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IN THE SUPREME COURT OF THE STATE OF IDAHO

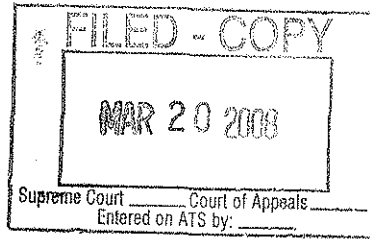
CHRIS M. DUNAGAN,
Plaintiff / Respondent,

vs.

KELLY A. DUNAGAN,
Defendant / Appellant.

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SUPREME COURT NO. 34516



RESPONDENT'S BRIEF

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

The Honorable John R. Stegner, District Judge presiding

Attorney for Plaintiff / Respondent

Paul Thomas Clark, ISBN 1329
Clark & Feeney
P.O. Drawer 285
Lewiston, Idaho 83501

Attorney for Defendant / Appellant

Garry W. Jones, ISBN 1254
Jones, Brower & Callery, P.L.L.C.
P.O. Box 854
Lewiston, ID 83501

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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the District Court's Opinion on Appeal affirming the Magistrate Court's decisions regarding the distribution of property and debt in a divorce action.

B. COURSE OF PROCEEDINGS / STATEMENT OF FACTS

Plaintiff/Respondent Chris Dunagan (hereafter "Dunagan") and Defendant/Appellant Kelly Dunagan (hereafter "Kircher") were married on May 27, 2000. The parties separated in 2005 and an interlocutory divorce was entered on March 21, 2006. A trial was conducted before the Honorable Magistrate Judge Randall W. Robinson on June 20, 2006, regarding the distribution of property and debt. On July 17, 2006, Judge Robinson issued his Memorandum Opinion and Decision. On August 25, 2006, an Order to Amend Decree of Divorce was entered. Kircher filed an appeal with the District Court in this case on October 5, 2006, and Dunagan filed a cross appeal on October 12, 2006. On July 27, 2007, the Honorable District Court Judge John R. Stegner affirmed the Magistrate Court's decisions regarding the issues that Kircher appealed.

Prior to marriage, Kircher operated a business called the Krystal Café. On July 24, 2000, the parties acquired the real property on which the Krystal Café was located (hereafter "Krystal Café real property"). Of the \$90,000 purchase price, \$80,000 was financed through a joint bank loan. Both parties were placed on the title to the Krystal Café real property and shortly after the purchase of the Krystal Café real property, part of said real property was sold as the Krystal Café did not occupy the entire building. At trial the parties agreed that the Krystal Café real property was owned by both parties as community property and that the Krystal Café real property and the debt should be assigned to Kircher, however conflicting testimony was offered regarding the value of the Krystal

Café real property. After hearing testimony regarding the value of the Krystal Café real property from both sides, the Magistrate Court held that the Krystal Café real property was worth \$236,500. (R. p. 36-40.)

Prior to marriage, Kircher owned a residential home (hereafter “marital home”) that the parties lived in throughout the duration of the marriage. Said marital home was subject to a debt when the parties were married. During the duration of the marriage, the marital home was refinanced on two occasions. Before the first refinance, Kircher executed a Quitclaim Deed transferring her interest in the marital home to Kelly Dunagan (now Kircher) and Chris Dunagan, wife and husband. Both parties were signatories on the two marital home refinances.

At trial, Kircher, to support her position that she should receive an unequal distribution of community property, sought to introduce testimony that the parties had an oral premarital agreement that each party would keep their finances separate. Kircher attempted to introduce testimony that she would not have executed the Quitclaim Deed had she known it would give Dunagan an interest in the marital home. Dunagan objected to this testimony because it would violate the parole evidence rule. While the Magistrate Court sustained the objection it allowed Kircher to make an offer of proof. This offer of proof included statements that Kircher made all payments on the home, all tax payments, all insurance payments, and all utility payments from her earnings. The Magistrate Court ultimately rejected Kircher’s offer of proof because it concluded the testimony violated the parole evidence rule, treated the entire value of the home as an asset of the community, and assigned the home and debt associated with the marital home to Kircher. (R. p. 44-47.)

