FILED
SUPREME COURT
STATE OF WASHINGTON
9/5/2017 4:20 PM
BY SUSAN L. CARLSON
CLERK

No. 94836-4

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

JOHN GREGORY,

Petitioner,

v.

JENNIFER GREGORY,

Respondent

ANSWER TO PETITION FOR REVIEW

SAKAGUCHI & REESE, PLLC

By: Kristilyn Reese
WSBA No. 38938

11120 NE 2nd Street, Suite 201
Bellevue, WA 98004
(425) 456-1840

SMITH GOODFRIEND, P.S.

By: Valerie Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondent

TABLE OF CONTENTS

A. Relief Requested by Respondent. 1

B. Restatement of the Case. 1

C. Grounds for Denial of Review. 5

1. The Court of Appeals' unpublished opinion refusing to imply a clause terminating conversions is compelled by this Court's decisions interpreting marital agreements. 7

2. The Court of Appeals' unpublished opinion does not conflict with cases addressing RCW 26.16.140 because the parties' right to the conversions arose before they separated. 11

3. The Court of Appeals' unpublished opinion does not conflict with cases holding that donative intent is necessary to prove a gift because the parties agreed that separate property payment of community expenses "will be treated as a gift." 14

4. This Court should award attorney fees to respondent for having to answer this petition. 16

D. Conclusion. 16

TABLE OF AUTHORITIES

Page(s)

Cases

Aetna Life Ins. Co. v. Bunt,
110 Wn.2d 368, 754 P.2d 993 (1988)....................13

City of Tacoma v. City of Bonney Lake,
173 Wn.2d 584, 269 P.3d 1017 (2012)....................10

Connell v. Francisco,
127 Wn.2d 339, 898 P.2d 831 (1995).................... 5

Estate of Bachmeier,
147 Wn.2d 60, 52 P.3d 22 (2002).................... 7-10

Estate of Borghi,
167 Wn.2d 480, 219 P.3d 932 (2009)....................15

Estate of Catto,
88 Wn. App. 522, 944 P.2d 1052 (1997), *rev. denied*, 134 Wn.2d 1017 (1998).................... 7, 9-10

Estate of Lyman,
7 Wn. App. 945, 503 P.2d 1127 (1972), *rev. granted*, 81 Wn.2d 1010, *opinion adopted by* 82 Wn.2d 693 (1973)....................12

Kerr v. Cochran,
65 Wn.2d 211, 396 P.2d 642 (1964).................... 6, 11-12

Marriage of Schweitzer,
132 Wn.2d 318, 937 P.2d 1062 (1997).................... 7, 9-10

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

Marriage of Wright,
179 Wn. App. 257, 319 P.3d 45, *rev. denied*, 186 Wn.2d 1017 (2013)....................14

Peterson v. Sykes-Peterson,
133 Conn. App. 660, 37 A.3d 173 (2012).. 9

Seizer v. Sessions,
132 Wn.2d 642, 940 P.2d 261 (1997)..13

Togliatti v. Robertson,
29 Wn.2d 844, 190 P.2d 575 (1948) 14

Statutes

RCW 26.09.140..16

RCW 26.16.140 .... 6, 11-14

Rules and Regulations

RAP 13.4.. 7, 16-17

A. Relief Requested by Respondent.

Jennifer Gregory, respondent in the Court of Appeals, asks this Court to deny John Gregory's petition for review of Division One's July 17, 2017 unpublished decision affirming the trial court's decision that, by the plain terms of the parties' prenuptial agreement, the scheduled conversions of separate to community property on each anniversary of the parties' marriage continued until the marriage was dissolved and separate property payments towards community expenses were gifts to the community. The Court of Appeals' opinion does not conflict with decisions of this Court or the Court of Appeals and the lower courts' interpretation of the parties' negotiated prenuptial agreement presents no ground for review. This Court should award respondent her fees incurred in answering the petition.

