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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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

It has long been the rule in Washington that the "right of the spouses in their separate property is as sacred as is their right in their community property." *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911), *quoted in Estate of Borghi*, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009). While RCW 26.09.080 gives the court discretion to award separate property of one spouse to the other, the issue presented by this case is the circumstances under which that discretion can be exercised.

In this case, the trial court erred in awarding the husband's separate property to the wife based on an overly broad interpretation of *Marriage of Konzen*, 103 Wn.2d 470, 477, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985), which rejected the proposition that "the situations which warrant an award of one spouse's separate property to the other spouse are 'exceptional.'" But the court must still find that a just and equitable division cannot be made from the community estate alone before separate property can be invaded, as the Supreme Court has held both before and after deciding *Konzen*. *Stokes v. Polley*, 145 Wn.2d 341, 347, 37 P.3d 1211 (2001); *Marriage of Holm*, 27 Wn.2d 456, 465, 178 P.2d 725 (1947). This rule properly recognizes the sanctity of a spouse's

separate property, making it available for division on dissolution only if the "nature and extent of the community property" is insufficient to make a just and equitable distribution.

The net community estate in this case was worth nearly $110 million. It was error for the trial court to award the wife the entire net value of the community estate *and* nearly 18% of the net value of the husband's separate estate without any findings or consideration whether the value of the community property alone was adequate to make a "just and equitable" division.

II. REPLY ARGUMENT

A. A Trial Court's Discretion in Dividing the Marital Estate on Divorce Is Not Boundless.

While trial courts have "broad discretion" in distributing marital assets in a dissolution action (Resp. Br. 14, *citing Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999)), the court cannot divide the marital estate without a proper consideration of the character of the individual assets and expect to be affirmed. *See, e.g., Marriage of Pollock*, 7 Wn. App. 394, 404, 499 P.2d 231 (1972) (reversing when the trial court did not have the proper character of the property in mind); *Marriage of Holm*, 27 Wn.2d 456, 466, 178 P.2d 725 (1947) (reversing after considering "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"); *see also Marriage of Bodine*, 34 Wn.2d 33, 35-36, 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 half of the community property); *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).

1. The Courts Have Long Disavowed the "No Reasonable Man" Standard of Review Proposed by the Wife.

In support of her claim that the trial court has "wide latitude and discretion" to divide the marital estate, the wife relies on *Rehak v. Rehak*, 1 Wn. App. 963, 465 P.2d 687 (1970) (Resp. Br. 35-36). But Division One disavowed and overruled *Rehak* for "its imprudent standard for the exercise of judicial discretion" in *Coggle v. Snow*, 56 Wn. App. 499, 506, 784 P.2d 554 (1990), because *Rehak* did not address the factors used by the trial court in exercising its discretion. In rejecting the "no reasonable man" standard of review applied in *Rehak,* 1 Wn. App. at 967, Division One noted that "[i]nstead of examining the reasons for the decision, this standard focuses on the reasonableness of the decision-maker.

But to say that an abuse of discretion exists when 'no reasonable man, woman or judge' would have taken the view adopted by the trial court is not accurate." *Coggle*, 56 Wn. App. at 506.

The *Coggle* court held that "[t]he proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." 56 Wn. App. at 507. The Supreme Court formally adopted this standard for review of family law decisions in *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). This standard of review properly focuses on whether the trial court's decision is based on the correct legal standard and whether the facts as found by the trial court meet the requirements of the correct legal standard. *Littlefield*, 133 Wn.2d at 47. (*See* App. Br. 20)

Even if *Rehak* had used the correct standard of review, the wife's reliance on it is misplaced. In *Rehak,* the community property was valued at $7,260, and the husband's separate property was valued at $30,000. Based on the parties' economic circumstances, including that the husband earned twice the income of the wife, the appellate court affirmed an award to the wife of "substantially all the community property." *Rehak*, 1 Wn. App. at 967. But the wife's award in *Rehak* included none of the husband's

separate property, which was more than four times the size of the community estate. Had the trial court in this case made an award similar to that in *Rehak,* the husband would agree that the trial court would not have abused its discretion. But the trial court here went far beyond what the trial court did in *Rehak,* awarding the wife all the net value of the community property *and* 18% of the net value of the husband's separate property.

