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No. 98990-7

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

BEVERLY SEVIGNY,

Respondent,

v.

MICHAEL G. SEVIGNY,

Petitioner.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Jonathan B. Collins
WSBA No. 48807

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

Attorneys for Respondent

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I. Introduction.

After 33 years of marriage, the parties were separated for two years before this dissolution action was commenced. Three more years passed before the matter came to trial. The husband, who historically and at trial controlled the parties' finances, failed to provide any information about the (admittedly) community businesses after he left the marriage, and made no effort to trace any part of the marital estate to his "earnings and accumulations" after separation. The husband nevertheless now claims as a basis for review that his estranged wife had the obligation to prove a community interest in assets acquired by the community businesses after separation.

Contrary to statute, case law, and public policy, the husband's petition for review argues, in essence, that he was free to use the community businesses to acquire assets that would not only be his separate property, but that would be not subject to consideration or division on dissolution, because "breakups are hard." (Pet. 18) This Court should deny the husband's petition for review of the Court of Appeals' unpublished opinion affirming the trial court's division of the marital estate, which raises no possible grounds for further review in this Court under RAP 13.4(b).

II. Restatement of facts.

A. A community business controlled by the husband acquired several properties after separation. At trial in 2018 the husband provided no information about the community businesses for years after 2012.

Beverly and Michael Sevigny, both born in 1958, married in 1979. (RP 99-100) Beverly was a stay-at-home parent to the parties' five children, now all adults, before returning to work as a paraprofessional in the Zillah School District. The community and their eldest son were equal partners in a construction firm, M. Sevigny Construction, founded in 2007, and a real estate company, 16th Avenue Properties LLC (the "LLC"), founded in 2012. (RP 14-15, 102; Op. App. A 2-3)[1]

Michael and Beverly separated in 2013, when Michael left the family home; Beverly filed a petition for dissolution in 2015. (CP 13, 3; Op. App. A 3) The LLC had acquired two office buildings, a vacant lot, three residential properties, an industrial warehouse, and a 20% interest in another LLC that owned a large medical building after the parties separated and before Beverly filed for dissolution. (RP 127-28, 169-70; Resp. Ex. 2.23; *see also* Op. App. A 6-8) At trial in 2018

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[1] The appendix to the petition for review is cited as "App. A;" the Court of Appeals' opinion is App. A 1-21 and is cited as "Op. App. A."

before Judge Gayle Harthcock of Yakima County Superior Court ("the trial court"), the main issue was the community's interest in the LLC.

Beverly's commercial real estate appraiser appraised the value of the LLC including its real property holdings. (Resp. Ex. 2.23; Op. App A 9) Although Michael testified that he did not own these assets—the LLC did—and that because the LLC was a community asset, Beverly had a 25% ownership interest in it (RP 188-89), he argued that the community had no interest in these real properties and that they could not be considered in division of the marital estate because they had been acquired by the LLC after separation. Michael relied solely on the parties' 2012 income tax return to estimate the value of the LLC, and on a 2012 financial report to estimate the value of M. Sevigny Construction. Although testifying he had this information in his possession, Michael provided the trial court with no information about the community businesses or their holdings for any year after 2012. (RP 217-18, 112-14; Resp. Ex. 2.3, 2.8, 2.9; Op. App. A 10)

B. The trial court awarded all income-producing property to the husband and ordered an equalizing judgment to the wife.

The trial court was concerned that Michael had not been transparent about his current financial circumstances, noting that he failed to produce any recent income information despite testifying that he could do so. (RP 226; Op. App. A 14) The trial court was concerned that Michael appeared to be hiding income; in particular, he had not wanted Beverly "to know that there had been some additional rental" from the large medical building in which the LLC had a 20% interest. (RP 226; CP 50)

