100045-6

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

IN RE:

DANIEL WATANABE
Appellant

V.

SOLVEIG WATANABE
Respondent

NO. 366197-III

PETITION FOR REVIEW TO WASHINGTON SUPREME COURT

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STATE CASES

IDENTITY OF PETITIONER

Daniel Watanabe, the Appellant in the Court of Appeals matter, respectfully seeks review of said decision by the Supreme Court.

CITATION TO COURT OF APPEALS DECISION

Daniel Watanabe seeks review of the Court of Appeals decision in Daniel Y. Watanabe, Appellant, and Solveig H. Watanabe, Respondent, Court of Appeals No. 36619. As more defined in the *Issues Presented*, below, Daniel Watanabe seeks review of the Court of Appeals decision as to the application of *Estate of Borghi* to gift presumption established under *Marriage of Skarbek,* as well as to the Court of Appeals' determination regarding the trial court's use of extrinsic evidence.

ISSUES PRESENTED FOR REVIEW

I. Did the Court of Appeals expand this Court's ruling in *Estate of Borghi* beyond the scope intended by this Court, resulting in a de facto over-ruling of gift presumption established in *Marriage of Skarbek,* despite the fact that this case was not overturned by this Court in its *Estate of Borghi* ruling

(unlike *In re Marriage of Hurd* which was explicitly overruled), thereby substantially depriving Daniel Watanabe of his interest insubstantial real property?

II. Did the Court of Appeals err in approving the trial courts acceptance of extrinsic evidence to clarify an unambiguous quit claim deed by the wife to the marital community, and even if this was permissible, should it have had any factor in the adjudication of the real property interests given this Court's holdings in *Estate of Borghi* and given the gift presumption established in *Marriage of Skarbek?*

STATEMENT OF THE CASE

I. THE COURT OF APPEALS ERRED BY CHARACTERIZING ASSETS THAT WERE ACQUIRED DURING THE MARRIAGE TO BE THE SEPARATE PROPERTY OF THE WIFE, TO INCLUDE AN ERROR IN THE APPLICATION OF CASE LAW, IN PARTICULAR *ESTATE OF BORGHI* AND *MARRIAGE OF SKARBEK.*

The parties married on January 2, 1999 after dating during college. CP 165-210. The parties were married 17 years, separating in July of 2016. CP 165-210. RP 180. After the unexpected death of the wife's mother, the parties moved to her mother's farm and began to take care of it to include its livestock (albeit the husband also remained employed full time). RP 186, line 5; RP 435, lines 18-21. This farm is referred to as the "Arlington

property". RP 436, line 2. After her death, the Wife's mother left her estate, which included this Arlington property, to Solveig Watanabe and her sister Olivia Gunn, each receiving a ½ interest. CP 141-164, page 2, RP 435 line 22 – RP436, line 4.

The parties later desired to move to Eastern Washington to facilitate both their lifestyle desires and to advance their horse operation known Olivia Farms. RP 188, line19 – RP 190, line 4. The parties located and decided to purchase the "Ford Property" in 2005, approximately 6 years after marriage. RP 188, line 16 – RP 189, line 25. The "Ford property" consisted of both the family home and adjacent acreage parcels. See CP 141-164, joint management report attached to memorandum opinion (behind page 17), first page of joint management report section 5.1.

The parties completed the purchase of the initial "Ford Property" in 2005 (on which the family home was built), with adjoining parcels of land being purchased in 2008. CP 141-164, page 2; RP 437, lines 18-21. See also statutory warranty deed in the name of both parties. Exhibit P-5. The "Ford Property" consisted of 157 acres that included the residence (to be built) and outbuildings, with an additional 228 acres consisting of six separate parcels. CP 141-164, page 2; Exhibit P-1. Critical to this petition for review, the "Ford Property", both as to the main residence and the adjacent parcels of land, was all purchased after marriage and titled in the

names of Daniel and Solveig Watanabe at all times. CP 141-164, page 3.

The first five parcels of the Ford property were purchased from the Erringtons for $410,000 on May 26, 2005. CP 141-164, page 2. Exhibit P-2. This purchase occurred over six years *after* the parties' marriage. All purchase documents were in the names of both parties. Exhibit P-2. Exhibit P-4. The "Ford Property" remained titled in the names of the both parties at all times during marriage. Exhibit P-6. This was not disputed. CP 141-164, page 3, third full paragraph.

In conjunction with payment of the earnest money, to purchase the "Ford Property" the parties applied for and were approved for a loan with Cascadia Mortgage (which later became Flagstar Mortgage). RP 191, lines 6-11; Exhibit P-3; CP141-164, page 2. The loan was taken out in the name of the husband because he had good credit and the wife had no credit at that time. RP 191, lines 12-23. Exhibit P-3. The down payment was paid from the parties' joint checking account. RP 192, lines 2-16. The parties had been able to save money because of their minimal living expenses. RP 192, line 17 – RP 193, line 6. As with the purchase of the properties, this loan was taken about 6 years after marriage.

