No. _____

Court of Appeals No. 75155-7-I

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

JOHN GREGORY,

Appellant,

and

JENNIFER GREGORY,

Respondent.

PETITION FOR REVIEW

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INTRODUCTION

The parties' prenuptial agreement provides that both will convert a percentage of their separate property to community property on anniversaries of the marriage, beginning on the sixth anniversary. A conversion is accomplished simply by redesignating title. The Agreement preserves all remaining separate property.

The appellate court held that John Gregory converted about $1 million separate property to community property nine months after filing for divorce, when the parties lived apart and the marriage was defunct. Since there was no community, there could be no community property. The court's holding conflicts with numerous cases from this Court and the appellate courts routinely applying the living separate and apart statute. The appellate court's refusal to apply that rule also creates additional conflicts, principally those providing that parties must *knowingly* waive a legal right by contract and that contract interpretation cannot lead to absurd results.

The appellate court's decision that placing separate property into a community property joint account was not a conversion, but a gift, conflicts with numerous decisions requiring donative intent to prove a gift, and those providing that contract interpretation cannot lead to absurd results. This Court should accept review.

ISSUES PRESENTED FOR REVIEW

1. Where the parties' prenuptial agreement provides that a percentage of "each party's remaining separate property shall be converted to community property" upon an "anniversary of the Marriage," did the parties intend to continue converting their separate property to community property after the marriage was defunct, and the community no longer existed? CP 489.

2. Where the prenuptial agreement requires the parties to pay community expenses from a "community property joint account," and where it is undisputed that John placed his separate property into a community account used to pay community expenses, did the parties intend that those funds were the separate-to-community-property conversions, not independent gifts of separate property to the community? CP 490.

FACTS RELEVANT TO PETITION FOR REVIEW

John and Jennifer Gregory separated on December 31, 2014, after nine years of marriage. RP 25. They have one child, J. *Id*.

John holds a bachelor's in computer science and math and a master's in computer science. RP 25. He began working for Google, then still a startup, in August 2001, receiving part of his compensation in stock options. RP 28-29. John purchased all his

options before Google's 2004 IPO. RP 33-34. He quickly became very wealthy. CP 500. Jennifer stopped working in 2003, and has not worked since. RP 29-30, 42, 220.

The parties became engaged in December 2004, and began discussing a prenuptial agreement six months later. RP 38, 40-41. They executed their prenuptial agreement ("Agreement") one week before marrying in September 2005. RP 42.

After J. was born in May 2009, Jennifer became noticeably depressed about being a stay-at-home parent. RP 55. She returned to school in fall 2010, eventually also volunteering at her friend's restaurant and bar one to four nights each week. RP 55, 58-59, 242, 244. She was away from the family home half the nights. RP 58.

Jennifer moved out in summer 2013. RP 59. Although she moved back in six months later, she lived in a separate bedroom, typically staying behind closed doors. *Id*. The marriage continued to deteriorate throughout 2014. RP 144-45. The "final straw" came when Jennifer excluded John and J. from her December 2014 graduation. CP 167-68; RP 246. John petitioned for dissolution that month. CP 1, 167-68; RP 145.

The parties resolved parenting disputes before trial, and J. resides primarily with John. CP 401-09; RP 25. During trial, both

parties ultimately agreed that the Agreement was enforceable. RP 435. The sole question at trial and on appeal was the distribution of assets under the Agreement. CP 453-60.

The Agreement created $1.4 million in community property upon execution. CP 502. The Agreement provides that all other property, then owned or later acquired, would be separate property. CP 488. The following two provisions were at issue at trial and on appeal.

The Agreement required the parties to convert a percentage of their separate property to the community beginning on the fifth "anniversary of the Marriage." CP 489. These conversions were to occur annually for 10 years, with all remaining separate property converting to the community on the 15th "anniversary of the Marriage." *Id*. The parties could "implement these conversions" by "redesignati[ng] title" of their separate property. CP 490.

If the parties did not contemporaneously "redesignate[] title… to implement these conversions," then the community would have a lien. *Id*. Though these conversions applied to both parties' separate property, Jennifer had few assets, did not work, and never resumed working. RP 29-30, 220-21.

