IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of TINA SCALF-FOSTER, Respondent, and JACKIE CRAIG FOSTER, Appellant.	No. 39218-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Jackie "Jack" Foster appeals the trial court's distribution of 13 different pieces of real property and the awarding of a community interest in his separate property as part of the decree dissolving his marriage with Tina Scalf-Foster (Scalf). Additionally, Foster challenges the trial court's awarding of attorney fees to Scalf despite his inability to pay.[1]

Foster and Scalf were married on March 18, 1995, separated and reconciled several times over the course of their marriage, and permanently separated on December 15, 2007. Scalf petitioned for dissolution of the marriage on January 10, 2008.

Foster and Scalf each owned real property prior to the marriage and the couple acquired

[1] There are no issues raised on appeal relating to the trial court's distribution of the couple's personal property or debts and liabilities.

several pieces of real property during their marriage. The couple acquired interests in the following real properties during the marriage: (1) Lot 13, Eagle Peak; (2) Zero Mary Lane/High Valley Park 10; (3) Sherwood Court/High Valley Park 8; (4) Lot 2, Eagle Peak, on which the couple built a golf ball driving range; (5) two one-acre lots in Soldotna, Alaska; and (6) a deed of trust note worth $13,500 on a third Soldotna, Alaska lot. The trial court awarded Scalf the couple's interests in Lot 13, Mary Lane, Sherwood Court, and the deed of trust note and awarded Foster the couple's interests in the Lot 2 driving range and two Soldotna, Alaska lots.[2]

Foster alleges that prior to the marriage, he and Scalf orally "agreed we would keep everything separate" and that the trial court should have awarded him the Lot 13, Mary Lane, and Sherwood Court properties, all acquired during the marriage, as his separate property. Report of Proceedings (RP) (Feb. 2, 2009) at 169. Scalf denied that any oral agreement regarding the couple's real estate holdings and purchases existed.

Foster also challenges the awarding of a $35,000 community interest to Scalf for improvements made to the marital home, which is Foster's separate property, in Packwood, Washington (Packwood Home). Foster received the Packwood Home from a prior marriage dissolution. Scalf moved from her prior home in Ellensburg, Washington, into the Packwood Home after the couple married. Around 1999, Foster and Scalf improved the Packwood Home by erecting a four-car garage. The parties dispute when a blacktop driveway was installed with

[2] The trial court also awarded each party several pieces of real property that each party agreed were separately owned and acquired prior to the marriage. These separate property distributions are not challenged on appeal except to the extent that Foster challenges the equitable distribution of the property because all of the parties' property, both community property and separate, is before the trial court for distribution. *In re Marriage of Olivares*, 69 Wn. App. 324, 328-29, 848 P.2d 1281, *review denied*, 122 Wn.2d 1009 (1993).

Foster claiming that the installation occurred prior to the marriage and Scalf claiming that the installation occurred at the same time they added the four-car garage.

On April 24, 2009, following a two-day hearing, the trial court entered findings of fact and conclusions of law and a decree of dissolution. The trial court found that "no written separation contract or prenuptial agreement" existed. Clerk's Papers (CP) at 23. It also found that Foster attempted to place various pieces of property beyond the reach of the trial court for distribution by "abus[ing] and overus[ing] quit claim deeds and . . . treat[ing] every parcel, including those acquired during the marriage, as his own." CP at 25. Further, the trial court found that the improvements to the Packwood Home were made with community funds. Substantial evidence supports these findings. In light of these findings, Foster's challenges to the trial court's property distribution as inequitable and the awarding of a community interest in the Packwood Home fail. Finally, the awarding of Scalf's attorney fees was based on Foster's intransigence making his ability to pay irrelevant. Accordingly, we affirm.

ANALYSIS

Prenuptial Agreement

Foster alleges that the trial court mischaracterized some of the real property resulting in an inequitable distribution of the real property. Foster alleges that he and Scalf had an oral prenuptial agreement that negated the presumption that real property acquired during a marriage is community property. The trial court found "[t]here is no written separation contract or prenuptial agreement" changing the community property presumption for real property acquired during the marriage. CP at 23.

