpose of the parties." *Id.*

Seventy-nine years later, in *In re Marriage of Hurd*, 69 Wn. App. 38, 848 P.2d

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185 (1993), Division One of this court held that property acquired by the husband's separate funds, but titled in the names of both husband and wife, was community property. The *Hurd* court set forth a new standard stating: "We now hold that a spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation, permits a presumption that the purchase or transaction was intended as a gift to the community. We also hold that there must be clear and convincing proof to overcome such a presumption." *Id.* at 51. The facts in *Hurd* and *Deschamps* were nearly identical, and the *Hurd* court reached the opposite conclusion from the *Deschamps* court; however, *Hurd* did not distinguish or even mention *Deschamps*.

In November 2009, the Supreme Court decided *In re Estate of Borghi*, No. 80925-9, 2009 WL 3648068 (Wash. Nov. 5, 2009). In *Borghi*, a deed was given to Robert and Jeanette Borghi in fulfillment of a real estate contract that was Ms. Borghi's separate property. *Id.* at *1. In a plurality opinion, the Supreme Court overruled *Hurd*, stating that "no presumption arises from the names on a deed or title." *Id.* at *5. The court held, with regard to real property, that converting separate property to community property requires a writing evidencing the transferor's intent to change the property's character. *Id.* Because there was no such writing in *Borghi*, the court held that the

property was Ms. Borghi's separate property. *Id.* at *6.

In 1998, when the Emerson Road property was purchased, the deed listed both Mr. Erdman and Ms. Mohs. This shows that the parties originally intended to jointly own the property. Ms. Mohs quitclaimed her interest back to Mr. Erdman. Mr. Erdman and Ms. Mohs were married in May 2000, and Mr. Erdman quitclaimed his interest to the community in July 2000, only two months after the marriage. The consideration listed on the deed was "to establish community property," despite Mr. Erdman's argument that he only added Ms. Mohs's name to obtain a loan. PE tab 5. If Mr. Erdman's sole reason to add Ms. Mohs's name to the deed was to obtain a loan, it is highly unlikely he would want the consideration to be "to establish community property." Furthermore, if Mr. Erdman's reasoning is to be believed, he could have taken Ms. Mohs's name off the deed once the loan was obtained, or after the loan was satisfied, which he did not. Ms. Mohs's name remained on the deed throughout the entire seven-year marriage. Similarly, Ms. Mohs was listed on the real estate excise tax affidavit, where the consideration was also listed as "to establish community property." PE tab 6.

Borghi requires a writing evidencing the transferor's intent to change the property's character. Here, the quitclaim deed clearly states that Ms. Mohs was added to the deed to establish community property. Credibility determinations are for the trier of

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fact and will not be revisited on appeal. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). Mr. Erdman originally intended for both parties to own the property in 1998. He listed the consideration on the deed and the real estate excise tax affidavit as establishing community property, and he kept Ms. Mohs's name on the deed for the entire marriage.

In *Hurd*, *Deschamps*, and *Borgh*, one or both of the spouses were deceased at the time of trial. Here, both spouses are alive and testified to the intent behind the deed, allowing the trial court to assess credibility. The trial court viewed the evidence and listened to testimony from both Mr. Erdman and Ms. Mohs. The court determined that Ms. Mohs was more credible and that the parties added her name to the deed with the intent to establish community property. The Emerson Road property was community property as of July 20, 2000.

Separate Property Contribution. "When exercising its discretion, a trial court is permitted to consider, as one relevant factor, a spouse's unusually significant contributions to (or wasting of) the assets on hand at trial." *In re Marriage of White*, 105 Wn. App. 545, 551, 20 P.3d 481 (2001).

Mr. Erdman argues that the trial court abused its discretion by failing to award him

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credit for his contribution (\$30,000 down payment and \$77,000 in subsequent payments, totaling \$107,000) to the Emerson Road property based on *In re Marriage of Nuss*, 65 Wn. App. 334, 828 P.2d 627 (1992). In *Nuss*, the husband was given credit for a home that was his separate property, but was later converted to community property.

