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No. 98453-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 78989-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

HOVSEP MKRTCHYAN,

Petitioner,

and

LILIT ADAMYAN,

Respondent.

PETITION FOR REVIEW

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A. Identity of Petitioner.

Petitioner is Hovsep Mkrtchyan, appellant in the Court of Appeals.

B. Court of Appeals Decision.

Petitioner seeks review of the Court of Appeals decision affirming the trial court's characterization as community property, real property purchased with his separate funds and credit, and its parenting plan for the parties' son. The Court of Appeals' February 18, 2020 opinion is attached as Appendix A ("Op."). The Court of Appeals' March 23, 2020 order denying petitioner's timely motion to publish and motion for reconsideration is attached as Appendix B.

C. Issues Presented for Review.

1. Whether a spouse rebuts the presumption that real property acquired during the marriage is community property with proof that the down payment was from his separate funds and that he was the only spouse personally obligated on the loan to complete the purchase, which was secured by the real property?

2. Can a reviewing court determine that a trial court has not abused its discretion in entering a parenting plan when the trial court neither makes findings on the factors it is required to consider

under RCW 26.09.187 nor articulates its consideration of those factors in its oral ruling?

3. When a parent's mental health is placed at issue to the extent the trial court has ordered an evaluation of the potential risks to the child, must the trial court ensure that a culturally competent psychological evaluation be performed before entering a permanent parenting plan placing the child with that parent without restrictions?

D. Statement of the Case.

Petitioner Hovsep Mkrtchyan, then age 35, and respondent Lilit Adamyan, then age 30, married on August 29, 2014 in Armenia. (Finding of Fact (FF) 4, CP 11) Their only child was born August 2, 2015. (RP 1399) The parties separated after less than 26 months of marriage. (FF 5, CP 11) Final orders dissolving their marriage, distributing property, and establishing an equal residential schedule for the parties' son were entered on July 23, 2018. (CP 4-41)

1. Facts related to characterization of real property.

When the parties married in 2014, Hovsep, a software engineer employed with Microsoft since 2010, already owned assets valued over $109,000, including cash, retirement, and investments.

(RP 562, 1248-50; Exs. 3, 4, 5, 6) Lilit, who relocated from Armenia to the U.S. after marrying Hovsep, did not work outside the home, and came to the marriage with limited assets. (RP 1369-70)

After Lilit became pregnant, Hovsep wished to purchase a home for the family to live, but the marriage was already troubled, the parties were spending more than Hovsep earned (*Compare* Exs. 3, 4, 5 *with* Exs. 13, 14, 15; RP 1249-50), and the down payment would be from his separate property. Hovsep therefore asked Lilit to agree that the house would be his separate property. (RP 1185-86, 1246-47)

In September 2015, a year after the parties married, Hovsep purchased a house with separate funds and funds from a loan for which he was the only borrower, "as his separate estate." (RP 1247; Exs. 7, 9) Lilit signed a "non-applicant affidavit," affirming that to the extent she was required to sign "any loan (and loan-related) documentation," it was "solely for the purpose of pledging any and all interest of the undersigned in the collateral securing the loan, without personal obligation for payment of any sums secured by the Security Instrument." (Ex. 9) In a quit claim deed, Lilit "convey[ed] and quit claim[ed] to Hovsep Mkrtchyan, a married man as his separate estate," the house Hovsep purchased. (Exs. 8, 9)

The trial court found the quit claim deed signed by Lilit to be "questionable" because it was executed shortly after the son's birth, when Lilit's English language skills were still limited. (FF 8, CP 12) Although the trial court found that Hovsep used his separate property to make the down payment, it concluded the home was community property because "community funds were used to pay the mortgage during the course of the marriage." (FF 8, CP 12) The trial court made no finding as to the character of the mortgage.

The Court of Appeals affirmed the trial court's characterization, holding Hovsep's "use of his separate funds for a down payment does not rebut the presumption that the couple acquired the house as community property." (Op. 11) Division One's decision was premised on its mistaken belief that the trial court had found "the mortgage was community debt" (Op. 11), and on its rejection of the proposition that "property acquired during marriage has the same character as the funds used to purchase it" when it is "real property acquired by a down payment combined with a loan secured by a mortgage." (Op. 10-11)

2. Facts related to entry of parenting plan.

Prior to trial, Lilit was ordered to participate in two psychological evaluations to address whether she had mental health

issues that impaired her ability to exercise appropriate judgment in caring for the parties' young son. (CP 259, 367) Elevated test scores in both evaluations suggested Lilit was underreporting her mental health symptoms. (RP 133-34, 423-24, 444-45; *see also* Exs. 20, 21) In the latter evaluation, performed by Dr. Monique Brown, Lilit's test scores were consistent with a person who is "turbulent and compulsive" and has difficulties with "emotional control and impulse control" and "taking feedback." (RP 136-37, 218) Dr. Brown reported concerns about Lilit's ability to parent, specifically "around decision making and judgment." (RP 236) Despite Lilit displaying "elevations in interpersonal difficulties," Dr. Brown "deferred" diagnosing a personality disorder because psychotherapy was a better setting for diagnosis. (RP 135-36)

