IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Domestic Partnership of

KIRSTEN KARI STAVELAND
Petitioner-Respondent,
Respondent on Review

and

MICHAEL JON FISHER
Respondent-Appellant,
Petitioner on Review.

Multnomah County Circuit Court No. 16DR00887

A163944

S066424

RESPONSE BRIEF OF RESPONDENT ON REVIEW

Review of the Decision of the Court of Appeals
In an Appeal from the Judgment of the Circuit Court for Multnomah County
The Honorable Susan M. Svetkey, Judge

Robert T. Scherzer (791052)
1300 SW 6th Ave., Suite 300
Portland, OR 97201
Phone: (503) 208-2679
Attorney for Respondent on Review

George W. Kelly (822980)
303 W. 10th Ave.
Eugene, OR 97401
Phone: (541) 343-1884
Attorney for Petitioner on Review

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INDEX OF CONTENTS

LIST OF AUTHORITIES

ISSUES PRESENTED AND PROPOSED RULES

Issues

1) In an appeal from a Judgment dissolving a domestic partnership, should the appellate court review for an abuse of discretion, as in a dissolution of marriage, or for legal error as in a contract dispute?

2) Whether the courts may infer an agreement to equally share the appreciation in a shared home when the evidence of a marriage ceremony, sharing living expenses, each providing sweat equity and the cost of labor and materials all support the creation of a family home.

Proposed Rules

1) This brief adopts Petitioner on Review designation of the parties, i.e., the same way as in the court of appeals and the trial court. Petitioner supports the trial court's exercise and the court of appeals' statement that a court's exercise of equitable power in a domestic partnership dissolution is analogous to its exercise of discretion in a marital dissolution case resulting in the same standard of review, abuse of discretion, though in a domestic partnership case there is no statutory presumption of equitable contribution. Nonetheless the legal (and factual) analysis remains very much the same between domestic partnership cases and dissolution of marriage cases, i.e., what was the intent of the parties? Therefore, the standard of review for both marital

dissolution and domestic partnership cases should remain the same, i.e., abuse of discretion.

2) The courts can certainly infer an agreement to equally share the appreciation in a shared home when the evidence presented is that the parties shared if not equally then equitably monthly expenses on the home, both parties provided sweat equity as well as artistic and design skills to the home, the parties held themselves out as a married couple following a wedding ceremony and had a child with the Petitioner becoming the primary caregiver. It is neither a abuse of discretion or for that matter, improper inference that the parties had an implicit contract in coming to the conclusion that the appreciation while sharing the house should be shared.

NATURE OF THE ACTION AND RELIEF SOUGHT

In the trial court the Petitioner sought to share in the appreciation of the family home while the parties lived in said home as a family, in contrast with each party keeping all of their other assets separate and un-commingled.

NATURE OF THE JUDGMENT

The trial court awarded Petitioner one half of what it determined to be the appreciation of the home through the date of divorce. The court of appeals remanded

for a recalculation of what the appreciation should have been, given a cut off date of separation, rather than date of trial.

SUMMARY OF FACTS

Respondent on Review agrees with and reiterates the Summary of Facts as set out in the Petitioner on Review's Brief, as it pertains to the court of appeals findings and the ruling from the trial court.

In addition to those facts as set forth by the court of appeals and the trial court, the following should be considered in supporting the court of appeals and trial court's decision:

- Respondent, prior to trial, stipulated in open court that the "Ainsworth" house was precluded from the domestic partnership analysis. Tr 28. Petitioner made the down payment on the "Ainsworth" house and made all mortgage payments and tax and insurance payments. *Staveland and Fisher, 295 Or. App. 201, 213 P.3d (2018).* Respondent contributed no money and minimal labor toward the property other than on three occasions provided minor labor in regards to the Ainsworth house. *295 Or. App. at 213.* As the trial court stated:

> "That it's my understanding that the only issues before the Court are custody, parenting time and whether or not she's [Petitioner]

> entitled to a portion of the appreciation of the Dickinson home." Tr 133.