Ms. Mohs contributed to the development of the Emerson Road property. The trial court notes that Ms. Mohs's good credit history benefitted the community by allowing them to develop the Emerson Road property. Furthermore, Ms. Mohs testified that she contributed to the development of the Emerson Road property with some of the \$40,000 in proceeds from the sale of her separate property house.

The trial court must make a just and equitable property distribution. Here, the trial court awarded each party his or her separate property and made a 50/50 split of their community property (which includes the Emerson Road property). The trial court did not base its property division on unreasonable or untenable grounds and, therefore, did not abuse its discretion.

\$90,000 Cash. The trial court may consider wasting or concealment of assets in its property division determination. *In re Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002). "Neither spouse shall give community property without the express or implied consent of the other." Former RCW 26.16.030(2) (1981).

Mr. Erdman admits that he concealed \$35,000 of community property in a can in his garage, but he does not agree with allocation of the remaining \$55,000 allotted as skimmed cash. The court allotted \$45,000 for funds Mr. Erdman spent on noncommunity costs and an additional \$10,000 for unaccounted for hay proceeds.

Mr. Erdman argues that the trial court does not explain how it calculated \$45,000. Mr. Erdman agreed at trial that he spent close to \$50,000 in cash on his daughter's tuition, allowances for his children, his son's trip to Disneyland, payment to his children for odd jobs, cars for both his children, a motorcycle for himself, and allowances for Ms. Mohs's children. Ms. Mohs was unaware of Mr. Erdman's expenditures for his children and his motorcycle. The record is unclear as to whether Ms. Mohs was aware of the allowances to her children in the amount of \$4,800. The balance remaining, without the \$4,800, would be very close to \$45,000, and this is likely how the trial court calculated the \$45,000 figure.

We cannot say the trial court abused its discretion in calculating and allocating the cash.

Marital Residence. In *Nuss*, the court concluded that a spouse cannot be charged rent for living in community property; however, the living situations of the parties may be taken into account in property division. In that case, the wife was living in a portion of

the party's community real property while the husband was paying the mortgage, the taxes and the insurance on the property. *Nuss*, 65 Wn. App. at 337-38.

Here, the house Ms. Mohs was occupying for 19 months, during the pendency of the dissolution, was already paid for and Ms. Mohs was responsible for her own living expenses. While *Nuss* permits the court to consider the inequities that may be involved in the parties' living situations during the pendency of a dissolution, this is only one factor available to the court among many that must be analyzed in making a just and equitable distribution. Also, *Nuss* does not require the court to consider the living situations of the parties. Therefore, it is not automatically an abuse of discretion if a court merely does not make an adjustment to the property division because of the living situations of the parties. There was no abuse of discretion.

Retirement Benefits. Both parties withdrew \$10,000 from their retirement accounts in 2007. Ms. Mohs had permission from the court to withdraw the money from her account to pay medical bills. Ms. Mohs's medical expenses were verified on her 2007 tax return. Mr. Erdman withdrew \$10,000 from his retirement account just prior to the parties' separation. He claims to have paid off his parents for the well that was put in on the Emerson Road property (\$7,000), and that the rest went to his son (\$2,000) and to pay the fee for early withdrawal (\$1,000); however, there are no records to substantiate

how Mr. Erdman spent the money. The only evidence was introduced by Mr. Erdman through witness testimony. Witness credibility is for the trier of fact to determine.

Without records contrary to the findings of the trial court, there is no basis for this court to find that the trial court abused its discretion.

Sold Property. It is undisputed that Mr. Erdman sold a treadmill, table saw, gun, motorcycle and colt, all of which were community property. The court placed the following values in Mr. Erdman's column: treadmill sale (\$250); table saw sale (\$250); .45 handgun sale (\$250); sale of motorcycle (\$3,750); and colt (\$500). Ms. Mohs testified that Mr. Erdman retained these funds. Mr. Erdman testified that the proceeds were either put into community funds or became a part of the \$35,000 in the can in the garage. As with the retirement benefits, Mr. Erdman cannot substantiate how the money was spent and witness testimony was the only evidence presented. Again, credibility is for the trier of fact to determine, and absent records contrary to the trial court's findings, there is no basis to find the trial court abused its discretion.

The decision of the trial court is affirmed.

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

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RCW 2.06.040.

Kulik, A.C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.