The Agreement also provides that the parties would pay community expenses out of a "community property joint account." CP 490. The Agreement designated John's "E*Trade Bank Shared Account" as "community property." CP 502. Jennifer acknowledges that the parties have had a "community" account that John funded since they married. RP 39-43, 298-99; BR 5, 10.

John placed Jennifer's name on the E*Trade account, plus another account, in 2012, continuing to fund both. RP 165-67, 418-22. The trial court found that the community paid significant expenses by John "contributing money to a community joint account." CP 444.

The trial court ruled that the conversions did not stop when the marriage was defunct, but continued until the marriage was dissolved. CP 440-42, 452. Thus, John converted over $1 million of his separate property to the "community" when the parties were months away from trial, battling out discovery abuses. CP 6-8. The court also rejected John's argument that the conversions were the source of funds going into the joint community property account, ruling instead that the separate property John liquidated and placed into the joint community account was a gift to the community. CP

442-44. The appellate court affirmed on July 17, 2017. Slip. Op. (attached). John seeks this Court's review.

REASONS THIS COURT SHOULD ACCEPT REVIEW

Whether a contract is ambiguous is a legal question this Court reviews *de novo*. ***GMAC v. Everett Chevrolet***, 179 Wn. App. 126, 135, 317 P.3d 1074 (2014). This Court also reviews *de novo* the interpretation of the parties' prenuptial agreement. *See* ***In re Marriage of DewBerry***, 115 Wn. App. 351, 364, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006, 77 P.3d 651 (2003) (citing ***In re Marriage of Burke***, 96 Wn. App. 474, 477, 980 P.2d 265 (1999)); ***In re Estate of Wahl***, 31 Wn. App. 815, 818, 644 P.2d 1215 (1982), *aff'd*, 99 Wn.2d 828, 664 P.2d 1250 (1983).

A. The appellate court's holding that the parties were creating community property when no community existed conflicts with numerous holdings from this Court and the appellate courts. RAP 13.4 (b) (1) & (2)

As addressed above, the trial court ruled that John converted approximately $1 million in separate property to community property in September 2015, when the marriage was defunct, concluding that "anniversaries of the Marriage" occurred until the pending dissolution was complete. CP 452. The appellate court's decision affirming that ruling conflicts with this Court's decisions in ***Seizer v. Sessions***, 132 Wn.2d 642, 657, 940 P.2d 261 (1997) and ***Aetna Life Ins. Co v.***

Bunt, 110 Wn.2d 368, 372, 754 P.2d 993 (1988), holding that when there is no marital community, the parties cannot create community property. RAP 13.4 (b) (1) & (2). As this Court explained in ***Seizer***, a marriage is defunct when the parties mutually accept its demise. ***Seizer***, 132 Wn.2d at 657-58. When a marriage is defunct, the community ends, and "the 'living separate and apart' statute applies." 132 Wn.2d at 658 (quoting ***In re Marriage of Short***, 125 Wn.2d 865, 871, 890 P.2d 12 (1995) (citing Harry M. Cross, *The Community Property Law in Washington* (revised 1985), 61 Wash. L. Rev. 13, 34-35 (1986)). Without a community, the parties cannot create community property:

> [W]hen a marital community no longer exists, there can be no community property because there is no longer any common enterprise to which each spouse is contributing.

Seizer, 132 Wn.2d at 657 (citing ***Bunt***, 110 Wn.2d at 372).

The conflicts do not end with ***Seizer*** and ***Bunt***. In ***Togliatti v. Robertson***, this Court held that "[t]he whole theory of community property is that it is obtained by the efforts of the husband or wife, or both, for the benefit of the community." 29 Wn.2d 844, 852, 190 P.2d 575 (1948)). And in ***In re Marriage of Wright***, the court of appeals held that RCW 26.16.140, the living separate and apart statute,

applies when no community exists. 179 Wn. App. 257, 267, 319 P.3d 45 (2013).

Under these cases, the parties could not create community property when their marriage was defunct, and the community no longer existed. Importantly, it is beyond dispute that the marriage was defunct. The trial court held that the parties were legally separated on December 30, 2014, when John filed for dissolution. CP 454. The appellate court agreed. Op. at 2. The year prior, Jennifer had been living in a separate bedroom behind closed doors. RP 59. Brief counseling attempts had failed. RP 144-45. Jennifer even excluded John and J. from her graduation. CP 167-68; RP 246. After John filed for dissolution, the parties immediately began living in separate residences, each acquiescing in the end of the marriage (if they had not already). RP 157-59, 270. Jennifer has never disputed that the marriage was over at that point.

