69833-8

69833-8

69833-8

No. ~~87085-3~~

SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTOPHER R. LARSON,

Appellant,

vs.

JULIA CALHOUN,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE WILLIAM DOWNING

BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

THOMAS G. HAMERLINCK, P.S.

By: Thomas G. Hamerlinck
WSBA No. 11841

10900 NE 4th Street, Suite 2300
Bellevue WA 98004-5882
(425) 990-1075

Attorneys for Appellant

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR 2

III. STATEMENT OF THE CASE 3

A. This Appeal Is Taken from Unchallenged Findings of Fact that Raise a Significant Issue of Law. 3

B. Chris Larson Went to Work at Microsoft in 1975, and was a Multi-Millionaire by the Time the Parties Married in 1986. His Heavily-Leveraged Separate Assets Include a 30% Interest in the Seattle Mariners. 5

C. After Their Marriage in 1986, the Marital Community Amassed Extraordinary Wealth as a Result of Larson's Continued Employment at Microsoft. Larson Proposed at Trial that Calhoun Receive Virtually All the Value of the Community Estate, Free of Debt. 10

D. The Trial Court Awarded Calhoun $70 Million More than the Value of the $109 Million Community Estate, Debt-Free, on the Grounds She Would Otherwise Leave the Marriage "in a Less Advantageous Position" than Larson. 15

IV. ARGUMENT 20

A. The Trial Court's Decision Rests on Untenable Reasons. 20

B. Separate Property Cannot Be Invaded When a Just and Equitable Division of Property Can Be Accomplished from the Community Estate Alone. 21

1. A Spouse's Separate Property Cannot Be Invaded When Ample Provision Can Be Made from the Community Estate..... 22

2. *Konzen* and Other Cases in which Separate Property Was Invaded to Prevent the Other Spouse From Falling into Poverty Are Irrelevant to the Issue Presented in this Case. 28

C. The Trial Court's Findings of Fact Do Not Support Its Conclusion that the Husband's Separate Property Should Be Awarded to the Wife..... 33

V. CONCLUSION..... 42

TABLE OF AUTHORITIES

STATE CASES

Estate of Borghi, 167 Wn.2d 480, 219 P.3d 932 (2009)..... 22, 35, 37

Farver v. Dept. of Retirement Systems, 97 Wn.2d 344, 644 P.2d 1149 (1982)..... 40

Folsom v. Folsom, 106 Wash. 315, 179 P. 847 (1919)..... 24

Guye v. Guye, 63 Wash. 340, 115 P. 731 (1911)..... 22

In re Cave, 26 Wash. 213, 66 P. 425 (1901)..... 24

Johnson v. Johnson, 650 So.2d 1281 (Miss. 1994)..... 27

Luithle v. Luithle, 23 Wn.2d 494, 161 P.2d 152 (1945)..... 29

Marriage of Bodine, 34 Wn.2d 33, 207 P.2d 1213 (1949)..... 25-26

Marriage of Bulicek, 59 Wn. App. 630, 800 P.2d 394 (1990)..... 30

Marriage of Chumbley, 150 Wn.2d 1, 74 P.3d 129 (2003)..... 12, 36, 39

Marriage of Griswold, 112 Wn. App. 333, 48 P.3d 1018 (2002), *rev. denied*, 148 Wn.2d 1023 (2003)..... 31

Marriage of Hay, 80 Wn. App. 202, 907 P.2d 334 (1995)..... 40

Marriage of Holm, 27 Wn.2d 456, 178 P.2d 725 (1947)..... 23-26, 29, 32

Marriage of Horner, 151 Wn.2d 884, 93 P.3d 124 (2004)..... 36

Marriage of Konzen, 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985) 25-26, 28, 32

Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997) 20

Marriage of Mansour, 126 Wn. App. 1, 106 P.3d 768 (2004) 20

Marriage of Sedlock, 69 Wn. App. 484, 849 P.2d 1243, *rev. denied*, 122 Wn.2d 1014 (1993) 40

Marriage of Short, 125 Wn.2d 865, 890 P.2d 12 (1995) 12, 36

Marriage of Skarbek, 100 Wn. App. 444, 997 P.2d 447 (2000) 35, 36

Marriage of White, 105 Wn. App. 545, 20 P.3d 481 (2001) 34

Marriage of Williams, 84 Wn. App. 263, 927 P.2d 679 (1996), *rev. denied*, 131 Wn.2d 1025 (1997) 30-31, 37

McNary v. McNary, 8 Wn.2d 250, 111 P.2d 760 (1941) 25

Nuss v. Nuss, 65 Wn. App. 334, 828 P.2d 627 (1992) 34

Odom v. Odom, 141 P.3d 324 (Alaska 2006) 27

Oestreich v. Oestreich, 2 Wn.2d 72, 97 P.2d 655 (1939) 29

State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984) 27

Stokes v. Polley, 145 Wn.2d 341, 37 P.3d 1211 (2001) 23, 26

Webster v. Webster, 2 Wash. 417, 26 P. 864 (1891) 24

STATUTES

Bal. Code § 5723 24

Code of 1881 § 2007 24

Minn. Stat. Ann. § 518.58 27

RCW 11.04.015 23

RCW 26.08.110 24

RCW 26.09.080 ..... 20, 23-24, 26-27, 30, 34, 41

RCW 26.16.010 23

RCW 26.16.030 23

RCW 26.16.090 23

Rem. Rev. Stat. §989 24

Wis. Stat. Ann. § 767.61 27

OTHER AUTHORITIES

Wash. State Bar Ass'n, Washington Family Law Deskbook (1989) 26

Harry M. Cross, *The Community Property Law In Washington,* 49 Wash. L. Rev. 729 (1974) 40

Harry M. Cross, *The Community Property Law In Washington (Revised 1985),* 61 Wash. L. Rev. 13 (1986) 40

William Q. de Funiak & Michael J. Vaughn, Principles of Community Property (2d ed. 1971) 40

I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 29(d):

> None of this is to say that, under its broad equitable powers, the Court cannot make a lopsided division of community assets and also invade a separate estate to the extent necessary to achieve a just result. It is the Court's intention to do both of these. (CP 295)

2. The trial court erred in entering Finding of Fact 29(e):

> This was, after all, a long-term marriage in which the wife made a major contribution to all that the community accomplished measured in terms of their children, their foster children, their impact in the broad community and their more narrow business interests. It is not that she leaves the marriage in need but the fact is she will leave the marriage in less advantageous position than her husband. (CP 295)

3. The trial court erred in entering Finding of Fact 30:

> Consistent with the above discussion and the stipulations or agreements of the parties, the document attached as an appendix sets forth the assets and liabilities of the parties, designates their character as either community or separate, states their value and makes the distribution deemed just and equitable by the Court. (CP 295-96)

4. The trial court erred in entering Finding of Fact 31:

> As a further division of the assets of the parties, Mr. Larson shall deliver to Ms. Calhoun the sum of $12,000,000 at the time of entry of the decree, and an additional $10,000,000 on January 1, 2013 and a final payment of $5,000,000 on January 1, 2014. (CP 296)

5. To the extent they reflect the previously assigned errors, the trial court erred in entering its Amended Findings and Conclusions and Additional Findings and Conclusions on February 3, 2012. (CP 261-76)

6. The trial court erred in its division of the marital estate as set out in the Appendix to its Findings and in the Decree of Dissolution entered February 3, 2012. (CP 210-29)

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in invading a spouse's separate property and awarding it to the other spouse when ample provision could be made for both spouses from the parties' community estate?

2. Whether the trial court erred in awarding the wife property equal in value to 100% of the community estate plus $70 million from the husband's separate estate on the grounds that the wife "will leave the marriage in less advantageous position than her husband," when an award to the wife equal to the net value of the community estate would have left her with property valued at $109 million, debt-free?

III. STATEMENT OF THE CASE

A. This Appeal Is Taken from Unchallenged Findings of Fact that Raise a Significant Issue of Law.

Appellant Chris Larson appeals the division of the parties' marital estate at the end of his 23-year marriage to respondent Julia Calhoun. Larson and Calhoun were married in July 1986 and separated in the summer of 2009. (Finding of Fact (FF) 1, CP 278) The parties agreed to all financial and residential matters relating to their five children, who ranged in age from 26 to 17 at the time of trial, including a final parenting plan for the one minor child. (FF 2, CP 279) Both Larson, age 52 at trial, and Calhoun, age 54, are in "excellent fiscal and physical health." (FF 3, CP 279; FF 4, CP 280)

The net value of the marital estate before the court exceeded $500 million, of which $109 million was community property and the rest the husband's separate property. The parties had agreed on many "potentially thorny" points of contention by the time of trial, which was held November 28 through December 15, 2011, before the Honorable William L. Downing, King County Superior Court. (CP 277-78) Left as the primary factual issues at trial were (a) the nature and extent of Larson's separate estate; (b) the value of both the family residence and of a minority ownership

interest in the Seattle Mariners; and (c) the dates to be used for the beginning and ending of the marital community. (CP 278)

These factual issues were resolved largely in the husband's favor, and this is not a factual appeal. This statement of facts derives almost entirely from the trial court's findings of fact (Appendix A), which confirmed the separate nature of both Larson's pre-marriage Microsoft stock and his 30% interest in the Mariners. Larson also does not dispute on appeal the $176 million value placed by the trial court on his separate interest in the Mariners, or the value of the parties' major community assets, including their $20 million residence in the Highlands. Instead, based on the facts as found by the trial court, Larson asks the Court to reverse the trial court's property award because given these facts the trial court erred in invading his separate property and awarding more than the net value of the community property to Calhoun.

The Court should hold that the trial court applied an improper legal standard and consequently abused its discretion in awarding Calhoun a significant share of Larson's separate estate in addition to the net value of all the community property, because more than ample provision could have been made for Calhoun from the

parties' $109 million net community estate. Although the facts of this case, and the parties' wealth, are extraordinary, the issues raised on appeal regarding invasion of one spouse's separate property in a dissolution action are universal. They should be addressed here, in a case where the factual findings on which the trial court divided the marital estate are undisputed.

B. Chris Larson Went to Work at Microsoft in 1975, and was a Multi-Millionaire by the Time the Parties Married in 1986. His Heavily-Leveraged Separate Assets Include a 30% Interest in the Seattle Mariners.