B. Restatement of the Case.

Jennifer and John Gregory began living together in 1998, three years before Google hired John and granted him stock options vesting over the next five years. (RP 25, 26, 29) John was worth $12.8 million, originating almost entirely from Google stock, when he asked Jennifer to sign a prenuptial agreement a month before their September 2005 wedding. (RP 34, 37-42, 233; CP 500) A week

before the wedding, the parties signed a negotiated prenuptial agreement (the "Agreement")[1] providing that "on the fifth anniversary of the Marriage," twenty percent of each party's separate property would be converted to community property. (RP 42; CP 489) On each anniversary thereafter, an additional ten percent of the remaining separate property would be converted to community property until the couple's 15th wedding anniversary, when "all of each party's remaining separate property shall be converted to community property." (CP 489-90)

Because "it never came up," John did not redesignate any of his separate property as community property on the couple's fifth anniversary, or on any subsequent anniversaries. (RP 181, 192) The parties had contemplated that conversions might not occur contemporaneously, however; the Agreement provided that the community would have a lien on separate property until the conversions required by the Agreement were effected. (CP 490)

During the marriage, John paid community expenses from separate accounts in his name or by funding an account in both parties' names that he opened in 2012. (*See* RP 43, 86, 92, 165-66)

---

[1] The Agreement was admitted as Exhibit 3 at trial, and can be found in the Clerk's Papers at CP 487-502.

The Agreement also contemplated that community expenses might be paid from separate property; the parties agreed that "such separate property payments will be treated as a gift to the community and the contributing Spouse will not have any rights as lien holder against the community." (CP 490-91)

The parties separated on December 30, 2014, when John filed for divorce. (CP 1) Since John had never effected any of the conversions contemplated by the Agreement, the trial court had to determine the amount of the community lien. After an agreed continuance, trial was held on February 8, 2016. (*See* CP 442) The trial court calculated the community property lien as of September 13, 2015 – the parties' 10th marriage anniversary. (CP 442) The trial court rejected John's argument that the lien should be calculated as of the parties' 9th marriage anniversary – the last anniversary before John filed for dissolution – because under the plain language of the Agreement, conversions continued until there are no further anniversaries of the marriage. (CP 440-41) The trial court also rejected John's argument that the community property lien should be reduced by the amount of community expenses he had paid from his separate property, because the parties had agreed that such payments were "gifts" to the community. (CP 444)

John appealed the trial court's award to him of $7.208 million – two-thirds of the marital estate, and roughly twice the amount awarded Jennifer. (CP 539) Division One of the Court of Appeals affirmed in an unpublished decision because "the Agreement plainly states that on each anniversary after the fifth one, part of the party's separate property shall be converted to community property. The parties were still married on September 13, 2015, the tenth anniversary of their marriage. The applicable Agreement provision provided for conversion of separate property on that date without any limiting qualification about the status of the parties' relationship beyond the fact that they were married." (Opinion 6)

The Court of Appeals noted that if John and his attorney, who drafted the Agreement, intended that conversions terminate on the "date of separation" if the parties were married for more than five years, they "knew how to include further limitations when they intended them."[2] (Opinion 6) The Court of Appeals concluded that "John offers no persuasive reason why the trial court should have

[2] For instance, the Agreement provided that if a "dissolution" (defined as the marriage terminating by "dissolution, legal separation, or annulment") occurred in the first five years of marriage, John would convert a sufficient amount of his separate property to community property to equal the lesser of $2 million or 20% of John's separate property on the date of separation, with the intent that the separation be permanent. (CP 491)

implied a similar provision in the disputed provision when the parties did not include it." (Opinion 6) The Court also agreed that John was not entitled to credit for paying community expenses from his separate property because the Agreement made those payments gifts to the community. (Opinion 10)

C. Grounds for Denial of Review.

John seeks review of Division One's unpublished opinion, claiming it "conflicts with numerous decisions from this Court and the appellate courts across a range of topics" (Petition 19), despite receiving two-thirds of the marital estate – over $3.5 million more than Jennifer - including property that would have been community-like property but for the Agreement.[3] But the only issue before the courts below was the interpretation of the parties' unique, negotiated prenuptial Agreement, and Division One's opinion is wholly consistent with, and compelled by, this Court's decisions on interpretation of marital agreements. A decision from this Court

