2-19-2008

Dunagan v. Dunagan Appellant's Brief Dckt. 34516

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHRIS M. DUNAGAN,

Plaintiff / Respondent

vs.

KELLY A. DUNAGAN,

Defendant / Appellant.

DOCKET NO. 34516

APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District for Clearwater County, State of Idaho

HONORABLE JUDGE JOHN R. STEGNER
DISTRICT COURT JUDGE PRESIDING

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STATEMENT OF FACTS

Plaintiff (Dunagan) and Defendant (Kircher) married on May 27, 2000. At the time Dunagan and Kircher entered into the marriage, they orally agreed they would keep their finances separate. During their marriage, Dunagan and Kircher kept their finances separate. Kircher paid all insurance and payments on the home she owned prior to their marriage and her business. Dunagan gave Kircher $500 on two occasions. (*Memorandum Opinion & Decision*, pg.3). Shortly after the marriage, Kircher attempted to refinance the home. As a condition of the loan, the lending institution prepared a quitclaim deed from Kircher to Dunagan and Kircher, which quitclaim deed was executed by Kircher and recorded in July 2001 as Instrument Number 187321, records of Clearwater County, Idaho.

The parties subsequently purchased the Krystal Café building in Orofino, Idaho. A portion of the purchased premises was sold. The parties extensively remodeled the remainder of the real property in order to house the "Krystal Café" business, a business owned and operated by Kircher prior to the marriage and her separate property.

The parties separated in 2005 and an Interlocutory Decree of Divorce was entered on March 21, 2006. The Interlocutory Decree of Divorce resolved all the parties' issues except the distribution of property and debt. At trial Kircher attempted to testify as to the oral prenuptial agreement of the parties - the context of her reasoning for executing the

quitclaim to her husband so shortly after their marriage. Her testimony was excluded under the Parole Evidence Rule, but the Court did accept an offer of proof by Kircher.

This offer of proof included that Kircher made all the payments on the home, all tax payments, all insurance payments and all utility payments from her earnings. (Tr. pg. 171). Having rejected Kircher's testimony, the Court treated the entire value of the home as an asset of the community.

In dividing the property, the Court found that Dunagan was entitled to an equalization payment of $108,500. (*Memorandum Opinion & Decision,* pg. 8). The Court granted Kircher sixty (60) days in which to make the payment and ordered that if Kircher timely made such payment that Dunagan would sign over and release to Kircher all his interest in the Krystal Café building. At trial, Kircher had testified she could raise $30,000 as an equalization payment. (Tr. pg. 166, l. 13-18). The Court further ordered that if Kircher did not make the payment on the building, the property would put up for sale in a reasonably commercial manner because there were no other properties available to Dunagan to make the equalization payment.

Kircher moved to modify the magistrate's order. Among other things, Kircher asked the Court to: 1) require Dunagan to pay one-half of the costs of sale should the building be sold; and 2) adjust the amount of the equalization payment to reflect the actual sale price, should the building be sold.

The magistrate agreed that if the building is sold, Dunagan must pay one-half the sale costs, which will be paid by reducing his $108,500 equalization payment by the

amount of such costs. However, the magistrate declined to adjust the equalization payment based on the actual sale price:

> The Defendant's proposal has appeal as it gives both the Defendant and the Plaintiff an equal stake in the sale. Despite such appeal, I deny Defendant's request.
>
> The value of the equalization payment is fixed at the time of the Decree based upon the fair market value of the property at the time of the divorce. *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 600, 21 P.3d 918 (2001). As noted by the Supreme Court, "Any community asset may change in value after the division of the community. This is not a reason to modify the division. *Ross v. Ross*, 117 Idaho 548, 789 P.2d 1139 (1990). The Plaintiff should not be penalized by the Defendant's actions while controlling use of the building or by the vagaries of the market. By fixing the equalization payment, this Court is removed from becoming intimately involved with the Plaintiff's actions or inactions in controlling the building since the date the value was established. Also, the Defendant has alternatives to selling the Café such as by selling her own home and/or loans.
>
> *Order to Amend Decree of Divorce*, pgs. 2-3.