Michael had recognized a disproportionate division in Beverly's favor was appropriate. (Resp. Ex. 2.3; Op. App. A 3) Working with the evidence it had, the trial court ordered a 60/40 division of property in Beverly's favor, awarding Michael a vacation cabin, several vehicles, and all of the income-producing property, including the community businesses, and Beverly the family home, her car, minimal retirement and life insurance accounts, a sewing machine, and an equalizing judgment to achieve a 60-40 division. (CP 10-11; RP 226; Op. App. A 3) After increasing the value of the family home awarded to Beverly and taking into account tax liabilities Michael claimed he would incur, the trial court ordered

an equalizing payment of $707,485 from Michael to Beverly, to be paid by August 5, 2018, and bearing interest at 4% per annum. (CP 46; Op. App. A 3)

At the conclusion of trial, the trial court had estimated Michael's expected gross monthly income at $19,693. (CP 50) Working full-time for the Zillah School District, Beverly earned $26,530 gross per year ($2,210 monthly) at the time of trial. (RP 13-14, 45; Pet. Ex. 1.2; CP 51) The trial court awarded maintenance of $6,500 per month for 10 years, finding that amount equitable given Beverly's estimated net monthly income of $1,701.70 and Michael's estimated net monthly income of $14,832. (CP 9)

C. The Court of Appeals affirmed the property distribution and remanded for reconsideration of maintenance in an unpublished opinion.

In an unpublished opinion, Division Three affirmed the property distribution, recognizing that "the LLC was community property, not Michael's property, as Michael admitted at trial," and that "Michael presented no evidence at trial to establish that the LLC increased in value because of his investment of separate funds or his separate efforts after the parties separated." (Op. App A 11) Noting there was no evidence in the record "as to the source of funds used" to acquire properties on behalf of the LLC (Op. App. A 6), and that

Michael "did no tracing to establish that he used separate funds to acquire any of the properties the LLC purchased after separation," the Court of Appeals confirmed that he had "failed to meet his burden" to show that these properties were his separate property rather than part of the community interest in the LLC. (Op. App. A 9) Because "[a]ll of the parties' property, both community and separate, is before the trial court for distribution," and the trial court has broad discretion to "ensure the final division is fair, just and equitable" (Op. App. A 12), the Court of Appeals affirmed the 60/40 division of the parties' assets, noting that the parties had been married for 33 years, that they had substantially "disparate earning histories," and that "Beverly did not finish college because she married Michael and remained out of the workforce to raise their five children." (Op. App. A 14)

The Court of Appeals remanded the maintenance award "with directions to consider maintenance in light of the monetary judgment Michael owes to Beverly and his ability to simultaneously pay off that judgment and pay reasonable maintenance." (Op. App. A 19) On remand, the consequence of the Court of Appeals' decision will be to necessarily force Michael to fully reveal his current financial circumstances. Respondent is confident that the evidence

on remand will demonstrate that there is no impediment to petitioner paying both the equalizing judgment, at its reduced interest rate, and maintenance, especially given Michael's most recent financial declaration revealing he currently enjoys a gross monthly income of $35,763 (App. A 31)—far exceeding the trial court's estimation of his expected monthly income at the conclusion of trial. (CP 50) Respondent Beverly Sevigny therefore does not cross-petition for review of the Court of Appeals' unpublished opinion remanding on maintenance and affirming the imposition of interest at only 4% on the equalizing judgment.

III. Argument why review should be denied.

A. Petitioner's failure as a matter of fact to prove that properties acquired after separation by the community business were his separate property does not warrant further review.