All property acquired during a marriage is presumptively community property. RCW

26.16.030; *In re Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995). Spouses can contractually change their community property into separate property. *Volz v. Zang*, 113 Wash. 378, 381-84, 194 P. 409 (1920); *see also In re Marriage of DewBerry*, 115 Wn. App. 351, 359, 62 P.3d 525 (stating that Washington law does not "prohibit[] parties from entering into prenuptial agreements that alter the status of community property"), *review denied*, 150 Wn.2d 1006 (2003). But agreements that purport to change the strong community property presumption must be proven by clear and convincing evidence. *Kolmorgan v. Schaller*, 51 Wn.2d 94, 98, 316 P.2d 111 (1957); *In re Marriage of Janovich*, 30 Wn. App. 169, 171, 632 P.2d 889, *review denied*, 95 Wn.2d 1028 (1981). The party seeking to enforce the agreement altering the community property presumption must establish (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout their marriage. *Kolmorgan*, 51 Wn.2d at 98. Where real property is at issue an acknowledged *writing* is generally required.[3] *Graves v. Graves*, 48 Wash. 664, 666-67, 94 P. 481 (1908); *see also In re Estate of Borghi*, 167 Wn.2d 480, 485, 219 P.3d 932 (2009) (a writing is required to change the character of real property from separate to community); *Volz*, 113 Wash. at 383-84 (community property and separate property can be changed by proper conveyances and agreements that conform to all the essential legal requirements affecting real property transfers).

At trial, Foster alleged that a prenuptial agreement changed the community property presumption of *real* property acquired during the marriage, but he failed to produce any written documentation of the agreement necessary to satisfy Washington's statute of frauds requirements.

[3] In Washington, "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010.

RCW 64.04.010. Moreover, Foster appears to concede that the statute of frauds applies to this alleged oral prenuptial agreement.[4]

However, relying on *DewBerry,* Foster argues that the parties partially performed their oral prenuptial agreement and can thus avoid the statute of frauds. But his reliance on this exception to the statute of frauds, as articulated and applied in *DewBerry*, is misplaced. Part performance is an equitable doctrine providing remedies for agreements otherwise barred by the statute of frauds. *See Beckendorf v. Beckendorf*, 76 Wn.2d 457, 465, 457 P.2d 603 (1969). Part performance requires (1) the oral contract be proven by clear, cogent, and convincing evidence and (2) that the acts relied upon "unmistakably point to the existence of the claimed agreement." *Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623 (1947). "[S]ubstantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

In *DewBerry*, the trial court found the witness asserting the oral prenuptial agreement existed credible. 115 Wn. App. at 362. Additionally, several witnesses testified as to the creation of the *DewBerry* agreement and the terms were "clear and simple." 115 Wn. App. at 362. Here, no witnesses corroborated Foster's account of an oral prenuptial agreement and the three times Foster described the agreement at trial, he used different terms when describing the scope of the alleged agreement. One time, he described the agreement as "no checking account together, no savings account, no anything together" (RP (Feb. 2, 2009) at 169); another time, that the parties would "keep our property separate" (RP (Feb. 2, 2009) at 186); and finally, he testified that the

[4] While discussing the statute of frauds in his briefing, Foster stated, "Although the statute of frauds would apply to the agreement in question, it should be noted that it is enforceable under the part performance exception to the statute of frauds." Br. of Appellant at 9.

parties intended to keep their "things" separate (RP (Feb. 3, 2009) at 25-26). Moreover, the trial court found Foster's uncorroborated testimony incredible. We do not review a trial court's credibility findings. *In re Marriage of Rideout*, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003). Foster failed to provide clear, cogent, and convincing evidence of the alleged oral prenuptial agreement and his partial performance argument to avoid the statute of frauds fails.[5]

Community Property Interest in Packwood Home

Foster alleges that the trial court erred by finding Scalf had a $35,000 community interest in his separately owned Packwood Home for improvements made to it during the marriage. Scalf argues that the trial court did not err because Foster presented no evidence regarding the source of the funds the couple used to make the improvements other than his own testimony, which the trial court found incredible. We agree with Scalf; given the lack of evidence, we cannot say that the trial court's award of the value of improvements made to Foster's separate property during the marriage was inequitable.

The characterization of property as community or separate is determined at the date of acquisition and depends on whether it was acquired by community funds and community credit or separate funds and separate credit. *In re Estate of Binge*, 5 Wn.2d 446, 484-85, 105 P.2d 689 (1940). All assets acquired during a marriage are presumed to be community property. *Estate of Madsen v. Comm'r of Internal Revenue*, 97 Wn.2d 792, 796, 650 P.2d 196 (1982), *overruled on other grounds by Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d 652, 689 P.2d 46 (1984); *Yesler*

[5] We note in passing that Scalf's reliance on *In re Marriage of Mueller*, 140 Wn. App. 498, 167 P.3d 568 (2007), *review denied*, 163 Wn.2d 1043 (2008), is also misplaced because *Mueller* involved an oral property agreement allegedly made *after* the parties married. 140 Wn. App. at 502.

v. Hochstettler, 4 Wash. 349, 354, 30 P. 398 (1892).