In this case, the trial court abused its discretion by awarding a significant portion of the husband's separate property to the wife even though a just and equitable division could have been accomplished from the value of the community estate alone. *Holm,* 27 Wn.2d at 466. The trial court awarded the wife assets valued at $180,518,499, without any debt, an award equal to 100% of the net value of the community property ($109,638,032), all of her net separate property ($669,000), and an additional $70,211,467 from the value of the husband's separate property – nearly 18% of the net value of the husband's separate property, not 11% as the wife claims.[1] (*See* App. Br. 18-19) The trial court awarded the wife from

[1] The husband's separate property was valued at $397,253,948. (CP 300-01) $70,211,467 is 17.6% of the husband's separate property. The wife calculates the award at 11% of the husband's separate property by ignoring the fact that his community property award was a *negative* $29,538,773.

the husband's separate estate $27 million in cash and $13 million in Microsoft stock,[2] further exacerbating the acknowledged illiquidity of the award to the husband.[3] (CP 300-01)

2. The Husband Did Not Invite the Trial Court's Error.

The wife asserts that the husband "invited the error" because he proposed the property distribution that the trial court adopted. (Resp. Br. 16-17) This is not true. As the wife acknowledges (Resp. Br. 17), the husband proposed that the wife be awarded assets valued at $104 million (95% of the net value of community estate) and no debt.[4] And as the wife then admits, the trial court in fact awarded her "$139 million in real and personal property and

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[2] After the trial court awarded the Microsoft stock to the wife, the parties agreed to sell the stock for tax purposes and transfer the proceeds to the wife. (CP 261-62, 301)

[3] As the trial court recognized, "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." (Finding of Fact (FF) 29(f), CP 295)

[4] The wife also wrongly claims that the husband argues "for the first time on appeal" that separate property should only be invaded if "an award confined to community property" is insufficient to make a just and equitable division. (Resp. Br. 30) This has consistently been the husband's position, below and on appeal. As the husband argued in his trial brief, the wife should not have been awarded any value of the husband's separate property in light of the size of the community estate: "It is ludicrous to argue it is unfair to award Julia 'only' $104,000,000 in assets and no debt. Such an award would leave her fabulously wealthy, and it would give Chris almost none of the fruits of his labor from the 23-year marriage." (CP 69)

approximately $40 million of Larson's separate property [including the] $27 million transfer payment," and no debt. (Resp. Br. 17) The husband proposed that he shoulder all the parties' debt only if he received sufficient assets to service the debt. (CP 71-72, 76) Instead, the trial court awarded the wife $75 million *more* than the husband proposed, and left the husband with $75 million less with which to service all the parties' debt.

The husband also has never claimed that he was entitled to a "disproportionate award" because he was the "major income producer." (Resp. Br. 40-41, *citing Marriage of DeHollander,* 53 Wn. App. 695, 770 P.2d 638 (1989)). In *DeHollander,* Division Three reversed the trial court's award of a "larger share of the community property" to the wife on the grounds that she was the "major income producer" during the marriage. 53 Wn. App. at 701.[5] Here, the husband was not asking for a "disproportionate award" of the community property, and did not assert that he was entitled to more property because he was the "major income producer" during the marriage. Instead, the husband proposed that the wife receive almost the entire net value of the community estate, which resulted

[5] *DeHollander* in fact reflects a proper application of the correct standard of review. The appellate court reversed in that case because the trial court's division of property was based on an improper factor.

from both his community efforts and assistance from his separate estate. (CP 68-69; CP 71: "Chris's proposed property award allocates nearly 100% of the community net worth to Julia, while freeing her of the financial burden of the community debt.") The husband only asked that he be left with value equivalent to his separate estate – a proposal that was more than reasonable in light of the husband's "meticulous" efforts to keep his pre-marital assets separate (Finding of Fact (FF) 19, CP 287), and the fact that the community received "significant benefits from the husband's separately maintained assets." (FF 29(b), CP 294)