[3] Property acquired during a committed intimate relationship ("a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist") is presumed to be owned by both parties. *Connell v. Francisco*, 127 Wn.2d 339, 346, 351, 898 P.2d 831 (1995). By signing the Agreement characterizing all of John's property as separate, Jennifer (whose separate estate at the time was worth less than $10,000) gave up any community-like property claim to assets acquired by John during their premarital cohabitation.

addressing the interpretation of an agreement tailor-made for these parties, at the behest of the richer spouse and in aid of his efforts to reduce the wife's share of the marital estate even more than he accomplished by having her enter an agreement that overwhelmingly favored him, will provide no guidance to other litigants.

Division One's unpublished opinion does not conflict with any of this Court's decisions holding that contract interpretation cannot lead to absurd results (Petition 14-15); there is nothing "absurd" about an agreement benefitting the community the longer the parties are married. Division One's unpublished opinion does not conflict with this Court's decisions addressing the characterization of property acquired after a marriage is "defunct" under RCW 26.16.140 (Petition 6-12); the parties' rights to the scheduled conversions vested upon execution of the Agreement, and RCW 26.16.140 "has no effect on the status of property acquired prior to separation, nor does it dissolve the marital community." *Kerr v. Cochran,* 65 Wn.2d 211, 225, 396 P.2d 642 (1964). Division One's unpublished opinion does not conflict with this Court's decisions requiring evidence of "donative intent" to prove a gift (Petition 17-19); the Agreement plainly states that "separate property payments [toward community expenses] will be treated as a gift to the community." (CP 490-91)

This Court should deny review and award respondent her fees incurred in answering this meritless petition for review.

1. The Court of Appeals' unpublished opinion refusing to imply a clause terminating conversions is compelled by this Court's decisions interpreting marital agreements.

The Court of Appeals properly concluded that the scheduled community property conversions set out in the Agreement continued until the marriage was dissolved. The Court of Appeals' unpublished opinion is not in conflict with any decision from this Court or the lower appellate courts, warranting review under RAP 13.4(b)(1) or (2). Indeed, the lower courts' refusal to imply a provision in the Agreement that terminated conversions upon separation is compelled by this Court's decisions in *Marriage of Schweitzer,* 132 Wn.2d 318, 937 P.2d 1062 (1997) and *Estate of Bachmeier,* 147 Wn.2d 60, 52 P.3d 22 (2002), and Division Two's decision in *Estate of Catto,* 88 Wn. App. 522, 944 P.2d 1052 (1997), *rev. denied,* 134 Wn.2d 1017 (1998), all governing the interpretation of marital agreements.

As this Court stated in *Schweitzer,* "it is the duty of the court to declare the meaning of what is written, and not what was intended to be written." 132 Wn.2d at 327 (*cited in* Opinion 7) Because the Agreement here did not include a provision terminating the

conversions upon the parties' separation if the parties were married more than five years, the Court of Appeals properly declined to imply one. "In the absence of fraud, accident, or mistake, a court will not add, modify, or contradict the terms of a written contract." (Opinion 6-7, *quoting Schweitzer,* 132 Wn.2d at 327)

The lower courts' refusal to imply a provision in the Agreement terminating conversions upon the parties' separation is consistent with this Court's decision in *Estate of Bachmeier,* 147 Wn.2d 60, 52 P.3d 22 (2002), where this Court stated, "filing a dissolution proceeding is 'not the same as an intention to immediately effect an ex parte abandonment of a valuable contractual right." (Opinion 8, *quoting Bachmeier,* 147 Wn.2d at 64)

In *Bachmeier*, spouses executed an agreement that converted all their separate property to community property, and provided that upon the death of either spouse, all the community property would vest in the survivor. After the husband filed to dissolve the marriage, the wife changed her will to bequeath her estate to her daughter, and disinherited her husband. The wife died before the marriage was dissolved. Holding that the husband was entitled to the wife's share of the community property under the agreement, this Court rejected

the daughter's argument that it should imply a clause terminating the agreement if the underlying marriage became defunct:

> We are not persuaded in this case that there is a principled means of implying a termination clause to end a CPA when the parties' marriage has become defunct. Generally, courts function to enforce contracts as drafted by the parties and not to change the obligations of the contract the parties saw fit to make.