When John supposedly converted separate property to community property nine months later, the parties were in a discovery battle leading up to trial. CP 6-8. They were not, at that point, having an "anniversary of the Marriage." CP 489.

The appellate courts misplaced reliance on ***In re Estate of Bachmeier***, 147 Wn.2d 60, 52 P.3d 22 (2002) and ***In re Estate of***

Catto, 88 Wn. App. 522, 944 P.2d 1052 (1997), *rev. denied*, 134 Wn.2d 1017 (1998) does not resolve this conflict with the defunct-marriage cases. Op. at 7-8. The appellate court held that "[o]ther provisions of the Agreement show that the parties knew how to include further limitations when they intended them." *Id*. at 6. Thus, the court was persuaded by ***Bachmeier*** and ***Catto***, *supra*, in which the courts refused to re-write decades-old community property agreements to add a clause terminating the agreements when the marriage became defunct. *Id*. at 7-8.

But John did not ask the court to write "further limitations" into the Agreement. *Id*. at 6. The conversions are triggered by an "anniversary of the Marriage," so without an anniversary there is no basis for a conversion. CP 489. That is, the term of the Agreement providing for conversions necessarily provides when they will end: when there are no more anniversaries. *Id*. That is the "termination clause." BR 20-21. The appellate court ignored this point.

In short, when there is no community, the parties cannot create community property. This Court should accept review.

B. The appellate court's refusal to apply *Seizer* simply because the parties have a prenuptial agreement conflicts with cases from this Court and the appellate courts holding that parties must knowingly waive a legal right. RAP 13.4 (b) (1) & (2)

The court refused to apply ***Seizer***, holding that "here the trial court did not apply a statute to determine the status of the parties' property," but determined their property rights under the Agreement. Op. at 5-6. The court continued that since the parties agreed to waive certain property rights in entering the prenuptial agreement, "***Seizer's*** statutory construction provides no guidance to the meaning of the Agreement." *Id*. at 6.

The appellate court's holding that the parties waived their rights under RCW 26.16.140 conflicts with numerous decisions from this Court and the appellate courts: (1) that a party waives a legal right only when he has actual or constructive knowledge that the right exists, and he intends to relinquish it; (2) that an implied waiver must be based on unequivocal acts or conduct; and (3) that the party asserting the waiver bears the burden of proof. RAP 13.4 (b) (1) & (2). In ***Jones v. Best***, this Court explained that a "waiver is the intentional and voluntary relinquishment of a known right." 134 Wn.2d 232, 241, 950 P.2d 1 (1998); *see also* ***Bowman v. Webster***, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). A waiver can be express

or implied, and if implied, "there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors." ***Jones***, 134 Wn.2d at 241 (citing ***Cent. Wash. Bank v. Mendelson-Zeller, Inc.***, 113 Wn.2d 346, 354, 779 P.2d 697 (1989); ***Wagner v. Wagner****,* 95 Wn.2d 94, 102, 621 P.2d 1279 (1980)). The party asserting the waiver bears the burden of proof. ***Jones***, 134 Wn.2d at 241-42 (citing ***Rhodes v. Gould*****,** 19 Wn. App. 437, 441, 576 P.2d 914, *rev. denied,* 90 Wn.2d 1026 (1978)). The conflict with these cases extends to many others. *See e.g.,* ***Bainbridge Island Police Guild v. City of Puyallup***, 172 Wn.2d 398, 409-10, 259 P.3d 190 (2011); ***Hill v. Garda CL Nw., Inc.***, 198 Wn. App. 326, 354, 394 P.3d 390 (2017).

The parties did not expressly waive their rights under RCW 26.16.140, the living separate and apart statute at issue in ***Seizer***. 132 Wn.2d at 657-58. The Agreement addresses the parties' waivers repeatedly and at length. CP 491-93, 497-99. In paragraph 4, the parties waived any rights acquired before marriage and any rights they might acquire in the other's property during marriage. CP 491. In paragraph 5, the parties waived their right to a just and equitable distribution of assets. CP 491-92. And in paragraph 9, the parties waived any rights that might have been available to them in the

absence of a prenuptial agreement. CP 493. Exhibit A to the Agreement spells out the rights waived in paragraph 9. CP 497-99. None of these provisions, nor Exhibit A, discuss RCW 26.16.140 or otherwise address the parties' property rights in the event the marriage became defunct. CP 491-93, 497-99.