The wife claims that an award of a portion of the husband's separate property was necessary "to place [the wife] in a secure economic position," and that because of the husband's "significant separate property" the trial court could invade his separate property "without jeopardizing his financial security." (Resp. Br. 36) Both propositions are false. An award of 100% of the value of the community estate to the wife, debt-free, would have generated income of at least $2.196 million a year, without invasion of principal. (CP 71) And the community debts with which the husband was charged exceed his liquid assets by nearly $17 million, leaving him a net annual deficit of over $2 million. (*See* CP 299-

301)[6] Again, while the husband had initially proposed to take on all of the parties' debt, the proposal was premised on him retaining the net value of his separate estate. The husband did not invite the trial court's error, and the trial court abused its discretion in awarding the wife more than the value of the community property.

B. Separate Property Should Be Invaded Only if the Community Property Is Inadequate to Make a Just and Equitable Division.

The trial court failed to comply with RCW 26.09.080 and the case law interpreting the statute. The trial court ignored the "nature and extent" of the community and separate property when it awarded the wife all of the net value of the community property and almost a fifth of the net value of the husband's separate property, because its award was unnecessary to make a "just and equitable" division. It is undisputed that under RCW 26.09.080, both separate property and community property are available to the trial court to make a just and equitable distribution. But as the

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[6] The "liquid" assets awarded to the husband included his Microsoft stock in the encumbered community Goldman account ($73.463M), his separate Goldman account ($168.722M, of which $1.410M was illiquid), his JP Morgan account ($8.121M, of which $7 million was illiquid), and his Wells Fargo account ($511,000) – a total of $242.407 million. (CP 299-301; Exs. 116, 117, 124) He was ordered to pay debts of $232.280 million and to pay $27 million in cash to the wife, making his total obligations $259.280 million. (CP 299-301; Ex. 124)

Supreme Court held in *Marriage of Holm*, 27 Wn.2d 456, 466, 178 P.2d 725 (1947), and affirmed in *Stokes v. Polley*, 145 Wn.2d 341, 347, 37 P.3d 1211 (2001), separate property should only be invaded if the community property alone is insufficient to make a just and equitable award to the economically disadvantaged spouse.

1. RCW 26.09.080 Requires the Courts of Washington State to Consider the Character of the Property in Dividing the Marital Estate on Divorce.

The premise underlying the trial court's division of the marital estate, and the respondent's defense of that decision, is the misconceived notion that the trial court has unfettered discretion to award property in any fashion and to any party regardless of character. (*See* Resp. Br. 18-19) The trial court apparently concluded that because *Konzen* stated no "exceptional" circumstances are required to invade separate property and the character of property is not "controlling," the trial court can invade separate property in *any* circumstance, for *any* reason. (*See* Conclusion of Law (CL) 5, CP 297, *citing Marriage of Konzen,* 103 Wn.2d 470, 478, 693 P.2d 97 (1985)) The trial court's interpretation of *Konzen* goes too far and ignores the plain language of RCW 26.09.080, which requires the court to consider both the "nature and extent of the community

property" and the "nature and extent of the separate property" in dividing the marital estate. RCW 26.09.080(1), (2).

If separate property and community property were intended to be interchangeable in dividing the marital estate, the requirement of RCW 26.09.080 that the court consider the "nature and extent" of each asset's character would be superfluous. "It is well settled that statutes must not be construed in a manner that renders any portion thereof meaningless or superfluous." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 809, 16 P.3d 583 (2001). Further, there would be no point in requiring trial courts to "have in mind the correct character" of property if ultimately, as the trial court decided here, the character of the property has no impact on how the property is divided. *See Blood v. Blood,* 69 Wn.2d 680, 682, 419 P.2d 1006 (1966) ("the court must have in mind the correct character and status of the property as community or separate before any theory of division is ordered"); *see also Marriage of Pollock*, 7 Wn. App. 394, 404, 499 P.2d 231 (1972) (*citing Blood*).