Pertinent to this appeal is that during the parties marriage, Dunagan gave Kircher \$500 on two occasions. Additionally, in November of 2003, \$20,000 from the second refinance of the marital home went to the payment of debt on a 32 foot travel trailer owned by Dunagan.

After division of property and debt, the Magistrate Court found that Dunagan was entitled to an equalization payment of \$108,500. The Magistrate Court granted Kircher sixty (60) days in which to make the payment and ordered that if Kircher timely made such payment that Dunagan would be required to sign over and release to Kircher all interest in the Krystal Café real property. The Magistrate Court further ordered that if Kircher did not make the payment then the Krystal Café real property would be put up for sale in a commercially reasonable manner because there was no other property available to pay Dunagan his equalization payment. (R. p. 51.)

On July 25, 2006, Kircher filed a motion requesting clarification of the decree. Among other issues for clarification, Kircher requested “That in the event the net proceeds of the Krystal Café do not equal the \$196,905.36 equity contemplated by the Court, that the Court clarify the division of such net proceeds.” A telephonic hearing was held and regarding this issue the Magistrate Court held:

Fifth, the Defendant requests clarification of the division of the net proceeds should they not equal the equity contemplated by the Court. At the argument, the Defendant requested that the amount of equalization vary according to the actual amount that the property sells for. 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 the 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, 554, 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 selling her own home and/or by loans.

The Defendant argues she believes the business to be only worth \$150,000.00 and so the Plaintiff will receive a windfall in obtaining a disproportionate value from the sale of the building. The Defendant at the trial failed to offer any evidence to support

her subjective belief as to the value of the building other than anecdotal stories about two local properties that had not sold quickly. The appraiser's value was adopted, a value which the appraiser said he would pay for the property.

(R. p. 57-58.)

Subsequently Kircher filed an appeal with the District Court raising the following issues: (1) whether the court made a mistake of law in ruling that evidence of the oral premarital agreement did not constitute a compelling circumstance for ordering an unequal disposition of the community property; (2) whether the court abused its discretion by ruling that the circumstances surrounding the marital home were not a compelling reason to order an unequal disposition of the community property; (3) whether the court abused its discretion in the disposition of the Krystal Café real property; and (4) whether the court achieved "substantial equality" in the disposition of the community property.

On appeal, the District Court held that the Magistrate Court did not err as a matter of law in failing to consider the purported oral premarital agreement between the parties. (R. p. 73.) The District Court concluded that to be enforceable, premarital agreements must be in writing and that in light of the great weight of Idaho authority, no part performance exception exists. (R. p. 74.)

With regards to whether or not the Magistrate Court abused its discretion by ruling that the circumstances surrounding the marital home were not a compelling reason to order an unequal disposition of the community property, the District Court affirmed the Magistrate Court's ruling. In reaching this decision, the District Court concluded that the Magistrate Court did not abuse its discretion in rejecting Kircher's testimony relating to the Quitclaim Deed, that Kircher failed to explain how evidence rejected because of the parole evidence rule would become admissible when offered for a different purpose, and that Kircher failed to explain her hardship in the context of I.C. § 32-712, whose purpose is, in part, to set guidelines and boundaries for the Magistrate Court to

follow in making the “threshold decision” between equal and unequal division of community property. (R. p. 75-76.) The District Court found that the Magistrate Court’s decision to exclude evidence regarding the transmutation of the marital home was within its discretion, consistent with applicable legal standards, reached through the exercise of reason, and should not be set aside. (R. p. 76.)

Concerning the disposition of the Krystal Café real property, the District Court held that the Magistrate Court’s order awarding the Krystal Café real property to Kircher if she makes the equalization payment within six months proper. (R. p. 77.) The District Court noted that Kircher’s real objection is to the value established for the real property by the Magistrate Court. *Id.* Furthermore the District Court held that the Magistrate Court did exercise its discretion with regards to basing the equalization payment on the fair market value rather than the sale of the Krystal Café real property. (R. p. 78-79.) The District Court pointed out that Kircher’s argument that the Magistrate Court felt bound to base the equalization payment on the market value assumed that Kircher would sell the building. (R. p. 78.) The District Court stated that the amended decree suggests the Magistrate Court exercised his discretion in favor of finality and chose to determine the value of the real property at the time of trial rather than becoming intimately involved with Kircher’s actions, and that this decision was within the Magistrate Court’s discretion, consistent with applicable legal standards and reached through the exercise of reason. (R. p. 79.)