When Respondent continued to argue the appreciation issue on Ainsworth over objection from Petitioner's counsel, Respondent's attorney stated the following:

> Ms. Helton: "Okay. If that is your – because that's – my client has just said that he doesn't want to go – press this matter any further, so I'll move on." Tr 137.

- The contrast between how the parties treated "Dickinson" in terms of sweat equity, improvements, and monthly expenses, and that of "Ainsworth" provides a clear contrast between assets that were intended to be joint and those intended to be separate. With "Ainsworth" the Petitioner paid the mortgage, tax, and insurance payments and received rent even though it was a negative income flow for several years. Respondent made no contribution. Tr 39-40; *295 Or. App. at 213.* However, with "Dickinson" the parties shared household chores and each provided significant sweat equity, if not the cost of said improvements. They shared in the monthly overhead.
- The parties did have an agreement as to how expenses associated with "Dickinson" would be paid. Respondent paid the mortgage, property taxes, and homeowners insurance. *295 Or. App. at 212, 213.* Petitioner paid food,

car insurance, gas, electric, garbage, gas for the house, water, clothes for the child, the nanny for the child, supplies, toys, medical each month. Ex 29, 51.

Not only was the agreement between the parties implicit as to how monthly expenses were paid each month, the parties also acknowledge that it was explicit:

> "Q: We'll get to that. So when you [Respondent] and Ms. Staveland began living together in June of 2011, did you have any agreements as to how the monthly expenses were to be allocated between the two of you?
> A: We did. I don't remember that we put anything in writing, but the agreement was that she would pay for the utilities to live there." Tr 214 lines 8-14.

Respondent never contradicted the spreadsheets provided by the Petitioner as to the contributions that she made every month. Ex 29, 51. Nor did he testify to contributing anything other than mortgage interest and taxes, with the exception of food. Tr 263.

- Furthermore, both parties have significant sweat equity and financial contributions to the improvement and repairs of the "Dickinson" home. As testified to by the Respondent:

> "Q: Did you do any improvements or repairs as you moved into the house?
> A: I would say we did them after and then ---
> ---
> Q: Without oversimplifying that is, it sounds like what you are describing is much --- is much what Ms. Staveland has described as to what happened with the house.
> A: Yeah. I think she omitted a couple of items, but yeah, broadly it's similar." Tr 209-210.

Petitioner testified to a long list of contributions that she contributed to "Dickinson" including picking out furniture, picking out paint colors, arranging art, coming up with color schemes, remodeling " --- pretty much every room in the house: All of the bathrooms, the kitchen, the laundry room, the pantry. We painted huge walls, and I participated in the -- I had a lot of experience both from when I grew up in Alaska but also working on my own house, so I knew how to tile, I knew how to paint and do all those projects as a major participant." Tr 36-37. Petitioner went on to describe specific projects including tiling the kitchen, pantry, laundry room and den, tiling the upstairs bathroom and downstairs bathroom. Tr 37-38.

Respondent basically confirmed that Petitioner's testimony was accurate.

> "Q: And to the extent that you performed the labor versus Ms. Staveland performed the labor, was Ms. Staveland's statement in that regard accurate? Who did what work?
> A: Yeah. So we both contributed some of the projects. There were some projects that I did entirely. I would say over the work that we did we both contributed to, I did the overwhelming amount of the work.
> Q: Did the two of you pick out colors together?
> A: We did.
> Q: Furnishings together?
> A: Yeah, furniture." Tr 210-211

- Based upon the testimony and the evidence, the trial judge made numerous findings to support that the intent of "Dickinson" went beyond merely the financial component. The court was clear that Petitioner was the primary parent. Tr 417. It

was the intent of the parties to be married. Tr 422. It was the intent of the parties have a family and to live together the rest of their lives. Tr 423. The parties held themselves out as husband and wife. Tr 423. Wedding rings were purchased and wedding vows were exchanged. Tr 423. Friends and family members were told by the parties that they were married, including those who were closest to them. Tr 423.

The court also found that the parties, including the Respondent, referred to moving, improving the home, painting, the wedding ceremony as "we", "you invited people to come to "our" house". Tr 424. The court found that the parties fixed the house up together and each contributed to fixing up the house together. Tr 424. The court found that Petitioner and her family contributed significant physical labor and decision making about décor and colors and all those things. Tr 424. Finally, the court found that the parties treated the home as a family home. Tr 425.