Kircher appealed the Magistrate's decision to the District Court. The District Court affirmed the Magistrate's decision and Kircher has now appealed from that decision.

ISSUES ON APPEAL

I.

DID THE TRIAL COURT ERR IN FAILING TO CONSIDER THE PARTIES PARTIAL PERFORMANCE OF THEIR ORAL PREMARITAL AGREEMENT AS A COMPELLING REASON TO ORDER AN UNEQUAL DISPOSITION OF THE COMMUNITY PROPERTY.

II.

DID THE TRIAL COURT ERR IN FAILING TO CONSIDER THE CIRCUMSTANCES SURROUNDING THE MARITAL HOME AS A COMPELLING REASON TO ORDER AN UNEQUAL DISPOSITION OF THE COMMUNITY PROPERTY.

III.

DID THE TRIAL COURT ERR IN THE MANNER THE SALES PROCEEDS OF THE KRYSTAL CAFÉ BUILDING WERE TO BE DISTRIBUTED IN EQUALIZING THE DISTRIBUTION OF COMMUNITY ASSETS?

I.

DID THE TRIAL COURT ERR IN FAILING TO CONSIDER THE PARTIES PARTIAL PERFORMANCE OF THEIR ORAL PREMARITAL AGREEMENT AS A COMPELLING REASON TO ORDER AN UNEQUAL DISPOSITION OF THE COMMUNITY PROPERTY.

Idaho Code § 32-917 requires that "all contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved." This requirement conforms to the Uniform Premarital Agreement Act (UPAA), which has been adopted by most states. However, "[a]s an exception to the strict application of the Statute of Frauds, the doctrine of part performance is well-established in Idaho. *Idaho Code* §9-504; *Jolley v. Clay*, 103 Idaho 171, 177, 646 P.2d 413, 419 (1982); *Hoffman v. S V Co.*, 102 Idaho 187, 191, 628 P.2d 218, 222 (1981); *Roundy v. Waner*, 98 Idaho 625, 570 P.2d 862 (1977); *Southern v. Southern*, 92 Idaho 180, 438 P.2d 925 (1968); *Boesiger v. Freer*, 85 Idaho 551, 381 P.2d 802 (1963); *Reynolds Irrigation Dist. v. Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 882 (1950)." *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994).

"Partial performance exceptions to former statute of frauds requirements for premarital agreements remain applicable under Uniform Premarital Agreement Act. *Hall v. Hall*, 271 Cal.Rptr. 773, 222 Cal.App.3d 578 (Cal.App. 4 Dist.1990)." *Comments to* Uniform Premarital Agreement Act §2.

While it is true that Idaho has not addressed the issue of whether partial performance removes the writing requirement for marital agreements, Idaho does allow partial performance in other areas of contract law. A finding of partial performance in any area, by definition, is an exception to the statutory law. Partial performance is an equitable concept, and is applied to recognize the parties' actions consistent with an oral agreement in situations where the agreement was not reduced to writing. At trial, Kirchner asked the Court to consider the oral premarital agreement. Kircher argues that partial performance of an oral pre-nuptial agreement should remove the written requirement of such an agreement in the same manner as allowed in the other areas where the Statute of Frauds applied. This would give the Court authority to consider any antenuptial agreement, as provided for in *Idaho Code* §32-712, of the parties, and take the actions of the parties, completely consistent with the oral agreement, into consideration in ordering an unequal distribution of the marital property.

The oral premarital agreement of Kircher and Dunagan was that they would keep their earnings separate, and take care of their own debts. They did this for the duration of their marriage. Kircher owned the home before the marriage. Kircher made all payments associated with the marital home out of her own account, she made all payments associated with the Krystal Café out of her own account. Now, Dunagan, who only became an "owner" of the house because of a bank loan requirement, has been awarded half the value of the home. He contributed none of his own income to the house related payments. By considering the way the parties handled their finances, the Court

should have considered these facts in its consideration of the award of the home. The Court should not have been restrained by a strict application of a Statute of Frauds type argument.