After the May 26, 2005 closing on Ford Property, the parties made mortgage payments of $2,877.00 per month for 18 months from their community/joint checking account. CP 141-164, page 2; RP 193, line 7-

RP194, line 1; Exhibit P-3.

The Flagstar loan for the "Ford Property", taken in the husband's name was secured by two deed of trusts on the Arlington property. CP 141-164, page 2. Prior to the purchase of the "Ford Property", the wife executed a quit claim deed to the husband making him joint owner of the "Arlington Property". Exhibit R-155, which shows the "Arlington Property" sale settlement statement with both Daniel and Solveig Watanabe as sellers and which contains the quit claim deed signed by Solveig Watanabe on May 25, 2005 to "Daniel Y. Watnabe and Solveig H. Watanabe, husband and wife". The reason for this quit claim deed is expressly stated on page 1 of this document: "To Establish Community Property". Exhibit R-155, Quit Claim Deed, page 4 of Exhibit.

During the marriage, in 2015, the parties purchased three contiguous parcels totaling 160.36 acres known as the "Clayton Property". Exhibit P8; Exhibit P-9; CP 141-164, page 6; RP 270 lines 7-12. The "Clayton Property was titled in the names of both parties and all closing documents were in the names of both parties. Exhibit P-8; Exhibit P-9; Exhibit P-10. Exhibit P-11. RP 276, line 16. The parties purchased the Clayton property for it hay production capabilities. RP 270, lines 13-20. Importantly, the Clayton property had no relation to the Ford Property, nor did it have any relation to the Arlington properties inherited by Ms. Solveig

and transferred to the community via quit claim deed as discussed above. (Emphasis added.)

The law favors characterization of property as community property unless there is no question of its separate character. Marriage of Brewer, 137 Wn.2d 756, 766-67 (1999). The Court of Appeals appropriately concluded that the Ford Property was presumed to by community. See Decision, page 10. No holding was made on the Clayton property, which appears overlooked and is error as discussed below.

The party asserting a characterization must present "clear and compelling" evidence to overcome that presumption. In re: Marriage of Marzetta, 129 Wn.App. 607, 620 (2005). See also In re Marriage of Skarbek, 100 Wn. App. 444, 448 (2000). The characterization of property is determined at the date it is acquired. Estate of Borghi, 167 Wn.2d 480, 484 (2009). We know that given the holding in Estate of Borghi, both the Ford Property and the Clayton Property were presumed under the law to be community.

We respectfully assert that the Court of Appeals has extended this Court's holding Estate of Borghi, 167 Wn.2d 480, 484 (2009) beyond what was intended by this Court. Additionally, we respectfully assert that the Court of Appeals has *de facto* overruled the holding in In re Marriage of Skarbek, 100 Wn. App. 444, 448 (2000). This is especially true as the

Clayton Property where no inherited properties were being utilized and which was essentially overlooked by the Court of Appeals.

There is a very distinct difference and a very critical difference, between the facts in Borghi and the facts of this instant case. In Borghi, the wife owned real property before marriage. After marriage, the deed to the property was transferred into the names of both spouses without adequate explanation. This Court affirmed the appellate court who had reversed the trial court's determination that this transfer of title created the presumption of a gift to the community. The entire holding can be summed up as follows: "We take this opportunity to clarify the applicable community property principles and disapprove of any reading of *Hurd* or *Olivares* that suggests a gift presumption arising when title to property is *changed* from the name of a single spouse to both spouses." Marriage of Borghi 167 Wn.2d 480, 486 (2009). (My emphasis added as to *changed.*)

Very importantly, Borghi did not overrule the gift presumption for property acquired *after* marriage and titled in both spouse's names. Hurd was only partially overruled as cited above. Thus, cases such as Skarbek in particular, and Hurd, continue to be cited as controlling authority. See for example, Lee v. Lee, No. 74405-4-1 (Unpublished Division 1 2017).

As noted, a critical difference exists in this case: Borghi focused exclusively on property that was acquired *prior* to marriage, and the Borghi

held that property retains its characterization once established unless evidence to the contrary is established. In the Watanabe dissolution, all property at issue was acquired *after* marriage. All property was originally titled in both names. Borghi has literally no application to this case except to state that property retains its characterization once established. Instead, this is a case that should turn on the gift presumption holdings of Skarbek and its progeny.

The Skarbek court ruled that the gift presumption applied to actual tangible property which was further defined to include land, which was exactly what was purchased here with both the "Ford Property" and the "Clayton Property". Marriage of Skarbek, 100 Wn.App. 444, 450 (Div. 3, 2000). Under Skarbek, these are wholly community properties. A rebuttable presumption arises that property acquired during marriage with separate funds is a gift to the community when it is titled in the names of the spouses with the Hurd court expressly holding: "However, a spouse's use of his or her separate funds to purchase property in the name of the other spouse, absent any other explanation, permits the presumption that the transaction was intended as a gift." In re Marriage of Hurd, 69 Wn.App. 38, 51 (1993). Accord, Marriage of Pearson-Maines, 70 Wn.App. 860, 868 (1993). This issue was further addressed in Marriage of Skarbek, 100 Wn.App. 444, 450 (2000).