The fact that separate property is available for distribution under RCW 26.09.080 does not mean that separate and community property are treated the same, or that one spouse's separate property may be awarded to the other spouse in any and every

circumstance. This would be inconsistent with the rule that 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)).

2. Washington Is Not a "Hotchpotch" State.

Throughout her response brief, the wife claims that the husband is arguing for a "departure" from the law of this state, or that he is asking the court to "overrule or substantially modify" Washington case law. (Resp. Br. 27-30) But in fact it is the wife who is asking this court to depart from the law of this state and transform Washington from a community property state to a "hotchpotch" state.[7]

In "hotchpotch" or "all-property" states, the courts are not limited "either by timing or method of acquisition or by source of funds, the property subject to a trial court's broad allocative power," *Krafick v. Krafick*, 234 Conn. 783, 792, 663 A.2d 365, 370 (1995),

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[7] The nine "hotchpotch" or "all-property" states are Connecticut (Conn. Gen. Stat. § 46b-81); Hawaii (Haw. Rev. Stat. § 580-47); Indiana (Ind. Code §31-15-7-4); Kansas (Kan. Stat. Ann. § 23-2802); Massachusetts (Mass. Gen. Laws ch. 208, § 34); North Dakota (N.D. Cent. Code § 14-05-24); Oregon (Or. Rev. Stat. § 107.105); South Dakota (S.D. Codified Laws § 25-4-44); and Wyoming (Wyo. Stat. Ann. 1977 § 20-2-114). Significantly, none of these are community property states.

and "all property" is available for distribution without regard to character. Unlike Washington, these states have no statutory definition of "marital" or "community" property, and no concept of "separate property." *Coppola v. Farina*, 50 Conn. Supp. 11, 13, 910 A.2d 1011, 1013-14 (Super. Ct. 2006). Further, while RCW 26.09.080 authorizes the court to distribute both separate and community property, our statute, unlike those of "all-property" states, requires the trial court to consider the "nature and extent" of each character of property before distributing the marital estate.[8]

3. Washington Preserves the Distinction Between Community and Separate Property Throughout the Marriage and on Divorce.

Washington's community property law is vastly different from an "all-property" or "hotchpotch" common law regime. Our statutory scheme clearly defines and distinguishes separate from

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[8] The wife also complains that the husband "hopes that by repeatedly citing" to out-of-state authorities, "this Court might be persuaded to ignore RCW 26.09.080." (Resp. Br. 31) The wife apparently is referring to a single footnote in the opening brief (App. Br. 27, fn. 5), in which the husband notes that many other jurisdictions prohibit an award of separate property if the community estate is sufficient to provide for the other spouse. The husband is not asking this court to adopt the laws of any other state; our statutes and case law compel the rule advocated here. *See* RCW 26.09.080; *Estate of Borghi*, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009); *Stokes v. Polley*, 145 Wn.2d 341, 347, 37 P.3d 1211 (2001); *Marriage of Holm*, 27 Wn.2d 456, 465, 178 P.2d 725 (1947). Nevertheless, the wife spends nearly five pages of her brief distinguishing the law of these states from Washington. (*See* Resp. Br. 30-34)

community property from the beginning of the marriage. RCW 26.16.010 (separate property is property owned prior to marriage, or acquired by gift or bequest after marriage); RCW 26.16.030 (community property is property acquired during the marriage, which is not separate property). During the marriage, our statutes distinguish how community and separate property may be managed. RCW 26.16.010 (spouses have unfettered discretion to unilaterally manage or dispose of separate property); RCW 26.16.030 (spouse needs the other spouse's consent to give away community property; to buy, sell, convey, or encumber community real property; and to acquire, purchase, sell, convey, or encumber assets of a community business). And when the marriage terminates on death, our statutes treat the deceased spouse's interest in community property differently than his or her interest in separate property. RCW 26.16.010 (spouse can bequeath all of his or her separate property to another); RCW 26.16.030 (spouse can bequeath only one-half of the community property); RCW 11.04.015 (on a spouse's death intestate, a surviving spouse is entitled to all of the community estate, but only to varying percentages of the decedent's separate estate, depending upon who else survives the decedent).