Kircher recognizes that Idaho courts have not considered the issue of whether partial or complete performance of an oral premarital agreement dispenses with the need for the agreement to be in writing—takes the agreement "out of" the statute of frauds. However, the courts in other states have found that partial or complete performance of an oral premarital agreement makes the statute of frauds inapplicable. *See* Hall v. Hall, 222 Cal.App.3d 578, 271 Cal.Rptr. 773, (Cal.App. 4 Dist.,1990), DewBerry v. George, 115 Wash.App. 351, 62 P.3d 525, (Wash.App. Div. 1,2003), and *In re Marriage of Lemoine-Hofmann*, 827 P.2d 587 (Colo.App., 1992).

Hall v. Hall, supra, addressed whether an oral premarital agreement made after enactment of the UPAA was, enforceable. In that case, after the death of his first wife, Aubrey Hall executed a revocable trust and a quitclaim deed transferring the fee interest in his residence to himself as trustee of the trust. During his lifetime Decedent was the sole beneficiary, and at his death his sons would inherit the property. In March, 1986, Aubrey met Carol and he convinced her to marry him, quit her job, draw her social security at age 62, and give him $10,000. Evidence was presented that she would not have done any of those things without Aubrey's promise that she could live in the house for the rest of her life. In June, Carol quit her job, applied for social security upon reaching age 62, and gave Aubrey more than the agreed $10,000. In July, 1986, Aubrey

and Carol were married. In October, 1986, Aubrey and Carol met with an attorney to amend the trust to provide Carol a life estate in the house. In January, 1987, before signing the amendment, Aubrey died.

Carol filed suit against Aubrey's sons seeking determination of her right to the life estate. The court found that although the agreement was oral, it was removed from the statute of frauds by Carol's partial performance, and that she was entitled to a life estate in the house. The executor of Aubrey's estate, appealed. The court of appeals acknowledged that the agreement fell within the UPAA's provisions, and recognized that the rule requiring a writing is a statute of frauds law. However the court took notice that "[e]xceptions 'taking the case out of the statute' have traditionally been recognized as to all statute of frauds provisions. Thus, a substantial change of position in reliance on an oral agreement will estop reliance on the statute" (citations omitted). Hall, 222 Cal.App. at 585, 271 Cal. Rptr at 777. The key issue then was "whether the partial performance exception remains applicable under the act" Hall, 222 Cal.App.3d at 587, 271 Cal.Rptr. at 778.

The court explained that under traditional law, partial performance of an agreement would remove that agreement from the statute of frauds.

> Relief because of the partial or full performance of the contract is usually granted in equity on the ground that the party who has so performed has been induced by the other party to irretrievably change his position and that to refuse relief according to the terms of the contract would otherwise amount to a fraud upon his

> rights." (*Busque v. Marcou* (1952) 147 Me. 289, 86 A.2d 873, 876; see also *O'Brien v. O'Brien* (1925) 197 Cal. 577, 241 P. 861.) For relief to be granted because of partial performance of an oral antenuptial contract, the acts which are relied upon must be unequivocally referable to the contract. Acts which, although done in performance of the contract, admit to an explanation other than the contract (such as the performance of husbandly or wifely duties) are not generally acts of partial performance which will take the agreement out of the statute of frauds. (*Trout v. Ogilvie, supra,* 41 Cal.App. at p. 172, 182 P. 333.)
>
> 222 Cal.App.3d at 586, 271 Cal.Rptr. at 778.

The Court of Appeals held that the exceptions to the statute recognized under the former law where equally applicable to the UPAA. In construing the UPAA as not overriding traditional exceptions, the *Hall* court considered legislative intent and applied a rule of statutory construction and determined that the legislature did not intend to abrogate traditional equitable exceptions to statute of frauds requirements.