Finally the District Court concluded that there was substantial evidence that the Magistrate Court arrived at a substantially equal division of the community property. (R. p. 79-80.)

II.

ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO CONSIDER THE PARTIES PARTIAL PERFORMANCE OF THE APPELLANT'S CLAIM OF AN ALLEGED ORAL PREMARITAL AGREEMENT AS A COMPELLING REASON TO ORDER AN UNEQUAL DISPOSITION OF THE COMMUNITY PROPERTY?
2. 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?
3. DID THE TRIAL COURT ERR IN THE MANNER THE SALES PROCEEDS OF THE KRYSTAL CAFÉ REAL PROPERTY WERE TO BE DISTRIBUTED IN EQUALIZING THE DISTRIBUTION OF COMMUNITY ASSETS?

III

ARGUMENT

On a preliminary note, it must be pointed out that the practical effect of Kircher's first two issues on appeal is to argue that compelling reasons exist justifying an unequal division of community property in her favor based on otherwise unsound legal positions. The first issue is an attempt to characterize an invalid oral prenuptial agreement as a compelling reason for her to be awarded an unequal proportion of community property. The second issue is an attempt to collaterally attack a valid Quitclaim Deed that she executed transmuting the marital residence from separate to community. A transmutation that she is barred from setting aside because of the parol evidence rule, by claiming that the circumstances surrounding the marital residence constitute a compelling reason for her to be awarded an unequal proportion of community property. In other words, the first issue on appeal is an attempt by Kircher to circumvent Idaho statutory law and case law which requires that a prenuptial agreement be in writing. The second issue on appeal is an attempt by Kircher to circumvent that the legal effect of a valid transmutation of property from separate property to community property. Basically Kircher is attempting to resuscitate her unsound legal positions by claiming that these positions constitute compelling reasons for her to be awarded an unequal portion of community property.

- A. THE MAGISTRATE COURT DID NOT ERR IN FAILING TO CONSIDER THE PARTIES PARTIAL PERFORMANCE OF THE APPELLANT'S CLAIM OF AN ALLEGED ORAL ORAL PREMARITAL AGREEMENT AS A COMPELLING REASON TO ORDER AN UNEQUAL DISPOSITION OF THE COMMUNITY PROPERTY.

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, 971-72, 88 P.3d 1210, 1211-12 (2004). The threshold choice between substantial equality and an unequal but equitable division is committed to the

discretion of the trial court, guided by statutory and case law. *Bailey v. Bailey*, 107 Idaho 324, 327, 689 P.2d 216, 219 (Ct. App. 1984). In reviewing an exercise of discretion, the court conducts a multi-tiered inquiry: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Chandler v. Chandler*, 136 Idaho 246, 249, 32 P.3d 140, 143 (2001).

I.C. § 32-712(1)(b) sets forth factors that a magistrate court should consider in determining whether or not a division of community proper should be equal. In pertinent, these factors include:

- (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.

I.C. § 32-712(1)(b).

1. The oral prenuptial agreement is not a valid antenuptial agreement.

On appeal, Kircher claims that the Magistrate Court erred by failing to consider the parties' oral premarital agreement as a compelling reason to order an unequal disposition of community property in favor of Kircher. Kircher claims that this oral premarital agreement should be considered an antenuptial agreement for purposes of I.C. § 32-712(1)(b). Because it has been unequivocally established by statutes and interpreted in case law that Idaho does not recognize oral prenuptial agreements, the Magistrate Court's decision that the oral prenuptial agreement does not constitute a compelling circumstance for an unequal disposition of the community property in favor of Kircher must be affirmed.

I.C. § 32-917 specifically states 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.” The Idaho Supreme Court has emphasized the importance of full compliance with Idaho Code § 32-917 before an agreement is recognized:

One of the major purposes for requiring life-changing documents to be written and executed is to impress upon the parties the importance of the legal consequences of the document. For example, prenuptial agreements and wills must be written, signed, executed, and acknowledged. *See* I.C. § 32-922; I.C. § 15-2-502. Dividing the property of a community that may have lasted for decades has consequences at least as important as distributing the assets of the deceased. Indeed, the process of drafting an agreement often shows the parties that they omitted major issues or made hasty assumptions while negotiating. In addition, the requirement of writing and execution substantiates that the parties actually did come to a meeting of the minds in a vitally important area.