Petitioner's contention that the Court of Appeals failed to apply the "straightforward approach to characterizing property" required by RCW 26.16.140, that "property acquired after separation is it is [sic] presumed to be the separate property of the separated spouse acquiring it" (Pet. 14-15) is wrong both as a matter of law and fact. First, RCW 26.16.140 says nothing about the date of acquisition of property, or its consequence to the division of property under RCW 26.09.080. It only provides that "[w]hen spouses or domestic

partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each." RCW 26.16.140. Second, the husband did not acquire *any* of the properties at issue here. The LLC that he conceded was community in nature acquired the properties. The properties at issue were not petitioner's personal "earnings and accumulations" under RCW 26.16.140, and the husband presented no evidence that the properties were acquired with his post-separation "earnings and accumulations." (RP 189; Op. App. A 9)

When the marital community has an interest in a business, the value of that interest rises and falls with the business even after separation. "[S]ince the legal status remains, the management is presumptively on behalf of the community, and the burden is upon the person who says it is not to prove this fact by clear and convincing evidence." 19 Scott J. Horenstein, *Washington Practice, Family and Community Property Law* § 12:18 (2nd ed. 2015), citing *Dizard & Getty v. Damson*, 63 Wn.2d 526, 530-31, 387 P.2d 964 (1964). *See also Marriage of Sedlock*, 69 Wn. App. 484, 509, 849 P.2d 1243, *rev. denied*, 122 Wn. 2d 1014 (1993) (post-separation increase or decrease in a property's value is shared by the community unless a

party can trace separate contributions by clear and convincing evidence).

Consistent with this rule that the manager spouse of a community business has the burden of rebutting the presumption that actions taken on behalf of the business were not for the community benefit, the spouse controlling an asset that he alleges is separate property bears the burden of proving his claim. For that reason, the *Sedlock* court rejected the husband's claim that a condo he had purchased after separation was his separate property, because he failed to prove by clear and convincing evidence that he had made the down payment from post-separation earnings. 69 Wn. App. at 509.

The husband here likewise had the burden of proving he acquired properties after separation with separate property. And although he was the only one with access to this information, he utterly failed to produce any evidence, much less prove by clear and convincing evidence that properties acquired by the community business after separation could be traced to his separate earnings or accumulations. (Op. App. A 9) "When a party fails to produce relevant evidence within its control, without satisfactory explanation, the inference is that such evidence would be

unfavorable to the nonproducing party." *See Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 689, 871 P.2d 146 (1994) (*citing Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977)).

Petitioner claims the Court of Appeals misapplied *Berol v. Berol*, 37 Wn.2d 380, 223 P.2d 1055 (1950), asserting that *Berol* has nothing to do with the "presumption that post-separation property is separate." (Pet. 17) But the Court of Appeals did not rely on *Berol* to support its conclusion that the properties at issue here are community property; rather, the Court of Appeals explained that *because* the LLC was a community asset—as the husband admitted—he was required under *Berol* to present "clear and satisfactory evidence" showing that that "funds used" to acquire the properties in the community LLC could "be traced with some degree of particularity" to the husband's separate funds, and that a "self-serving declaration . . . claiming the property" as his own fails that burden. (Op. App. A 8, quoting *Berol*, 37 Wn.2d at 382.) Indeed, later courts have relied on *Berol* for the same proposition. *See, e.g., Sedlock*, 69 Wn. App. at 509. The Court of Appeals' decision is wholly consistent with *Berol*.

Further, the evidence petitioner *did* submit at trial fully supported the trial court's findings. Corporate income tax returns for the community business proved that the properties belonged to the business, and not to him. (Resp. Ex. 2.9, 2.21) The husband admitted at trial that the LLC was a community business and that the wife's ownership interest was equal to his own. (RP 189; Op. App. A 6) At least two of the properties at issue were obtained using corporate (and thus community) credit. (Resp. Ex. 2.22) When asked to produce any evidence that he had contributed separate earnings or accumulations to the acquisition of these properties, the husband claimed that such evidence existed, but failed to produce it. (RP 189; Op. App. A 10) And contrary to his claims, during separation "both [parties] treated the LLC as a community asset and the income generated from properties the LLC purchased both before and after separation as community income," noting that the parties filed "joint tax returns declaring income from the LLC as community income." (Op. App. A 9; Pet. Ex. 1.25, 1.26, 1.27, 1.28)

All property in the marital estate, community or separate, is available for distribution upon dissolution (not separation) under RCW 26.09.080. There is no need for "clarification" of RCW 26.16.140 because "breakups are hard," or because this Court should

soothe "the newly-single in [their] time of distress" by clarifying the statute and thereby "put[ting] their future financial life out of reach of the old relationship." (Pet. 18-19) If petitioner wants to take the "first step to finality and moving on" (Pet. 19), he should satisfy the trial court's equalizing judgment rather than waxing poetic on meritless statutory interpretations of the parties' burdens of proof in characterizing property subject to distribution on dissolution.