Larson first learned to program a computer as a 7th grader at Seattle's Lakeside School – a "quite remarkable" feat in 1971. (FF 3, CP 279) In early association with schoolmate Bill Gates, who was several years his senior, Larson began working part-time for the nascent company called Microsoft in 1975. (FF 3, CP 279) He continued to work intermittently for Microsoft while attending Princeton University, where he dual-majored in economics and computer science, from 1977 through 1981. (FF 3, CP 279)

As his college graduation approached, Larson wrote Gates from Princeton to say "he thought he'd only come to work for Microsoft if he received an equity interest in the company." (FF 5, CP 280; Ex. 43; RP 71) Having negotiated the right to acquire a

one-half of one percent equity interest in the company, which was not yet publicly traded (RP 72, 74), Larson began as a fulltime Microsoft employee after graduating from Princeton in 1981. (FF 3, CP 279) Larson purchased his one-half of one percent interest in the company in December 1981, and was issued Microsoft stock certificate number 8, for 56,600 shares. (FF 14, CP 284; RP 103; Ex. 40) The trial court found that Larson repaid from his separate funds the $26,885 loan that the company had made to him to pay the federal income tax obligation associated with his acquisition of this separate-property stock. (FF 14, CP 285; RP 77, 606-12)

Larson's separate-property block of 56,600 pre-IPO shares of Microsoft stock subsequently underwent ten stock splits. (FF 14, CP 285; RP 117) It increased in value 500 times (50,000 percent) by the time of trial. (RP 118-19) It is the sole source of Larson's separate estate, which at the time of trial was valued at $397 million. (FF 14, CP 285) As an employee of Microsoft, Larson was subsequently granted numerous Microsoft stock options, but the shares resulting from the stock Larson purchased in 1981, five years prior to marriage, "were always worth more than the sum total of all options exercised after marriage." (RP 128) As set forth

below, Larson acquired numerous other separate-property assets during the marriage primarily by borrowing against his separate-property Microsoft stock. (RP 119-20, 610, 612-13)

Before his marriage to Calhoun, Larson established a margin account with Goldman Sachs where he held his separately acquired stock. (FF 15, CP 285; RP 91-93, 96) As his separate-property Microsoft shares grew in both number and value, Larson used them to secure lines of credit and as pledges for variable prepaid forward contracts to make various additional investments, including "some big winners (Dell Computers, Silver Lake Partners), some big losers (Video Networks, Promptu Systems) and some that have appreciated on paper while paying no dividends or profits (Mudville Nine)." (FF 15, CP 285) After the parties married, they "openly discussed that Mr. Larson would not take such risks with community funds as he did with the funds that he considered his separate estate." (FF 15, CP 285; RP 131)

A major issue at trial was whether the assets that grew from the investments Larson made with funds originating from his pre-marriage, separate-property stock retained their separate character, "or if they lost it somewhere along the way through

commingling with community property." (FF 16, CP 286) The "key witness" on this issue was Gregory Porter, a CPA/Certified Forensic Financial Analyst, who provided a tracing analysis on behalf of Larson. (FF 17, CP 286) The trial court "without equivocation ... found Mr. Porter to be an exceedingly reliable witness." (FF 17, CP 286) "As Mr. Porter convincingly stated: 'Everything was accounted for and nothing was left over.'" (FF 17, CP 286; RP 598)

The trial court found that Larson was "meticulous" in seeing to it that all Microsoft shares were correctly registered either in his name only (for those shares derived from his separate property), or in both his and Calhoun's names (for the parties' community shares in Microsoft, discussed in the next section). (FF 19, CP 287; FF 18, CP 287; RP 656, 659) "When gauging the extent to which Mr. Larson had the intention to retain his pre-marital assets as a separate estate," the trial court noted "the consistent effort he expended to keep things separate, the corrective actions he took when he became aware of record-keeping errors made by others; and the open discussions within the marriage of the fact that he would make risky investments with separate funds but not with community funds." (FF 18, CP 287):

> [O]ver [a] 24 year span, this [separate] account saw deposits totaling $1,800,318,815. Every dollar of this was traced and, of this amount, the misdeposited funds represent .05%, a *de minimis* amount relative to the 99.95% traceable to separate sources. . . . [D]uring the same [24 years], funds were taken from this separate account and used for community purposes at a rate . . . 100 times greater.

(FF 23, CP 289-90; RP 714) The trial court thus found "that the evidence has established clearly and convincingly that Mr. Larson's separate estate did not become commingled with the community estate," and that "[f]unds used for his various post-marriage acquisitions . . . [had] been clearly and convincingly traced to a separate source." (FF 24, CP 290)

Among the assets the trial court found Larson to hold separately was "Mudville Nine, Inc.," a corporation he created in 1992 for the purpose of purchasing and holding a 30.636% interest in the Seattle Mariners baseball team. (FF 25, CP 290) The trial court found the value of Larson's separate-property interest in Mudville Nine to be $176,739,084, subject to a $40 million loan from J.P. Morgan. (FF 26, CP 292, 300)

Larson's interest in the Mariners represents over 40% of the net value of his separate estate. (*See* CP 300-01) In nearly 20 years, the Mariners partnership has never paid any kind of dividend

or distribution to its owners. (RP 484-85) The owners operate on a "debt-free basis," and all capital expenditures are paid from cash holdings or capital contributions from the owners. (RP 320-26, 470) Larson testified that he would like to retain his ownership interest in the Mariners, and the owners are subject to significant restrictions on their ability to sell their interests. (RP 334-37, 485-86)

The trial court found that Larson made consistent efforts during the marriage to keep his premarital assets separate from the community estate. (FF 18, CP 287) The trial court found that Larson's separate estate had not become commingled with the community estate, and that his various post-marriage acquisitions, including the Mariners, had been clearly and convincingly traced to a separate source. (FF 24, CP 290)

C. After Their Marriage in 1986, the Marital Community Amassed Extraordinary Wealth as a Result of Larson's Continued Employment at Microsoft. Larson Proposed at Trial that Calhoun Receive Virtually All the Value of the Community Estate, Free of Debt.

Julia Calhoun moved to Seattle from Wenatchee, and earned a B.A. in English literature from Seattle University. (FF 4, CP 280) She and Larson met in the late 1970s, when she socialized with the "bright, young Microsoft crew." (FF 4, CP 280)

Larson and Calhoun continued the dating relationship they had begun in 1980 after Larson returned to Seattle after graduating from college to work for Microsoft in 1981. (FF 5, CP 280) Before marrying in July 1986, the parties lived together for part of a year, but did not establish any joint accounts or jointly acquire any significant assets. (FF 5, CP 280; RP 111-13)

By the time they married in July 1986, Larson had already worked at Microsoft for eleven years and was a multi-millionaire. (RP 95, 129) Microsoft's initial public offering took place prior to the marriage. (RP 123-24) The trial court rejected Calhoun's argument that their earlier cohabitation was a committed intimate relationship, finding that after they began dating "her own businesslike appraisal of him as the next few years unfolded was that 'his stock wasn't trading too high with me.'" (FF 5, CP 280) The trial court found that the marital community was in existence from the date of marriage, July 5, 1986, through July 31, 2009. (CL 3, CP 296)

From the beginning of the parties' marriage through 2001, when he retired, Larson was employed by Microsoft, where he received a salary and took full advantage of his employer's stock option and stock purchase plans. (FF 7, CP 281) The parties'

substantial community estate derived primarily from Microsoft stock options granted to Larson prior to marriage that he exercised during marriage. (FF 7, CP 281) Larson treated all Microsoft stock options exercised during the marriage (irrespective of when they were granted to him) as creating an entirely community asset, foregoing any claim under ***Marriage of Short*** to his separate property portion of stock options that were issued and partially earned (vested) before marriage.[1] (FF 29(b), CP 294; RP 126, 248, 654)

By the time of separation, the net community estate was worth $109 million. (FF 8, CP 281, 299-300) The community assets included $14 million in retirement accounts, $7.3 million in Microsoft stock, a $17 million London townhome, a $13.3 million waterfront compound in Hawaii, real properties in Snohomish and

---

[1] In ***Marriage of Short***, 125 Wn.2d 865, 872, 890 P.2d 12 (1995), the Court adopted the "time rule" method of characterizing stock options, which calculates the community portion of the asset by dividing the number of years of service while the employee is married by the total years of service, and then multiplying that fraction by the number of shares that can be purchased on the date the option is first exercisable. Under ***Short***, a significant portion of Larson's options, and the stock purchased with them, would have been separate property. *See* ***Marriage of Chumbley***, 150 Wn.2d 1, 6-7, 74 P.3d 129 (2003). Larson exercised most of his Microsoft stock options before the ***Short*** decision in 1995, so he could not possibly have been aware of the implications of his decision to treat all post-marriage stock option exercises as community property. (*See* RP 128, 646, 650; Ex. 175)

Kittitas counties worth $7 million, $12 million in King County commercial properties, over $110 million in fine art, $4 million in furnishings, and collectables valued at $11.2 million (half their purchase price). (CP 299-300) All but the art, which secured a line of credit, were held debt-free. (*See* FF 22, CP 288-89; RP 222-27, 231-32, 964-66)

Also included in the community's assets were five residential properties in the Highlands, a gated community in the City of Shoreline overlooking Puget Sound. (FF 9, CP 282) Most notably, after acquiring two Highlands properties known as Norcliffe and the Gatehouse for $5.7 million in 1993, the parties invested an additional $160 million in improvements, including a 200-person ballroom, a 24-vehicle underground parking garage, and 13 water features. (FF 9, CP 282; RP 140-49) The cost to maintain Norcliffe is approximately $127,000 a month – over $1.5 million a year. (RP 150; Ex. 173) The trial court valued the Norcliffe estate at $20,000,000, noting that "[w]hile this figure is far below the amount put into the unquestionably fabulous estate, . . . the current market is not strong and this would be an astounding, record-setting high price for non-waterfront property in King County." (FF 9, CP 282-83)

The community thus "amassed considerable wealth" during the marriage (FF 7, CP 281), and the trial court correctly noted that "[b]oth of these impressive people will go on to do well and to do good." (FF 29(a), CP 294) The trial court expressly rejected Calhoun's claims that Larson had improved his separate estate to the detriment of the community (FF 28, CP 293), and to the contrary found that the "community had received significant benefits from Larson's separately maintained estate," including "substantial tax benefits due to the losses experienced by various separate assets." (FF 29(b), CP 294; RP 844)

At trial, Larson proposed that Calhoun receive a property award with a total value of $104 million, free of debt, including $25 million in cash, $20 million in Microsoft stock, and real estate that with limited exceptions produced cash flow or had the ability to do so. (CP 70-71) Larson's proposed property award would have given nearly 100% of the community net worth to Calhoun, while freeing her of the financial burden of over $100 million of community debt and the high maintenance costs of the Norcliffe estate. (RP 27-28, CP 70-71) Larson projected that, based on conservative rates of return, Calhoun could realize income of

$2,196,000 per year from the proposed property award, without invading principal. (CP 71)

D. The Trial Court Awarded Calhoun $70 Million More than the Value of the $109 Million Community Estate, Debt-Free, on the Grounds She Would Otherwise Leave the Marriage "in a Less Advantageous Position" than Larson.