In Skarbek, the husband added the wife's name to his bank account which contained separate funds. The wife claimed this to be a presumed gift to the community. Division III rejected this contention, stating that bank accounts and money do not have the same presumption as opposed to the purchase *of actual tangible property*. (Emphasis added.) The Skarbek court expressly stated "If Mr. Skarbek had spent his money on an unrelated asset and put that asset in Ms. Skarbek's name, the rebuttable presumption would have attached. Only then would he have the burden of rebutting this presumption by providing an explanation for the transfer sufficient to convince the court that the true intention of the parties was to keep the property separate." Id.

Skarbek leaves no ambiguities. It states, "The Skarbeks are fighting over money, not bank accounts. The transaction here is not the same as buying stocks or bonds or land. They did not buy a "bank" account." Id. Thus, Skarbek made clear that if it is merely a situation where separate monies have been transferred to a jointly titled bank or investment account, the monies can be traced to the separate source and remain separate property. However, if the separate funds were used to purchase tangible assets (which includes real property by the Skarbek Court's definition) in the names of both parties, then the gift presumption applies. (Emphasis added.)

In the instant case, there is no factual dispute whatsoever as to what occurred. The parties purchased the "Ford Property" during marriage. A presumption of community property arises. The first purchase occurred in 2005 over six years after the date of marriage. The second purchase of Ford Property adjoining parcels occurred in 2008. The purchase of the Clayton Property occurred in 2015, approximately 16 years after marriage.

These are not the only significant differences in the facts of the instant case as opposed to those resulting in the Borghi decision. In Borghi, the issue to be decided involved the change in title from the wife (before marriage) to the wife and husband (after marriage). Here, the "Ford Property" was titled in the name of both parties at the outset and remained titled in the names of the both parties at all times during marriage. The "Clayton Property was titled in the names of both parties and all closing documents were in the names of both parties. Again, there is no issue of changing the names on title as occurred in Borghi. As cited above, it was the change of title, and the application of gift presumption to such change, that was the issue for the Borghi court.

Thus, what has occurred in the instant ruling is that the Court of Appeals has dramatically extended the holdings of this Court in Borghi. Instead of being limited to a change in title from presumed separate property owned before marriage, it has now been extended to property acquired during

marriage and title in both spouse's names. The Petitioner submits that this was not the intent of this Court.

Assuming arguendo that the Arlington properties were the separate property of Solveig Watanabe and that she adequately explained her rationale for signing a deed "to create community property", this does not have any effect on the law of gift presumption that results from purchasing the Ford Property during marriage in the names of both spouses.

Even more critical to this Court's decision as to whether to accept review, and completely aside from the issue of the Ford Property, the Arlington properties at issue have absolutely no connection to the Clayton property purchase din 2015. The Clayton Property was purchased during marriage in the names of both parties. The issue of gift presumption as articulated in Marriage of Skarbek, 100 Wn.App. 444, 450 (2000) would have to apply to the Clayton Property unless Borghi is being extended to properties purchased after marriage, in the names of both parties, where no transfer of real property owned prior to marriage has occurred (unlike the Arlington properties being sold and paid toward the Ford Property). Again, the Petitioner respectfully submits that this was not intended by this Court in Borghi, and this was either overlooked by the Court of Appeals or that the law was not appropriately applied.

II. THE COURT OF APPEALS ERRED IN ALLOWING PAROL EVIDENCE TO CLARIFY AN UNAMBIGUOUS QUIT CLAIM DEED BY THE WIFE TO THE MARITAL COMMUNITY, WHERE WASHINGTON FOLLOWS THE OBJECTIVE MANIFESTATION THEORY, WHICH REQUIRES A COURT TO RELY ON THE WRITTEN WORDS.

This issue, for purposes of asking this Court to accept review, is indeed a secondary issue. The rules of contract interpretation apply to interpretation of a deed. Pelly v. Panayuk, 2 Wn. App. 2d 848, 864 (2018). Washington follows the objective manifestation theory of contract interpretation. Hearst Comm., Inc. v. Seattle Times, Co., 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005). This theory of interpretation requires a court to determine the intent of the parties by focusing on the "objective manifestation of the agreement, rather than on the unexpressed subjective intent of the parties." Id.

If the intent of the parties cannot be ascertained through the objective manifestation of intent, the court must apply the "context rule." Berg v. Hudesman, 115 Wn.2d 657, 667 (1990). The context rule allows courts to consider extrinsic evidence to determine the intent of the parties. Hollis v. Garwall, Inc, 137 Wn.2d 683, 695 (1999). "If the plain language [of a deed] is unambiguous, extrinsic evidence will not be considered." Sunnyside Valley Irrigation Dist. V. Dickie, 149 Wn.2d 873, 880 (2003).