> We must assume the framers of the uniform act were well versed in the statute of frauds and knew about the exceptions applied to the writing requirement. Since the Commissioners on Uniform State Laws apparently recognized the existence of traditional exceptions, and the reports of legislative committees commenting on the law make no suggestion of exclusion of the exceptions, we must assume it was intended such exceptions continue to be viable. We therefore find the trial court's reliance upon partial performance as removing the case from the statute to be justified.
>
> *Id.*

In *DewBerry v. George*, 115 Wash.App. 351, 62 P.3d 525 (Wash.App. Div. 1,2003), the parties were discussing marriage and George told DewBerry that he insisted on the following conditions of marriage: (1) DewBerry would always be fully employed; (2) each party's income and property would be treated as separate property; (3) each party would own a home to return to if the marriage failed; and (4) DewBerry would not get fat. DewBerry agreed to these conditions. George and DewBerry married in 1986. The parties continually affirmed this agreement through words and actions. Painstaking and meticulous efforts were made to maintain separate finances and property. During their marriage, DewBerry and George deposited their incomes into separate accounts which they used for their personal expenses and investments. 62 P.3d at 526-527.

During their divorce proceedings, George argued that the trial court erred in finding by "clear, cogent, and convincing evidence" that an oral separate property agreement had been made by the parties prior to marriage and that it had been fully performed during their marriage, making it an enforceable agreement. He claimed that such an agreement is void under the statute of frauds. *Id.* at 528.

The court held that the statute of frauds applied to the agreement in question, and concluded that it was enforceable under the part performance exception to the statute of frauds. The court stated that the doctrine of part performance is an equitable doctrine which provides the remedies of damages or specific performance for agreements that would otherwise be barred by the statute of frauds. In order to prove partial performance, two requirements must be met. First, the contract must be proven by clear,

cogent, and convincing evidence. Second, the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they point to some other relationship, such as that of landlord and tenant, or may be accounted for on some other hypothesis, they are not sufficient. *Id.* at 529, *citing 362* Granquist v. McKean, 29 Wash.2d 440, 445, 187 P.2d 623 (1947). The court found that there was clear, cogent, and convincing evidence that there was an oral agreement. Further, it was found that the acts constituting part performance strongly suggested a separate property agreement. The court stated:

> [T]he steps taken by the parties to avoid commingling of their assets were unusually strong evidence of a separate property agreement. It was undisputed that the parties meticulously accounted for and handled their individual incomes as separate property and created minimal joint accounts to handle certain family-related expenses and requirements. The husband and wife relationship cannot account for such painstaking efforts to establish and maintain separate property.
>
> *Id.* at 530.

Dunagan and Kircher in this case had an oral premarital agreement to keep their finances, including their earnings and checking accounts separate. The parties did actually keep all their earnings, accounts, and all financial obligations separate. Kircher made all loan payments for the business from her account. Kircher made all house payments from her account. Kircher made all insurance payments and tax payments from her account. Dunagan kept his earnings separate and took care of his own financial obligations. Dunagan admitted that the parties kept their finances separate. (Tr. pg. 100,

19, through pg. 105, 1.18). Everything that Kircher and Dunagan did indicate that there was a premarital agreement to keep their finances separate.

Like in *DewBerry,* the husband and wife relationship does not account for such painstaking efforts to establish and maintain separate property. In addition, as in *Hall*, Kircher irretrievably changed her position by the bank's requirement, not her free will, and that to refuse relief according to the terms of the contract would essentially amount to a fraud upon her rights. Because of the agreement to keep their finances, both income and debts, separate, Kircher was confident that the home she had prior to her marriage to Dunagan would be protected in the event her relationship with Dunagan was unsuccessful.

Idaho Code §32-712 provides, in pertinent part that:

> In case of divorce by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows:
> 1. The community property must be assigned by the court in such proportions as the court, from all the facts of the case and the condition of the parties, deems just, with due consideration of the following factors:
> (a) Unless there are compelling reasons otherwise, there shall be a substantially equal division in value, considering debts, between the spouses.
> (b) Factors which may bear upon whether a division shall be equal, or the manner of division, include, but are not limited to:
> (1) Duration of the marriage;
> (2) Any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement;

> (3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;
> (4) The needs of each spouse;
> (5) Whether the apportionment is in lieu of or in addition to maintenance;
> (6) The present and potential earning capability of each party; and
> (7) Retirement benefits, including, but not limited to, social security, civil service, military and railroad retirement benefits.