The trial court chose to "make a lopsided division of community assets and also invade [the husband]'s separate estate" because otherwise the wife "will leave the marriage in a less advantageous position than her husband." (FF 29(d), (e), CP 295) The trial court ordered Larson to be responsible for all of the community debts, making his net community property award a *negative* $29 million, while awarding Calhoun community assets of more than $139 million, an additional $40 million from Larson's separate property ($13 million in separate-property assets plus $27 million in additional post-dissolution cash transfers), all of her separate property, and no debt. (CP 299-301) The trial court's division of assets is described below:

The parties had agreed that Larson would retain Norcliffe and the Gatehouse. (FF 9, CP 282-83) The court awarded Larson one adjacent home in the Highlands, valued at $1,430,000, and awarded to Calhoun two other homes in the Highlands, valued at $1,200,000 and $1,500,000. (FF 10, CP 283) The court also awarded to Calhoun the community's London townhome, valued at $17,055,803; the three contiguous homes in Hawaii, valued at $13,290,000; 29 lots and homes surrounding Lake Armstrong in Snohomish County, valued at $5,171,000; the community's one-third interest in "Swauk Valley Ranch" near Cle Elum, valued at $1,850,000; and $11,631,000 in Seattle commercial and residential rental properties. (FF 11, CP 283) Larson was awarded a condominium in Scottsdale, Arizona, valued at $297,380, and residential property in North Seattle that was valued at $1,487,000 but had already been pledged as a charitable gift to the Lakeside School. (FF 11, CP 283) The court awarded each party 50% of the $110 million in appraised art. (FF 12, CP 284)

The trial court valued Larson's highly risky separate investments in Promptu Systems and Video Networks, which the court acknowledged had thus far resulted in nothing but heavy

losses, at over $6 million. (FF 27, CP 292, 300-01; RP 888-90) The court awarded Calhoun an equal share in any profits from these separate-property investments once Larson had recouped his future investments in these companies, together with a 100% risk premium. (FF 27, CP 292-93)

The court ordered Larson to fulfill all of the parties' previous community charitable commitments, which in the past few years they had borrowed to fulfill, totaling more than $5 million (not including the $1,487,000 in property pledged to Lakeside School). (RP 225; CP 212, 300) In addition, the court ordered Larson to pay Calhoun $27 million cash: $12,000,000 on entry of the decree, an additional $10,000,000 on January 1, 2013, and $5,000,000 on January 1, 2014. (FF 31, CP 296)

The chart on the next two pages of this brief summarizes the trial court's property award:

COMMUNITY PROPERTY

	Husband	Wife
Highland properties	$ 21,430,000	$ 2,700,000
Hawaii		$ 13,290,000
London		$ 17,055,803
Lake Armstrong		$ 5,171,000
Swauk Valley Ranch		$ 1,850,000
The Rocks	$ 297,380	
Thistledown	$ 336,000	$ 11,731,000
Art work	$ 55,150,000	$ 55,150,000
Non-appraised art		$ 390,198
Furnishings	$ 3,340,938	$ 457,609
Collectibles	$ 1,515,070	$ 9,759,882
Golf club memberships	$ 12,000	
Vehicles	$ 212,825	$ 65,400
Jewelry		$ 596,268
Loan to brother		$ 231,000
Wine collection	$ 150,000	
Goldman Sachs acct.	($113,565,847)	
Microsoft 401(k)		$ 4,002,755
IRAs	$ 6,114,836	$ 4,000,191
Bank Accounts	$ 30,343	$ 3,057,336
MSFT shares (276,316)		$ 7,358,295
Fidelity acct. -068		$ 350,801
Laurel Ink, Laurel Gifts		$ 283,727
Charitable Foundations	$ 533,722	$ 1,675,540
Charitable Pledges	($ 5,096,000)	
SUBTOTAL	($ 29,538,773)	$139,176,805

(CP 262, 299-300)

HUSBAND'S SEPARATE PROPERTY

	Husband	Wife
Microsoft stock (56,600 shares to H, 349,730 shares to W)	$ 1,507,258	$9,313,310
Mudville Nine	$176,739,084	
Less J.P. Morgan loan	($ 40,155,987)	
Kelowna Rockets	$ 160,013	
Promptu/Video Networks	$ 6,163,224	
Private Equity Funds	$ 53,094,930	
Goldman Sachs -047-8	$168,722,516	
Wells Fargo -0204	$ 511,356	
J.P. Morgan acct. (163,702 MSFT shares to W)	$ 8,121,210	$4,359,384
Separate tangibles	$ 8,399,221	
Loan to daughter	$ 318,429	
Transfer Payment	($ 27,000,000)	$27,000,000
SUBTOTAL	$356,581,254	$40,672,694

(CP 300-01)

WIFE'S SEPARATE PROPERTY

	Husband	Wife
Jewelry		$ 669,000

(CP 301)

	Husband	Wife
TOTAL:	**$327,042,521**	**$180,518,499**

Larson appeals. (CP 207) Calhoun has not cross-appealed the trial court's characterization or valuation of the marital estate or any of its assets.

IV. ARGUMENT

A. The Trial Court's Decision Rests on Untenable Reasons.

The appellate court reviews a property distribution for an abuse of discretion. ***Marriage of Mansour***, 126 Wn. App. 1, 13-14, ¶ 36, 106 P.3d 768 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. ***Marriage of Littlefield***, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is manifestly unreasonable if "it is outside the range of acceptable choices, given the facts and the applicable legal standard." ***Littlefield***, 133 Wn.2d at 47. It is based on untenable grounds if the factual findings are unsupported by the record. ***Littlefield***, 133 Wn.2d at 47. It is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. ***Littlefield***, 133 Wn.2d at 47.

To make a just and equitable division of the property and liabilities of the parties, the trial court must consider (1) the nature and extent of the community property; (2) the nature and extent of the separate property; (3) the duration of the marriage; and (4) the economic circumstances of each spouse at the time the division of property is to become effective. RCW 26.09.080. The trial court's

property division in this case, awarding the wife far more than the net value of the community estate, was based on untenable reasons because the trial court's factual findings do not as a matter of law support invasion of the husband's separate estate.

The trial court in Finding of Fact 29 identified six "noteworthy" points in coming to a "fair and equitable" division under the statute. (CP 293-95) But the trial court's findings of fact do not support its conclusion that a significant portion of the husband's separate property should be awarded to the wife because the court cannot invade a spouse's separate property when a just and equitable division of property can be accomplished from the community estate alone. The Court should reverse the trial court's distribution of the marital estate and direct the trial court on remand to limit its award to the wife to the net value of the community estate.

B. Separate Property Cannot Be Invaded When a Just and Equitable Division of Property Can Be Accomplished from the Community Estate Alone.

Washington law prohibits an award of one spouse's separate property to the other when ample provision for the spouse can be made from the community estate alone. Here, the trial court found

that the parties could be amply provided for from the $109 million community estate alone:

> To first address the "elephant in the ballroom", this is not a case like so many others where the concern is with making sure all in the family are housed, clothed and fed. Both of these impressive people will go on to do well and to do good. One has expressed a continuing commitment to fund efforts to ease the struggles of needy children while the other has pledged to continue giving generously to support education. The Court, of course, does not consider these intentions other than to applaud them.

(FF 29(a), CP 294) (*See also* FF 29(e), CP 295: "It is not that she leaves the marriage in need . . .".) The trial court erred in then concluding that it had the discretion to nevertheless award the husband's separate property to the wife to effect a "just and equitable" distribution.

1. A Spouse's Separate Property Cannot Be Invaded When Ample Provision Can Be Made from the Community Estate.

The "right of the spouses in their separate property is as sacred as is their right in their community property." ***Estate of Borghi***, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009) (*quoting* ***Guye v. Guye,*** 63 Wash. 340, 352, 115 P. 731 (1911)). A party's "sacred right" to separate property requires greater care before invading it at the end of the parties' marriage. As a consequence,

"Washington courts refrain from awarding separate property of one spouse to the other if a just and equitable division is possible without doing so." ***Stokes v. Polley***, 145 Wn.2d 341, 347, 37 P.3d 1211 (2001); *see* ***Marriage of Holm***, 27 Wn.2d 456, 465, 178 P.2d 725 (1947).

This has long been the law in Washington. Our statutory scheme clearly distinguishes between community and separate property, and requires the trial court to consider the character of property before distributing it. *See* RCW 26.16.010 (defining separate property); RCW 26.16.030 (defining community property); RCW 26.09.080 (among the "relevant" factors the court must consider is "(1) The nature and extent of the community property; [and] (2) The nature and extent of the separate property").[2] But the Court reversed awards of one spouse's separate property to the other that were not necessary to make adequate provision for the

---

[2] This distinction is not important only at divorce. Separate property also is treated differently than community property for purposes of intestate succession, management during the marriage, and liability to creditors. *See e.g.* RCW 11.04.015 (on an intestate spouse's death, a surviving spouse is entitled to all of the community estate, but is only entitled to varying percentages of the decedent's separate estate, depending upon who else survives the decedent); RCW 26.16.010, RCW 26.16.030 (during the marriage, spouses have unfettered discretion to unilaterally manage their separate property while their management of community property is more limited); RCW 26.16.190 (separate property is protected from community creditors).

other spouse even before the enactment of RCW 26.09.080 in 1973, when the statutes governing the division of property on divorce did not require the court to "consider" as a factor the character of property before dividing it. *Former* RCW 26.08.110;[3] Rem. Rev. Stat. § 989; Bal. Code § 5723; Code of 1881 § 2007.[4]

In ***Holm***, for instance, the trial court valued the marital estate at $342,000, including $73,000 that was the husband's separate property, and distributed the entire marital estate equally between the parties, including the husband's separate property. The

---

[3] "If the court determines that either party, or both, is entitled to divorce or annulment, judgment shall be entered accordingly, granting the party in whose favor the court decides a decree of full and complete divorce or annulment, and making such disposition of the property of the parties, either community or separate, as shall appear just and equitable having regard to the respective merits of the parties, the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children . . ." RCW 26.08.110 (enacted as part of the Divorce Act of 1949).