Extrinsic evidence is meant to "illuminate what was written, not

what was intended to be written." Nationwide Mut. Fire Ins. Co. v. Watson, 100 Wn.2d 178, 189 (1992). The admissible extrinsic evidence may not include: "1. Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; 2. Evidence that would show an intention independent of the instrument; or 3. evidence that would vary, contradict, or modify the written word." Hollis at 697.

In the seminal case of Hollis v. Garwall, this Court clarified the context rule and expressly recognized its application to written documents involving real property. 137 Wn.2d at 695-96. This Court found that the terms in the restrictive covenant itself were not ambiguous and that Garwall did not show more than one reasonable interpretation of the language. Id. at 698. Because the covenant was not ambiguous, the plain language of the covenant controlled and no extrinsic evidence could be considered.

Similarly in Watanabe, the quit claim deed is unambiguous. Ms. Watanabe conveyed the Western Washington property to herself and Mr. Watanabe for the purpose of creating community property. The deed specifically demonstrates the intent to gift the property to the community. The objective intent theory bars testimony and other extrinsic evidence meant to demonstrate an intent contradictory to the unambiguous deed. Even if this Court found that in some way the deed was ambiguous, applying the context rule would not change the outcome. The only

extrinsic evidence that could change the designation of community property would be contradictory to the facial language of the deed. The context rule bars the admission of contradictory evidence.

Critically, even if this Court were to concur with the Court of Appeals on this issue, it would not impact the extension of Borghi and the *de facto* overruling of Skarbek and its progeny. The issue of interpretation of the quit claim deed only impacts the Arlington Properties and thus only impacts the Ford Property (which was its derivative). It has absolutely no impact whatsoever on the Clayton Property. Purchased during marriage in the names of both parties to which the gift presumption should have bene applied unless this Court dramatically extends its ruling in Borghi.

ARGUMENT

For the reasons as more fully set forth in the Issues presented, above, this Court is asked to accept review as the ruling of the Court of Appeals has improperly extended, and is in conflict with, this Court's ruling in Estate of Borghi, 167 Wn.2d 480, 484 (2009). The instant holding by the Court of Appeals is also in conflict with the gift presumption rule as set forth in the published decisions In re Marriage of Hurd, 69 Wn.App. 38, 51 (1993) (overruled on other grounds); Marriage of Pearson-Maines, 70 Wn.App. 860, 868 (1993) and Marriage of Skarbek, 100 Wn.App. 444, 450 (2000). For these reasons, particularly as to its effect on real property acquired in

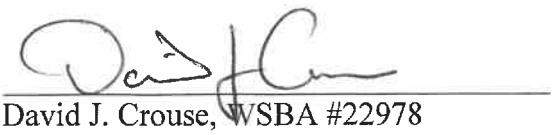
the names of both spouses after marriage, this Petition also involves an issue of substantial public interest.

CONCLUSION

The pertinent facts of this case have never been in dispute. Both the "Ford Property" and the "Clayton Property" were purchased during marriage. Both properties were titled in the joint names of the parties. All purchase documents were in the joint names of the parties. Community credit was used to purchase the "Ford Property". "Ford Property" mortgage payments were made from community accounts. The "Clayton Property" was purchased from a community account without any possibility of separate inherited real property being involved in its acquisition.

Because these properties were purchased after marriage, the Petitioner respectfully submits that Borghi was not intended to have any application, particularly as to the Clayton property. This case, particularly the Clayton Property, is controlled by the established doctrine of gift presumption, never overruled by this Court. This Court is asked to accept review of this Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion to be competent to serve papers. That on the 2nd day of August, 2021, he served this Petition for Review via the efiling Portal for the Washington State Appellate Courts:

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APPENDIX -COURT OF APPEALS DECISION

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In re the Marriage of	)	No. 36619-7-III
	)	
DANIEL Y. WATANABE,	)	
	)	
Appellant,	)	
	)	
and	)	UNPUBLISHED OPINION
	)	
SOLVEIG H. WATANABE,	)	
	)	
Respondent.	)	

LAWRENCE-BERREY, J. — Daniel Watanabe appeals the trial court's property award in this dissolution appeal. He argues the trial court misclassified two properties as his former wife's separate property and erred by admitting parol evidence of intent. We disagree and affirm.

FACTS

Daniel Watanabe and Solveig Watanabe married in January 1999 in Silvana, Washington. After Daniel and Solveig[1] graduated from the University of Washington, they moved to California where Daniel got a teaching job.

[1] We choose to refer to the parties by their first names for stylistic reasons.