This rule allows courts to order an unequal distribution of property when compelling reasons indicate that fairness requires such a division. Idaho's recognition, and application, of the doctrine of partial performance in the area of oral premarital agreements would enhance the court's ability to make a fair distribution, considering all the circumstances in a given case, of the marital property. Because *Idaho Code* §32-712 provides that the court may consider **any antenuptial agreement of the parties**, and because Idaho has already recognized that the doctrine of partial performance in other contract areas removes the requirement that the agreement be in writing, the Court should at least consider the parties oral prenuptial agreement in determining whether an unequal distribution of the community property was appropriate. The lack of a written agreement in the present situation should not be an absolute bar to such consideration.

II.

DID THE TRIAL COURT ERR IN FAILING TO CONSIDER THE CIRCUMSTANCES SURROUNDING THE MARITAL HOME AS A COMPELLING REASON TO ORDER AN UNEQUAL DISPOSITION OF THE COMMUNITY PROPERTY.

The marital home was valued at $125,000. The magistrate found that the home had been transmuted from the separate property of Kircher to community property by virtue of a deed signed in order to obtain a home loan. The only evidence of a transmutation was the deed itself. The Court, relying on the Statute of Frauds, did not consider other evidence. It is interesting to note that in distinguishing the present case from the *Hoskinson v. Hoskinson*, 139 Idaho 448, 80 P.3d 1049 (2003), the Court set forth the standard for transmutation of property (*Memorandum Opinion & Decision, pg. 15)*, as follows:

> In *Hoskinson*, the Supreme Court held that the spouse failed to prove a "transmutation by clear and convincing evidence". The evidence did not establish that Read intended to make a gift to the community".
>
> *Id.* at 460.

By applying the Statute of Frauds, the only standard that the Court used was the deed itself, the Court's reasoning was that there was no ambiguity in the deed. While that may be the case in this instance, and assuming that a transmutation did occur, the magistrate

still should have considered the surrounding facts in ordering an unequal distribution of the community property. At the time of Kircher's marriage to Dunagan, Kircher only owed $48,000 on the home. The parties had been married a little more than one year when the deed was executed. At the time of the divorce the outstanding loan on the house was $60,597.34. (Tr., pg. 148.) All loan and mortgage payments for the marital home were paid out of Kircher's account. Dunagan had no interest in the home at the time of the marriage and made no payments associated with the home during the duration of the marriage. Even Dunagan recognized that the home belonged to Kircher. (Tr., pg. 67.) Kircher's offer of proof (Tr., p. 172, l. 5-17) goes into details of Kircher's extreme work hours to make her payments.

The magistrate was guided by his understanding that the most important factor in allowing an unequal distribution is hardship (*Memorandum Opinion and Decision*, pg. 5), and that only in the rarest circumstances would there be an unequal distribution of the property (Tr., pg. 175.) However, there are no cases saying that hardship is the most important factor in ordering an unequal distribution, and while *Idaho Code* §32-712 requires compelling reasons, there is no reason to believe that the reasons are only found in the rarest of circumstances. If hardship is a compelling reason, then Kircher's situation certainly represents a hardship. Taking the home's value and outstanding loan into consideration, there is $64,402.66 in equity in the home. Kircher has paid the house down twice out of her own checking account. The entire value of the home was considered as being awarded to Kircher as community property, and contributes to the

$108,500 equalization payment that Kircher has been ordered to pay. The only reason that Dunagan has a community interest in the home is because the bank required Dunagan to be on the loan. It is vastly unjust to require Kircher to owe money to Dunagan for an asset that was owned solely by her prior to the marriage, and paid for solely by her during the course of the marriage.