Although at trial Scalf did not dispute that Foster obtained the Packwood Home prior to their marriage and that the building and the land are Foster's separate property, she contended that she acquired a community interest in the property based on improvements made to the property—a new four-car garage and blacktopping of the driveway—during the marriage. The trial court awarded Foster the Packwood Home as his separate property "[l]ess $35,000 in improvements made by the community."[6] CP at 8.

Foster and Scalf began living together in 1994. At that time, Foster moved from the Packwood Home to live with Scalf in Ellensburg. After the parties married in 1995, the couple moved to Foster's home in Packwood. For the duration of the marriage, Scalf worked various jobs, eventually acquiring a real estate license, and worked for Four-U-Realty beginning in 2003. Foster retired in 1994 and did not work during the marriage. The garage and the driveway upgrade were improvements to Foster's separate property made during the marriage when Scalf was the only member of the marital community working.[7] In finding of fact 2.21, the trial court stated, "[Foster] has not provided any evidence property acquired during the marriage was obtained with separate funds other than his own self-serving testimony." CP at 25. This finding of fact is unchallenged and as such is a verity on appeal. *Davis v. Dep't of Labor & Indus*., 94

---

[6] Technically, the proper characterization of the community's acquired interest in Foster's separate real property is a lien against the property and not a per se interest in the real property. Members of the community normally have a half interest in the lien amount subject to any modifications that equity requires under the circumstances of the case.

[7] To the extent Foster argues that he and Scalf presented conflicting evidence on the date of installation of the blacktop driveway, the trial court's determination that improvements worth $35,000 were made during the marriage is rooted in a credibility determination that we do not review. *Rideout*, 150 Wn.2d at 351-52.

Wn.2d 119, 123, 615 P.2d 1279 (1980); *In re Marriage of Vander Veen*, 62 Wn. App. 861, 865, 815 P.2d 843 (1991). A person alleging that an asset acquired during a marriage is separate property must provide clear and convincing evidence to overcome the community property presumption. *Madsen*, 97 Wn.2d at 796. Credibility determinations are not reviewed on appeal. *Rideout*, 150 Wn.2d at 351-52. Foster presented no evidence that the improvements to his separate property—the marital residence—were made with his separate funds. The trial court did not err in awarding Foster the Packwood Home subject to Scalf's $35,000 interest in improvements made to the property during the couple's marriage.

Property Distribution

Foster contends that the trial court unfairly and inequitably distributed the couple's real property assets. In particular, he challenges the trial court's authority to award real property to which neither he nor Scalf held title at the time of trial. The trial court refused to exalt form over substance by giving effect to Foster's apparent fraudulent quitclaim deeds that made it appear that he held no interest in the couple's assets and, instead, the trial court distributed whatever interests the parties had in the 13 real property assets equitably. The trial court's decision was not an abuse of discretion and we affirm.

In a dissolution action, a court must divide property in a manner that is "just and equitable" after considering all relevant factors, including the nature and extent of the community and separate property, the length of the marriage, and the economic circumstances of each spouse when the property is divided. RCW 26.09.080. All of the parties' property, both community property and separate, is before the trial court for distribution. *In re Marriage of Olivares*, 69 Wn. App. 324, 328, 848 P.2d 1281, *review denied*, 122 Wn.2d 1009 (1993). We only disturb a

trial court's dissolution rulings if there has been a manifest abuse of discretion by the trial court. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). A trial court manifestly abuses its discretion if its decision is based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). During a dissolution proceeding, "the trial court may properly consider a spouse's waste or concealment of assets." *In re Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011 (2003); *see also In re Marriage of Steadman*, 63 Wn. App. 523, 528, 821 P.2d 59 (1991) (holding that "gross fiscal improvidence" or "the squandering of marital assets" is not precluded from consideration by a trial court under RCW 26.09.080). However, during a dissolution proceeding, "[i]f one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial." *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). And a dissolution court "has no power over the property as to the rights of third parties claiming an interest in the property." *See In re Marriage of Soriano*, 44 Wn. App. 420, 422, 722 P.2d 132 (1986), *review denied*, 107 Wn.2d 1022 (1987).

Here, the trial court based its distribution of the properties on the belief that Foster's quitclaim deeds were sham transactions. The trial court entered a finding that Foster abused quitclaim deeds and treated property acquired during the marriage as his own. This finding is a verity on appeal because Foster assigns no error to it. *Davis*, 94 Wn.2d at 123; *Vander Veen*, 62 Wn. App. at 865. The trial court distributed the assets as it deemed "appropriate under the circumstances" in light of Foster's misconduct. RP (Feb. 3, 2009) at 107. The trial court granted each party its separate property, imposed a deed of trust on one of Foster's separate properties to cover Scalf's judgment related to the Packwood Home improvements, and then divided the six

community property interests acquired during the marriage (Lot 13, Mary Lane, Sherwood Court, the Lot 2 driving range, the two Soldotna lots, and the deed of trust note on the third Soldotna lot).