[4] "In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the conditions in which they will be left by such divorce, and to the party through whom the property was acquired." ***Folsom v. Folsom***, 106 Wash. 315, 318, 179 P. 847 (1919) (*quoting* Rem. Rev. Stat. § 989); ***In re Cave***, 26 Wash. 213, 217, 66 P. 425 (1901) (*quoting* Bal. Code § 5723, which had language identical to Rem. Rev. Stat. § 989). "This statute was passed in 1863, prior to the passage of community property law, and has ever since been the law of the territory, and of the state." ***Webster v. Webster***, 2 Wash. 417, 419, 26 P. 864 (1891) (*citing* Code of 1881 § 2007, which had language identical to Rem. Rev. Stat. § 989 and Bal. Code § 5723).

Supreme Court reversed, holding that "[w]e consider the division made by the trial court unjust and inequitable in so far as it awarded to the respondent a portion of what was appellant's separate property." ***Holm***, 27 Wn.2d at 466. The Court recognized in ***Holm*** that separate property *could* be awarded to the wife, but held that "[t]his is not a case where, in order to make adequate provision for the necessitous condition of the wife, the court is constrained to take from the husband his separate property." ***Holm***, 27 Wn.2d at 465. *See also* ***McNary v. McNary***, 8 Wn.2d 250, 253-54, 111 P.2d 760 (1941) (reversing property division when trial court divided the entire marital estate, community and separate, equally between the parties); ***Marriage of Bodine***, 34 Wn.2d 33, 35, 207 P.2d 1213 (1949) (reversing property division awarding the wife some of the husband's separate property when the trial court had already found that wife was not entitled to even half of the community property).

In ***Marriage of Konzen***, 103 Wn.2d 470, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985), the Court distinguished ***Bodine***, which held that the trial court may award one spouse's separate property to the other spouse only in "exceptional" situations, 34 Wn.2d at 35, on the grounds that ***Bodine*** was decided before the

1973 enactment of RCW 26.09.080, the current statute governing division of property. 103 Wn.2d at 477-78. But appellant is not arguing that the Court should reinstate ***Bodine's*** holding that one spouse's separate property may be awarded to the other spouse only in "exceptional" circumstances. Instead, appellant's argument is based on the holding of ***Holm***, 27 Wn.2d at 465-66, that when a spouse can be "amply provided for" from the community property, the court should not invade the other spouse's separate property, because "Washington courts refrain from awarding separate property of one spouse to the other if a just and equitable division is possible without doing so." ***Stokes***, 145 Wn.2d at 347.

In support of this limitation on the trial court's authority to invade separate property, the Court in ***Stokes*** cited and quoted Wash. State Bar Ass'n, Washington Family Law Deskbook § 39.3(2)(a) at 39-14 (1989). ***Stokes***, 145 Wn.2d at 347. The Deskbook in turn cites ***Holm***, 27 Wn.2d at 466. ***Stokes*** (decided in 2001), a post-***Konzen*** case (decided in 1985), thus confirms that ***Holm***, a case that has never been distinguished or overruled, is still

good law. [5] ***State v. Gore***, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court").

The enactment of RCW 26.09.080, requiring the court to consider the "nature and extent" of both the community and separate property before dividing property in a dissolution, makes this factor even more important under the current statute than it was previously. A spouse's separate property cannot be invaded when ample provision can be made from the community estate. The trial court's findings, and in particular Findings of Fact 29(a) and 29(e) (CP 294-95), do not support the trial court's invasion of

---

[5] Many other states also prohibit an award of one spouse's separate property to the other if it is possible to provide for the spouse from the community (or marital) assets. *See, e.g.*, ***Odom v. Odom***, 141 P.3d 324, 339 (Alaska 2006) ("it was error to invade the separate estate without first determining whether an unequal division of the marital estate would properly balance the equities"); Minn. Stat. Ann. § 518.58(2) (if award of only marital property and that party's separate property is "so inadequate as to work an unfair hardship, considering all relevant circumstances, the court may, in addition to the marital property, apportion up to one-half [of the other spouse's separate property], to prevent the unfair hardship"); ***Johnson v. Johnson***, 650 So.2d 1281, 1287 (Miss. 1994) ("If there are sufficient marital assets which, when equitably divided and considered with each spouse's nonmarital assets, will adequately provide for both parties, no more need be done."); Wis. Stat. Ann. § 767.61(2)(b) (court may award separate property to the other spouse if "the court finds that refusal to divide the property will create a hardship on the other party or on the children of the marriage").

the husband's separate property because ample provision and a just and equitable award could be accomplished from the significant community estate alone.

2. *Konzen* and Other Cases in which Separate Property Was Invaded to Prevent the Other Spouse From Falling into Poverty Are Irrelevant to the Issue Presented in this Case.

Our courts have affirmed an award of one spouse's separate property to the other where the court has equally divided the parties' insignificant or heavily encumbered community property and the other spouse would become impoverished if the court did not also invade her spouse's separate property and award a portion to her. In ***Konzen***, for instance, the Court affirmed the trial court's decision awarding the wife 30% of the husband's military pension, which had been accrued prior to the parties' marriage and was in pay status at the time of trial. 103 Wn.2d 477-78. The wife, a recovering alcoholic, had not completed high school, was unemployed at the time of trial, and her work history consisted of waitressing and retail work. The wife had no separate property of her own and the half of the community property awarded to her was largely illiquid. ***Konzen***, 103 Wn.2d at 472.

Before deciding ***Holm***, the Court also allowed invasion of one spouse's separate property to prevent the other spouse from becoming impoverished. In ***Oestreich v. Oestreich***, 2 Wn.2d 72, 97 P.2d 655 (1939), for instance, the parties were married for 24 years. The community property was valued at $10,000 and the husband's separate property was valued at $43,000. The parties had eight children, six of whom were still minors at the time of divorce. The wife was awarded custody of the children and assets valued at $13,000. Thus, the wife's property award was 100% of the community property plus $3,000 – less than 10% of the husband's separate property.[6] Because of the relatively modest size of the estate and the wife's custodial responsibility for six children, the property award in ***Oestreich*** was upheld. 2 Wn.2d at 74-75; *see also* ***Luithle v. Luithle***, 23 Wn.2d 494, 499-502, 161 P.2d 152 (1945) (collecting cases affirming awards of separate property to the other spouse; "we have always held that the necessitous condition of the wife and the financial ability of the

[6] A dollar is worth about 16 times today what it was worth in 1939 (http://www.dollartimes.com/calculators/inflation.htm/), so the wife's inflation-adjusted property award would have been $160,000 for 100% of the community estate and $48,000 from the husband's separate estate – a total of $208,000 out of a combined community and separate estate of $688,000.

husband are the most important circumstances to be taken into consideration. . .").

Since enactment of RCW 26.09.080, the intermediate appellate courts also have affirmed invasion of a spouse's separate estate, but only where the other spouse's "necessitous circumstances" compelled it. Three intermediate appellate cases, from Divisions One and Three, have addressed this issue:

In ***Marriage of Bulicek***, 59 Wn. App. 630, 800 P.2d 394 (1990), Division One affirmed the trial court's division of the husband's pension over the husband's challenge that dividing the pension would in effect provide the wife a portion of his post-dissolution retirement contributions because he intended to continue working post-dissolution. The wife was in ill health, collecting disability, and had limited job skills and experience. The court noted that the wife "does not live on income close to the income that supported the couple's standard of living during the marriage and will likely never achieve the postdissolution economic level" of the husband. ***Bulicek***, 59 Wn. App. at 633-34.

In ***Marriage of Williams***, 84 Wn. App. 263, 927 P.2d 679 (1996), *rev. denied*, 131 Wn.2d 1025 (1997), Division Three

affirmed a property distribution that awarded the wife half of the husband's retirement benefits that he had accrued during 30 years of service working for the city, even though technically four years of the retirement benefits were the husband's separate property. The wife had only a high school degree, and although she worked three jobs, she still earned less than the husband. The wife also was awarded half of the community property and apportioned half of the community debts. ***Williams***, 84 Wn. App. at 265-66.

In ***Marriage of Griswold***, 112 Wn. App. 333, 48 P.3d 1018 (2002), *rev. denied*, 148 Wn.2d 1023 (2003), Division Three affirmed a property division that awarded each party one-half of the community property and awarded $138,000 of the husband's separate property to the wife. The wife's annual income was $12,000 compared to $219,000 earned by the husband. ***Griswold***, 112 Wn. App. at 337.

These cases share several similarities – in each, the court split the parties' modest community property, and then awarded the economically disadvantaged spouse some portion of the other spouse's separate property in light of her impoverished economic circumstances and significantly lower income. These cases share

no similarities with this case, in which the trial court recognized that there was "no concern . . . with making sure all in the family are housed, clothed and fed," acknowledged (but did not consider) each party's intention to continue to give generously to charity in the future, (FF 29(a), CP 294), and made an express finding that the wife will not "leave[ ] the marriage in need . . .". (FF 29(e), CP 295) Instead, as in ***Holm***, the wife here "can be amply provided for out of the community property, without invading the separate property" of the husband, 27 Wn.2d at 466, as an award to the wife in this case of the entire net community estate would have exceeded $100 million.

Konzen, and the intermediate appellate court cases affirming invasion of separate property to prevent a spouse from becoming impoverished, are irrelevant to the issue here: Is it just and equitable for the court to invade a spouse's separate property when ample provision can be made for the other spouse from the community property? Obviously, what constitutes "ample provision" in one case may not constitute ample provision in another, but if an award of 100% of the community property, totaling $109 million, free of debt, does not constitute ample provision, then the concept

has no meaning. There was no need to invade the husband's separate property under the reasoning of this state's precedent, and the trial court made no findings that would justify its award of over 20% of the husband's separate estate to the wife. The trial court abused its discretion in invading the husband's separate property when the wife could be "amply provided for" with a just and equitable award from the community property alone.

C. The Trial Court's Findings of Fact Do Not Support Its Conclusion that the Husband's Separate Property Should Be Awarded to the Wife.