Hovsep asked to be primary residential parent. (*See* Ex. 49) Expressing concern that Dr. Brown's psychological evaluation pointed to the possibility of a personality disorder that could not be diagnosed absent psychotherapy, Hovsep also asked the court to order Lilit to begin mental health treatment to address the issues identified by Dr. Brown in her report, and to complete any treatment recommended by the provider. (RP 1241-42; CP 135)

The court-appointed guardian ad litem (GAL) also recommended that Hovsep be designated primary residential parent. (CP 942; RP 558) The GAL expressed concern that Lilit has mental health issues "that were coming to the surface but not diagnosed." (RP 612) While not recommending specific restrictions on Lilit's residential time, the GAL recommended she engage in psychotherapy to "address whatever issues [ ] I sense were left unaddressed for her." (RP 611-12)

Without addressing any of the RCW 26.09.187 factors, the trial court entered a parenting plan placing the son equally with both parents and ordering joint decision-making. (CP 25-26) The trial court found the psychological evaluations "interesting" but not "terribly helpful," reasoning that "because of the language difference, things got lost in translation . . . There are different cultural norms that might not translate to the forensic arena here." (FF 22, CP 18) Rather than address the issues that had been raised about her mental health, the trial court rationalized Lilit's behavior as the result of the "huge cultural differences between the US and the country that the parents were brought up in." (FF 22, CP 18-19)

In affirming the trial court, the Court of Appeals dismissed Hovsep's argument that by dismissing Dr. Brown's psychological

evaluation as being of "questionable validity" (FF 22, CP 19) the trial court left unanswered concerns raised by Hovsep and the GAL as to Lilit's mental health on the irrelevant ground that Lilit was not a native English speaker, reasoning that the trial court's rejection of the psychological evaluation was a "credibility determination" that it would not review. (Op. 4) Division One acknowledged that the trial court's findings did not address the RCW 26.09.187 factors governing entry of a permanent parenting plan, but affirmed based on an assumption that the "trial court discharged its duty" (Op. 5) because "the record shows the parents presented extensive evidence on each factor." (Op. 6)

E. Why This Court Should Grant Review.

1. The Court of Appeals decision characterizing the house as community property conflicts with established law and raises an issue of substantial public interest.

The Court of Appeals decision holding that the house was 100% community property even though it was acquired with petitioner's separate property and credit conflicts with decisions of this Court and the Court of Appeals, RAP 13.4(b)(1), (2), and raises an issue of substantial public interest concerning the proof necessary to rebut the presumption that real property acquired during the

marriage is community property, warranting review by this Court. RAP 13.4(b)(4).

This Court most recently reiterated the long-held principle that "the right of the spouses in their separate property is as sacred as is the right in their community property" in *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). Thus, spouses cannot be deprived of their separate property solely because it is used during the marriage to acquire additional property. "Separate property will remain separate property through changes and transitions, if the separate property remains traceable and identifiable." *Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Petitioner in this case proved to the trial court's satisfaction that the down payment was his separate property. (FF 8, CP 12) He also presented unchallenged evidence that he was the only spouse personally obligated on the mortgage, which was secured by the property itself. (Exs. 7, 9) In nevertheless holding that petitioner's "use of his separate funds for a down payment does not rebut the presumption the couple acquired the house as community property" (Op. 11), the Court of Appeals elevated the presumption that property acquired during marriage is community property to irrefutable fact, in conflict

with decisions from this Court and the Court of Appeals. RAP 13.4(b)(1), (2).

"[P]resumptions may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts." *State v. Jackson*, 112 Wn.2d 867, 873, 774 P.2d 1211 (1989) (quoted source omitted). The "actual facts" necessary to rebut the presumption that property acquired during marriage is community property is the tracing of funds used to acquire the property to separate property. *Scott v. Currie*, 7 Wn.2d 301, 306, 109 P.2d 526 (1941); *Estate of Binge,* 5 Wn.2d 446, 484, 105 P.2d 689, 705 (1940); *Schwarz v. Schwarz*, 192 Wn. App. 180, 189, ¶ 17, 368 P.3d 173 (2016). This is consistent with the long-established principle that "the community or separate character of real property is determined by the character of funds used in its purchase." *Rustad v. Rustad*, 61 Wn.2d 176, 178, 377 P.2d 414 (1963) (citing *Brookman v. Durkee*, 46 Wash. 578, 582-83, 90 P. 914 (1907)); *Chumbley,* 150 Wn.2d at 6; *Marriage of Kile & Kendall*, 186 Wn. App. 864, 883, ¶ 48, 347 P.3d 894 (2015); *Marriage of Lutz,* 74 Wn. App. 356, 364, 873 P.2d 566 (1994).

The Court of Appeals refused to apply the principle that "property acquired during the marriage has the same character as the

funds used to purchased it" because the property here was "real property acquired by a down payment combined with a loan secured by a mortgage" (Op. 10-11), reasoning that "the contested property was not truly 'acquired' in a single cash payment." (Op. 11) Its decision conflicts most directly with this Court's decision in *Borghi,* which held that "property acquired subject to a real estate contract or mortgage is acquired when the obligation is undertaken." 167 Wn.2d at 484, ¶ 8 (citing *Estate of Binge*, 5 Wn.2d at 484 and *Beam v. Beam*, 18 Wn. App. 444, 453, 569 P.2d 719 (1977), *rev. denied*, 90 Wn.2d 1001 (1978)).