Thus, Jennifer cannot meet her burden of establishing that the parties had knowledge of the separate property rights established in RCW 26.16.140, where the Agreement spells out other rights the parties waived without mentioning RCW 26.16.140. Nor can Jennifer prove unequivocal acts or conduct demonstrating a waiver. Simply put, the parties did not waive the defunct marriage rule when they entered their Agreement, nor would John, or any reasonable person, have done so. This Court should accept review.

C. Limiting the application of *Seizer* to cases involving "extreme facts" conflicts with many cases from this Court and the appellate courts applying the living separate and apart statute to determine the character of the assets before the court. RAP 13.4 (b) (1) & (2).

The appellate court declined to follow ***Seizer***, (without mentioning ***Bunt***), holding that "the issue decided in ***Seizer***" was readily distinguishable, where "the court considered the application of Washington's separate and apart statute, RCW 26.16.140, under a set of extreme facts." Op. at 5. During oral argument, the writing

judge expressed a concern that the defunct marriage rule applies only in matters involving third parties. http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20170608 at 4:30-5:27. Limiting the defunct marriage rule to "extreme" cases or matters involving third parties conflicts with numerous decisions applying the separate and apart statute in ordinary cases to determine the character of the assets before the court. ***Kerr v. Cochran***, 65 Wn.2d 211, 225, 396 P.2d 642 (1964) (RCW 26.16.140 "operates while the spouses are living separate and apart, and is effective regardless of whether there has been a dissolution of the community"); ***Bunt***, 110 Wn.2d at 372; ***In re Marriage of Griswold***, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002); ***In re Marriage of Terry***, 79 Wn. App. 866, 870, 905 P.2d 935 (1995); ***In re Marriage of Nuss***, 65 Wn. App. 334, 344-45, 828 P.2d 627 (1992); ***Aetna Life Ins. Co. v. Boober***, 56 Wn. App. 567, 571, 784 P.2d 186 (1990).

In short, RCW 26.16.140 applies in all cases where the trial court must determine when the marriage is defunct to resolve the character of the assets before the court. The appellate court's refusal to apply the statute creates a conflict this Court should resolve.

D. The appellate court's decision conflicts with numerous cases from this Court and the appellate courts holding that contract interpretation must avoid absurd results. RAP 13.4 (b) (1) & (2).

The appellate court's decision conflicts with countless decisions that courts must give contracts a practical and reasonable reading, avoiding strained constructions that lead to absurd results. ***E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.***, 106 Wn.2d 901, 907, 726 P.2d 439 (1986) (contract must be read as the "average" person would read it and "should be given a practical and reasonable rather than a literal interpretation," and not a "strained or forced construction" leading to absurd results); ***City of Tacoma v. City of Bonney Lake***, 173 Wn.2d 584, 593, 269 P.3d 1017 (2012) (holing the trial court erred in interpreting the contract in a manner producing an absurd result); ***Dep't of Ecology v. Tiger Oil Corp.***, 166 Wn. App. 720, 761-62, 271 P.3d 331 (2012) (same). ***Forest Mktg. Enters. v. Dep't of Natural Res.***, 125 Wn. App. 126, 132, 104 P.3d 40 (2005) (same). An "average person" would not read the Agreement to mean that John intend to give over $1 million to a marital community that no longer exists, at a time when the parties were in the midst of a discovery dispute leading up to trial. ***E-Z Loader***, 106 Wn.2d at 907.

The Agreement has three express purposes: (1) "to designate certain property as community property; (2) to "preserve" each party's "remaining property" as separate property; and (3) to periodically "convert separate property to community property." CP 488. Paragraph 1(d) spells out that upon an "anniversary of the Marriage" beginning with the sixth anniversary, the parties would convert a specified percentage of their "remaining separate property" to "community property." CP 489-90. Together, these terms both create community property and protect the parties' remaining separate property.