- Despite the consistent monthly contribution made by the Petitioner (Ex 29, 51) which entailed almost all of the household expenses other than mortgage, taxes, and insurance, Respondent argues that Wife made little or no contribution to the family home. In fact, his statement was that the Wife created a "extreme financial burden to have her live there". Tr 275. Respondent simply failed to recognize or for that matter even respond to the contributions to which Petitioner made throughout the relationship and in particular, to the "Dickinson" home.

RESPONSE TO SUMMARY OF ARGUMENT

The court of appeals did not err in its decision:

1. There was substantial and persuasive evidence inferring an implicit agreement to equally share in appreciation in the "Dickinson" home, if not an explicit agreement.
2. The court of appeals did not consider "Ainsworth" property in that Respondent stipulated that it was not an issue to be taken up by the trial court and the facts were that Respondent made little or no financial contribution and nominal sweat equity.
3. The court of appeals' review of the trial court discretion to determine the case based on "an abuse of discretion" was appropriate, and is the law. The court of appeals decision should be reaffirmed.

ARGUMENT

1. Applicable Law. *Beal and Beal, 282 Or 115, 577 P2d 507 (1978)* remains controlling law on the issue:

   "We believe a division of property accumulated during a period of cohabitation must be begun by inquiring into the intent of the parties, and if an intent can be found, it should control that property distribution. --- The difference is often only the sophistication of the parties. Thus, absent an express agreement, courts should closely examine the facts in evidence to determine what the parties implicitly agreed upon ---.

--- In such cases, inferences can be drawn from factual settings in which the parties lived. Cohabitation itself can be relevant evidence of an agreement to share incomes during continued cohabitation. Additionally, joint acts of a financial nature can give rise to an inference that the parties intended to shared equally. Such acts may include a joint checking account, a joint savings account, or joint purchases.
--- In summary we hold the courts, when dealing with the property disputes of a man and a woman who have been living together in a nonmarital domestic relationship, should distribute the property based upon the expressed or implied intent of those parties." *282 Or at 122.*

2. Application. The key facts for the court to consider are as follows:

- The parties met in April 2011 and began to cohabitate two months later by moving into a recently purchased home by the Respondent. As the trial court set forth, these parties intended to be married. They had wedding invitations, they had a wedding ceremony, the said wedding vows, they held themselves out as husband and wife, they moved into a new house together (purchased by the Respondent). They had a child together and lived as a family in "Dickinson" from June 2011 through December 2015.
- The parties had an agreement as to expenses on "Dickinson", the family home. Respondent would pay the mortgage, taxes, and insurance. Petitioner would pay utilities, household expenses, food, and when the child was born, expenses related to the child including the nanny.
- The parties made joint decisions regarding improvements and repairs. The parties contributed labor together. Respondent paid for materials.

- Petitioner previously owned "Ainsworth". The intent of the parties was to keep "Ainsworth" separate, particularly from the perspective the Respondent in that "Ainsworth" was under water for numerous years. All financial responsibilities of "Ainsworth" were that of the Petitioner and Respondent provided only nominal labor over the course of their relationship by fixing a toilet, installing a stove, and helping to move out a renter. "Ainsworth" stands in sharp contrast to how the expenses and improvements of "Dickinson" were handled by the parties during their relationship.
- As set forth in Exhibits 29 and 51, Wife's contribution to the family household expenses (at least in the years 2014 and 2015 after the birth of their child) included car insurance, couples therapy, food, gas (automobile), therapists bills, electric, garbage, gas, water, child's activities, child's art supplies, child's clothes, community center classes for the child, nanny, preschool, supplies, and toys for the child. On occasion Respondent would pay directly to the Petitioner sums to partially reimburse for the child's expenses. Though never specifically quantified, based upon what Respondent testified to was his financial contribution ($2,600 per month) there was an equitable if not equal split of the household expenses on "Dickinson" each month.

- The parties' child was born in 2014. Mother was clearly the primary caregiver. Mother paid for directly all expenses for the child, including the nanny, and would occasionally be reimbursed some sums from the Respondent.