Petitioner could not be deprived of the "sacred right" to his separate property simply because his down payment alone did not acquire the house. Instead, "where the buyer acquires legal title at the outset in exchange for a cash payment and an obligation to pay the remainder of the purchase price, the fractional share of the ownership represented by the cash payment will be owned as the cash was owned, and the character of ownership of the balance will be determined by the character of the credit pledged to secure the funds to pay the seller or to secure payment to the seller." Harry M. Cross, *The Community Property Law (Revised 1985),* 61 Wash. L. Rev. 13, 40 (1986) (quoted by this Court in *Chumbley,* 150 Wn.2d at

7-8, and cited in *Marriage of Zahm,* 138 Wn.2d 213, 224, 978 P.2d 498 (1999)).

Here, the "character of the credit pledged" was also petitioner's separate property. Where, as here, only the husband was liable for repayment of the loan, and the security for that repayment was the house acquired with the husband's separate property down payment, the monies borrowed upon that debt are separate in character. *See e.g. Estate of Finn*, 106 Wash. 137, 142-44, 179 P. 103 (1919) (real property purchased with wife's separate property and a note secured by a mortgage on wife's separate property was wife's separate property); *National Bank of Commerce of Seattle v. Green,* 1 Wn. App. 713, 718, 463 P.2d 187 (1969) (when a "note is collectible only out of separate property," it is indication that the debt is the separate obligation of the owner of the separate property).

Further, to the extent that the Court of Appeals decision stands for the proposition that any mortgage taken out during the marriage is irrebuttably a community debt, this is an issue that should be addressed by this Court. If this proposition were true, no spouse could ever acquire separate real property during the marriage with the proceeds of a loan, even if the loan is secured by the spouse's

separate property and the lender has agreed to only pursue payment from the borrowing spouse.

Finally, even if, as the Court of Appeals erroneously reasoned, the mortgage was a community debt, its holding that the house was entirely community property, notwithstanding petitioner's separate property down payment, conflicts with the "mortgage rule" that the character of an asset is "determined to be proportionate to the ratio of separate and/or community funds used to acquire the asset." *Zahm*, 138 Wn.2d at 224; *see also Estate of Parker,* 153 Wash. 392, 394-96, 279 P. 599 (1929); *Rawlings v. Heal*, 111 Wash. 218, 221, 190 P. 237 (1920); *Katterhagen v. Meister*, 75 Wash. 112, 114-16, 134 P. 673 (1913). Therefore, even assuming that the mortgage was a community debt, the house was still partially the husband's separate property to the extent of his down payment.

No public policy supports limiting a spouse's ability to acquire separate real property during marriage. Under the circumstances present here, the community will be protected from the borrowing spouse's obligation in the event of default because the lender can only execute against the borrower's separate real property. Further, to the extent community funds are used towards the obligation, the community is entitled to a lien on the property. *Borghi,* 167 Wn.2d

at 491, n. 7 (community contributions to the payment of obligations "may in some instances give rise to a community right of reimbursement protected by an equitable lien"); *Merkel v. Merkel*, 39 Wn.2d 102, 114, 234 P.2d 857 (1951) (community payment of mortgage on spouse's separate real property "would not . . . change the status of the property from separate to community, though it would impress the property with a community lien"). Because a spouse has the right to acquire separate property during marriage, this Court should grant review to address the characterization of real property acquired during the marriage with a spouse's separate funds and a loan made only to that spouse and secured by the property being acquired.

2. The Court of Appeals decision conflicts with established law requiring the trial court to articulate its consideration of statutory factors before entering a permanent parenting plan.

The Court of Appeals decision affirming the parenting plan even though the record does not show the trial court considered the mandatory factors under RCW 26.09.187 plan conflicts with the long-established principle that when a court must consider certain statutory factors before making a decision, the record must show that evidence was presented on each of the factors *and* that the trial court

articulated its consideration of those factors in written findings or otherwise, orally or in writing. *Marriage of Croley*, 91 Wn.2d 288, 291-92, 588 P.2d 738 (1978) (addressing former RCW 26.09.190, which RCW 26.09.187 replaced); *Murray v. Murray*, 28 Wn. App. 187, 189-90, 622 P.2d 1288 (1981) (same); *see also Marriage of Horner*, 151 Wn.2d 884, 895-96, 93 P.3d 124 (2004) (addressing RCW 26.09.520 child relocation factors); *Matter of K.J.B.*, 187 Wn.2d 592, 60, ¶¶ 29, 30, 387 P.3d 1072 (2017) (addressing RCW 13.34.180 factors to terminate rights of incarcerated parent). This Court should grant review under RAP 13.4(b)(1) and (2).

