

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1818

DEBRA SMITH

VERSUS

ROGER SMITH

Judgment Rendered: OCT - 5 2011

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On Appeal from the 21st Judicial District Court  
Parish of Livingston, Louisiana  
Docket No. 109,410, Division "E"  
Honorable Brenda Bedsole Ricks, Judge Presiding

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Defendant-Appellant  
Roger Smith

BEFORE: PARRO, GUIDRY, HUGHES, WELCH, AND  
HIGGINBOTHAM, JJ.

Parro, J., dissents in part and assigns reasons by <sup>RHP</sup>   
Guidry, J., dissents in part for the reasons  
assigned by Parro, J.

## **HUGHES, J.**

This is an appeal from a judgment partitioning the community of acquets and gains previously existing between appellant, Roger Smith (Roger), and appellee, Debra Smith (Debra). For the reasons that follow, we reverse in part, render in part, and remand.

### **FACTUAL AND PROCEDURAL BACKGROUND**

After many years of marriage, the parties were divorced by judgment rendered December 13, 2004. The community property regime existing between the parties was terminated retroactive to the date of filing of the petition for divorce, March 15, 2004. Because the parties were unable to agree to a partition of the community property or a settlement of claims arising from the matrimonial regime, Debra filed a petition to partition the community property on September 23, 2005. Attached to the petition as Exhibit A was Debra's sworn detailed descriptive list of community property, setting forth the fair market value and location of most of the community's assets, the community's liabilities, and her reimbursement claims.<sup>1</sup> In the descriptive list, Debra classified the marital home located at 13000 N. Café Line Road, Tickfaw, Louisiana, as community property. Although Roger did not file either his own descriptive list or a traversal of Debra's descriptive list, he did dispute the classification of the marital home as community property at the trial of the matter. It is the classification and value of this property that is the primary dispute between the parties on appeal.

A hearing on the partition of the community property was held on November 10, 2009, at which time, the parties agreed to submit the matter on briefs. At the hearing, Debra suggested that she was entitled to reimbursement for the

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<sup>1</sup> The detailed descriptive list was identified as the first supplemental and amended sworn detailed descriptive list of community property; however, the petition to which it was attached was not an amended petition, and there is no evidence that any earlier descriptive list was filed.

community funds used to improve the marital home and the immovable property on which the home was located, which she acknowledged was separate property. However, in her brief to the trial court, Debra argued in support of the community nature of the property.

On December 8, 2009, the trial court issued written reasons for judgment, finding that the community property regime had a net value of \$188,300. Included in the value of the community property was the value assigned by the trial court to the marital home,<sup>2</sup> which the trial court had determined to be community property.

The trial court subsequently signed An April 7, 2010 written judgment, decreeing that Roger receive the marital home, along with his personal automobile, which was currently in his possession. In addition, the judgment ordered that Roger was to receive the entirety of his LASERS retirement account, having an approximate value of \$5,000, and the individual community movables currently in his possession. The judgment further required Roger to pay the entirety of his student loan, totaling approximately \$19,000, as well as an equalizing payment of \$37,650 to Debra.

Pursuant to the judgment, Debra was awarded her personal automobile and the individual movables, which were currently in her possession, as well as her retirement account with North Oaks Medical Center (North Oaks), having an approximate value of \$35,000. Finally, the judgment required Roger to reimburse Debra an additional sum of \$5,371.29, which represented one-half of the community obligations already paid by Debra with her separate funds. It is from this judgment that Roger has appealed.

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<sup>2</sup> The trial court had assigned a value of \$113,300 to the marital home and the immovable property on which it was located. This value was apparently based on the value for which the property was insured. No other evidence was presented as to the value of this property.

## DISCUSSION

Louisiana Revised Statute 9:2801 provides that, when the spouses are unable to agree on a partition of community property or on the settlement of the claims between them arising either from the matrimonial regime or from the co-ownership of former community property following termination of the matrimonial regime, either spouse may institute a proceeding as an incident of the action that would result in a termination of the matrimonial regime or upon termination of the matrimonial regime or thereafter. The statute also provides certain rules by which the community property and liabilities are to be divided. As part of this procedure, the property and liabilities must be properly classified as community or separate prior to its allocation between the spouses.

Under Louisiana law, property of married persons is generally characterized as either community or separate.<sup>3</sup> See LSA-C.C. art. 2335. The classification of property as either community or separate is fixed at the time of its acquisition. **Biondo v. Biondo**, 99-0890 (La. App. 1st Cir. 7/31/00), 769 So.2d 94, 99. In proving whether an asset is community or separate, the parties are guided by the following principles.

Louisiana Civil Code article 2338 provides that community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

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<sup>3</sup> Pursuant to LSA-C.C. art. 2341.1(B), it is possible for property to be both separate and community property if an undivided interest in the property is held as community property and an undivided interest is held as separate property. This Article is not applicable to this matter, however.