Solveig's inheritance

In 2000, Solveig's mother unexpectedly died. Solveig and her sister, Olivia Gunn, each received a 50 percent interest in their mother's property in Arlington, Washington. Solveig also received an individual retirement account (IRA) and annuity totaling over $40,000.00 shortly after her mother's death. She received another $45,000.00 in April 2002 and $59,032.00 in December 2002. She received $100,000.00 from the sale of her mother's other property in August 2005. In February 2008, she received another distribution from her mother's estate in the sum of $732,678.87.

Arlington property & Olivia Farm, Inc.

After Solveig's mother's death, Daniel and Solveig took over her farm in Arlington. They started a horse boarding business, which allowed for Solveig to stay home and work the farm. They began acquiring Norwegian Fjord horses in 2001 and later decided to become breeders. In 2003, Daniel and Solveig incorporated their horse breeding and boarding business as Olivia Farm, Inc. They were 50/50 owners of the corporation. The business was not profitable.

On May 25, 2005, Solveig quitclaimed her interest in the Arlington property to herself and Daniel. The quitclaim's stated purpose was to establish community property.

Ford property

On May 26, 2005, the parties purchased five parcels of land (Ford property) in Stevens County. Their goal was to expand the breeding business to produce hay, train horses, and become a riding and driving destination facility. Earnest money of $1,000.00 was paid from an account that neither party recalls. The remainder of the purchase price was secured by two deeds of trust on the Arlington property in the aggregate sum of $413,000.00 in favor of Flagstar Bank. The parties made monthly mortgage payments of $2,877.00 from June 2005 to July 2006.[2] The mortgage payments came from the parties' joint checking account. After Solveig received her one-half of the proceeds from the Arlington sale, she applied those funds to the principal of the Ford mortgage.[3] Two wire transfers, totaling $407,718.69 were applied to the balance of the Ford mortgage.

In 2008, the parties purchased land adjacent to the Ford property for $33,000. That property was paid for with a check from Solveig's separate bank account. The

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[2] The trial court indicated the payments ended prior to January 2006. *See* Clerk's Papers (CP) at 167. The payments actually ended in mid-2006. *See* Report of Proceedings (RP) at 193-94 (Daniel testifies mortgage payments ended July 2006); Ex. P-3 (Form 1098, Annual Tax and Interest Statement 2006 indicating $11,588.77 interest paid and Ford mortgage paid in full).

[3] The trial court also indicated that Solveig received the Arlington proceeds on December 31, 2015. *See* CP at 167. She received those proceeds well before then because she paid the Ford Mortgage in mid-2006. *See* RP at 193-94, 541-42; Ex. P-3.

parties constructed a home on the Ford property in 2009. Daniel worked full time for Olivia Farm until the fall of 2012, when he started working as a teacher. Daniel's teaching paychecks were deposited into the parties' joint bank account. Solveig deposited $370,000 into the parties' joint account between 2010 and 2014. Solveig also paid over $170,000 to the Olivia Farm business account during that period. These funds paid for the construction of the family home, credit card balances, and business expenses.

Clayton property

In 2015, the parties purchased three tracts of land referred to as the Clayton property. The warranty deeds for all three purchases show the purchasers as both Daniel and Solveig. The funds to purchase two of the tracts were from Solveig's separate bank account. The funds to purchase the third tract came from the parties' Bank of America joint account, which Solveig had made significant deposits into beforehand.

In July 2016, the parties separated.

Trial court proceedings

The court held hearings in late October and mid-November 2018. The trial spanned eight days with 15 witnesses and 220 exhibits.

Solveig's testimony

Solveig testified that she and Daniel had to borrow funds to purchase the Ford property because they had not accumulated any savings. Solveig used the Arlington property to secure the loan for the Ford property. At the time of the Ford purchase, they had a buyer for the Arlington property. The sale did not go through for 18 months because the buyer was a property developer who had to determine permitting for subdivisions, which impacted the final sale price.

Solveig testified she did not recall signing the quitclaim deed to Arlington. She did not intend to convert her inherited interest in her mother's home to community property. She said no one explained the consequences and although creation of community property appears on the deed, she did not understand what that meant at the time.

Stacey Pedersen's testimony

Stacey Pedersen, Solveig's cousin's wife, was the loan officer for the Arlington property. She testified that the lender required the Ford loan to be in Daniel's name because he was the only one who had W-2 income. She stated the lender required the Arlington quitclaim and read the loan documents that provided, "borrower must be on

title on the above captioned property [Arlington] prior to closing or this commitment is null and void." Report of Proceedings (RP) at 1166.

Trial court's rulings

The trial court authored a detailed memorandum opinion and thereafter entered its findings of fact and conclusions of law.

With respect to the Arlington property, the court wrote in its memorandum opinion:

> The testimony and exhibits do not show Solveig intended to convert her separate property in the Arlington home to community property. . . . Testimony from Stacey Pedersen and Exhibit R-158 specifically show that Flagstar Bank required Dan be added on title to the Arlington home as a condition of the loan. Dan even testified that he had good credit and Solveig had none. Solveig signed the deed at closing of the Arlington property to be able to finance the purchase of the Ford property and does not establish an intention to convert her half interest in Arlington to community property. . . .