The above facts are precisely the set of facts that would allow the trial court (and court of appeals) to award half the appreciation of the "Dickinson" home to the Petitioner. The case of *Wilbur v. DeLapp, 119 Or. App. 348, 850 P.2d 1151 (Or. App., 1993)* is on point. Though a house was purchased in the name of one party only in *DeLapp*, the court found and was supported by the court of appeals that Plaintiff contributed to repairs that were necessary to qualify for a loan by selling jewelry. The Defendant paid the mortgage and utility bills. The Defendant in *DeLapp* argued that there was insufficient evidence of an intent to share equally "---because only his name is on the title and because he was responsible for the mortgage, taxes and utilities other than the telephone." He contended that to award Plaintiff an equal interest in the house was essentially recognizing common law marriage. That argument was not supported by the court of appeals and the house was determined to be jointly held.

It should also be noted that the trial court found though these parties did not marry, the parties held themselves out as a married couple by going through a

marriage ceremony with all the attendant formality and without telling friends and family that they weren't getting married.

A written agreement is not necessary to prove intent. The court will examine the facts to determine what matters the parties implicitly agreed upon if there is no written agreement. *Beal, 282 Or App at 122.* Inferences can be drawn from the factual setting. In the instant case there are a number of examples of such inferences. The parties cohabitated. The parties went through a wedding ceremony and held themselves out as husband and wife. In *Brazell v. Meyer, 600 P.2d 460, 42 Or. App. 179 (Or. App., 1979)* the court awarded equal shares in property when evidence showed the parties intent was to be treated as married with respect to that property, *Id at 184.*

An express oral agreement is also recognized as evidence of intent. *Holloway v. Holloway, 663 P.2d 798, 63 Or. App. 343 (Or. App., 1983).* In the instant case there was expressed intent. Petitioner's statement was as follows:

> "A: We had a very clear agreement. And Mike paid for the mortgage and property taxes, anything about the property taxes. I think they're included in his – in his mortgage payment. And then it sounds like there was some interest, house insurance. So he paid for those things, and then I paid for everything else.
> So I paid for all the utilities. I did – that's 300 --- 3,000 square-foot house so they were substantial, especially in the winter. And then I paid for all of our grocery shopping." Tr 113

Respondent also testified to an agreement:

> "Q: --- So when you and Ms. Staveland began living together in June of 2011 did you have any agreements as to how the monthly expenses were to be allocated between the two of you? A: We did. I don't remember that we put anything writing but the agreement was that she would pay for the utilities to live there." Tr 214.

A breakout of that specific agreement as to what Petitioner ended up paying was memorialized in Exhibits 29 and 51. When expenses have been shared on a particular property (but separately owned) the court of appeals has exercised its equitable powers to reach a fair result when precise interest of ownership cannot be determined. *Wilbur v. DeLapp, 119 Or. App. 348, 850 P.2d 1151 (Or. App., 1993) at 351.* The same result was obtained in *Pinto and Smalz, 955 P.2d 770, 153 Or.App. 1 (Or. App., 1998).* In *Pinto and Smalz* a non exclusive list was provided that may be relevant in determine the parties' implicit agreement:

- How the parties held themselves out to the community.
- Nature of cohabitation.
- Joint acts of financial nature.
- How title to property was held.
- Respective financial and non financial contributions of each party. *Pinto, 153 Or. App. at 5-6.*

As set forth in the record, the key facts of this case are as follows:

- The parties did have an agreement as to the expenses on the "Dickinson" home. The Respondent would pay mortgage, taxes and insurance, Petitioner would pay utilities, food, and ended up paying for the expenses related to the child. The division of expenses to the home, if not equal, was certainly equitable.
- The parties moved into the home together and together they made design choices and throughout the relationship, each provided certain costs of improvements, understanding that Respondent paid for more.
- The parties planned a wedding, sent out wedding invitations (including a 'save the date' card), had a wedding ceremony, and held themselves out as husband and wife throughout their relationship.
- Other than the "Dickinson" house (and a joint Vanguard account) the parties kept separate all other assets, including Petitioner's premarital house which was underwater at the time of the parties' wedding.