See Stevens v. Stevens, 135 Idaho 224, 229, 16 P.3d 900, 905 (2000); *see also Pike v. Pike*, 139 Idaho 406, 80 P.3d 342 (Ct. App. 2003) (Because any agreement regarding the division of the retirement accounts is not in writing, it is unenforceable by either party.)

Kircher’s position is that the Magistrate erred in not considering the parties’ oral prenuptial agreement to keep their finances and debts separate as a compelling reason to order an unequal disposition of community property in favor of Kircher. This oral agreement fails to comply with the mandatory provisions of I.C. § 32-917 and consistent with the Idaho Code and Idaho case law, is not enforceable as a valid prenuptial agreement and it is not an antenuptial agreement as contemplated by I.C. § 32-712(1)(b). While written prenuptial agreements of parties could be considered a compelling reason for an unequal division of community property, interpreting I.C. § 32-712(1)(b) to allow oral prenuptial agreements to constitute a compelling reason for an unequal division of community property in effect destroys the basis for I.C. § 32-917. If oral prenuptial agreements can constitute a compelling reason for an unequal division of community property there would be no need to have the agreements in writing rendering I.C. § 32-917 meaningless. Thus the

Magistrate Court did not err in failing to consider the parties' oral prenuptial agreement as a compelling reason to order an unequal disposition of the community property and its decision should be affirmed.

2. There has been no partial performance of the oral prenuptial agreement because the parties failed to follow the terms of the agreement and modified the agreement.

Kircher is asking this Court to recognize an exception to the requirement of I.C. § 32-917 that all contracts for marriage settlements must be in writing based on the doctrine of partial performance. Regardless of whether or not in some circumstances courts have found that partial performance of a oral contract alleviates the need for the contract to be in writing, the fact is that Idaho has never recognized such an exception in the context in which Kircher is asserting. Such a holding flies in the face of the statutory framework of the Idaho Code and is contrary to judicial interpretations of the Idaho Code.

While Kircher has discussed the facts and holdings in *Hall v. Hall*, 222 Cal.App.3d 578 (Cal.App. 4 Dist., 1990) and *DewBerry v. George*, 62 P.3d 525 (Wash.App. Div. 1, 2003) in great detail, neither one of these cases deserve any consideration in this matter. Partial performance is a defense to a statute of frauds violation. According to *Hall*, a “substantial change of position in reliance on an oral agreement will estop reliance on the statute.” 222 Cal.App.3d at 585. 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. *Id.* at 586. In this case, Kircher did not change her position whatsoever based on this oral prenuptial agreement and thus there is no equitable basis to enforce partial performance.

In *DewBerry*, the basis for the application of partial performance was that the oral agreement required each party's income and property to be treated as separate property and the court found strong evidence that the parties meticulously accounted for and handled their individual incomes as separate property. 62 Pl.3d at 530. In our case, the parties had a purported oral prenuptial agreement to keep their finances and debts separate. However, the parties failed to do so in this case. Dunagan gave Kircher \$500 on two occasions - clearly contrary to the oral prenuptial agreement. Furthermore, and more significantly, in November of 2003, \$20,000 from the second refinance of the marital home went to the payment of debt on a 32 foot travel trailer owned by Dunagan - again clearly contrary to the oral prenuptial agreement. Kircher and Dunagan did not keep their finances and debts separate, contrary to the oral prenuptial agreement, and thus there can be no partial performance of the agreement.

More importantly than the fact that Kircher did not change her position in reliance of the agreement, or that the parties did not follow the terms of their agreement, is the fact that the oral prenuptial agreement to keep their finances and debts separate was **modified** by the Quitclaim Deed executed by Kircher. The Quitclaim Deed transmuted the marital residence into community property after the oral prenuptial agreement was entered into. The fact that after the marital home had been refinanced a second time during marriage that a portion of the funds were used to pay the separate debt of Dunagan establishes beyond doubt that the parties intended to modify and abandon the agreement.