Clerk's Papers (CP) at 143.

With respect to the Ford property, the court's findings state:

> The parties simply did not have sufficient community income or cash flow to pay anything towards the Ford purchase. Every single corporate tax return . . . shows both the net taxable income and the cash flow from Olivia Farm Inc.'s . . . operations were conducted at a loss so that payments could not have been from [Daniel's] earnings on the ranch nor did they likely have sufficient savings from prior accumulated earnings to do so.
>
> . . . Additionally, there was no evidence of any significant infusion of community funds to purchase the Ford property unless [Solveig's] separate

> property interest in the Arlington home or inherited cash was converted/transmuted to community property.
>
> . . . .
>
> It is not disputed that the initial Ford property was titled in both their names. However, as referenced above, the entire proceeds were from [Solveig's] separate property gifts and inheritances. . . . [Daniel] asserts that the purchase was intended to be as community property and produced a copy of the Real Estate Excise Tax Affidavit . . . . However, the affidavit only references the parties as grantees on title as husband and wife. There is nothing shown on this affidavit that [Solveig] intended to transmute her separate inheritances or investments into community real estate.
>
> Although the Statutory Warranty Deed lists both names as husband and wife, the preparation of the deed by the closing agent that lists both parties as grantees . . . does not establish community property. Rather, what was [Solveig's] intent? Was it her intent to keep her separate property separate or to convert her separate property inheritance into community property real estate?

CP at 168-70.

The court answered this question by discussing *In re Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009), in its conclusions of law:

> [I]t is this court's understanding from reading Borghi that legal title is irrelevant irrespective of whether acquisition was before or after marriage and that it must analyze the conveyance in terms of an intention to gift, without any legal presumption of transmutation.
>
> . . . Without such a presumption of gift to the community, [Solveig's] separate property would continue to be traced to the Ford property. Furthermore, characterization of whether such property is designated as community or separate property is only one factor to consider. Another just as important factor is the court's requirement to use its broad discretion to divide such property equitably and in doing so may consider the source of funds for the parties' acquisitions.
>
> . . . .

> The value of the Ford residence was and will be considered paid either directly or indirectly from [Solveig's] separate funds.

CP at 193-94. Ultimately, the court found the Ford property's value was $1,089,079 of which $879,079 was Solveig's separate property and $210,000 was community property. The $210,000 reflected the rent free use of the property and the years of work Daniel spent improving the property.

With respect to the Clayton property, the court found that two of the three parcels were Solveig's separate property because she had paid for them from her separate account. The court found that the third parcel was community property because it had been paid for from the parties' joint account.

The court valued Solveig's separate property at $2,216,186, Daniel's separate property at $16,000, and the parties' community property at $693,466. The court awarded the parties their separate properties and awarded Daniel 65 percent of the community property. Daniel appealed this property award.

ANALYSIS

A. PROPERTY CHARACTERIZATION

Daniel assigns error to the trial court's characterization of the Ford and Clayton[4] properties as Solveig's separate property. He argues the trial court misconstrued *Borghi*. We disagree.

We begin by reviewing the applicable standards of review. The characterization of marital property is a mixed question of law and fact. *In re Marriage of Kile*, 186 Wn. App. 864, 876, 347 P.3d 894 (2015). We review factual findings supporting the trial court's characterization for substantial evidence. *Id.*; *In re Marriage of Schwarz*, 192 Wn. App. 180, 191-92, 368 P.3d 173 (2016). For example, the time and method of property acquisition, the intent of the donor, and whether a party rebuts the presumption of community or separate property are questions of fact, reviewed for substantial evidence. *Schwarz*, 192 Wn. App. at 192; *Kile*, 186 Wn. App. at 876. The ultimate

[4] Daniel fails to adequately argue why the trial court erred in classifying two of the Clayton property parcels as Solveig's separate property. For this reason, we address only the trial court's characterization of the Ford property. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."). We however note that the analysis we use to affirm the Ford property's characterization would be equally applicable to the two Clayton parcels.

characterization of the property is a question of law, reviewed de novo. *Schwarz*, 192 Wn. App. at 192; *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003).

"[P]resumptions play a significant role in determining the character of property as separate or community." *Borghi*, 167 Wn.2d at 483. Property acquired during marriage is presumed to be community property, regardless of how title is held. *Dean v. Lehman*, 143 Wn.2d 12, 19, 18 P.3d 523 (2001). A party challenging a property's characterization as community bears the burden of rebutting the presumption, which can be overcome only by clear and convincing evidence. *Id.* at 19-20.