Rather than address the mandatory factors under RCW 26.09.187, the trial court's oral ruling and written findings here were largely focused on minimizing the behaviors that caused the father and GAL to question the mother's ability to exercise proper judgment related to the son. (FF 22, CP 17-21; 7/17 RP 16-32) While acknowledging the trial court did not specifically address any of the RCW 26.09.187 factors, the Court of Appeals nevertheless affirmed based on its independent review of the evidence, reasoning that because "the record shows the parents presented extensive evidence on each factor, and the court's ruling is consistent with having reviewed the evidence presented, we conclude the court adequately

considered the RCW 26.09.187(3)(a) factors." (Op. 6) Relying on this Court's decision in *Matter of K.J.B.*, 187 Wn.2d 592, which addressed the requirement that a trial court consider RCW 13.34.180 factors before terminating an incarcerated parent's rights, the Court of Appeals held "findings are not required when the statute requires only that the factors[s] be considered." (Op. 4-5) *See* 187 Wn.2d at 603-04, ¶ 24.

In affirming on this reasoning, the Court of Appeals both arrogated to itself a task left to the trial court and abandoned its proper role on review. "Findings of fact play a pivotal role upon review: the purpose of findings on ultimate and decisive issues is to enable an appellate court to intelligently review relevant questions upon appeal, and only when it clearly appears what questions were decided by the trial court, and the manner in which they were decided, are the requirements met." *Horner*, 151 Wn.2d at 895-96 (internal quotations and quoted source omitted). As this Court held in *Croley,* absent written findings on each statutory factor, the trial judge's oral opinion and written findings must "clearly indicate that the statutory factors were weighed in determining which parent would be best suited as custodian of the child." 91 Wn.2d at 292. And this Court in *K.J.B. reversed* a decision terminating an incarcerated parent's rights,

even though there was evidence in the record relevant to the statutory factors, because "the judge does not mention the factors at any point[;] we are unable to conclude the trial court weighed the mandatory issues in reaching its decision." 187 Wn.2d at 605, ¶ 30.

"Any presumption that the trial court considered the statutory factors is rebutted by the failure of the written findings or oral opinion to reflect any application of the statutory elements or to even mention the best interests of the child." *Murray*, 28 Wn. App. at 189-90. Here, the trial court never mentioned the RCW 26.09.187 factors, yet the Court of Appeals affirmed because it concluded the trial court's "ruling is consistent with having reviewed the evidence presented" on each factor. (Op. 6) Absent the trial court's articulation of how it applied the statutory factors to the evidence, the Court of Appeals wrongly placed itself in the role of fact finder, weighing the evidence and deciding for itself whether the parenting plan was appropriate.

This Court in *K.J.B.* reversed the Court of Appeals for doing exactly that as well. By affirming the trial court absent any record of the trial court's consideration of the statutory factors, the Court of Appeals in *K.J.B.* improperly "weigh[ed] the evidence on appeal" by finding "the evidence to be sufficiently strong such that reversal was

not required." 187 Wn.2d at 605-06, ¶ 31. *See also Horner,* 151 Wn.2d at 896-97 (addressing RCW 26.09.520; "only with such written documentation or oral articulations can we be certain that the trial court properly considered the interests of the child and the relocating person within the context of the competing interests and circumstances required by the [Child Relocation Act]").

The trial court's role is to weigh the evidence and resolve parenting disputes by applying the facts that it finds to the statutory factors before entering a permanent parenting plan; the appellate court's role is to determine whether given the facts found by the trial court and the applicable legal standard the trial court's decision falls with the range of acceptable choices. *Marriage of Littlefield,* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). When a court fails to fulfill its duty, as the trial court did here, or takes on an improper role, as the Court of Appeals did here, reversal and remand is necessary.

3. The Court of Appeals decision affirming the parenting plan absent a culturally competent psychological evaluation raises an issue of substantial public interest.

The trial court's failure to articulate the basis for its decision under RCW 26.09.187 is further compounded by its error in making a final parenting decision without a culturally competent

psychological evaluation of the mother. The Court of Appeals decision raises an issue of substantial public interest concerning the need for culturally competent psychological evaluations when a parent's mental health has been placed at issue to the extent the court believes an evaluation is necessary to protect the child, warranting review under RAP 13.4(b)(4).

Here, the mother was ordered to participate in two psychological evaluations because of concerns raised by the father and GAL regarding her mental health. The trial court ultimately found neither psychological evaluation created a "valid profile" and were of "questionable validity" because the mother was not a native English speaker, reasoning "there are different cultural norms that might not translate into the forensic arena here." (FF 22, CP 18) Yet the trial court entered a parenting plan while leaving unanswered the issues raised by the father and GAL.