In making its property award, the trial court relied on six points that it found "noteworthy." (FF 29, CP 293-95) But these factual determinations simply do not support a conclusion that the husband's separate property should be invaded in order to reach a "just and equitable" division. Indeed, most were further justification for limiting the wife's property award to the value of the community estate.

The trial court's first justification for its award, "that this is not a case . . . where the concern is with making sure all the family are housed, clothes and fed," (FF 29(a), CP 294), is addressed in the preceding argument section. Significantly, the trial court did not

find that invasion of the husband's separate property was necessary to maintain the wife's lifestyle – nor was there any evidence that it was. To the contrary, an award of 100% of the value of the community estate to the wife, debt-free, would have generated income for her of at least $2,196,000 a year, without invasion of principal. (CP 71) As the trial court found, "[i]t is not that she leaves the marriage in need . . .". (FF 29(e), CP 295)

As its second noteworthy point, the trial court recognized that the community estate had received significant benefits from the husband's separately-maintained assets, including substantial tax benefits due to losses experienced by Larson's separate assets. (FF 29(b), CP 294) This would be a reason for a disproportionate award to the husband, not the wife. In ***Nuss v. Nuss***, 65 Wn. App. 334, 341, 828 P.2d 627 (1992), for instance, the appellate court affirmed a disproportionate award of the property to the wife when it found that the "origin" of community property was the wife's separate property. *See also* ***Marriage of White***, 105 Wn. App. 545, 551, 20 P.3d 481 (2001) (in dividing property under RCW 26.09.080, the court may consider one party's "unusually significant contribution" of separate property to the community estate).

As its third noteworthy point, the trial court correctly recognized that the characterization of property is a legal conclusion, and stated that "the separate estate of the husband was compelled by evidence that was clear and convincing." (FF 29(c), CP 294-95) The husband's "meticulous" efforts to keep his pre-marital assets separate from the community also supports an award that preserves his separate estate, not one that invades it. ***Estate of Borghi***, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009) (reversing intestate succession premised on mischaracterization of separate property as community, based on the "sacred right" to separate property); *see also* ***Marriage of Skarbek***, 100 Wn. App. 444, 997 P.2d 447 (2000).

In ***Skarbek***, the husband "exhaustively document[ed]" the details of a bank account and was able to prove that $46,000 in the account could be traced back to pre-marital funds. 100 Wn. App. at 449-50. Nevertheless, the trial court incorrectly characterized the entire account as community property and divided the account equally between the parties. The appellate court reversed and held that "remand is required when it appears the trial court's division of the property was dictated by a mischaracterization of the separate

or community nature of the property." ***Skarbek***, 100 Wn. App. at 450. *See also* ***Marriage of Chumbley***, 150 Wn.2d 1, 10, 74 P.3d 129 (2003) (reversing property division premised on improper characterization of stock options); ***Marriage of Short***, 125 Wn.2d 865, 875, 890 P.2d 12 (1995) (reversing property division premised on improper characterization of stock).

As its fourth noteworthy point, the trial court stated that "None of this is to say that, under its broad equitable powers, the Court cannot make a lopsided division of community assets and also invade a separate estate to the extent necessary to achieve a just result. It is the Court's intention to do both of these." (FF 29(d), CP 295) But simply restating that the court has "broad equitable powers" is not sufficient, without actual findings explaining the reason that invasion of separate property is "necessary to achieve a just result." *See* ***Marriage of Horner***, 151 Wn.2d 884, 897, 93 P.3d 124 (2004) ("conclusory findings" are "insufficient because we cannot review the trial court's application of the facts" to the legal standard).

As its fifth noteworthy point, the trial court identified only that "this was, after all, a long-term marriage in which the wife made a

major contribution to all that the community accomplished, measured in terms of their children, their foster children, their impact in the broad community and their more narrow business interests.[7] It is not that she leaves the marriage in need but the fact is she will leave the marriage in a less advantageous position than her husband." (FF 29(e), CP 295)

Separate property does not transmute into community property the longer a marriage endures. *See* ***Borghi***, 167 Wn.2d at 484, ¶ 8. Nor is it affected by the personality of the spouse seeking a share of it on divorce. The "paramount concern when distributing property in a dissolution is the economic condition in which the decree leaves the parties," ***Marriage of Williams***, 84 Wn. App. 263, 270, 927 P.2d 679 (1996), not whether one party is in a more or less advantageous position than the other. (*See* FF 29(a), (e), CP 294, 295)

The trial court acknowledged that "this is not a case like so many others where the concern is making sure all in the family are housed, clothed and fed. Both of these impressive people will go

---

[7] In particular, the trial court had found that "both the community at large and the marital community benefitted greatly from her serving as, in her phrase, the 'approachable face' of the couple." (FF 4, CP 280)

on to do well and to do good." (FF 29(a), CP 294) In other words, because of the size of the community estate, neither party would leave the marriage in need – as the trial court also acknowledged in this very finding: "It is not that [the wife] leaves the marriage in need . . .". (FF 29(e), CP 295) As argued in the preceding section, this fact alone should have caused the trial court to not invade the husband's separate property.

As its sixth noteworthy point, the trial court recognized that "the division to be effectuated will provide the wife with substantial earning capacity, moderate liquidity and assets that can be liquidated prudently as time goes by. Meanwhile, the husband, while retaining a substantially greater paper value with his separate property assets, will shoulder all of the parties' debt, most of the risk, heavy carrying costs and interest payments and a considerable amount of trapped-in tax liability." (FF 29(f), CP 295) These too were not reasons to award a significant portion of the husband's separate property to the wife.

The trial court gave the wife far more than 100% of the net value of the good things in this huge community estate (the assets), while saddling the husband with 100% of the bad things in the

community estate (the debts), and no way to pay them all other than by further risking his already-leveraged separate property. Only the wife benefits from the investments that helped the community estate "grow tremendously" during the marriage (FF 28, CP 293), contrary to "the most basic of investing principles" governing the division of property on dissolution. ***Chumbley***, 150 Wn.2d at 10 (holding that in characterizing property on divorce a separate investment in community assets should proportionally share in any increase in value of the assets; "our result conforms to the most basic of investing principles – that reward is related directly to the amount of risk taken. A spouse who contributes separate funds for the purpose of exercising stock options takes an additional risk, and the reward should be proportionate to that additional risk.").

Further, although the trial court recognized there was "considerable amount of trapped-in tax liability" associated with the assets awarded to the husband (FF 29(f), CP 295), it failed to properly consider that liability when, in addition to shifting all of the "debt, most of the risk, heavy carrying costs and interest payments" to the husband, it awarded the wife a significant portion of his

separate property. *See* ***Marriage of Hay***, 80 Wn. App. 202, 206, 907 P.2d 334 (1995) (court should consider imminent tax consequences in valuing property); ***Marriage of Sedlock***, 69 Wn. App. 484, 500, 849 P.2d 1243 (court properly divided property so that both parties shared any adverse tax consequences resulting from the distribution), *rev. denied*, 122 Wn.2d 1014 (1993).

"It is a fundamental principle of community property law that since both spouses participate in the community, both are entitled to share in its reward." ***Farver v. Dept. of Retirement Systems***, 97 Wn.2d 344, 346, 644 P.2d 1149 (1982).[8] As the trial court found, "[b]oth of these impressive people will go on to do well and to do good." (FF 29(a), (f), CP 294, 295) Both spouses are entitled to the benefit of "all that the community accomplished," and of the

---

[8] This "fundamental principle" that both spouses have an interest in property onerously acquired during marriage is the "cardinal precept" of the community property system. Harry M. Cross, *The Community Property Law In Washington,* 49 Wash. L. Rev. 729, 734, fn. 8 (1974), *and* Harry M. Cross, *The Community Property Law In Washington (Revised 1985),* 61 Wash. L. Rev. 13, 18, fn. 7 (1986), *citing* William Q. de Funiak & Michael J. Vaughn, Principles of Community Property § 1 at 2-3 (2d ed. 1971) ("Equality is the cardinal precept of the community property system. At the foundation of this concept is the principle that all wealth acquired by the joint efforts of the husband and wife shall be common property; the theory of the law being that, with respect to marital property acquisitions, the marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution.")

community estate that they amassed through their joint efforts. (FF 29(e), CP 295) One spouse should not lose any interest in the community's assets simply because he or she has a sizeable separate estate as well. Yet the husband, with none of the net community assets and all the community debt, leaves the marriage with a *negative* community award of $70 million as a result of the trial court's award. It is fundamentally unfair for a spouse who worked for years to help amass a net community estate of more than $100 million to receive $70 million less than none of that estate upon dissolution.

The trial court's first, second, third, and sixth "noteworthy points" were reasons *not* to invade the husband's separate estate. The trial court's fourth noteworthy point was no reason at all. The trial court's fifth point disregards the century-long distinctions made by the Legislature and the courts of this state between separate and community property, and in particular directly contravenes the requirement in RCW 26.09.080 that the dissolution court in dividing the marital estate consider the character of the property before it. The trial court's exercise of its discretion based on any and all of these grounds to award the wife $70 million of the husband's

separate property in addition to the $109 million value of the parties' net community estate, while leaving the husband with 100% of the significant community and separate debt, was based on untenable reasons, and therefore must be reversed.

V. CONCLUSION

The Court should clarify when a trial court may award one spouse more than 100% of the value of the community estate by invading the other spouse's clearly-traced separate property, and hold that an award to the wife of more than $100 million in community property meets the threshold of "ample provision" that prohibits invasion of the husband's separate estate. The Court should reverse the trial court's distribution of the marital estate and direct the trial court on remand to limit its award to the wife to the net value of the community estate.

Dated this 13th day of August, 2012.

SMITH GOODFRIEND, P.S.

By: _____
Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

THOMAS G. HAMERLINCK, P.S.

By: _____
Thomas G. Hamerlinck
WSBA No. 11841

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 13, 2012, I arranged for service of the foregoing Brief of Appellant, to the court and to counsel for the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Messenger _X_ U.S. Mail ___ E-Mail
Thomas G. Hamerlinck Thomas G. Hamerlinck PS 10900 NE 4th Street, Suite 2300 Bellevue WA 98004-5882	___ Facsimile ___ Messenger ___ U.S. Mail _X_ E-Mail
Janet A. George Janet A. George, Inc. P.S. 701 Fifth Avenue, Suite 4550 Seattle, WA 98104	___ Facsimile ___ Messenger _X_ U.S. Mail _X_ E-Mail
Philip A. Talmadge Talmadge/Fitzpatrick 18010 Southcenter Pkwy Tukwila WA 98188-4630	___ Facsimile ___ Messenger _X_ U.S. Mail _X_ E-Mail

DATED at Seattle, Washington this 13th day of August, 2012.