Separate property is property owned by a spouse before marriage or acquired after marriage "by gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof." RCW 26.16.010. "Separate property brought into the marriage will retain its separate character as long as it can be traced or identified." *In re Marriage of Tulleners*, 11 Wn. App. 2d 358, 368, 453 P.3d 996 (2019).

Here, it is undisputed that the Ford property was acquired during the marriage. Thus, the presumption of community property applies. To rebut this presumption, Solveig needed to provide clear and convincing evidence that the funds used to purchase the Ford property came from her separate property and were traceable to the Ford purchase.

1. Funds used came from Solveig's separate property

The trial court found that the funds used to purchase the Ford property came from Solveig's separate estate. This finding is quoted at length above and we do not restate it here. Daniel has not challenged this finding nor does he argue the trial court failed to apply the proper clear and convincing standard. Rather, he challenges the trial court's legal conclusion that the joint title gift presumption does not apply here.

Estate of Borghi

In *Borghi*, the wife entered into a real estate purchasing contract before marriage. 167 Wn.2d at 482. A few months after marriage, the contract seller issued a fulfillment deed in the names of the husband and wife. *Id.* When the wife died intestate, her son from a prior marriage sought rights to that property. *Id.* at 482-83.

After recognizing that the property was presumed separate because it was acquired before marriage, the Supreme Court discussed and rejected the joint title gift presumption. That rule, which arises when title to a spouse's separate property changes to include both spouses' names, presumes the spouse intended to gift the property to the community. *Id.* at 484-85. The court explained:

> [E]ven when a spouse's name is included on a deed or title at the direction of the separate property owner spouse, this does not evidence an intent to transmute separate property into community property but merely an intent to put both spouses' names on the deed or title. There are many reasons it may

> make good business sense for spouses to create joint title that have nothing to do with the intent to create community property. Allowing a presumption to arise from a change in the form of title inappropriately shifts attention away from the relevant question of whether a gift of separate property to the community is intended and asks instead the irrelevant question of whether there was an intent to make a conveyance into joint title.

Id. at 489 (citations omitted).

Daniel argues *Borghi* does not control because the Ford property was always titled in both his and Solveig's names. He asserts that *Borghi* did not overrule the joint title gift presumption for property acquired after marriage and titled in both spouses' names. We disagree. The *Borghi* court's disapproval of the joint title gift presumption did not rest on whether the property was acquired before or after marriage. The court instead discussed the inherent problems with relying on title alone to determine intent. As that court explained, "We have consistently refused to recognize any presumption arising from placing legal title in both spouses' names and instead adhered to the principle that the name on the deed or title does not determine the separate or community character of the property, or even provide much evidence." *Id.* at 488. Indeed, there are many reasons for spouses to create joint title. This proposition is illustrated here: Solveig had no credit and the community needed to secure a loan. To satisfy the lender's requirements, Solveig created joint title for the Arlington property.

Marriage of Skarbek

Daniel argues *In re Marriage of Skarbek*, 100 Wn. App. 444, 997 P.2d 447 (2000), controls. We disagree. There, the husband deposited separate funds into a joint bank account, and the trial court classified those funds as community property. *Id.* at 446. This court reversed, concluding the trial court erred in characterizing the funds as community when the husband traced and identified them at trial. *Id.* We reasoned, "The name under which property is held does not constitute direct and positive evidence determinative of whether the property is community or separate." *Id.* at 448.

Skarbek was decided nine years before *Borghi*. It recognized the joint title gift presumption but found it inapplicable due to the nature of the property and the traceability of the funds. Daniel relies on one line: "The Skarbeks are fighting over money, not bank accounts. The transaction here is not the same as buying stocks or bond or land. . . . If Mr. Skarbek had spent his money on an unrelated asset and put that asset in Ms. Skarbek's name, the rebuttable presumption would have attached." *Id.* at 450. We do not find this citation convincing. Importantly, *Borghi* disapproves of the joint title gift presumption discussed therein.

We conclude the trial court did not err by refusing to apply the joint title gift presumption to the Ford property. *Borghi* makes clear that the presumption no longer applies in Washington.

2. Funds used were traceable to Solveig's separate property

Daniel notes that funds from the parties' Bank of America joint account were used for 13 months to purchase the Ford property. He argues that commingling of community (Bank of America) funds with Solveig's separate property requires the Ford property to be characterized as community property. We disagree.

In *Schwarz*, we discussed the commingling doctrine:

> "Commingling" of separate and community funds may give rise to a presumption that all are community property. This is not commingling in the ordinary sense, however; it must be hopeless commingling. Unlike the foregoing presumptions, this one is conclusive, arising only after the effort at tracing proves impossible. Only if community and separate funds are so commingled that they may not be distinguished or apportioned is the entire amount rendered community property. If the sources of the deposits can be traced and identified, the separate identify of the funds is preserved.