The Court of Appeals affirmed on the ground "no expert believed a third evaluation would be helpful." (Op. 8) But Dr. Brown did not recommend another evaluation because she believed her evaluation, concluding the mother displayed "elevations in interpersonal difficulties," was valid. The GAL agreed, recommending instead that the mother participate in psychotherapy to address the

mental health issues implicated, but not diagnosed, in Dr. Brown's psychological evaluation. (RP 611-12) In not ordering another evaluation, the trial court was apparently influenced by the psychologist who first evaluated the mother, and who testified to her belief that no valid evaluation could be performed due to "language barriers" and because the mother had been raised within the Armenian culture. (RP 449, 452; Ex. 19 at 3)

The child of parents whose native language is not English is just as entitled to the protection of a decision made after consideration of all of the facts as a child of native English-speaking parents. This Court recognized a need for cultural competency on the part of an expert or professional conducting psychological evaluations in *State v. Sisouvanh*, 175 Wn.2d 607, 624, ¶ 31, 290 P.3d 942 (2012) (affirming acceptance of psychological evaluation of defendant while recognizing "the basic need for cultural competency on the part of an expert or professional person conducting a competency evaluation is important and indisputable"). When the trial court here found the existing psychological evaluations not valid because of cultural or language issues, the answer was to order a culturally competent evaluation, not to proceed with entering a permanent parenting plan without all the necessary facts.

F. Conclusion.

This Court should accept review, reverse the Court of Appeals, and direct the trial court on remand to recharacterize the house based on petitioner's separate property contributions and to vacate the parenting plan and enter a new plan after a culturally competent psychological evaluation and articulated consideration of the statutory factors in RCW 26.09.187.

Dated this 22nd day of April, 2020.

SMITH GOODFRIEND, P.S.

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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 April 22, 2020, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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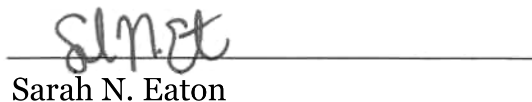
DATED at Seattle, Washington this 22nd day of April, 2020.



Sarah N. Eaton

FILED
2/18/2020
Court of Appeals
Division I
State of Washington

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

In the Matter of the Marriage of HOVSEP MKRTCHYAN, Appellant, and LILIT ADAMYAN, Respondent.	No. 78989-9-I UNPUBLISHED OPINION FILED: February 18, 2020

VERELLEN, J. — Hovsep Mkrtchyan appeals the court's entry of a permanent parenting plan and division of community property. Mkrtchyan argues the court abused its discretion because it did not consider each of the RCW 26.09.187(3)(a) factors before entering the parenting plan and because it did not order an additional psychological evaluation to confirm one expert's testimony. On the record presented, Mkrtchyan fails to show the trial court abused the broad discretion it has when entering a parenting plan.

Mkrtchyan argues the court erred by classifying the couple's house as community rather than separate property because, first, the down payment for the house came solely from his separate funds and, second, his then-wife transferred her interest in the house to him in a quitclaim deed. Because substantial evidence

supports the court's findings of fact and those findings support its conclusions of law, the court did not err.

Based on the parties' financial needs and abilities to pay, we award Adamyan attorney fees on appeal.

Therefore, we affirm.

FACTS

Hovsep Mkrtchyan had been living in Washington and working for Microsoft when he vacationed in his native Armenia and met fellow Armenian Lilit Adamyan. After a brief and mostly long-distance courtship, the two married on August 29, 2014, and Adamyan moved to Redmond with Mkrtchyan. She soon became pregnant with their son, M.M.

In September of 2015, they bought a house in Lynnwood. After M.M. was born, Adamyan was a full-time parent and homemaker, and Mkrtchyan continued working for Microsoft as a senior software developer. The couple's marriage became increasingly contentious and, on October 19, 2016, Mkrtchyan filed for dissolution.

The couple engaged in almost 20 months of acrimonious pretrial litigation. Mkrtchyan contended that Adamyan was mentally ill and a danger to their child. Adamyan contended that Mkrtchyan was abusive, using money and isolation to control her. The court appointed a guardian ad litem (GAL) to investigate the allegations and ordered both parents to undergo mental health evaluations. Dr.

Monique Brown evaluated Mkrtchyan and Adamyan, determined Adamyan was not mentally ill, and recommended therapy for both parents.

After a 10-day trial, the court granted the dissolution and entered a final parenting plan. The parents have shared decision-making authority and equal residential time with their son. As part of the plan, both parents must participate in one year of individual therapy. The court found that the couple's house was community property, although Mkrtchyan used his separate funds for the down payment. The court awarded Mkrtchyan the house and required that he pay Adamyan a $65,000 equalization payment.

Mkrtchyan appeals.

ANALYSIS

I. Parenting Plan

We review a trial court's decisions on the provisions of a parenting plan for abuse of discretion.[1] A court abuses its discretion where its decision rests on untenable grounds or was made for untenable reasons.[2]

Mkrtchyan argues the trial court "wholly disregarded" Dr. Brown's evaluation of Adamyan because it felt the evaluation was "not 'terribly helpful.'"[3] And, Mkrtchyan contends, disregarding the evaluation meant the court failed to consider every RCW 26.09.187(3)(a) factor before entering a permanent parenting plan.

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[1] In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

[2] Id.

[3] Appellant's Br. at 34-35 (quoting Clerk's Papers (CP) at 18).

Mkrtchyan's argument rests on an inaccurate premise. The court expressly "reviewed the evaluations by the psychologists,"[4] and heard several days of testimony from the psychologists about their evaluations.[5] After doing so, the court concluded the evaluations were "interesting but . . . not . . . terribly helpful."[6] The court did not disregard Dr. Brown's evaluation but instead gave it less weight than other evidence. This is a question of credibility, and we do not review credibility determinations by the finder of fact.[7] Because the court considered Adamyan's psychological evaluation, the real issue is whether the court adequately considered the factors required in RCW 26.09.187(3)(a).