Victoria K. Isaksen

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

In re: the Marriage of:	)	
	)	
CHRISTOPHER ROSS LARSON,	)	
	)	
Petitioner,	)	NO. 10-3-04077-7 SEA
	)	
and	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
JULIA LARSON CALHOUN,	)	AT TRIAL
	)	
Respondent.	)	
	)	

INTRODUCTION

Before the undersigned Judge of the above-entitled Court, this matter came on for trial on November 28 – December 15, 2011. The Petitioner Christopher Larson was represented by attorney Thomas Hamerlinck and the Respondent Julia Calhoun was represented by attorney Janet George. The Court has listened closely to the testimony of the parties and ten additional witnesses, has reviewed the exhibits admitted into evidence as well as extensive legal briefing and heard closing arguments of counsel.

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

Although the parties may have been more congenial, the issues more engaging and the lawyers considerably more skilled than is typical, it is now the job of the Court, as in any marital dissolution case, to identify the assets and liabilities of the parties, determine the value of each, characterize each as either separate or community, and direct a division that is just and equitable. The concept of fairness and equity requires that the Court state and give consideration to all of the attendant circumstances in which the parties find themselves now and into their post-dissolution futures. See, RCW 26.09.080. Of course, the past is relevant prologue.

To the credit of both the parties and their counsel, many potentially thorny points of contention have been agreed upon. This has left as the primary issues in serious dispute (a) the nature and extent of Mr. Larson's separate estate; (b) the value of certain assets before the court, notably the family residence and an ownership interest in the Seattle Mariners; (c) the dates to be used for the beginning and ending of the marital community; and, most significantly, (d) what division is just and equitable.

In consideration of the foregoing, the Court now makes and enters the following:

FINDINGS OF FACT

1. On the 5th of July, 1986, in Kirkland, Washington, Christopher Larson and Julia Calhoun were joined in marriage. Twenty-three years later, the marital community separated in the summer of 2009. Both agree their marital bond is broken beyond retrieval and ask the Court to dissolve their marriage.

2. The marriage was blessed with five children who now range in age from 26 to 17. Geographically, they are spread out (oldest to youngest and as of the moment) in Seattle, New York, London, California and Massachusetts. With a shared view of the children's best interests, the parties have agreed as to all financial and residential matters that relate to them. A final parenting plan as to the one minor child has already been entered and any necessary orders for the support and education of the children are expected to be submitted in an agreed form.

3. As a student in the 7th grade at Seattle's Lakeside School, Mr. Larson first learned to program a computer. Not unusual today, that was quite remarkable in 1971 and it pointed him on a path that leads to the wealth that is before the Court today. A few years later, in early association with schoolmate Bill Gates (several years his senior), he began working part-time with a nascent company called "Microsoft" in 1975. During his college years at Princeton University (1977-81), where he majored in economics and computer science, he continued working intermittently for Microsoft. Upon graduation in 1981, he began as a fulltime Microsoft employee, significantly one who was granted an equity interest in the company which was not yet publicly traded. He continued as an employee through his marriage five years later in 1986 and up through his retirement in 2001. In recent years, he has stayed busy actively managing his extensive investments and philanthropic endeavors. Only 52 years of age, he leaves the marriage in excellent fiscal and physical health.

4. Having grown up in Wenatchee, Julia Calhoun moved to Seattle where she eventually earned a B.A. in English literature from Seattle University. In the late 1970's she socialized with the bright, young Microsoft crew through whom she met her future husband. During her marriage, she was active as a parent, foster parent, overseer of major construction projects and the generous and committed benefactor of numerous charitable organizations. Both the community at large and the marital community benefitted greatly from her serving as, in her phrase, the "approachable face" of the couple. She did not need to be gainfully employed during the marriage and will not need to be now. 54 years of age, her fiscal and physical conditions are likewise strong.

5. Displaying the keen business sense that would serve him well over the years, Mr. Larson wrote to Bill Gates from Princeton to say he thought he'd only come to work for Microsoft if he received an equity interest in the company. With that wish granted, he returned to Seattle where he and Ms. Calhoun continued the dating relationship they'd begun in 1980. Despite her investment of homemade cookies mailed to him during his senior year, her own businesslike appraisal of him as the next few years unfolded was that "his stock wasn't trading too high with me." In early 1985, he proposed marriage, she demurred, he "made his case" and they "negotiated." She insisted upon a one year engagement and, accordingly, they lived together for about a year (without establishing joint accounts or jointly acquiring any significant assets) before they sealed their commitment with the exchange of wedding vows in July of 1986.

6. By May of 2009, finding herself frustrated by a communications and cooperation gap she felt had been growing for several years, Ms. Calhoun moved out of the parties' primary residence. She briefly moved back in the following month but all agree they never resided together "as husband and wife" after July of 2009. Through that summer, fall and winter, they engaged in unproductive, cursory discussions of a need to formalize their separation or divorce. The Court will adopt July 31, 2009 as the parties' date of separation.

7. From the beginning of the parties' marriage through 2001, the husband was employed by Microsoft. During this time, he received a salary and took full advantage of his employer's stock option and stock purchase plans. Consequently, the marital community amassed considerable wealth. It was testified that the total number of split-adjusted, hypothetical shares of Microsoft stock (if none had been sold) that went into the community estate would be 23,577,316.

8. The marital estate indisputably characterized as community property is currently valued at something over $100 million. It would be higher but for several factors. For one thing, when the community exercised stock options as it did to purchase millions of Microsoft shares, the strike price had to be paid as well as income tax on the "spread." Additionally, the community has had, and has acted upon, the ability to make substantial expenditures for purposes other than the production of income. These include pouring over $165 million into acquisition and renovation of the properties in the Highlands, the purchase of expensive homes in London, Hawaii, Snohomish County and

elsewhere, the construction of a couple of commercial buildings, the purchase of millions of dollars' worth of collectibles such as baseball memorabilia (his interest), Victorian posy holders (her interest), and fine art (appreciated by both) and the altogether commendable charitable contributions in excess of $120 million over the years of the marriage.

9. During the marriage, the community acquired several residential properties in the Highlands, a gated community in Shoreline overlooking Puget Sound. It is said that after acquiring the two properties known as Norcliffe and the Gatehouse for $5.7 million, they invested an additional $160 million in improvements. Included are such features as a ballroom to accommodate 200 guests, an underground parking garage to accommodate 24 vehicles and 13 water features including a turtle pond no doubt enjoyed by an untold number of turtles. In the real estate world, the term "superadequacy" (an improvement that costs more than its contributory value or that, due to its quality or uniqueness, is not fully valued in the marketplace) well describes the situation that has been produced; in fact, this is a rather extreme case.

Due to their physical, mechanical and aesthetic relationship, Norcliffe and the Gatehouse are best valued as a united estate. Having considered the opinions of Mr. Campos and Mr. Pope, the two real estate appraisal witnesses, the Court finds the current fair market value is $20,000,000. This includes the fixtures in the home (such as fireplaces, mantles, chandeliers and windows) but neither the hanging art nor the outdoor art pieces. While this figure is far below the amount put into the unquestionably fabulous estate, the facts remain that the

current market is not strong and this would be an astounding, record-setting high price for non-waterfront property in King County. It has been agreed that Mr. Larson will retain the Norcliffe and Gatehouse properties (and the Court will simply note with approval his expressed willingness to allow Ms. Calhoun the continued use of the premises through the summer of 2012).

10. For an additional $4.7 million, the community also acquired three adjoining homes in the Highlands. These are known as "Teltoft" ("a cute little Cape Cod"), "Jacob" ("dysfunctional and tired") and "Allen" ("an eclectic post-modern contemporary"). These properties are valued by the Court, respectively, at $1,430,000, $1,200,000 and $1,500,000. Teltoft should stay with Norcliffe and so it is awarded to Mr. Larson; Jacob and Allen shall be awarded to Ms. Calhoun.

11. In addition, the marital community acquired a number of other pieces of real property that are unencumbered and have been valued by stipulation. They are referred to in shorthand as "London" (approximately £10,770,000 or $17,055,803), "Hawaii" ($13,290,000), "Lake Armstrong" ($5,171,000), "Swauk Valley Ranch" ($1,850,000), "Thistledown" ($10,580,000 in commercial properties and $1,487,000 in residential properties), and "The Rocks" ($297,380). All of these are being awarded to Ms. Calhoun with the exception of The Rocks in Scottsdale, Arizona and the Thistledown residential property on Palatine Ave. N. and those pledged to Lakeside School.

12. As to the pieces of outdoor art on the Norcliffe grounds, it must be said that while they unquestionably add to the charm of the estate, they do not add value to match their value if sold separately. It is easily imaginable, for

instance, that a buyer who loved the house might not find it comforting to be always greeted by Diana's "restive dog"; he or she might well prefer a giant typewriter eraser or an Easter Island moai. As noted by both appraisers, those few in the market for a dream house in this price range will expect to indulge their own dream. Ms. Calhoun has expressed a wish to have certain of the outdoor pieces and the Court would award to her "Diana", "Undine", "Shivering Girl(s)", "Wood Nymph", "Girl with Basin" and her choice of either "Playdays" or "Joy of the Waters". To keep "Pan of Rohallion" with Norcliffe, the Court would award it to Mr. Larson. The paintings "Morning Sunshine" and "Sunny Window" would also be awarded to Ms. Calhoun. The stipulated value of these specific pieces awarded to each is approximately $4,500,000. As to the remainder of the outdoor and indoor art works, the parties will need to devise a protocol for effectuating a 50-50 division. The same should be done with respect to an equal division of any other personal property that the Court may neglect to address in these findings or the attached appendix.

13. The parties have other community property assets (such as vehicles, bank accounts, retirement funds, etc.), most of which need not be addressed in these findings although they should find inclusion in the appendix and the eventual decree.