Bachmeier, 147 Wn.2d at 68; *see also Schweitzer,* 132 Wn.2d at 329 (Opinion 6-7) (refusing to rescind an agreement based on husband's claim that it was only operative at death); *Catto,* 88 Wn. App. at 529 (Opinion 7-8) (refusing to imply a termination clause to an agreement with "no express clause terminating the effectiveness of the agreement after the marriage becomes defunct").[4]

The Court of Appeals' unpublished opinion affirming the trial court's refusal to modify the parties' Agreement and imply a clause terminating conversions upon the parties' separation does not

---

[4] The Court of Appeals also properly rejected John's argument that the Agreement expressly contained a termination clause based on his claim that "anniversaries" end once the parties separate. (Petition 9) In doing so, the court relied on *Peterson v. Sykes-Peterson,* 133 Conn. App. 660, 37 A.3d 173 (2012), as "persuasive support." (Opinion 8-9) There, the Connecticut court refused to rewrite a "sunset clause" that terminated a prenuptial agreement on the parties' seventh wedding anniversary by adding language making the agreement unenforceable only if the parties were "still happily married and actually celebrating their seventh wedding anniversary" because had the parties desired that result they could have chosen language that indicated such an intent. (Opinion 8, *citing Peterson,* 37 A.3d at 177)

conflict with those cases cited by John holding that "contract interpretation must avoid absurd results." (Petition 14-16) John's argument that the parties would not have intended for the conversions to continue after the parties' separation is no different than the arguments rejected by this Court in *Bachmeier* and *Schweitzer,* and by Division Two in *Catto.* That John might not have intended this result, does not make the lower courts' interpretation of an agreement that he drafted and negotiated "absurd," nor is it basis for this Court to grant review.

"[W]hen interpreting a contract, we give ordinary meaning to the words in the contract and try to give effect to the parties' *mutual* intent." *City of Tacoma v. City of Bonney Lake,* 173 Wn.2d 584, 590, ¶ 14, 269 P.3d 1017 (2012) (emphasis added) (Petition 18); *see e.g. Schweitzer,* 132 Wn.2d at 329 (irrelevant that husband "unilaterally" believed that agreement converting each party's separate property to community property would only operate at death); *Bachmeier,* 147 Wn.2d at 68 ("unpersuaded" to imply a termination clause because, while parties might intend for the agreement to terminate upon the parties' separation, it is "equally possible" that they might not); *Catto,* 88 Wn. App. at 529 (refusing to include a termination clause when it is "conceivable" that its omission was intended). In this case,

in light of the substantial rights Jennifer waived to property that would have been otherwise characterized as community-like by signing the Agreement, it is not absurd, and is in fact "conceivable," that the parties intended for the Agreement, just as it was written, to allow the community to continue to receive benefits from John's purported separate property until the marriage is dissolved.

2. The Court of Appeals' unpublished opinion does not conflict with cases addressing RCW 26.16.140 because the parties' right to the conversions arose before they separated.

Ignoring the cases that compel the Court of Appeals' decision, John falsely alleges "conflicts" with decisions from this Court that hold that property acquired after parties are "living separate and apart" is separate property under RCW 26.16.140. (Petition 6-9) There is no conflict because those decisions have no bearing on the issue presented to the lower courts in this case. The property right at issue here – the right to conversions on each anniversary, starting with the fifth anniversary – arose *before* the parties separated, when the parties executed the Agreement.