Finally, and most importantly for this case, when a marriage ends in divorce, our statutes treat separate property and community property differently. While both are available for distribution, the trial court must consider the "nature and extent" of property of each character before distributing the property to make a just and equitable division. RCW 26.09.080.

4. Reaffirming the Holdings of *Stokes* and *Holm* Will Increase Predictability and Equity in the Division of Marital Estates on Divorce.

"Consideration" of the "nature and extent" of the parties' separate and community property requires more from the trial court than that it be aware of the character of property, and thereafter turn a blind eye to its character when distributing it. Instead, "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; *see Holm*, 27 Wn.2d at 465. In other words, if the "nature and extent of community property" is sufficient to make a just and equitable distribution, separate property should not be invaded.

As the Supreme Court recognized in *Holm,* separate property *could* be awarded to the other spouse when necessary "to make adequate provision for the necessitous condition of the [other

spouse]." 27 Wn.2d at 465. The wife claims that the holding of *Holm* is "no longer the governing standard." (Resp. Br. 22) But *Holm* has never been overruled, its holding was reaffirmed in *Stokes,* and it is not inconsistent with *Konzen*'s holding that "exceptional" circumstances are not required before the court can invade separate property.

In *Konzen,* the Supreme Court affirmed the trial court's award of some of the husband's separate property to the wife based on the trial court's determination that a just and equitable division could not be made from only community property. The trial court "had chosen to award a portion of Mr. Konzen's separate property, *rather than a disproportionate share of the community property,* to Mrs. Konzen because the [husband's separate] military retired pay was a more liquid asset." 103 Wn.2d at 472 (emphasis added). In affirming, the Supreme Court rejected the husband's argument that the invasion of his separate property was an abuse of discretion because the parties' circumstances were not "exceptional." *Konzen,* 103 Wn.2d at 477-78. The Court reasoned that "under the circumstances of this case" – including that the community estate was not liquid and the wife was a recovering alcoholic with limited work experience – it was not an "abuse of discretion" to award the

wife some portion of the husband's separate property. *Konzen,* 103 Wn.2d at 478. Thus, the Court's decision in *Konzen* is consistent with both *Stokes* and *Holm.*[9] Because of the illiquid nature of the community estate and the wife's "necessitous condition," the trial court in *Konzen* needed to invade the husband's separate property to make a just and equitable division.

The wife argues that reaffirming the holdings of *Stokes* and *Holm* would "breed new dissolution litigation to determine what constitutes the appropriate circumstances for an award of separate property from one spouse to the other." (Resp. Br. 37) But the contrary is true. A ruling in this case recognizing the factors relevant to an award of one spouse's separate property to the other would give litigants and trial courts guidance as to when separate property should be invaded, instead of the unfettered (and unguided) discretion that the wife advocates.

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[9] In fact, the result in *Konzen* was similar to what the husband proposed here. The husband suggested an award of some portion of his liquid separate property to the wife, offering to take all the parties' debt so long as he received sufficient value from the community estate to service it. (*See* RP 552-55, 1232) Instead, the trial court left him with a *negative* $30 million from the community estate and $75 million less than he requested despite ordering him to pay all the community debt (over $192 million) and $27 million in cash to the wife. (CP 299-300)

As noted in the Statement of Grounds for Direct Review, "[w]ithout any meaningful guidance, superior courts make inconsistent decisions, either preserving or invading separate property in cases where the factual circumstances are otherwise similar. Direction from this Court will provide the public with enormous benefits by providing some predictability in the division of marital estates that include both separate and community property, and will allow attorneys to counsel their clients when separate property is likely to be invaded, increasing the likelihood that cases will be settled out of court instead of at trial." (Statement of Grounds 2)[10] The court should reaffirm the holdings of *Stokes* and *Holm,* and hold, consistent with all previous authority, that the