Regarding the classification of property as separate, LSA-C.C. art. 2341 provides, in part, that a spouse's separate estate is his exclusively and includes property acquired by a spouse by inheritance or donation to him individually. Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property. LSA-C.C. art. 2340.

The trial court's findings regarding the nature of the property as community or separate are factual determinations. **Biondo**, 769 So.2d at 99. The appellate court's review of factual findings is governed by the manifest error-clearly wrong standard. In order to affirm the factual findings of the trier of fact, the supreme court posited a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See **Stobart v. State, through Dep't of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993); **Moss v. State**, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092.

Roger submitted a copy of the act of donation by which he obtained the property at issue. According to the act of donation, Roger received the property, which contained a single family residence, from his parents, Cercie Smith and Johnnie May Collins Smith, on December 8, 1992. Debra and Roger were married

at the time of the donation, and Debra intervened in the act for the purpose of acknowledging that the property subject to the act of donation was Roger's separate property and that all fruits and revenues of the property would remain his separate property.

Debra appears to suggest in her brief to this court that the finding of the trial court that the property was community was correct because she was the only party to submit a sworn detailed descriptive list of community property for the trial court to consider. It is true that, in accordance with LSA-R.S. 9:2801(A)(1)(a), each party is required to file a sworn detailed descriptive list of all community property, the fair market value and location of each asset, and all community liabilities. If a party fails to file a sworn detailed descriptive list timely, the other party "may" file a rule to show cause why its sworn detailed descriptive list should not be deemed to constitute a judicial determination of the community assets and liabilities. However, Debra did not file such a rule to show cause and, therefore, no hearing was held, nor did the court determine the community assets and liabilities prior to the trial on the merits. Nevertheless, the court, in its discretion, may by ordinary procedure try and determine all issues at one hearing. See LSA-R.S. 9:2801(A)(2).

It appears the trial court exercised its discretion and proceeded by ordinary procedure to try and determine at one hearing all issues. Pursuant to LSA-R.S. 9:2801, the court must then partition the community in accordance with the rules set forth in Subparagraph (A)(4) of Section 2801. Based on the evidence submitted to the trial court, the marital home and property was clearly Roger's separate property and should not have been considered by the trial court when dividing the community assets between the parties. Accordingly, the trial court erred in finding that the marital home was a community asset.

In light of our conclusion that the marital home is Roger's separate property,

the value assigned to the home must be removed from the value of the community property regime. In addition, once the value of the marital home is removed from the calculation of the net value of the community property regime, Roger no longer owes Debra an equalizing payment. Based on the values of the movables and other items assigned to the parties in the written reasons for judgment, Roger received the following community assets and liabilities:<sup>4</sup>

Assets

Personal automobile	\$20,000
LASER retirement	\$5,000
Individual movable items in his possession	<u>\$12,500</u>
Total Assets:	\$37,500

Liabilities

Student loans	<u>\$19,000</u>
Net Value:	\$18,500

Roger was assigned to pay an equalizing payment to Debra of \$37,650 based on the fact that he received the marital home that had been classified as a community asset and valued at \$113,300. Without that equalization payment, Debra is still scheduled to receive the following community assets pursuant to the judgment:

Personal automobile	\$20,000
North Oaks retirement	\$35,000
Individual movable items in her possession	<u>\$1,500</u>
Total Assets:	\$56,500

Based on these values, the community property regime would now have a total net value of \$75,000, with each party being entitled to one-half, or \$37,500.

We note, however, that there is evidence in the record that the marital home was greatly improved during the marriage. Specifically, Debra submitted a

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<sup>4</sup> This listing does not include the marital home.

photograph of the marital home at, or close to, the time of the donation, as well as another photograph of the home after multiple improvements had been made, which appear to have greatly increased the size of the home. This evidence raises the question of the classification of the obligations incurred by the parties in improving the marital home.

Except as provided in LSA-C.C. art. 2363, all obligations incurred by a spouse during the existence of a community property regime are presumed to be community obligations. LSA-C.C. art. 2361. Louisiana Civil Code article 2363 defines a separate obligation as follows:

A separate obligation of a spouse is one incurred by that spouse prior to the establishment of a community property regime, or one incurred during the existence of a community property regime though not for the common interest of the spouses or for the interest of the other spouse.

An obligation resulting from an intentional wrong or an obligation incurred for the separate property of a spouse is likewise a separate obligation to the extent that it does not benefit both spouses, the family, or the other spouse.

Clearly, the obligations incurred by the parties in improving the marital home were presumed to be community obligations pursuant to LSA-C.C. art. 2361, and as they were incurred for the common interest of the spouses, they could not have been separate obligations in accordance with LSA-C.C. art. 2363.

Pursuant to LSA-C.C. art. 2366, if community property has been used during the existence of the community property regime for the acquisition, use, improvement, or benefit of the separate property of a spouse, the other spouse is entitled to reimbursement for one-half of the amount or value that the community property had at the time it was used. Therefore, it appears that Debra may have been entitled to a reimbursement claim for one-half of the amount or value that the community property had at the time it was used to make those improvements.