RCW 26.16.140 "has no effect on the status of property acquired prior to the separation." *Kerr v. Cochran*, 65 Wn.2d 211, 225, 396 P.2d 642 (1964). "The filing of a divorce complaint [ ] in itself does not serve to change, modify or abrogate the property rights

of the parties otherwise existing" and "is not the same as an intention to immediately effect an ex parte abandonment of a valuable contractual right." *Estate of Lyman,* 7 Wn. App. 945, 950, 951, 503 P.2d 1127 (1972), *rev. granted,* 81 Wn.2d 1010, *opinion adopted by* 82 Wn.2d 693 (1973). It does not matter that the conversion could not be effected until after the parties separated, because the community's right to conversion on the parties' tenth anniversary arose prior to their separation. *See e.g. Marriage of Short,* 125 Wn.2d 865, 890 P.2 d 12 (1995).

In *Short,* the husband was awarded unvested stock options two months before the parties separated to compensate him for present employment services. This Court held that the options were acquired when granted and thus community property since they were received during the marriage. Even though the community had "no legal title or right of absolute ownership over the stock options" until they vested, 16 months and 22 months after the parties were "living separate and apart" under RCW 26.16.140, the stock options were nevertheless all community property because the parties' right to them arose during the marriage. *Short,* 125 Wn.2d at 873-75.

The Court of Appeals' opinion is controlled by this Court's decisions in *Kerr, Lyman,* and *Short.* Its unpublished opinion does

not conflict with other cases relied on by John, such as this Court's decision in *Seizer v. Sessions*, 132 Wn.2d 642, 940 P.2d 261 (1997). (Petition 6-7) As the Court of Appeals recognized, *Seizer* was distinguishable because it addressed the character of lottery winnings from a lottery ticket purchased by the husband after it was alleged that the parties' marriage was defunct under RCW 26.16.140. (Opinion 5-6) Because the status of the parties' property here was governed by an agreement entered prior to separation, the court properly concluded that *Seizer's* "statutory construction provides no guidance to the meaning of the Agreement."[5] (Opinion 5-6)

The other cases cited by John, like *Seizer*, address the character of property acquired after the marriage was alleged to be defunct under RCW 26.16.140, not existing property rights arising from the parties' voluntary agreement. *See Aetna Life Ins. Co. v. Bunt*, 110 Wn.2d 368, 754 P.2d 993 (1988) (Petition 7) (whether wife is entitled to life insurance proceeds depends on whether premiums were paid from husband's earnings before or after the marriage

---

[5] It was this distinction, not the "extreme facts" of *Seizer*, that governed Division One's decision. (Petition 12-13) Further, Judge Leach's musings during oral argument on whether RCW 26.16.140 only applies in matters involving third parties is not a basis for this Court to grant review. (Petition 13) That petitioner relies on this colloquy only demonstrates the weakness of his legal argument; the Court of Appeals' decision does not discuss, much less rely on, this point.

became defunct); *Togliatti v. Robertson,* 29 Wn.2d 844, 190 P.2d 575 (1948) (Petition 7) (saving bonds purchased by the husband after the marriage was defunct were his separate property); *Marriage of Wright,* 179 Wn. App. 257, 319 P.3d 45 (Petition 7-8) (the marriage was not defunct for purposes of RCW 26.16.140, therefore the community remained intact), *rev. denied,* 186 Wn.2d 1017 (2013). These cases, therefore, have no bearing here because the right to conversions arose prior to the parties' separation. For the same reason, John's claim that he was unaware "of the separate property rights established in RCW 26.16.140" (Petition 10-12) is irrelevant, nor is it a basis for this Court to review the Court of Appeals' decision.

3. The Court of Appeals' unpublished opinion does not conflict with cases holding that donative intent is necessary to prove a gift because the parties agreed that separate property payment of community expenses "will be treated as a gift."