The Court of Appeals properly recognized that petitioner failed "to establish that he used separate funds to acquire any of the properties the LLC purchased after separation." (Op. App A 9) Recognition of this fact-based failure of proof in an unpublished opinion does not warrant further review in this Court. Thus, the Court need not accept review of this unpublished opinion to "address the scope and intent of RCW 26.16.140 in helping divorcing couples to move on" (Pet. 18), as RCW 26.09.080, not RCW 26.16.140, governs the division of the marital estate at dissolution.

B. The Court of Appeals' unpublished opinion conflicts with neither *Borghi* nor any other authority.

Petitioner contends the Court of Appeals' unpublished opinion conflicts with *Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009), but provides little analysis other than to suggest the Court of

Appeals failed to follow *Borghi* because the case requires that the characterization of property be "determined on the date of acquisition." (Pet. 18) The Court of Appeals' unpublished opinion conflicts with neither *Borghi* nor any other authority.

Borghi centered on a dispute over the characterization of real property after a spouse had died intestate. There was no dispute that the house was the wife's separate property when she acquired it nine years before marriage, and that it remained her separate property when she married the husband. *Borghi,* 167 Wn.2d at 484. After the wife died intestate, however, the husband argued that the wife had given the property to the community because she included his name on the fulfillment deed when the contract on the property was paid off. This Court disagreed, holding the mere presence of the husband's name on the deed was not enough to overcome the presumption that the property remained the wife's separate property. *Borghi,* 167 Wn.2d at 490.

Like RCW 26.16.140, *Borghi* is irrelevant to the trial court's authority to "make disposition of the property and the liabilities of the parties, either community or separate," in a dissolution proceeding under RCW 26.09.080. To the extent *Borghi* sheds any light on the characterization of property, it is the logical inverse of

this case. Just as the husband in *Borghi* failed to show that the wife's separate property became a community asset because she included his name on the fulfillment deed, the husband here failed to show that properties acquired by a community business after separation were his separate property.

The Court of Appeals' unpublished opinion also does not conflict with any of the other cases petitioner footnotes, with no analysis, in arguing for further review. (Pet. 9, n.4-8) For instance, the issue was whether the community had an interest in a house that the wife had purchased *before* marriage—an unambiguously separate asset— in both *Elam v. Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982) (distinguished at Op. App. A 10-11) and *Marriage of Pearson-Maines*, 70 Wn. App. 860, 865, 855 P.2d 1210 (1993) ("In the instant case, the [property] was undisputedly Ms. Pearson-Maines' separate property at acquisition because it was purchased prior to cohabitation and marriage from her separate funds.") (both cases cited Pet. 9, n.4). *Elam* in particular only supports the proposition that any post-separation increase in the value of the community businesses was presumptively community property.

Similarly irrelevant are, for example, *Marriage of Short*, 125 Wn.2d 865, 869-70, 890 P.2d 12 (1995) (Pet. 9, n.5), where the

question was whether stock options acquired during marriage but vested after separation compensated the husband for community or separate efforts, and *Marriage of Griswold*, 112 Wn. App. 333, 339-41, 48 P.3d 1018 (2002) (Pet. 9, n.8), *rev. denied*, 148 Wn.2d 1023 (2003), which relied on *Short* in addressing the same issue. *See also Marriage of Harrington*, 85 Wn. App. 613, 625-26 , 935 P.2d 1357 (1997) (applying *Short*) (Pet. 9, n.5). The analyses of these cases have no application here, where no stock options are at issue, and the petitioner presented *no* evidence that he contributed post-separation funds to the LLC's property acquisitions. The Court of Appeals' unpublished opinion conflicts with neither *Borghi* nor any of the other decisions in petitioner's string cites, and does not warrant further review.