The parties specifically stipulated that the matter would be submitted on post-hearing briefs. Although Debra's counsel suggested he would offer proof of her reimbursement claim at the hearing, Debra neither specifically made such a claim for reimbursement in her pleadings or detailed descriptive list nor did she claim that she was entitled to such reimbursement in her brief after the hearing. And because the trial court found the property was community, it did not address the issue of reimbursement, and this claim was clearly not adjudicated by the trial court. Nevertheless, Debra *may* be entitled to reimbursement for one-half of the amount or value that the community property had at the time it was used to make improvements to the separate property of Roger, and we will remand this matter to allow Debra to assert her claim for reimbursement and for the trial court to adjudicate such claim. (See generally LSA-R.S. 13:4232(B) providing that in an action for partition of community property and settlement of claims between spouses under LSA-R.S. 9:2801, the judgment has the effect of *res judicata* only as to causes of action actually adjudicated.)

### **CONCLUSION**

For the above reasons, that portion of the judgment of the trial court declaring the marital home located at 13000 N. Café Line Road, Tickfaw, Louisiana, to be community property is reversed, and judgment is rendered declaring the marital home to be the separate property of Roger Smith. In addition, this matter is remanded to the trial court to allow Debra Smith to pursue a claim for reimbursement and for a final accounting between the parties. Each party is to bear its own costs of this appeal.

**REVERSED IN PART, RENDERED IN PART, AND REMANDED.**

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RHP by 



**BEFORE: PARRO, GUIDRY, HUGHES, WELCH, AND HIGGINBOTHAM, JJ.**

**PARRO, J., dissenting in part.**

I agree with the majority's conclusion that the marital home was the separate property of Roger Smith. See LSA-C.C. arts. 462 and 463. I also submit that the immovable property, consisting of 0.3991 acres, on which the marital home was situated, constituted the separate property of Roger.

I disagree with the majority's conclusion that the issue of Debra's claim for reimbursement for one-half of the amount or value that the community property had at the time it was used to improve or benefit the separate property of Roger was not adjudicated by the trial court. My position in this regard relies on several factors.

First, the trial court presided over the November 10, 2009 hearing in which Debra agreed, through her counsel, that the former matrimonial domicile was the separate property of Roger. Counsel for Debra further stated, "[t]hat is an evidentiary finding." Obviously, as a result of this statement, there was no reason for the court to revisit this issue, especially since evidence of the act of donation to Roger was submitted with his memorandum.

Second, the only evidence submitted to the trial court regarding the amount or value of community property used to improve or benefit the separate property was a copy of the declaration page of the Smiths' homeowners' insurance policy showing a value of the dwelling and other structures to be \$113,300 for insurance purposes. Since the value of the 0.3991 acres of land was not included in this amount in a homeowners' policy, it appears the trial court accepted Debra's argument that the dwelling located on the property at the time of the donation was "significantly devalued" when, in its reasons for judgment, it assigned the value of the dwelling and other structures shown on the insurance policy as the value of Roger's immovable property.

Third, and last, in its reasons for judgment, the trial court stated, "[c]onsidering the amount of improvements made to the matrimonial home," it "accepts [Debra's] proposal and hereby partitions the community property." Obviously, the court used the value of the dwelling and other structures set forth in the insurance policy as the value of the immovable property of Roger, even though a value of the 0.3991 acres was never established. Moreover, the fact that the court acknowledged it had considered "the amount of improvements made to the matrimonial home" in the same sentence that it ordered a "partition" leads to the inescapable conclusion that the court "adjudicated" Debra's claim for reimbursement for one-half of the amount or value of the community property that was used to improve the marital home.<sup>1</sup>

In light of my conclusion that the issue of reimbursement was adjudicated, I submit that the trial court erred in rendering its judgment in favor of Debra, because Debra failed to offer any evidence of the amount or value that the community property had "at the time it was used" to make improvements to Roger's separate property. See LSA-C.C. art. 2366.

We are a court of review, and as such, we are constrained by the record before us. A thorough examination of that record demonstrates that although Debra may have

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<sup>1</sup> It appears that the trial court erroneously assumed the dwelling had no value at the time of the donation and accepted the value shown on the insurance policy as representing the total amount or value that any community property had at the time it was used to improve or benefit the separate property of Roger.

been entitled to a reimbursement claim for the improvements made to the marital home, she clearly failed to carry her burden of proof in establishing the value that the community property had at the time it was used to make improvements to Roger's separate property. Therefore, based on the values of the movables and other assets, less the liabilities, assigned to the parties in the written reasons for judgment, Roger's net value in the community would be \$18,500 and Debra's net value in the community would be \$56,500. The total net value of the community property regime would be \$75,000, with each party being entitled to \$37,500. However, in order to achieve this result, Debra would owe Roger an equalizing payment of \$19,000. I submit that a judgment should be rendered accordingly.

For these reasons, I respectfully dissent in part.