Kircher is attempting to circumvent well established Idaho law by claiming that a oral prenuptial agreement, which is not enforceable in Idaho, constitutes a compelling reason for her to receive an unequal proportion of the community property. While in some instances, compelling reasons do exist which would justify an unequal division of community property, I.C. § 32-712(1)(b)

should not be interpreted to assist a party who otherwise has an unsound legal position. Holding that an oral premarital agreement as a matter of law constitutes a compelling reason for an unequal division of community property destroys the requirement of I.C. § 32-917 that all contracts for marriage settlements must be in writing.

B. THE MAGISTRATE COURT DID NOT ERR IN FAILING TO CONSIDER THE CIRCUMSTANCES SURROUNDING THE MARITAL HOME A COMPELLING REASON TO ORDER AN UNEQUAL DISPOSITION OF THE COMMUNITY PROPERTY.

Kircher's next contention is that the Magistrate Court erred by not considering the circumstances surrounding the marital home as a compelling reason to order an unequal disposition of community property in favor of Kircher. Similar to Kircher's contention regarding the parties oral agreement, this position contradicts the provisions of the Idaho Code and the judicial interpretations of the Idaho Code.

The Quitclaim deed executed by Kircher on July 13, 2001, transmuted the marital home from separate to community property. This transmutation complied with the statutory requirements of the Idaho Code. The Magistrate Court properly held that the entire value of the marital home should be treated as an asset of the community.

While Kircher appears to accept the Magistrate Court's holding that the marital home should be treated as an asset of the community, Kircher adopts the position that the circumstances surrounding the marital home constitute a compelling reason for the Magistrate Court to make an unequal division of community property between the parties.

As set forth above, unless there were compelling reasons to do otherwise, the Magistrate Court in this divorce action was required to make a substantially equal division of community property. The threshold choice between substantial equality and an unequal but equitable division is committed to the discretion of the trial court, guided by statutory and case law. *Bailey*, 107 Idaho

at 327, 689 P.2d at 219. In reviewing an exercise of discretion, the court conducts a multi-tiered inquiry: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Chandler*, 136 Idaho at 249, 32 P.3d at 143.

I.C. § 32-712(1)(b) sets forth factors that a magistrate court should consider in determining whether or not a division of community proper should be equal. The purpose of I.C. 32-712, is in part, to set guidelines and boundaries for the Magistrate Court to follow in making the “threshold decision” between equal and unequal division of community property. *See Donndelinger v. Donndelinger*, 107 Idaho 431, 435, 690 P.2d 366, 370 (Ct. App. 1984).

The Magistrate Court did not abuse its discretion in rejecting Kircher’s testimony relating to the Quitclaim Deed based on the parole evidence rule, nor as stated above, does Kircher appear to challenge that holding. However, Kircher claims that the circumstances surrounding the marital home should constitute a compelling reason for an unequal division of community property in her favor and the Magistrate erred by not considering these circumstances as a compelling reason. As the District Court pointed out, Kircher fails to explain how the evidence that Kircher submitted in her offer of proof, which was rejected because of the parole evidence rule, would become admissible when offered for the different purpose of constituting a compelling need. Dunagan is under the impression that the offer of proof was made to challenge the validity of the Quitclaim Deed, not as a compelling need under I.C. 32-712(1)(b). The Magistrate Court stated that “besides the oral agreement, the only fact argued was the duration of the marriage.” (R. p. 35.)

In this case the Magistrate Court was required to make a substantially equal division unless there existed compelling reasons to do otherwise. The Magistrate Court recognized that the factors

listed in I.C. § 32-712(1)(b) are not all-inclusive. (R. p. 35.) The Magistrate Court observed that besides the oral premarital agreement, the only other compelling factor that was argued was duration of the marriage. While the Magistrate Court stated that “generally, to show compelling need, hardship is the most important factor” this statement is merely an observation of cases that it has examined and does not stand for the proposition that the Magistrate felt that it could not find, in its discretion, a compelling need unless a hardship existed.