C. The property division is not inequitable because the equalizing judgment was partially satisfied when petitioner sold property.

Petitioner also asks this Court to take review because he claims it required him to sell property to partially satisfy the equalizing judgment. (Pet. 12-14) Leaving aside that the judgment was only partially satisfied, over the husband's objections, when real properties under his control were sold, this argument again seeks to relitigate factual issues that the trial court had broad discretion to

resolve and that the Court of Appeals correctly affirmed in its unpublished decision.

Petitioner's claim that the trial court's 60/40 distribution resulted in a 78/22 or 82/18 distribution (Pet. 12-14) is mathematical nonsense. The trial court relied on substantial evidence to determine the value of the parties' assets, divided those assets, and then calculated the offsetting payment owed to ensure a 60/40 distribution. (Op. App. A 11-15) An offsetting payment presumes that one party will transfer assets in some form to the other party; that does not alter the overall proportion of assets distributed to the parties. And in this case, the husband indisputably still retains the community's most valuable, income-producing properties. There was absolutely no proof what income any of these properties provided to the husband only *because the husband refused to reveal that information at trial.* (RP 189; Op. App. A 9) In any event, one of the properties sold was a vacation cabin that generated no income, and the husband's most recent financial declaration shows that even after (involuntarily) partially satisfying the equalizing judgment he is still making *more* money than the trial court estimated he would. (*Compare* App. A 31 *with* CP 50; App. A 26)

Petitioner cannot withhold financial information at trial and then seek review on the grounds that the trial court abused its discretion when it divided the parties' property based on the evidence it had. To the extent the husband disputes the property distribution based on his ability to pay, the Court of Appeals' unchallenged remand of the maintenance award with specific instructions to consider maintenance "in light of the monetary judgment Michael owes Beverly and his ability to simultaneously pay off that judgment" (Op. App. A 19) fully satisfies his (unwarranted) concerns.

The trial court has broad discretion to determine a fair and equitable distribution of property, which will not be disturbed absent a showing that the trial court manifestly abused its discretion. *Brewer v. Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). The trial court is not required to divide property equally, particularly after a long-term marriage. *Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008). The Court of Appeals' unpublished opinion affirming the property distribution does not conflict with any Washington authority and does not warrant further review.

IV. Conclusion.

The petition for review should be denied.

Dated this 29th day of October, 2020.

SMITH GOODFRIEND, P.S.

By:

Catherine W. Smith
WSBA No. 9542
Jonathan B. Collins
WSBA No. 48807

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 October 29, 2020, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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Emily Schwab Hazel & Schwab 1420 Summitview Ave Yakima WA 98902-2941 emily@davidhazel.com dianar@davidhazel.com	___ Facsimile ___ Messenger ___ U.S. Mail _x_ E-Mail
Gregory M. Miller Sidney C. Tribe Carney Badley Spellman PS 701 5th Ave Ste 3600 Seattle, WA 98104-7010 miller@carneylaw.com tribe@carneylaw.com	___ Facsimile ___ Messenger ___ U.S. Mail _x_ E-Mail

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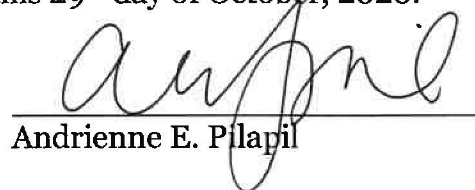

Andrienne E. Pilapil

SMITH GOODFRIEND, PS

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Filing on Behalf of: Catherine Wright Smith - Email: cate@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

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