Mkrtchyan argues "the absolute lack of findings assessing the factors under RCW 26.09.187" showed the court failed to consider them.[8] But "findings are not

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[4] CP at 18.

[5] Before Dr. Brown evaluated Adamyan, Dr. Christen Carson attempted an evaluation. Dr. Carson concluded her own results were invalid because of "five different cautions," such as Adamyan's cultural background and language skills, that potentially affected the validity of her testing. RP (June 7, 2018) at 398. Because these results were invalid and Dr. Brown had already tested Mkrtchyan, the court ordered that Dr. Brown evaluate Adamyan as well.

[6] CP at 18. The court did not explain why Dr. Brown's evaluation was not helpful, but it heard testimony from Dr. Carson strongly criticizing Dr. Brown's conclusions and methods. RP (June 7, 2018) at 444, 505-07 (testifying that Dr. Brown's conclusions about Adamyan possibly having a personality disorder were internally inconsistent and did not make sense). Dr. Carson also criticized Dr. Brown's use of a "controversial" testing protocol because "it can over-pathologize." Id. at 386, 406.

[7] Burrill v. Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002).

[8] Appellant's Br. at 37.

required when the statute requires only that the factor[s] be considered."[9] And in absence of evidence to the contrary, "we assume the trial court discharged its duty and considered all evidence before it."[10]

RCW 26.09.187(3)(a) requires that a court "consider the following factors" before entering a permanent parenting plan:

> (i) The relative strength, nature, and stability of the child's relationship with each parent;
>
> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
>
> (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004[(2)], including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
>
> (iv) The emotional needs and developmental level of the child;
>
> (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
>
> (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
>
> (vii) Each parent's employment schedule, and [the court] shall make accommodations consistent with those schedules.

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[9] Matter of Parental Rights to K.J.B., 187 Wn.2d 592, 603-06, 387 P.3d 1072 (2017).

[10] In re Marriage of Croley, 91 Wn.2d 288, 291, 588 P.2d 738 (1978); see Young v. Thomas, 193 Wn. App. 427, 443, 378 P.3d 183 (2016) ("'When evidence of those factors [in RCW 26.09.187(3)(a)] is before the court and its oral opinion and written findings reflect consideration of the statutory elements, specific findings are not required on each factor.'" (quoting In re Marriage of Murray, 28 Wn. App. 187, 189, 622 P.2d 1288 (1981))).

The first factor must be given the greatest weight.[11]

Because the statute merely requires consideration of every factor, the record shows the parties presented extensive evidence on each factor, and the court's ruling is consistent with having reviewed the evidence presented, we conclude the court adequately considered the RCW 26.09.187(3)(a) factors.

Specifically, the court reviewed every exhibit admitted. These exhibits included each parent's psychological evaluation and several GAL reports that addressed each RCW 26.09.187(3)(a) factor. In its oral ruling, the court found "each of you love your son very much" and "want what is best for him."[12] And the GAL reported that M.M. "is attached and bonded with each parent, and each has unique qualities that they bring to the child."[13]

Considering Mkrtchyan and Adamyan's abilities to parent, the court ordered one year of individual mental health counseling for each parent to benefit themselves and their son. This is consistent with Dr. Brown's recommendation that both parents

> work with their individual therapists on ways to embrace their cultural backgrounds and how their cultural differences with each other and within the culture within which they presently reside might affect their co-parenting and the changing identity needs of a child born and raised of immigrant parents in the United States.[14]

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[11] RCW 26.09.187(3)(a).

[12] RP (July 17, 2018) at 5.

[13] Ex. 35 at 10-11.

[14] RP (June 6, 2018) at 232 (quoting Ex. 21 at 29).

Similarly, the GAL recommended that both parents "seek individual mental health therapy for a period of one year."[15]

Mkrtchyan raised many concerns about Adamyan's ability to parent, but the court found any past issues "ha[ve] been resolved at this time" because M.M. "is getting good nutrition, love from everybody in this family, and [is] at this point thriving."[16] It also found that Adamyan "is working toward a new life" because she "has a new job, [is] renting a new apartment, has her own car, has better language skills, has been investigating daycares, [and] she not only supports speech therapy [for M.M.] but is actively expressing her opinions on who would be an appropriate therapist."[17] The court concluded Adamyan's past performance in the marriage was not reflective of her current state because she "has moved on from the person she once was when she moved here in 2014."[18]

The court accounted for M.M.'s daycare attendance and educational needs. The court considered both parents' work schedules in the parenting plan and revised the parenting plan after Adamyan's work schedule changed.

The court's written and oral rulings demonstrate that it considered each factor under RCW 26.09.187(3)(a).

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[15] Ex. 32 at 39.

[16] CP at 19-20.

[17] CP at 21.

[18] CP at 21.