While the Lot 2 driving range property is presently titled in Foster's children's names, the trial court did not improperly consider or distribute it in this dissolution. The trial court stated that it believed Foster's transfer of the Lot 2 real property to his children was likely not legitimate. The record before this court supports the trial court's belief. Foster failed to present *any* evidence, other than his uncorroborated self-serving testimony, that this property acquired during the marriage was bought with separate property funds. Thus, under the community property presumption laws in Washington, the Lot 2 property is community property. RCW 26.16.030.[8] And community property cannot be conveyed without both spouses' approval. RCW 26.16.030(3).[9] Thus, the trial court appears to have correctly believed that, without Scalf's required permission, Foster ineffectively transferred community property to his children. But the trial court did not explicitly find, and we do not hold, that this property was in fact improperly conveyed. Instead, the trial court merely distributed *whatever property interests* a subsequent court finds exist.[10] By finding and distributing these interests in property as it did, the trial court

[8] "Property . . . acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property." RCW 26.16.030.

[9] "Neither person shall sell, convey, or encumber the community real property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners." RCW 26.16.030(3).

[10] Throughout the trial court's oral ruling, it explicitly granted the receiving party only "whatever interests" the parties presently had in that particular piece of property. RP (Feb. 3, 2009) at 107-10.

did not improperly infringe on any third parties' property rights and did not reward Foster's apparent misconduct at Scalf's expense. That Foster is concerned that he will not receive any benefits on the property interest awarded to him in the Lot 2 driving range is not a valid ground for this court to find the trial court abused its discretion.[11] The trial court divided the community property *interests* it believed existed in this case in a just and equitable manner per the circumstances of this case. Because the trial court found that Foster engaged in financial misconduct, an unchallenged verity on appeal, the trial court did not abuse its discretion in dividing the couple's interests in the real property assets.[12]

To the extent that Foster argues that the trial court abused its discretion by awarding the only income-producing property to Scalf, the $13,500 deed of trust on the Soldotna, Alaska lot paid in $250-per-month installments, which income he is "dependent upon," in addition to his social security to "sustain his day to day living," we disagree. Br. of Appellant at 20. The trial court divided the marital assets in a fair and equitable manner under the circumstances. The trial court awarded Foster substantially valuable real and personal property. We will not hold that the trial court abused its discretion by awarding one specific piece of property to Scalf that happened to be providing Foster with monthly income in light of the substantial value of the assets considered and distributed in this case.

Attorney Fees

---

[11] This analysis also applies to Foster's concerns about the interests awarded to him in properties which were his premarriage, separately-owned properties that he deeded to his grandson or the Restof corporation.

[12] We note that Foster's reliance on *White* to argue that the trial court distributed property disposed of prior to the trial is misplaced. 105 Wn. App. 545. The situation in *White* profoundly differs because it did not involve any allegations or findings of financial misconduct.

Finally, Foster alleges that the trial court abused its discretion by awarding Scalf $7,500 in attorney fees and costs. Attorney fees awarded in divorce proceedings are within the sound discretion of the trial court but generally must be based upon the financial need of the spouse and the ability of the obligor to pay. *Koon v. Koon*, 50 Wn.2d 577, 581-82, 313 P.2d 369 (1957). The party challenging the award must show that the court abused its discretion in an untenable or manifestly unreasonable manner. *In re Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995). But intransigence is an alternate basis for awarding attorney fees on appeal in a domestic relations action separate from the domestic relations attorney fee statute or appellate rule regarding frivolous appeals. *See In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). Attorney fees based on intransigence are an equitable remedy. *Mattson*, 95 Wn. App. at 604; *see In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992). If intransigence is demonstrated, the financial status of the party seeking the award is not relevant. *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

The trial court awarded Scalf her attorney fees based on a finding of intransigence. In its written findings of fact, the trial court stated:

> The award of attorney fees is equitable given the amount of separate and community property the husband was awarded and . . . the wife was awarded given that the husband had transferred a number of properties out of his name, frustrating the Court's ability to divide those properties in this dissolution action. The wife and her attorney had to unravel a number of transactions to determine ownership of the various real properties. The wife has incurred reasonable attorney fees and costs in the amount of $7,500.

CP at 24. Given this finding, that the litigation was unnecessarily lengthy and costly due to Foster's intransigent actions, the awarding of trial attorney fees is not an abuse of discretion. We

affirm Scalf's award of trial court attorney fees and costs.

Both parties requested attorney fees on appeal in compliance with RAP 18.1(b). We decline both their requests and each party shall bear the responsibility for their own attorney fees related to this appeal.

Affirmed.

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.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

VAN DEREN, C.J.