[10] The wife wrongly claims that the husband's argument has "morphed from his statement of grounds for direct review to his present brief." (Resp. Br. 12, fn. 8) In fact, the husband's argument has remained consistent. In the Statement of Grounds, the husband pointed out that *Konzen*, which was relied on heavily by the wife and trial court, did not provide meaningful guidance as to the circumstances under which invasion of separate property is appropriate, saying little more than that the character of property is not "controlling." (Statement of Grounds 8) The husband also pointed out that to the extent there is a pattern in recent Washington cases, our courts have approved 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 economically disadvantaged spouse would become impoverished if the other spouse's separate property was not invaded. (Statement of Grounds 8-9) This is fully consistent with the husband's argument in his substantive briefing that under *Holm* and *Stokes,* separate property should only be invaded if a just and equitable division cannot be made solely from the value of the community property.

trial court may award separate property of one spouse to the other only when an award of the value the community estate would be insufficient to make a just and equitable division of property.

The wife cites *Baker v. Baker,* 80 Wn.2d 736, 498 P.2d 315 (1972), for the proposition that the character of property is "not necessarily controlling; the ultimate question being whether the final division of the property is fair, just and equitable under all the circumstances." (Resp. Br. 18) But in *Baker* the Supreme Court affirmed an award to the wife of a portion of the husband's separate property expressly because the "nature and extent of the community property" was not sufficient to make a just and equitable distribution.

In *Baker*, the value of the community estate was $47,700 and the value of the husband's separate estate was $68,000. The trial court awarded the husband all of the assets (except for approximately $10,000 in personal property) and gave the wife a $50,000 judgment against the husband. *Baker,* 80 Wn.2d at 740. The husband had an MBA; the wife testified that she was "capable of doing only housework" and the court found that she had "no employment experience except for the period of time as a retail sales lady and rate clerk prior to the birth of her daughter" 14 years

earlier. *Baker,* 80 Wn.2d at 744, 747. In addition, the husband had left the marriage to pursue another woman (*Baker* was a pre-"no fault" case), and the trial court considered his fault in dividing the property. 80 Wn.2d at 748. Under those circumstances, the Supreme Court held that the trial court's property division was not a manifest abuse of discretion, particularly since almost all of the wife's award consisted of an inadequately-secured judgment lien. *Baker,* 80 Wn.2d at 747.

Similarly, in *Marriage of Bulicek,* 59 Wn. App. 630, 800 P.2d 394 (1990), the Court of Appeals affirmed an award to the wife of a portion of the husband's separate post-decree pension. As the wife acknowledges in her brief, the award was made in part because "the husband's 'advancements and pay raises during that time came as a direct result of community effort and performance. The prospective increase in retirement benefits due to increased pay after separation is founded on those 22 years of community effort." (Resp. Br. 25, *citing Bulicek,* 59 Wn. App. at 638-39) In other words, a division from the community estate alone would not have been just and equitable because it would have ignored the community effort that went to increase the husband's separate property.

But "under the circumstances of this case," an invasion of separate property was not warranted. As the trial court recognized, the community had "amassed considerable wealth" during the marriage. (FF 7, CP 281) Unlike in *Konzen,* this "considerable wealth" included net community assets of nearly $110 million, with significant liquidity. Unlike in *Baker,* the wife received substantial assets, in addition to a fully-secured money judgment. And unlike in *Bulicek,* there was no finding that the community benefited the husband's separate property without compensation. To the contrary, the trial court 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; *see also* RP 844)

5. Because Neither Party Disputes the Value or Character of the Assets in the Marital Estate No New Trial Is Necessary on Remand.

Contrary to the wife's claim on appeal, on remand there will be no "need to revisit the characterization and valuation decisions" previously made by the trial court. (Resp. Br. 44, fn. 20) The wife did not cross-appeal. Neither she nor the husband challenges the trial court's characterization of the assets, or their values. Those findings are now the law of the case, and cannot be revisited on

remand. *Marriage of Bernard*, 137 Wn. App. 827, 833, ¶ 12, 155 P.3d 171, 174 (2007) *aff'd,* 165 Wn.2d 895, 204 P.3d 907 (2009) (the trial court's decision becomes the law of the case and cannot be revisited on remand when party fails to raise a particular issue on appeal).