Despite this record, Mkrtchyan argues the court lacked sufficient information on Adamyan and should have ordered a third psychological evaluation of her because Dr. Brown opined she could have an undiagnosed personality disorder. But no expert believed a third evaluation would be helpful. Dr. Brown and Dr. Carson both rejected conducting additional evaluations at that time.[19] And the GAL's final report recommended individual therapy rather than additional testing. Only Mkrtchyan supported further delaying entry of a permanent parenting plan to conduct a third psychological evaluation. The court did not abuse its discretion or otherwise err by rejecting Mkrtchyan's request for additional testing.[20]

On this record, Mkrtchyan fails to show the court abused its broad discretion by entering a final parenting plan with equal residential time and shared decision-making authority.

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[19] See RP (June 5, 2018) at 134 (Dr. Brown rejecting additional testing at the time); RP (June 7, 2018) at 508 (Dr. Carson testifying additional testing would not have been "prudent").

[20] To the extent Mkrtchyan suggests Dr. Brown's personality disorder theory compelled individual psychotherapy followed by additional testing of Adamyan, this argument rests on the credibility of Dr. Brown. But the trial court determined that Adamyan had resolved any parenting issues, implicitly rejecting any risk of future parenting issues. And credibility questions are left to the finder of fact. Burrill, 113 Wn. App. at 868. Given Dr. Carson's strong criticisms of Dr. Brown's conclusion on this topic, the court was free to give one expert's opinion greater weight than another's.

II. Property Division

In a dissolution proceeding, the characterization of property presents a mixed question of law and fact.[21] As a legal question, we review de novo whether the property was properly characterized as community or separate.[22] We review factual questions, such as when the property was acquired and the parties' intentions, for substantial evidence.[23]

Mkrtchyan contends the court erred by concluding the couple's house was community property. He argues "the home was the husband's separate property because the trial court properly found that the husband used his separate property to fund the down payment."[24]

RCW 26.16.010 defines "separate property" as any "[p]roperty and pecuniary rights owned by a spouse before marriage and that acquired by him or her afterwards by gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof." RCW 26.16.030 defines "community property" as any property, other than separate property, acquired after marriage. It is well settled in

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[21] In re Marriage of Kile & Kendall, 186 Wn. App. 864, 876, 347 P.3d 894 (2015).

[22] Id.

[23] Id.

[24] Appellant's Br. at 41.

Washington that "the character of property as separate or community property is determined at the date of acquisition."[25]

Here, it is undisputed that Mkrtchyan and Adamyan acquired the house during their marriage.[26] Thus, we presume the house was community property,[27] and Mkrtchyan has the burden of rebutting that presumption.[28]

To establish that the house was his separate property, Mkrtchyan must provide clear and convincing evidence he acquired the house with his separate funds.[29] He relies heavily on the court's finding that his separate funds were used for the down payment on the house. He quotes In re Marriage of Chumbley for the proposition that "[p]roperty acquired during marriage has the same character as the funds used to purchase it."[30] But the Chumbley court was analyzing a stock purchase,[31] which is legally and substantively different than a purchase of real property acquired by a down payment combined with a loan secured by a

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[25] In re Estate of Borghi, 167 Wn.2d 480, 483-84, 219 P.3d 932 (2009) (citing Harry M. Cross, The Community Property Law, 61 WASH. L. REV. 13, 39 (1986)).

[26] See RP (June 14, 2018) at 1187 (Mkrtchyan testifying that the house was purchased in September of 2015).

[27] Kile & Kendall, 186 Wn. App. at 876.

[28] See id. ("'The burden of rebutting this [community property] presumption is on the party challenging the asset's community property status and can only be overcome by clear and convincing proof that the transaction falls within the scope of a separate property exception.'") (internal quotation marks omitted) (quoting Dean v. Lehman, 143 Wn.2d 12, 19-20, 18 P.3d 523 (2001)).

[29] Schwarz v. Schwarz, 192 Wn. App. 180, 189, 368 P.3d 173 (2016).

[30] 150 Wn.2d 1, 5, 74 P.3d 129 (2003).

[31] Id. at 4-5.

mortgage.[32] The proposition from Chumbley is misapplied where, as here, the contested property was not truly "acquired" in a single cash payment.

Mkrtchyan and Adamyan used a mortgage to acquire a house during their marriage. Mkrtchyan does not challenge the finding that the mortgage was community debt, making it a verity on appeal.[33] And although Mkrtchyan notes he had separate property funds available to pay the mortgage, he fails to cite any evidence he actually used those funds to make mortgage payments. Under these facts, Mkrtchyan's use of his separate funds for a down payment does not rebut the presumption that the couple acquired the house as community property.

Mkrtchyan also relies on a quitclaim deed signed by Adamyan—purporting to deed her interest in the house to him—to rebut the community property presumption. But "the name on a deed or title does not determine the separate or community character of the property, or even provide much evidence."[34] The critical question is whether clear and convincing evidence shows the grantor spouse's intent to change the property from community to separate.[35] Because spousal intent is a question of fact, Mkrtchyan's argument is actually a challenge

[32] See State of Cal. v. Tax Comm'n of State, 55 Wn.2d 155, 158, 346 P.2d 1006 (1959) (shares of stock are personal property).

[33] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

[34] Borghi, 167 Wn.2d at 488.