14. Back in 1981, in order to enlist Mr. Larson's services, Microsoft allowed him to purchase a 0.5% equity interest in the company for the grand sum of $56.60. He willingly paid this price and in December of 1981 he was issued certificate number 8 for 56,600 shares in the company. These were his, free and

clear, as of that time. He did need to borrow from the company to pay the income taxes on the spread between the purchase price and the already appreciated value; this loan was repaid from his separate funds. This block of 56,600 pre-IPO shares of Microsoft stock, which subsequently underwent ten two-for-one splits, is the source of Mr. Larson's claimed separate estate. Hypothetically, if none were sold, these shares would have become 32,601,600 shares over time with a December 31, 2010 value of $909,910,656.

15. Before his marriage, Mr. Larson established a separate margin account with Goldman Sachs with an account number ending in 047-8. It was into this account that he placed those separately acquired stocks. Over the years, as these shares grew in both number and value, he used them to borrow against, to secure lines of credit and as the pledges for variable prepaid forward contracts. With the funds thus acquired, he made various investments including some big winners (Dell Computers, Silver Lake Partners), some big losers (Video Networks, Promptu Systems) and some that have appreciated on paper while paying no dividends or profits (Mudville Nine). Within the marriage, it was openly discussed that Mr. Larson would not take such risks with community funds as he did with the funds that he considered his separate estate.

16. As a result of the expenditure of community funds for real estate acquisitions and improvements, for charity and for consumption, while the separate funds were being invested more aggressively, the net result today happens to be that the purported separate estate has maintained a significantly higher value than the community estate although it could have turned out

otherwise. A major disputed issue at trial was whether the present assets that grew from investments made with the funds originating in that pre-marriage stock purchase yet retain a separate character or if they lost it somewhere along the way through commingling with community property.

17. Certainly a key witness at trial, if not *the* key witness, was Gregory Porter. He is the Certified Forensic Financial Analyst (a CFFA who is also a CPA with an MBA and a MS in Taxation) who provided the "tracing" analysis on behalf of Mr. Larson. In court, besides those letters, he tossed around many big numbers, most of them relating to Microsoft shares or to units of currency (dollars, pounds and Euros), but they also included the pretrial hours his team spent on their task ("1700") and the number of pages of materials they reviewed ("several hundred thousand"). It must be stated without equivocation that the Court found Mr. Porter to be an exceedingly reliable witness. His quick mind and engaging presentation were simply a top layer resting upon a solid foundation of a daunting amount of thorough and conscientious work. When he says, as he did, that Mr. Larson maintained "a consistent pattern and practice of keeping his 56,600 shares, and what they grew into and were used for, separate from his later-acquired assets," this carries great weight. This opinion was backed up by a financial records "E-exhibit" the likes of which the Court has not previously seen. Through its live links, documentation was a click away from any entry that demonstrated the source of any funds and the uses to which they were put. As Mr. Porter convincingly stated: "Everything was accounted for and nothing was left over."

18. When gauging the extent to which Mr. Larson had the intention to retain his pre-marital assets as a separate estate, the Court would note the following circumstances:

a) The consistent effort he expended to keep things separate, most all of it successful;

b) The corrective actions he took when he became aware of record-keeping errors made by others; and

c) The open discussions within the marriage of the fact that he would make risky investments with separate funds but not with community funds.

19. Mr. Larson testified that he thought it "prudent" to see that all Microsoft shares were correctly registered either in his name only or in both names and Mr. Porter described him as "meticulous" about doing so. For example, on February 1, 1995, Mr. Larson discovered that 125,000 recently issued shares had been incorrectly registered in his name alone. He immediately directed Microsoft to fix their error, to reissue the certificate in both names and to make sure the records reflected joint ownership dating back to the original issuance.

20. 160 Microsoft shares purchased early during the marriage and 45 shares awarded to Mr. Larson (on the 10^{th}, 15^{th} and 20^{th} anniversaries of his employment) should have been registered jointly but ended up in his name only and these went unnoticed. Together, these shares represent only .14% of his separate hypothetical shares, a *de minimis* amount relative to the 99.86% that were properly registered.

21. At a certain point, due to frequent stock splits, Microsoft stopped routinely issuing certificates to Mr. Larson, in favor of simply issuing "book shares" with registration records kept by a transfer agent. Through no fault on the part of Mr. Larson, and unbeknownst to him, some community-purchased shares were registered only in his name. In April of 2001, Mr. Larson became aware that 2 million mis-registered book shares and 200,000 mis-registered certificates (held in Microsoft's vault until transferred to a bank) were among a larger number that he had pledged to certain lending institutions as security. By June, he had seen that the records were corrected as to the book shares; it took a little longer to get the physical certificates returned and restored to the community but this was accomplished as expeditiously as possible. Through this mix-up, there was no loss to the community and no risk since Mr. Larson had millions of other separate property shares he could and would have used had he known of Microsoft's error. It is true that the community was deprived of the use of the shares during the time they were pledged but there is no indication at all that the community would have done anything other than continue holding the shares.

22. The unintentional use of a small amount of community property collateral to obtains funds (from margin loans, lines of credit or variable prepaid forward contracts) to be used for separate purposes neither harmed the community interest nor placed it in serious jeopardy of being harmed. The same is true as to the J.P. Morgan $50 million line of credit taken out by Mr. Larson in

2008, secured primarily by his interest in Mudville Nine with a value more than twice the amounts he could borrow. For this LOC, because Mr. Larson's separate Goldman Sachs account (047-8) was cross collateralizing the community's Goldman Sachs account (839-5), it was necessary to also pledge, as secondary collateral, certain pieces of community artwork. Again, this did not harm or threaten to harm the community and would not serve to transform the character of the assets acquired (or paid down) with the funds received solely by Mr. Larson on his own separate promise to repay.

23. Into Mr. Larson's separate Goldman Sachs account (047-8), there were a total of four mistaken deposits of community funds over the course of 24 years. One involved a 401(k) dividend ($9749), one involved a community dividend ($2341) and one involved funds from a community account ($23,224). The largest of the four errors ($867,698) came from a $6.6 million settlement of a dispute with UBS and Lydian, a dispute in which there had been separate claims on behalf of the community and Mr. Larson's separate estate. Significantly, Mr. Larson had given express instructions that the proceeds be distributed on a *pro rata* basis between the two accounts. He did not know until Mr. Porter's recent analysis that someone had made a miscalculation that favored the separate account. It sounds more than a little odd to term a cumulative $900,000 error *de minimis* but the fact of the matter is that, over the 24 year span, this account saw deposits totaling $1,800,318,815. Every dollar of this was traced and, of this amount, the mis-deposited funds represent .05%, a *de minimis* amount relative to the 99.95% traceable to separate sources. By comparison, during the same time

period, funds were taken from this separate account and used for community purposes at a rate Mr. Porter calculated at 100 times greater.

24. Mixing facts and law for a moment, the Court would conclude that the evidence has established clearly and convincingly that Mr. Larson's separate estate did not become commingled with the community estate. Funds used for his various post-marriage acquisitions (as discussed in paragraphs 25-27) have been clearly and convincingly traced to a separate source.

25. In 1992, Mr. Larson formed a new corporation and named it for a baseball team famous for leaving the tying runs stranded on base. "Mudville Nine, Inc." was created for the purpose of purchasing and holding a 30.636% interest in the Baseball Club of Seattle LLP, doing business as the Seattle Mariners. Despite the appearance of a couple of anomalous, inconsequential documents prepared by others, Mr. Larson has been at all times the sole shareholder in Mudville Nine. Over the years, Mr. Larson put approximately $65 million into this enterprise which, per the above discussion, remains his separate property. The current fair market value of this separately held asset was in substantial dispute at trial.

26. Each party presented expert testimony from a highly respected appraiser of sports franchises. The husband called Mary Ann Travers of Chicago and the wife presented Don Erickson of Dallas. As to be expected, these CPA's both analyzed the valuation question in terms of team revenues, presupposing rational economic behavior by buyers and sellers. Of course, sports team sellers are often driven to sell by circumstances beyond their control and buyers may

often be buoyed by their egos or, as in the 1992 purchase of the M's, their public spiritedness. Nonetheless, both experts agreed on a general approach: take some recent comparable sales, calculate an average ratio between the sale price and the team's annual revenues, then apply this function to the subject team's revenues to produce a base price that a willing buyer would be expected to pay to a willing seller for the team.

Choosing among the purported comparable transactions, each of which is distinguishable due to its own circumstances involving divorces, bankruptcy filings or MLB pressures, and then "adjusting" the conclusions, injects a distinct subjective element into this mathematical exercise. The Court has reviewed the details of transactions involving the Houston Astros, Texas Rangers, San Diego Padres, Chicago Cubs and Atlanta Braves. The Court would find the May 2011 Astros transaction and the December 2010 Rangers transaction to be the best comparables due to their recency, similar attendance and other factors. The Seattle Mariners' on-field performance probably slides in between the two but, from a business point of view, they enjoy a superior demographic. Based on these comparables, the Court would utilize a revenue multiplier of 3.2.

Applying this multiplier to the Mariners' approximately $190 million local revenue figure produces a value of $608,000,000. To this figure must be added the non-operating assets of the team. Assets include vacant land ($3,750,000), future receivables ($21,250,000), and excess working capital (approximately $20,000,000). There is also a liability for a deferred sales tax payment

($12,000,000). This produces a full enterprise value of $641,000,000. The value, then, of Mudville Nine's 30.636% interest would be $196,376,760.

Finally, in determining a *market* value, the Court finds it appropriate to apply a 10% discount based on the facts that Mudville's interest is a minority, non-controlling share and that the BCOS partnership agreement imposes restrictions on a partner's ability to broadly market his interest. This is a relatively low discount since the restrictions are not particularly onerous and were willingly accepted by the local owners with a view to keeping the Mariners "Safe at Home". While not being able to unilaterally hire and fire a field manager (à la Steinbrenner) or to prescribe players' facial hair or its absence (à la Finley), the local minority owners do retain an unusual level of control over certain key ownership decisions. Based on the foregoing, the Court would find the value of Mr. Larson's separate property interest in Mudville Nine, Inc. to be $176,739,084.

27. There are other readily identifiable assets that were acquired as part of Mr. Larson's separate estate. These include interests in the Kelowna Rockets hockey team, Silver Lake Partners, Promptu Systems Corp., Video Networks Ltd., and assorted funds and accounts as well as a 1911 Rolls Royce Silver Ghost, and paintings by Winslow Homer and Norman Rockwell. A fuller listing, together with the agreed values, is contained in the appendix. As to his highly risky investments in the "crammed-down" Promptu Systems and Video Networks (thus far resulting in nothing but heavy losses), the Court will follow the close-to-agreed recommendation that, on the off-chance that one of them finds

success, Ms. Calhoun shall share equally in any profits once Mr. Larson has recouped his investment together with a 100% risk premium.