Idaho Code §32-712 provides an illustrative, but incomplete, list of factors to consider in ordering an unequal distribution of the community property. The magistrate erred in not considering the facts surrounding the marital home in his decision.

III.

DID THE TRIAL COURT ERR IN THE MANNER THE SALES PROCEEDS OF THE KRYSTAL CAFÉ BUILDING WERE TO BE DISTRIBUTED IN EQUALIZING THE DISTRIBUTION OF COMMUNITY ASSETS?

Magistrates are required to consider the circumstances of each case and decide the most equitable manner for dividing and valuing community property. *Hunt v. Hunt*, 137 Idaho 18, 43 P.3d 777 (2002). Community property should be divided in a substantially equal manner unless there are compelling reasons which justify an unequal distribution. *Idaho Code* §32-712 (1); and *Rice v. Rice*, 103 Idaho 85, 645 P.2d 319 (1982). A magistrate's distribution of community property must be upheld absent an abuse of discretion. *Hunt, supra.* Here, the magistrate failed to follow the law with respect to the disposition of the Krystal Café building.

Idaho Code § 32-713 provides:

> The court, in rendering a decree of divorce, must make such order for the disposition of the community property, and of the homestead as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds.

Under *Idaho Code* § 32-713, the magistrate had the option of: 1) awarding the building to one party with a corresponding award of value of property to the other; 2) ordering the building sold and dividing the proceeds equally between the parties; or 3) ordering the building partitioned between the parties. *Larson v. Larson*, 139 Idaho 970, 88 P.3d 1210 (2004). The magistrate, however, exercised none of those options.

The magistrate did not award the building to Kircher outright, as required under the first option. Rather, it awarded her the building only if she pays Dunagan $108,500 within sixty days. If Kircher does not meet that condition, Dunagan is not obligated to transfer his interest to Kircher and, as a consequence, the building will remain jointly owned. At trial, Kircher testified that her ability to make an equalizing payment was limited to $30,000. Clearly she could not pay $108,500. The effect of the Judge's decision was that the building be sold, but the burden of failing to achieve the full sales price fell solely on Kircher.

Dunagan will argue that the magistrate did actually award the Krystal Café building to Kircher, and that the fact that Dunagan does not have to transfer his interest to Kircher until the equalization payment is made or the building is sold, is of no

consequence. The magistrate did not award the building to Kircher outright as is required by *Idaho Code* §32-713. Only if she is able to pay Dunagan $108,500 within sixty days is the property solely hers. If Kircher is unable to make the payment then Dunagan is not obligated to transfer his interest to her. The property would then be held jointly until it sells. During that period, Dunagan is an owner of the property, and has all the rights and benefits that an owner of property enjoys, but none of the financial responsibilities. Such responsibilities fall entirely on Kircher.

This serves to illustrate very clearly the fact that the property was not in actuality awarded to Kircher. It is situations like this that applying the statute as written and judicially interpreted, i.e. 1) awarding the building to one party with a corresponding award of value of property to the other; 2) ordering the building sold and dividing the proceeds equally between the party; or 3) ordering the building partitioned between the parties, *Larson v. Larson*, 139 Idaho 970, 88 P.3d 1210 (2004), would avoid. It "flies in the face of common sense" to allow one party to have control over property that has supposedly been awarded to the other party.

Therefore, the magistrate erred in failing to make a disposition in accordance with *Idaho Code* §32-713.

Kircher's claim that the magistrate erred by failing to base the equalization payment on the actual sale price comes from his citation of case law:

> The value of the equalization payment is fixed at the time of the Decree based upon the fair market value of the property at the

> time of the divorce. *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 600, 21 P.3d 918 (2001). As noted by the Supreme Court, "Any community asset may change in value after the division of the community. This is not a reason to modify the division.
>
> *Ross v. Ross*, 117 Idaho 548, 789 P.2d 1139 (1990).
> *Order to Amend Decree of Divorce, pg.3-4*