The Magistrate Court’s decision to exclude evidence regarding the transmutation of the marital home was within its discretion, consistent with applicable legal standards, reached through the exercise of reason, and should not be set aside. Furthermore the offer of proof was not even argued as a compelling need. Similar to Kircher’s position that the oral premarital agreement, which is unenforceable, should be considered a compelling reason for an unequal division of community property in her favor, Kircher is merely trying to collaterally attack the valid Quitclaim Deed. The Quitclaim Deed which is a valid antenuptial agreement. In light of the validity of the Quitclaim Deed, a holding that the circumstances surrounding the marital home constitute a compelling need for an unequal division of community property in favor of Kircher would in effect be amending or rescinding the valid antenuptial agreement, which is contrary to the provisions of I.C. § 32-712(1)(b) (2) (any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement).

C. THE MAGISTRATE COURT DID NOT ERR IN THE MANNER THE SALES PROCEEDS OF THE KRYSTAL CAFÉ REAL PROPERTY WERE TO BE DISTRIBUTED IN EQUALIZING THE DISTRIBUTION OF COMMUNITY ASSETS.

The disposition of community property is left to the discretion of the trial court, and unless there is evidence in the record to show an abuse of that discretion, the award of the trial court will not be disturbed. *Chandler*, 136 Idaho at 249, 32 P.3d at 143 (citations omitted).

Encompassed in the disposition of community property is the determination of the value of that property. *Id.* at 249, 32 P.3d at 143 (citations omitted). Courts have held that in “divorce proceedings the determination of the value of community property is within the discretion of the trial court and will not be disturbed on appeal if it is supported by substantial competent evidence.” *Id.* at 249, 32 P.3d at 143 (citations omitted). 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 at 600, 21 P.3d 918. “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 at 554, 789 P.2d 1139.

When there is conflicting evidence, it is well established that the trial court judge is the arbiter of the evidence, and of the credibility and weight to be given the evidence. *Desfosses v. Desfosses*, 120 Idaho 354, at 357, 815 P.2d 1094, at 1097 (Ct. App. 1991). The trier of fact is in a unique position to make determinations of credibility and to discern the import of the testimony. *Miller v. Mangus*, 126 Idaho 876, at 880, 893 P.2d 823, at 827 (Ct. App. 1995). If the trial court’s factual findings are supported by substantial, though conflicting, evidence in the record, they must be accepted on appeal. *Jensen v. Jensen*, 124 Idaho 162, at 164, 857 P.2d 641, at 643 (Ct. App. 1993).

1. There is no substance to Kircher’s argument that the Magistrate Court failed to comply with I.C. § 32-713.

Kircher asserts that the Magistrate Court erred in failing to make a disposition in accordance with I.C. § 32-713. Kircher’s position is that, pursuant to Idaho Code § 32-713, the Magistrate Court had the option of: 1) awarding the Krystal Café real property to one party with a corresponding award of value of property to the other: 2) ordering the Krystal Café real property sold and dividing

the proceeds equally between the party; or 3) ordering the Krystal Café real property partitioned between the parties (*Larsen v. Larsen*, 139 Idaho 970, 88 P.3d 1210 (2004)) and that the Magistrate Court failed to exercise any of these options. However, in appropriate circumstances a fourth option is available. The trial court can also award property to one spouse and order the other to make payments over a reasonable period of time to equalize the division. *Id.* at 972, 88 P.3d at 1212.

While the Magistrate Court did not order that the Krystal Café real property be partitioned, as noted by Kircher, his order is consistent with the other options available under Idaho Code § 32-713. The Magistrate Court awarded the Krystal Café real property and the debt to Kircher and awarded Dunagan a corresponding value of property, as evidenced by the equalization payment. The fact that Dunagan does not have to transfer his interest to Kircher until after she makes the equalization payment does not conflict with the requirements of Idaho Code § 32-713. In fact it's consistent with the fourth option set out in *Larson*, and it merely creates a security interest in favor of Dunagan until the equalization payment is made. Based on the order Kircher has sixty days to make the payment, and then if she does Dunagan's security interest is extinguished. If she fails to make the payment then the Krystal Café real property is sold and both parties receive the proceeds equally. Kircher cites no case law supporting her interpretation and to invalidate the order on this ground flies in the face of common sense and common practice. As a practical matter, the inability to protect the non-receiving spouse from having the receiving spouse take the property and dispose of it, or keep it, without paying the equalization payment would dictate that the trial court either order the sale of any property, or the partition of any property, if one party owed another party an equalization payment without ever giving a party a chance to keep the property and pay off the equalization payment. Such a result cannot be what the drafters of our statutes contemplated.