The only reasonable interpretation of the provision creating "community property" upon the anniversaries of the marriage is that it operates when a community exists. This follows not only from the plain meaning of "community property," but also from the Agreement's express purpose to preserve as separate property all remaining separate property. It is also the only interpretation that is consistent with the law addressed above.

The appellate court's decision leads to the absurd result that John gifted over $1 million to a marital "community" that had ceased to exist. The trial court found that the parties were legally separated on the date John filed for dissolution, at which point the parties had

not shared a bedroom for 18 months. CP 454; RP 58-59. They had not lived under the same roof for nine more months when, according to the trial and appellate courts, John gifted over $1 million of his separate property to the "community." CP 1; RP 157-59, 270. At the time, John was seeking sanctions for discovery violations. CP 6-8.

The appellate court never squarely addresses that its interpretation leads to an absurd result. The most the court says on this point is: "[w]e reject John's assertion that this result will encourage a party to stall the dissolution process in order to have more property convert to community property." Op. at 9. But it is undeniable that requiring separate-to-community property conversions when the marriage is defunct, but not when the parties are actually divorced, encourages a party to stall so that more conversions will occur. John has never argued that Jennifer actually stalled. *Id*. at 9. The point is that she plainly could have, and the fact that she could have demonstrates the absurdity of the court's interpretation.

In short, no party entering a prenuptial agreement to protect his separate property would agree to convert his separate property to community property when there is no longer a marital community. This Court should accept review.

E. The appellate court's decision that John did not convert his separate property to community property by placing it in a joint community property account conflicts with cases from this Court and the appellate courts holding that gifting occurs only where these is donative intent. RAP 13.4 (b) (1) & (2).

As addressed above, it is undisputed that the Agreement created a community property joint account that Jennifer could access. RP 39-40, 43, 165-67, 298-99; BR 14. Jennifer admits that she had account access since the parties married (if not before) and that her name was put on the joint accounts in 2012. *Id*. The trial court even found that John put money into the joint account to pay "a significant portion of [the parties'] living expenses." CP 444.

The only reasonable interpretation of the Agreement is that in depositing his separate property into a community property joint account to pay community expenses, John was implementing the annual conversions of separate property to community property. A conversion is accomplished by a "redesignation of title" – no more is required. CP 490. Taking money from a separate property account and placing it in a community property joint account is a "redesignation of title." *Id*.

The appellate court's only analysis on this point is the summary – and incorrect – conclusion that John did not intend to

make conversions, so cannot now claim that he did. Op. at 11. John's testimony is that the conversions "never came up" and that he did not "categorize" the money he deposited into the parties' joint accounts. RP 181. But the appellate court's conclusion that John therefore gifted separate property to the community conflicts with numerous decisions holding that gifting requires donative intent. Op. at 11. ***Tacoma v. Taxpayers of Tacoma***, 108 Wn.2d 679, 702, 743 P.2d 793 (1987); ***In re Marriage of Kile***, 186 Wn. App. 864, 877, 347 P.3d 894 (2015); ***Barnier v. Kent***, 44 Wn. App. 868, 877, 723 P.2d 1167 (1986); ***In re Estate of Oney***, 31 Wn. App. 325, 329, 641 P.2d 725 (1982). Further, the party asserting the gift bears the burden of proof by "'clear, convincing, strong, and satisfactory'" evidence. ***Oney***, 31 Wn. App. at 329 (quoting ***Doty v. Anderson,*** 17 Wn. App. 464, 471, 563 P.2d 1307 (1977); ***Whalen v. Lanier,*** 29 Wn.2d 299, 312, 186 P.2d 919 (1947).

There is no indication that John intended to convert around a million dollars of separate property to the community every year, setting it aside to remain untouched, and then to separately gift large sums of separate property to the community for the purpose of paying all community expenses. That is absurd. So interpreted, the Agreement does nothing to protect John's separate property, reading

numerous provisions out of the Agreement. This absurd interpretation, of course, creates an additional conflict. *Supra*, Argument § D. This Court should accept review.

CONCLUSION

The appellate decision conflicts with numerous decisions from this Court and the appellate courts across a range of topics. This Court should accept review.

RESPECTFULLY SUBMITTED 3rd day of August, 2017.