It is clear that the magistrate felt he was required to establish the value as of the date of his decision. This is incorrect. The value of property unconditionally awarded to one party is normally valued at the time of the order. As shown above, this property was not unconditionally awarded to Kircher. *Idaho Code* §32-713 requires an equal distribution of the proceeds. Even using the $236,500 fair market value, Kircher will receive less than Dunagan, and the disparity increases with every dollar less than the determined fair market value received for the property. The question is why should Kircher bear all the risk associated with the sale? Dunagan gets the same amount under the current order if the property sells for less than the presumed market value. The statement by the trial court that "[t]he Kircher's proposal has appeal as it gives both Kircher and Dunagan an equal stake in the sale" shows that he recognized the potential inequity of his order, but his following citation of case law indicates that he did not feel he could do anything but determine the value as of the date of his decision.

Thus, the magistrate erred because he exercised none of the options available to him under *Idaho Code* §32-713.

And, of course, the magistrate did not order the third option that the building be partitioned.

The magistrate also erred by failing to base the equalization payment on the actual sale price. This error is based on the magistrate's mistaken belief that he did have the discretion to enter such an order. The magistrate's decision on the issue is repeated below:

> The Defendant's proposal has appeal as it gives both the Defendant and the Plaintiff an equal stake in the sale. Despite such appeal, I deny Kircher's request.
>
> The value of the equalization payment is fixed at the time of the Decree based upon the fair market value of the property at the time of the divorce. *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 600, 21 P.3d 918 (2001). As noted by the Supreme Court, "Any community asset may change in value after the division of the community. This is not a reason to modify the division. *Ross v. Ross*, 117 Idaho 548, 789 P.2d 1139 (1990). The Plaintiff should not be penalized by the Defendant's actions while controlling use of the building or by the vagaries of the market. By fixing the equalization payment, this Court is removed from becoming intimately involved with the Plaintiff's actions or inactions in controlling the building since the date the value was established. Also, the Defendant has alternatives to selling the Café such as by selling her own home and/or loans.

Thus, the magistrate apparently believed that he was required to establish value as of the date of his decision, and that the value could not thereafter be modified. The magistrate was incorrect. While it is true that the value of property unconditionally assigned to one party should normally be established as of the date of the order, there is no such rule in

the case of an ordered sale under *Idaho Code* §32-713. In fact, as mentioned, *Idaho Code* §32-713 requires an equal distribution of the proceeds – whatever those proceeds may be. Further, magistrates do have the discretion to reserve jurisdiction over property distributions until the actual value of the property can be established. *Hunt v. Hunt*, 137 Idaho 18, 43 P.3d 777 (2002). Indeed, given the uncertainty involved in valuing real property, that method is certainly the most fair and equitable. Thus, the magistrate erred by "failing to rightly perceive the issue as one of discretion."

The potential problems resulting from the magistrate's abuse of discretion are easily illustrated. Assume that Kircher cannot pay Dunagan $108,500 within 60 days. Under those circumstances, she would not acquire sole title to the property, and the property would be sold. Assume also that the property sells for only $150,000 – the value estimated by Dunagan, and $60,000 more than the assessed value. After paying off the underlying debt and $10,000 in sale costs (real estate commissions, etc.), the net sale proceeds would be approximately $100,000. Under the court's order, Dunagan's equalization payment would be reduced by one-half of the sale costs, or $5,000, which would mean that Kircher would still owe him $103,500 – $3,500 more than the net sale proceeds. The result would be that Dunagan would get $100,000 from the sale of the building, Kircher would get nothing, and Kircher would still owe Dunagan $3,500 – a highly inequitable and unfair result and contrary to the rule that community assets should be divided equally.

If, on the other hand, the court had held that the equalization payment should be based on the actual sale price, then the equalization payment would be reduced by $43,250 (one-half the difference in the assumed fair market value and the actual sale price), and $5,000 (one-half the sale costs), which would mean that Kircher would owe Dunagan only $60,250. As a consequence, Dunagan would receive $60,250 out of the net sale proceeds and Kircher would receive $39,750 – a much more fair and equitable result.