192 Wn. App. at 190-91 (internal quotation marks, citations, and footnotes omitted).

Commingling occurs only when a substantial amount of community property is intermixed with a substantial amount of separate property. *In re Marriage of Shui*, 132 Wn. App. 568, 584, 125 P.3d 180 (2005) (quoting 19 KENNETH W. WEBER,

WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 11.13, at 159-60 (1997)).

Here, the parties purchased the Ford property by paying over $37,000[5] from their Bank of America joint account and later paying over $400,000 from Solveig's separate property. With respect to the mortgage payments, the trial court reviewed tax and bank records and found that the source of the payments was Solveig's separate property. Daniel has not assigned error to this finding, so it is a verity on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Because all or substantially all of the money used to purchase the Ford property came from Solveig's separate property and because the payments are generally traceable to Solveig's separate property, the trial court did not err in characterizing the Ford property as Solveig's separate property.

But even if the trial court's characterization of the Ford property was error, for us to reverse, Daniel must prove that the characterization significantly influenced the property division or that the distribution was unfair and inequitable.

An appellate court rarely reverses a trial court's property distribution on the grounds that property was mischaracterized. *In re Marriage of Zier*, 136 Wn. App. 40, 46, 147 P.3d 624 (2006). We are reluctant to revisit the trial court's characterization of

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[5] $2,877 x 13 months = $37,401.

property when the distribution is otherwise just and equitable. *In re Marriage of Farmer*, 172 Wn.2d 616, 631, 259 P.3d 256 (2011). We remand based on mischaracterization if: (1) the trial court indicates the distribution was significantly influenced by the property's characterization, and (2) it is unclear that the court would have divided the property that way had it been properly characterized. *In re Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989); *see also In re Marriage of Langham*, 153 Wn.2d 553, 563 n.7, 106 P.3d 212 (2005) (remand necessary only if property characterization was crucial to distribution).

Here, the court acknowledged that the characterization of the property was only one factor to consider, and stated, "Another just as important factor is the court's requirement to use its broad discretion to divide such property equitably and in doing so may consider the source of funds for the parties' acquisitions." CP at 193.

Courts look to many factors when making distributions, including "(1) [t]he nature and extent of the community property" and "[t]he nature and extent of the separate property." RCW 26.09.080(1), (2). The source or origin of funds used to acquire community property may be considered. *In re Marriage of Nuss*, 65 Wn. App. 334, 341, 828 P.2d 627 (1992). We recently recognized a trial court's discretion to award a disparate share of community funds where the origin of such funds is separate property.

Tulleners, 11 Wn. App. 2d at 370-71. Here, the Ford property was completely or substantially paid for with Solveig's separate property. Thus, even if the trial court mischaracterized the Ford property and it was indeed community property as Daniel contends, the court was well within its discretion to award a disparate proportion of the Ford property to Solveig.

B. EXTRINSIC EVIDENCE: ARLINGTON PROPERTY

Daniel contends the trial court erred in permitting extrinsic evidence about Solveig's intent when she quitclaimed the Arlington property to herself and Daniel. Solveig responds that Daniel has not preserved this error. She further asserts that the parol evidence rule does not apply in this context. We agree with Solveig on both points.

In general, an appellate court will not address an error raised for the first time on appeal. RAP 2.5(a). We nevertheless exercise our discretion and address Daniel's argument. Washington follows the objective manifestation theory of contract interpretation. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). "Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Id.* If the objective manifestation theory does not help us determine the parties' intent, we apply the "context rule." *Berg v. Hudesman*, 115 Wn.2d

657, 667, 801 P.2d 222 (1990). This rule permits us to consider extrinsic evidence as to the circumstances under which the contract formed to aid in ascertaining the parties' intent. *Id.*; *see also Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851 (1992) (explaining that extrinsic evidence may be used to "illuminate[ ] what was written, not what was intended to be written"). We do not consider extrinsic evidence that contradicts the plain language of an unambiguous agreement. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

Although Daniel correctly cites our state's contract interpretation law, he misapplies it to this case. The quitclaim deed unambiguously transferred title from Solveig to the community, and the trial court did not permit extrinsic evidence to contradict that fact. Rather, extrinsic evidence was admitted to ascertain whether Solveig intended to *transmute* her share of Arlington permanently from her separate property to the community with that quitclaim. Extrinsic evidence is permissible on this question. *Scott v. Currie*, 7 Wn.2d 301, 308, 109 P.2d 526 (1941) (approving admission of parol evidence to establish grantor's intent); *see also Borghi*, 167 Wn.2d at 488-89 (distinguishing intent to transmute property from interpretation of deed). Solveig testified that she did not intend to transmute the property, and Ms. Pedersen testified that the lender required Daniel on the Arlington deed. *See* Ex. R-158 (Loan Closing Instructions,

Specific Conditions 1 and 16). This testimony was not offered to interpret the deed itself, but rather to explain the circumstances under which the deed was signed. It supports Solveig's claim that she did not intend to permanently gift her inheritance to the community.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Fearing, J.

DAVID J. CROUSE & ASSOCIATES PLLC

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