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CERTIFICATE OF SERVICE

I certify that I caused to be mailed, postage prepaid, via U.S. mail, and/or emailed, a copy of the foregoing **PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 3rd day of August 2017, to the following counsel of record at the following addresses:

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ATTACHMENT 1
SLIP OPINION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of JOHN GREGORY, Appellant, and JENNIFER GREGORY, Respondent.	No. 75155-7-I DIVISION ONE UNPUBLISHED OPINION FILED: July 17, 2017

LEACH, J. — John Gregory appeals the decree of dissolution dissolving his marriage to Jennifer Gregory. He challenges the court's division of assets, claiming that it misread the parties' prenuptial agreement when characterizing their property as separate or community. Because the trial court correctly interpreted the prenuptial agreement, we affirm.

Background

John Gregory began working for Google in 2001. As part of his initial compensation, he received stock options that vested over four years. He exercised these options before Google went public in 2004. The Google IPO (initial public offering) made John a wealthy man.

John and Jennifer Gregory executed a prenuptial agreement ("Agreement") on September 6, 2005. The Agreement states that they had lived

together for the past three years. They married seven days later on September 13, 2005. The couple had one daughter. They separated on December 30, 2014, when John filed for dissolution.

The parties agreed on a parenting plan but were unable to resolve the financial matters. After a trial, the trial court entered a decree of dissolution approving the parties' agreed parenting plan and distributing property in accord with its interpretation of the parties' Agreement.

John appeals.

Analysis

John challenges the trial court's interpretation of two provisions of the parties' Agreement, one providing for the conversion of separate property to community property and one addressing the payment of living expenses. Neither party challenges the enforceability of the Agreement.

Interpretation of a contract is a mixed question of law and fact. When the trial court's interpretation depends on the credibility of conflicting evidence, this court upholds the trial court's factual findings when substantial evidence in the record supports them.[1] But the question of whether a contract is ambiguous is a legal question for the court that an appellate court reviews de novo.[2]

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[1] Berg v. Hudesman, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990) (adopting RESTATEMENT (SECOND) OF CONTRACTS § 212 (AM. LAW. INST. 1981)).

[2] GMAC v. Everett Chevrolet, 179 Wn. App. 126, 135, 317 P.3d 1074 (2014).

Property Conversion

The Agreement included provisions converting the parties' separate property to community property in increments over fifteen years, beginning on the fifth anniversary of their marriage. John challenges the trial court's decision that the property conversion provisions continued to convert separate property until the time of trial. He contends that they became inoperative when the marriage became defunct upon his filing this dissolution action.

The Agreement property conversion provisions state,

> (d) Conversion of Separate Property to Community Property. On the fifth anniversary of the Marriage, twenty percent (20%) of each party's remaining separate property shall be converted to community property. Beginning on the sixth anniversary of their Marriage, ten percent (10%) of each party's separate property, including associated separate property obligations, shall be converted to community property each year. More specifically, this shall be accomplished in the following manner.
>
> i. On the sixth anniversary of the Marriage, one-tenth (1/10) of each party's remaining separate property shall be converted to community property;
>
> ii. On the seventh anniversary of the Marriage, one-ninth (1/9) of each party's remaining separate property shall be converted to community property;
>
> iii. On the eighth anniversary of the Marriage, one-eight (1/8) of each party's remaining separate property shall be converted to community property;
>
> iv. On the ninth anniversary of the Marriage, one-seventh (1/7) of each party's remaining separate property shall be converted to community property;

v. On the tenth anniversary of the Marriage, one-sixth (1/6) of each party's remaining separate property shall be converted to community property;

vi On the eleventh anniversary of the Marriage, one-fifth (1/5) of each party's remaining separate property shall be converted to community property;

vii. On the twelfth anniversary of the Marriage, one-fourth (1/4) of each party's remaining separate property shall be converted to community property;

viii. On the thirteenth anniversary of Marriage, one-third (1/3) of each party's remaining separate property shall be converted to community property;

ix. On the fourteenth anniversary of Marriage, one-half (1/2) of each party's remaining separate property shall be converted to community property; and

x. On the fifteenth anniversary of Marriage, all of each party's remaining separate property shall be converted to community property.