28. It has been suggested that, by virtue of the fact that the community estate did not experience growth like that of Mr. Larson's separate estate, the Court should find there was a breach of fiduciary duty on his part as manager of the community funds. Of course, the community estate *did grow* tremendously in the sense that it increased from the zero balance at time of marriage to what it is today. In hindsight, it may be noted that, in the risks he took with his separate funds, Mr. Larson had more good picks than bad ones and meanwhile, like many others, he failed to foresee either the failures in the real estate market or in his marriage. As with many other couples, their community estate ended up heavily leveraged as they made joint decisions regarding expenditures for the acquisition of real estate, home improvements and furnishings and for charitable donations. It had to be the expectation shared by the marital community that they would go on for years jointly enjoying their homes and art collection with a passion not measurable by market appraisals. Finally, the husband's cancellation of his life insurance policy (with the $100,000 premium) was neither shown to have been ill-intentioned nor to have had any likelihood of causing harm. The Court would decline the invitation to find any breach of fiduciary duty.

29. As stated at the outset, the Court still must make a division of assets and liabilities that is just and equitable. Although deriving from the same root, the concept of equity refers not to an *equality* of result but rather is descriptive of a process. The result must be fair and the process of reaching it

must be even-handed. In applying this standard to the present case, the Court finds the following six points to be noteworthy:

a) To first address the "elephant in the ballroom", this is not a case like so many others where the concern is with making sure all in the family are housed, clothed and fed. Both of these impressive people will go on to do well and to do good. One has expressed a continuing commitment to fund efforts to ease the struggles of needy children while the other has pledged to continue giving generously to support education. The Court, of course, does not consider these intentions other than to applaud them.

b) Over the years, the community estate has received significant benefits from the husband's separately maintained assets. Of relative small significance is the separate estate's gift to the community that allowed for the purchase of the first family home on Capitol Hill. More significant is that Mr. Larson (and Mr. Porter) treated all Microsoft stock options exercised during the marriage as creating an entirely community asset, thus foregoing his claim under In re: Marriage of Short to his separate property portion of these stock grants that were received and partially earned before the marriage. Finally, over the years, the community has received substantial tax benefits due to the losses experienced by various separate assets.

c) The characterization of property as either separate or community is a legal conclusion that is driven by application of the law to the available evidence rather than by the more flexible notions of equity. In this case, the legal

conclusion as to the separate estate of the husband was compelled by evidence that was clear and convincing.

d) None of this is to say that, under its broad equitable powers, the Court cannot make a lopsided division of community assets and also invade a separate estate to the extent necessary to achieve a just result. It is the Court's intention to do both of these.

e) This was, after all, a long-term marriage in which the wife made a major contribution to all that the community accomplished, measured in terms of their children, their foster children, their impact in the broad community and their more narrow business interests. It is not that she leaves the marriage in need but the fact is she will leave the marriage in a less advantageous position than her husband.

f) The division to be effectuated will provide the wife with substantial earning capacity, moderate liquidity and assets that can be liquidated prudently as time goes by. Meanwhile, the husband, while retaining a substantially greater paper value with his separate property assets, will shoulder all of the parties' debt, most of the risk, heavy carrying costs and interest payments and a considerable amount of trapped-in tax liability. Again, it must be emphasized that both will continue to do well and both will continue to do good.

30. Consistent with the above discussion and the stipulations or agreements of the parties, the document attached as an appendix sets forth the assets and liabilities of the parties, designates their character as either

community or separate, states their value and makes the distribution deemed just and equitable by the Court.

31. As a further division of the assets of the parties, Mr. Larson shall deliver to Ms. Calhoun the sum of $12,000,000 at the time of entry of the decree, an additional $10,000,000 on January 1, 2013 and a final payment of $5,000,000 on January 1, 2014.

Having made the foregoing findings of fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. The parties' marriage is irretrievably broken and a decree of dissolution should enter.

3. The Larson-Calhoun marital community was in existence from July 5, 1986 through July 31, 2009.

4. The character of property is determined as of the date of its acquisition. Property owned by a spouse before marriage, together with the rents, issues and profits thereof, remains the separate property of that spouse. RCW 26.16.010. There is a presumption that any increase in the value of separate property is also separate. There is also a presumption that where separate and community estates coexist, if there are both separate and community funds available, the appropriate fund was used for expenditures

intended to benefit one or the other. In re: Marriage of Pearson-Maines, 70 Wn. App. 860, 867-8 (1993) (citing Pollock v. Pollock, 7 Wn. App. 394 (1972) and other cases.) On the other hand, when separate funds become "hopelessly commingled" with community funds, there is a presumption that they have become community property. To rebut a claim of such commingling, the burden is on the party asserting a separate interest in property acquired during the marriage to establish by clear and convincing evidence that the funding can be traced and identified to a separate source. In this case, the Court is satisfied that such tracing has established that the pre-marriage assets of the husband provided the funding for the post-marriage acquisitions labeled as his separate property in these findings.

5. In applying RCW 26.09.080, no single factor such as the duration of the marriage or the extent of separate property is to be given undue weight. Rather, the statute "directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property. The character of the property is a relevant factor which must be considered, but is not controlling." In re: Marriage of Konzen, 103 Wn. 2d 470, 478 (1985).

6. The assets and liabilities of the parties are characterized and valued and shall be disposed of as outlined in the findings above and the attached appendix.

7. During the next fourteen days, the parties shall work to agree upon the form of the necessary final orders to effectuate the rulings indicated herein

and submit them to the Court for entry. Certainly any additional matters that the Court has neglected to address should be incorporated into the Decree, as should any necessary corrections to the Court's arithmetic errors. If agreement is not possible, alternative proposals may be submitted along with a cover letter explaining any disagreements that remain. Based on those submissions, the Court will enter the Decree of Dissolution and, if necessary, an Order of Child Support.

Dated this 22nd day of December 2011.

_____

Honorable William L. Downing

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

APPENDIX

COMMUNITY PROPERTY	VALUE & AWARDED TO:	
	Mr. Larson	**Ms. Calhoun**
Norcliffe & Gatehouse	$20,000,000	
Teltoft	$ 1,430,000	
Jacobs		$ 1,200,000
Allen		$ 1,500,000
Hawaii		$13,290,000
London		$17,055,803
Lake Armstrong		$ 5,171,000
Swauk Valley Ranch		$ 1,850,000
The Rocks	$ 297,380	
Thistledown commercial properties		$10,580,000
Thistledown residential properties	$ 336,000	$ 1,151,000
Art work	$55,150,000	$55,150,000
Non-appraised art		$ 390,198
Furnishings	$ 3,340,938	$ 457,609
Collectibles	$ 1,515,070	$ 9,759,882
Golf club memberships	$ 12,000	
Vehicles	$ 212,825	$ 65,400
Jewelry		$ 596,268
Loan to brother		$ 231,000
Wine collection	$ 150,000	

	Mr. Larson	Ms. Calhoun
Goldman Sachs acct. -839-5	(-$113,565,847)	
Microsoft 401(k)		$ 4,002,755
Fidelity IRA		$ 4,000,191
Oppenheimer IRA	$ 6,114,836	
U.S. Bank accts.		
Joint		$ 2,243,485
Laurel accts.	$ 49,731	
Thistledown		$ 702,782
Bank of Hawaii acct.	$ 4,451	
Barclay's Bank acct.	$ 30,343	
National Westminster acct.		$ 56,887
MSFT shares (276,316)		$ 7,358,295
Fidelity acct. -068		$ 350,801
Laurel Ink, Laurel Gifts		$ 283,727
Laurel Foundation, Positive Transitions		$ 1,675,540
Opportunities for Education	$ 533,722	
Charitable commitments (Children's, Evergreen School Solid Ground, University Prep, Lakeside School)	(-$ 5,096,000)	

HUSBAND'S SEPARATE PROPERTY

Mudville Nine	$176,739,084
Less J.P. Morgan loan	(-$ 40,155,987)
Kelowna Rockets	$ 160,013
Promptu Systems	$ 4,878,600

Hon. William L. Downing
King County Superior Court
516 Third Ave
Seattle, WA 98104

	Mr. Larson	Ms. Calhoun
Video Networks	$ 1,284,624	
Bregal Fund	$ 890,019	
Sand Spring Fund	$ 0	
Silver Lake Partnerships	$ 52,204,911	
Goldman Sachs -047-8	$168,722,516	
Wells Fargo -0204	$ 511,356	
J.P. Morgan acct. (163,702 MSFT shares to W)	$ 8,121,210	$ 4,359,384
Microsoft stock (56,600 shares to H, 349,730 shares to W)	$ 1,507,258	$ 9,313,310
Separate artwork (3 pieces)	$ 4,800,000	
Baseball memorabilia	$ 2,199,221	
1911 Rolls Royce Silver Ghost	$ 1,400,000	
Loan to daughter	$ 318,429	

WIFE'S SEPARATE PROPERTY

Jewelry		$ 669,000

TRANSFER PAYMENTS (H to W)

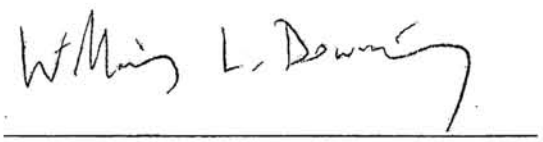
Entry of Decree	(-$ 12,000,000)	$ 12,000,000
January 1, 2013	(-$ 10,000,000)	$ 10,000,000
January 1, 2014	(-$ 5,000,000)	$ 5,000,000

King County Superior Court
Judicial Electronic Signature Page

Case Number: 10-3-04077-7
Case Title: LARSON VS CALHOUN

Document Title: ORDER FFCL

Signed by Judge: William Downing
Date: 12/22/2011 9:19:04 AM



Judge William Downing

This document is signed in accordance with the provisions in GR 30.
Certificate Hash: 70CC4E84F95D1278D4CC8C5D912EF7C33265BC33
Certificate effective date: 12/1/2010 9:38:13 AM
Certificate expiry date: 11/30/2012 9:38:13 AM
Certificate Issued by: CN=Washington State CA B1, OU=State of Washington CA, O=State of Washington PKI, C=US