The Court of Appeals properly affirmed the trial court's conclusion that John's contributions of separate property to a community account were gifts to the community rather than partial conversions under the Agreement. (Opinion 10, *citing* CP 490-91) The court's opinion does not "conflict with numerous decisions holding that gifting requires donative intent" (Petition 18) because the Agreement itself proves the parties' intent by specifically

providing that any separate funds contributed to the community account to pay expenses "will be treated as a gift to the community and the contributing Spouse will not have any rights as a lien holder against the community." (CP 491) The court's unpublished opinion is wholly consistent with *Estate of Borghi,* 167 Wn.2d 480, 485, 219 P.3d 932 (2009), where this Court held that the intent to gift separate property to the community can be proven by an acknowledged writing, including an agreement executed by the spouses. 167 Wn.2d at 488-89, ¶ 14. Not surprisingly, none of the cases John cites consider a written agreement that specifically states an intent to make a gift as is the situation here. (*See* Petition 18)

The Court of Appeals also properly rejected John's belated claim on appeal that rather than a "gift," it was his intention to "implement[ ] the annual conversions of separate property to community property" by depositing funds into the community account. (Petition 17) As the court noted, John testified to the contrary – it was *not* his intent to effect the scheduled conversions by depositing funds in the community account. (Opinion 10-11, *citing* RP 181: "I just provided her funds. I didn't categorize them.") In any event, whether John had an intention that was inconsistent with the

plain language of the parties' Agreement is not a basis for this Court to review the Court of Appeals' decision.

4. This Court should award attorney fees to respondent for having to answer this petition.

This Court should award attorney fees to Jennifer for having to respond to this petition, which provides no grounds under RAP 13.4 to warrant review. John leaves the marriage with nearly twice the assets as Jennifer, yet he continues to demand more. He has the ability to pay Jennifer's attorney fees to answer his petition and he should be ordered to do so. RCW 26.09.140.

D. Conclusion.

The Court of Appeals' unpublished opinion is wholly consistent with this Court's decisions governing the "range of topics" John presented to the lower courts in his efforts to evade the consequences of a prenuptial agreement that he insisted upon and that favored him. The decision does not conflict with any decisions from this Court or the lower appellate courts warranting review under RAP 13.4(b)(1) or (2), and a decision from this Court interpreting this private agreement between spouses could not address a "significant question of law under the Constitution" or raise an issue of "substantial public interest" that would warrant

review under RAP 13.4(b)(3), (4). This Court should deny review and award attorney fees to the respondent.

Dated this 5th day of September, 2017.

SAKAGUCHI & REESE, PLLC	SMITH GOODFRIEND, P.S.
By:	By:
Kristilyn Reese	Valerie Villacin
WSBA No. 38938	WSBA No. 34515

Attorneys for Respondent

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 September 5, 2017, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

Recipient	Method
Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Kristilyn Reese Sakaguchi & Reese, PLLC 11120 NE 2nd Street, Suite 201 Bellevue, WA 98004 KReese@sakaguchilaw.com Staff@sakaguchilaw.com mary@sakaguchilaw.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Shelby R. Frost Lemmel Masters Law Group PLLC 241 Madison Ave. N Bainbridge Island WA 98110 shelby@appeal-law.com paralegal@appeal-law.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 5th day of September, 2017.

Peyush Soni

SMITH GOODFRIEND, PS

September 05, 2017 - 4:20 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94836-4
Appellate Court Case Title:	John Gregory v. Jennifer Gregory
Superior Court Case Number:	14-3-08323-1

The following documents have been uploaded:

- 948364_Answer_Reply_Plus_20170905161857SC539532_5785.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  Certificate of Service
  The Original File Name was 2017 09 05 Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Staff@sakaguchilaw.com
- cate@washingtonappeals.com
- kreese@sakaguchilaw.com
- mary@sakaguchilaw.com
- paralegal@appeal-law.com
- shelby@appeal-law.com

Comments:

Sender Name: Peyush Soni - Email: peyush@washingtonappeals.com
Filing on Behalf of: Valerie A Villacin - Email: valerie@washingtonappeals.com (Alternate Email:)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20170905161857SC539532