As the trial court recognized, this was "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." (FF 29(a), CP 294; *see also* FF 29(e), CP 295: "It is not that she leaves the marriage in need . . .") Because the "nature and extent of community property" was adequate to make a just and equitable provision for the wife, the trial court erred in invading the husband's separate property. In light of the trial court's previous findings, this Court should reverse and remand with directions to limit the wife's award to the value of the net community estate.

C. The Wife Was Awarded $180 Million and Can Pay Her Own Attorney Fees on Appeal.

The wife concedes, as she must, that she is not entitled to attorney fees under RCW 26.09.140 based on her need and the husband's ability to pay. (Resp. Br. 42) The wife's award of $180

million, debt-free, leaves her with more than adequate resources to pay her own attorney fees.

Instead, the wife claims that she is entitled to her attorney fees based on the husband's alleged "intransigence." The wife seeks to attach some sort of emotional motive (*i.e.* revenge) to the husband's appeal. (*See* Resp. Br. 43) But there is nothing vengeful about raising an issue that clearly needs to be addressed, and that is worth at least $70 million in this case. A party does not lose his property rights just because he (and his ex-wife) are multi-millionaires. Even if not "controlling," the character of property matters in dividing the marital estate on divorce; the wife admits that "some Washington courts have avoided awarding one spouse's separate property to the other." (Resp. Br. 35) Apparently other courts, like the trial court here, will invade separate property for no other reason than those courts believe they can. A decision reaffirming the holdings of *Stokes* and *Holm* will provide guidance to the lower courts and other litigants, and the husband is not intransigent in bringing his appeal to seek that result.

There is also no basis for an award of attorney fees based on any alleged intransigence by the husband below. As the wife acknowledges, "the case was tried aggressively" by both parties

(Resp. Br. 4), and the husband has never been found intransigent. This case is very different from those cited by the wife, where the wife was awarded attorney fees on appeal after the husband had already been found intransigent in the trial court, and the appeal was a continuation of the husband's intransigence in the trial court. *See, e.g., Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002) (husband "demonstrated his intransigence at trial. To appeal the result justifies an attorney fees award to [the wife] on appeal"*), rev. denied*, 148 Wash.2d 1011 (2003); *Marriage of Mattson*, 95 Wn. App. 592, 976 P.2d 157 (1999) (husband's "incremental disclosure" of income and "less than candid portrayal of his contract termination" justified award of fees in husband's two appeals of denial of child support modification) (both cited Resp. Br. 42)[11]

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[11] In the other cases cited by the wife in support of her demand for attorney fees, the appellate court *denied* fees on appeal because the husband raised "reasonable arguments," *Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997), while affirming fees awarded at trial. *Marriage of Morrow,* 53 Wn. App. 579, 591, 770 P.2d 197 (1989) (trial court awarded fees "necessitated in good measure" by the husband's intransigence, which forced the wife to "unravel numerous transactions to establish community interests"); *Eide v. Eide,* 1 Wn. App. 440, 445, 462 P.2d 562 (1969) (trial court awarded fees after finding husband's "recalcitrant, foot-dragging, obstructionist attitude, increased the cost of this litigation" to wife).

The husband was not intransigent below, and he is not intransigent in bringing this appeal. This court should deny the wife's request for attorney fees.

III. CONCLUSION

The trial court improperly invaded the husband's separate estate because the value of the parties' $109 million community estate was more than adequate to make a just and equitable award to the wife. This court should reverse and remand with directions to the trial court to reconsider its property award because the "nature and extent of the community property" is sufficient to make a just and equitable distribution. This court should also deny the wife's request for attorney fees.

Dated this 19th day of December, 2012.

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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 December 19, 2012, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 19th day of December, 2012.

Victoria K. Isaksen