Likewise Kircher seems to misinterpret the effect of selling the Krystal Café real property

and dividing the proceeds between the parties. The debt allocation is already built into the equalization payment and has already been fairly accounted to both parties through other awards. Kircher has already been credited with \$19,750 of other community property.

Thus contrary to Kircher's contention, the Magistrate Court did not abuse its discretion and its order is consistent with the provisions of Idaho Code § 32-713 and should be affirmed.

2. The Magistrate Court did not abuse its discretion by failing to base the equalization payment on the actual sales price.

Any argument to the contrary not only is illogical but misreads the Magistrate Court's order. First of all, Kircher's argument presumes that the building is going to be sold, which is not the case. The building is only to be sold pursuant to the Magistrate Court's order if Kircher cannot pay the equalization payment according to the Magistrate Court's terms. If you accept Kircher's position then it would be impossible for the Magistrate Court to calculate an equalization payment if Kircher retains the Krystal Café real property - which is what both parties agreed to and what the Magistrate Court ordered. The Krystal Café real property is only to be sold if the equalization payment cannot be made. In its order, the Magistrate Court contemplated that Kircher would keep the Krystal Café real property if she makes the equalization payment. As such, it would be impossible to derive the equalization payment based on a sale that would never occur.

Secondly, Kircher claims that this error is based on the Magistrate Court's mistaken belief that it did not have the discretion to enter such an order (basing the equalization payment on the actual sale price). This contention is apparently based on the Magistrate Court's statement that "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." A full reading of the *Order to Amend Decree of Divorce* does not support this contention. While the Magistrate Court never came out and

said “this decision is discretionary” it is obvious that it treated this decision as discretionary. First of all, it did not say “Defendant’s proposal has appeal and I would like to grant it but it is not in my discretion to do so.” If the Magistrate Court felt so strongly about it, but felt bound, then it certainly would have justified its failure to adopt this position had it considered it to be outside of its hands. Secondly, if it felt bound to deny this position, the Magistrate Court would not have justified its decision by stating that Dunagan should not be penalized by Kircher’s actions or by the vagaries of the market, or that this way the court would not have to be intimately involved, nor would the Magistrate Court have mentioned that Kircher has several alternative to selling the Krystal Café real property.

In summary, the Magistrate Court did not abuse its discretion by failing to base the equalization payment on the actual sale price. As set forth above, it would be impossible to set the equalization payment without an actual sale and an actual sale was not mandated by the Magistrate Court. Secondly, a complete reading of the Magistrate Court’s order shows that it viewed this issue as discretionary and authored its opinion as such. Furthermore Kircher tries to illustrate scenarios which showcase the problems of the Magistrate Court’s decision. However, such illustrations should be given no weight. Said illustrations base the sale of Krystal Café real property at \$150,000 - the amount Kircher unsuccessfully attempted to get the Magistrate Court to establish as the fair market value for the Krystal Café real property. As set forth in its order, the Magistrate Court heard the evidence and concluded that \$236,500 was the fair market value of the Krystal Café real property. No other sale price should be contemplated. The sale of any real estate has some associated risk. Some property sells for less than fair market value while some property sells for more than fair market value. The overall trend in real property is that it appreciates. The point being that a court can never eliminate the risk that the fair market value it assigns to property will not match the actual


sale price and this risk cannot be considered grounds to overturn the Magistrate Court's decision in this case. Thus Dunagan respectfully requests that this Court affirm the Magistrate Court's order on this issue.

CONCLUSION

Based on the foregoing, Dunagan respectfully requests that this Court affirm the Magistrate Court's holdings regarding the issues in this appeal.

DATED This 18th day of March, 2008.

CLARK AND FEENEY


By:  _____
Paul Thomas Clark
Attorney for Plaintiff / Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of March, 2008, I caused to be served a true and correct copy of this document by the method indicated below, and addressed to the following:

Garry W. Jones
Jones, Brower & Callery, P.L.L.C.
1304 Idaho Street
P.O. Box 854
Lewiston, ID 83501

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)

 _____
Paul Thomas Clark
Attorneys for Plaintiff / Respondent