The above facts are precisely the substantial type of testimony and evidence that the trial court relied upon in establishing appreciation to the family home. Of particular note is the following:

A. The trial court found the following:

> "You, frankly, held yourselves out as husband and wife. You bought rings. You exchanged vows. You --- you told people at work and probably people who are parents of --- friends or

> playmates of Will's that you were married, and the only people you didn't tell --- the only people who told the truth to were your closest family and friends.
> And so there isn't any question in my mind that your intention was to live as a married couple, to raise the child as a married couple in spite of the fact that you are not legally married. That is your decision. That's your --- that's your choice, and that's fine. But it certainly has an impact on --- on what happens to the property, as both of the lawyers have argued.
> --- And there isn't any question that as you were testifying the first day that you were testifying that it --- that you referred to it as: We moved into our house; we fixed up our house; we painted our house; we had our wedding ceremony --- or our non-wedding ceremony at our house. You invited to people to come to our house." Tr 423-424.

B. Both parties testified to an agreement as to expenses as to the family home. Respondent argues that because he made payments on the mortgage, real property taxes and insurance that only he contributed to the expenses on the home. But as Exhibits 29 and 51 point out, there are substantial additional expenses related to supporting a family home including utilities, other insurances, household expenses, food, and after the child was born, expenses related to the child. Respondent's argument is nonsensical: That he was able to have Petitioner pay for all the other related expenses to living in a home and raising a child, yet the Petitioner was not able to share in the appreciation of the home.

C. Both parties contributed substantial sweat equity to the home and though Respondent was able to identify greater expense in the improvements and repairs to the home, Petitioner and Petitioner's family nonetheless contributed to those expenses. The parties together made design and color decisions regarding the home and treated the home in all regards as a "family home".

THE COURT OF APPEALS DECISION

The court of appeals was correct in determining that the parties implicitly agreed to share the "Dickinson" appreciation. There is testimony from both parties that there was an agreement in sharing expenses as to "Dickinson", Petitioner provided two different accountings showing her monthly contribution over a two year period to "Dickinson" representing at least as much a contribution to the household expenses as the Respondent was providing, and the parties treated "Dickinson" as a marital home in terms of the efforts and sweat equity provided by both parties during their time of cohabitation.

Respondent's argument that "Ainsworth", an asset to which Respondent stipulated was not part of his case in chief as arguing an offset to "Dickinson" does not create an inequitable result if the value of "Ainsworth" is not factored in. "Ainsworth" was treated like all the parties' other assets / liabilities (excluding

Vanguard and "Dickinson") in that it was kept separate, accounted for separately, and not in any way commingled or contributed to during the relationship.

Finally, Respondent's argument that the court has adopted a standard of review appropriate for marital dissolution instead of standard that applies to contract interpretation misconstrues the finding in *Beal and Beal* and its progeny. As *Beal* stated:

> " --- Thus, absent an express agreement, the court should closely examine the facts and evidence to determine what the parties implicitly agreed upon." *Beal at 510.*

Since this is a matter of interpretation of intent, the trial court should have the discretion to determine what the intent of the parties were. Only a clear abuse of discretion should be allowed to overturn a trial court's result.

CONCLUSION

The decisions of the trial court and court of appeals should be upheld, subject to the remand to the trial court to determine value of "Dickinson" as of the date of separation.

ROBERT T. SCHERZER, OSB#791052
Attorney for Kirsten Staveland

CERTIFICATE OF COMPLIANCE

WITH ORAP 5.05

I certify that this brief complies with the word-count limitation in ORAP 5.05(1) and the word-count on this brief (as described in ORAP 5.05(1)(b)(i)) is 3,872 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

Robert T. Scherzer, OSB#791052
Attorney for Kirsten Staveland

SERVICE AND FILING

I certify that I filed this brief on JUNE 10, 2019; that same day I sent two copies by first-class mail to George W. Kelly, George W Kelly PC, 303 W 10th, Eugene OR 97401, as well as served Mr. Kelly via e-service on the same day.

Robert T. Scherzer, OSB#791052
Attorney for Kirsten Staveland