If an actual redesignation of title is not accomplished to implement these conversions, the marital community shall have a community property lien on the party's separate property (which shall include increases and decreases in the value of the assets) until the appropriate changes in title are completed. Following the first day of the fifteenth year of the Marriage, all property of the parties, whether acquired by gift, inheritance, testamentary transfer or otherwise, shall be community property.

The trial court decided that the Agreement was not ambiguous, that marriage anniversaries continued to occur until the marriage was dissolved, and that the final property conversion happened on the tenth marriage anniversary, September 13, 2015. John disagrees. He contends that for purposes of the Agreement, marriage anniversaries stopped occurring when he filed his

dissolution petition because the marriage became defunct then. Thus, he claims that the last conversion occurred on the ninth marriage anniversary, September 13, 2014.

John cites Seizer v Sessions[3] as support for his position. But we readily distinguish the issue decided in Seizer. There, the court considered the application of Washington's separate and apart statute, RCW 26.16.140,[4] under a set of extreme facts. A man who was never divorced from his mentally incompetent first wife married a second and third time.[5] While he was married to his third wife, he won a substantial sum from the lottery.[6] The first wife, through her guardian, and the third wife made competing claims to these winnings.[7] In this context, the court held that the separate and apart statute required mutuality on the part of the spouses and thus would not apply where an abandoned spouse is mentally ill or incompetent during the separation.[8]

But here the trial court did not apply a statute to determine the status of the parties' property. It interpreted their voluntary agreement about status. In

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[3] 132 Wn.2d 642, 940 P.2d 261 (1997).

[4] Former RCW 26.16.140 (1978) provided, "When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each." RCW 26.16.140 was amended in 2008 to change "husband and wife" to "spouses or domestic partners" but otherwise remained the same. LAWS OF 2008, ch. 6, § 613.

[5] Seizer, 132 Wn.2d at 646-47.

[6] Seizer, 132 Wn.2d at 647.

[7] Seizer, 132 Wn.2d at 647-48.

[8] Seizer, 132 Wn.2d at 659.

paragraph 9 of the Agreement, John and Jennifer acknowledged discussing with their respective counsel a spouse's property rights under Washington law and the fact that the Agreement operated to waive those rights. Thus, Seizer's statutory construction provides no guidance to the meaning of the Agreement.

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 this date without any limiting qualification about the status of the parties' relationship beyond the fact that they were married. Other provisions of the Agreement show that the parties knew how to include further limitations when they intended them.

The provisions of the Agreement addressing a dissolution occurring within the first five years of marriage provide an example. Those provisions require John to contribute separate property to a community account with the amount calculated based on the date of separation "with the intention that the separation be permanent."

John offers no persuasive reason why the trial court should have implied a similar provision in the disputed provision when the parties did not include it. In the absence of fraud, accident, or mistake, a court will not add, modify, or

contradict the terms of a written contract.[9] As our Supreme Court noted in In re Marriage of Schweitzer,[10] "'[it] is the duty of the court to declare the meaning of what is written, and not what was intended to be written.'" This duty applies equally to what a party later wishes had been written.

In re Estate of Bachmeier[11] supports the trial court's decision There, a husband and wife signed a community property agreement declaring that all their property was community property and, upon the death of either, making the survivor the owner of that property.[12] When the husband filed for legal separation, the wife changed her will, disinheriting him and leaving her property to her daughter.[13] Soon after, the wife died. When the daughter sought to probate the will, the husband objected, claiming the wife's estate under the community property agreement.[14] The court rejected the daughter's invitation to imply a provision in the agreement terminating it upon the parties' separation.[15]

Division II of this court reached a similar result in In re Estate of Catto.[16] There, the court rejected the argument that a community property agreement

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[9] In re Marriage of Schweitzer, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997).

[10] 132 Wn.2d 318, 327, 937 P.2d 1062 (1997) (alteration in original) (internal quotation marks omitted) (quoting Berg, 115 Wn.2d at 669).

[11] 147 Wn.2d 60, 52 P.3d 22 (2002).

[12] Bachmeier, 147 Wn.2d at 62-63.

[13] Bachmeier, 147 Wn.2d at 63.

[14] Bachmeier, 147 Wn.2d at 63.

[15] Bachmeier, 147 Wn.2d at 68-69.