[35] Id. at 484-85.

to the court's finding that Adamyan did not sign the quitclaim deed "of her own free will."[36]

We review findings of fact for substantial evidence.[37] Evidence is substantial when a sufficient quantity exists to persuade a fair-minded, rational person of its truth.[38] Substantial evidence supports a finding of fact even when contradicted by other evidence because credibility determinations are not subject to review.[39]

Substantial evidence supports the court's finding of fact. Adamyan testified she did not understand the quitclaim deed when she signed it. When they closed on the house, Adamyan had been living in the United States for approximately one year. She generally did not communicate in English at that time, even for a simple transaction like buying items in a store. According to Mkrtchyan, she was trying to get to the point of conducting such basic transactions in English. Adamyan and Mkrtchyan both testified that no one translated the quitclaim deed into Armenian or explained it to her in Armenian. As Adamyan explained, "[T]here were numerous documents displayed on the table. [Mkrtchyan] had told me that we were going there to sign the documentation for the newly purchased house. And I never

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[36] CP at 12 (finding of fact 8).

[37] Kile & Kendall, 186 Wn. App. at 876.

[38] In re Marriage of Raskob, 183 Wn. App. 503, 510 n.7, 334 P.3d 30 (2014) (quoting Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

[39] Burrill, 113 Wn. App. at 868.

asked him what was the meaning of . . . that paperwork because I trusted [him]."[40] Although Adamyan also testified she "didn't even doubt that [Mkrtchyan] could buy a house without [her]"[41] and Mkrtchyan testified that Adamyan said she did not care whether the house was separate property, this contradictory evidence does not unsettle the trial court's finding of fact.

Substantial evidence supports the trial court's factual determination that Adamyan did not intend to change the house into separate property when she signed the quitclaim deed. Because Mkrtchyan does not present clear and convincing evidence to rebut the presumption that the house was community property, the court did not err by classifying it as such.

III. Attorney Fees on Appeal

Adamyan requests attorney fees on appeal. RAP 18.1 authorizes an award of attorney fees where allowed by law. Under RCW 26.09.140, a party may be entitled to attorney fees on appeal. An award of attorney fees under RCW 26.09.140 includes consideration of "'the parties' relative ability to pay.'"[42]

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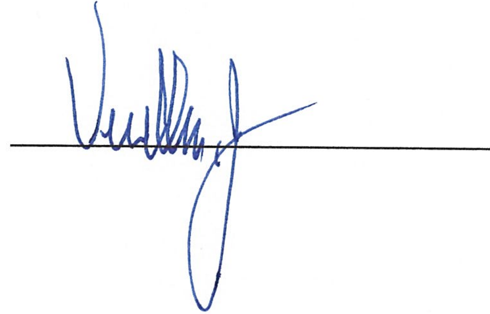
[40] RP (June 20, 2018) at 1400-01. Adamyan testified through an Armenian interpreter.

[41] Id. at 1400.

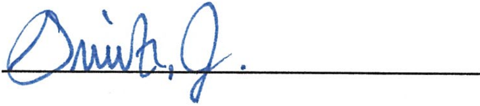
[42] In re Marriage of Muhammad, 153 Wn.2d 795, 807, 108 P.3d 779 (2005) (quoting In re Marriage of Leslie, 90 Wn. App. 796, 807, 954 P.2d 330 (1998)).

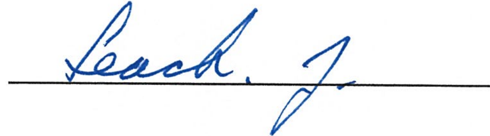
Based on Mkrtchyan's substantially greater ability to pay,[43] we award Adamyan attorney fees from this appeal upon her compliance with RAP 18.1.

Therefore, we affirm.



WE CONCUR:





[43] Mkrtchyan failed to file a financial affidavit as required by RAP 18.1(c). The record before us reveals his monthly income is several times greater than Adamyan's.

FILED
3/23/2020
Court of Appeals
Division I
State of Washington

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

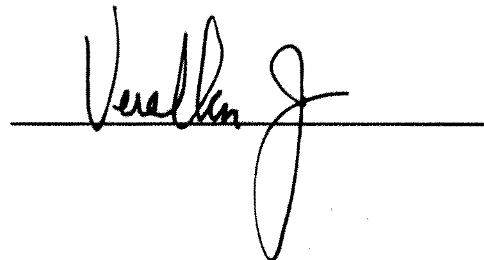
In the Matter of the Marriage of HOVSEP MKRTCHYAN, Appellant, and LILIT ADAMYAN, Respondent.	No. 78989-9-I ORDER DENYING MOTION TO PUBLISH OPINION AND MOTION FOR RECONSIDERATION

Appellant Hovsep Mkrtchyan filed a motion to publish and a motion for reconsideration of the opinion filed in this case on February 18, 2020. Having considered the motions, the panel has determined they should both be denied. Therefore, it is hereby

ORDERED that appellant's motion to publish the opinion is denied. It is further

ORDERED that appellant's motion for reconsideration is denied.

FOR THE PANEL:



SMITH GOODFRIEND, PS

April 22, 2020 - 2:55 PM

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