It should also be noted that setting the equalization payment based on the actual sale price could never be an unfair detriment to Dunagan. If the building sells for less than the estimated fair market value, Dunagan will receive his rightful one-half share of the actual value of the building; if the building sells at the estimated fair market value, Dunagan will receive the entire amount of the equalization payment; if the building sells at more than the estimated fair market value, Dunagan will receive more than the ordered equalization payment. In fact, the only reason Dunagan would object to that proposal would be that he believes the building is worth far less than the value found by the magistrate.

"Unless there are compelling reasons to do otherwise, the court in a divorce action is required to make a substantially equal division in value, considering debts, of the community property between the spouses." Larson v. Larson, 139 Idaho 970, 972. 88 P.3d 1210, 1212 (2004), *Citing,* Maslen v. Maslen, 121 Idaho 85, 822 P.2d 982 (1991); Idaho Code §32-712(1)(a) (1996). "If the judge chooses substantial equality, the issue on

appeal is a factual one--whether substantial and competent evidence shows that such equality actually has been achieved." *Bailey v. Bailey*, 107 Idaho 324, 328, 689 P.2d 216, 220 (Ct.App., 1984). The magistrate in this case did not achieve substantial equality in his division of the estate.

As stated above, after awarding the property of the estate to Dunagan and Kircher, the magistrate concluded that Kircher was receiving $108,500 more in community property than Dunagan. The magistrate, therefore, ordered Kircher to pay Dunagan $108,500 to equalize the distribution. The discussion in the preceding section illustrates the problem of presuming that "substantial equality" has been achieved. With the courts current order, there is no way of knowing whether or not the property distribution is substantially equal until after the sale of the Krystal Café. Only if the café sells for the assigned value of $236,500 would the distribution between the parties be equal.

Had the court held that the equalization payment would be based on the actual sale price, then the equalization payment would actually serve to equalize.

CONCLUSION

The magistrate made a mistake of law in determining that he could not consider the oral prenuptial agreement made between the parties. While the Idaho Code requires that marital agreements be in writing, partial performance of the agreement dispenses with the writing requirement.

Further, the magistrate made a mistake of law by too narrowly construing the term "compelling reasons" and not fully considering all of the facts surrounding the marital home.

The magistrate erred in the disposition of the Krystal Café. Under *Idaho Code* §32-713, the magistrate had three options: 1) awarding the building to one party with a corresponding award of value of property to the other; 2) ordering the building sold and dividing the proceeds equally between the party; or 3) ordering the building partitioned between the parties. The magistrate, however, exercised none of those options.

The Court also erred in ordering that the equalization payment had to be determined at the time of the magistrate's decision. He did not realize that he had the option of basing the payment on the actual sale price of the property. Thus, the magistrate erred by "failing to rightly perceive the issue as one of discretion."

Finally, the magistrate made a mistake of fact in determining that the disposition he ordered achieved substantial equality as required by *Idaho Code* §32-713. "Substantial and competent evidence" does not show that equality actually has been achieved.

For the foregoing reasons, this Court should order the following:

1. The Court should order the lower Court to take into consideration the oral Prenuptial Agreement entered into between the parties and the circumstances surrounding the home owned by Kircher prior to the marriage of the parties in reaching an equitable division of the property.

2. In any event, this Court should order that the amount of any equalization payment Kircher owes Dunagan be determined only after the Krystal Café is sold and the net proceeds are known to the parties.

DATED this 18th day of February, 2008.

JONES, BROWER & CALLERY, P.L.L.C.

By: _____
GARRY W. JONES
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *APPELLANT'S BRIEF* was this 18th day of February, 2008,

____ hand-delivered by providing a copy to: Valley Messenger Service;
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__X__ mailed, postage pre-paid, by first class mail; or
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to:

PAUL THOMAS CLARK
CLARK & FEENEY
THE TRAIN STATION, SUITE 201
13TH & MAIN STREETS
P.O. DRAWER 285
LEWISTON ID 83501

By: _____
GARRY W. JONES
Attorney for Defendant/Appellant