[16] 88 Wn. App. 522, 944 P.2d 1052 (1997).

contained an implied termination provision that became effective when the parties' marriage became defunct.[17] As Bachmeier states, filing a dissolution proceeding is "'not the same as an intention to immediately effect an ex parte abandonment of a valuable contractual right.'"[18]

A Connecticut case, Peterson v. Sykes-Peterson,[19] provides persuasive support. There, the parties signed a prenuptial agreement which contained a sunset clause, terminating the agreement on their seventh anniversary.[20] The seventh anniversary occurred after the husband had filed for divorce but before the divorce became final. As John does, the husband in Peterson argued that the provision would apply only if they were still happily married and celebrating their seventh anniversary.[21] The court disagreed, holding that the language was clear and that had the parties desired a different result, they could have included language that did so. The court offered the example that "the agreement would become unenforceable on the parties' seventh wedding anniversary provided that the parties remained married and living together and there was no pending separation or divorce action."[22] Similarly, here, the trial court could not imply a

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[17] Catto, 88 Wn. App. at 529.

[18] Bachmeier, 147 Wn.2d at 64 (quoting In re Estate of Lyman, 7 Wn. App. 945, 951, 503 P.2d 1127 (1972)).

[19] 133 Conn. App. 660, 37 A.3d 173 (2012).

[20] Peterson, 37 A.3d at 175.

[21] Peterson, 37 A.3d at 176.

[22] Peterson, 37 A.3d at 177.

provision terminating the property conversion terms of the Agreement on separation.

We reject John's assertion that this result will encourage a party to stall the dissolution process in order to have more property convert to community property. The trial court found no evidence of such a delay on Jennifer's part and noted that if such a scenario had occurred, then John would have been able to assert equitable defenses to Jennifer's effort to specifically enforce the Agreement.

Community Expenses

We turn now to the second issue presented. John claims that the trial court should have reduced the amount of his separate property converted to community property by the amount of community expenses he paid from his separate property.

The Agreement did not require that the parties implement the conversion of their separate property to community on each anniversary. And they did not. Paragraph 1(d) of the Agreement anticipated this circumstance and provided that "[i]f an actual redesignation of title is not accomplished to implement these conversions, the marital community shall have a community property lien on the party's separate property (which shall include increases and decreases in the value of the assets) until the appropriate changes in title are completed."

John paid a significant portion of John and Jennifer's living expenses by contributing money from his separate account to a community joint account. The trial court decided that the Agreement made these payments gifts to the community. It relied on paragraph 3 of the Agreement:

> During Marriage, all ordinary and necessary living expenses . . . shall be paid out of a community property joint account. In the event that there are insufficient funds in the community joint accounts to cover such living expenses, then each party shall contribute to the community joint accounts an amount necessary to pay such expenses, in proportion to each party's respective separate income from all sources. If either party so uses separate property to pay for ordinary and necessary living expenses of the community incurred during Marriage, such separate property payment 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.

(Emphasis added.)

John does not dispute that the parties paid community expenses from joint accounts held in both of their names since January 2012. Rather, John argues that payments from his separate account into that community account come from the annual conversions of his separate property to community property. At trial, however, during John's cross-examination, the following exchange occurred:

> Q. Okay. So since the assets were primarily under your control during the marriage, why didn't you segregate them or convert them on the deadlines as stated in the prenuptial agreement?
>
> A. Never came up.

Q. So with all—

A. I was never asked by Jennifer. It never was brought to my attention. I never considered it.

Q. Okay. Did you—then when you were providing Jennifer funds, when you were putting money in her account, was there any kind of support or information regarding what money she was getting? Or did you just—

A. I just provided her funds. I didn't categorize them.

Thus, John clearly never intended to make a contemporaneous conversion. He cannot now recharacterize those transfers as something other than payments from his separate account.

Because no conversions occurred, the prenuptial agreement provided the marital community with a lien on John's separate property.[23] And his payments for community expenses from his separate account did not reduce the amount of the lien the marital community had on his separate property because the Agreement made those payments gifts to the community. We find John's argument that the trial court erred in declining to deduct 2010 through 2011 community expenditures from the community lien similarly unpersuasive.

Jennifer's Request for Attorney Fees

RCW 26.09.140 provides that a court "may" award costs and attorney fees for a party's appeal in a dissolution case "after considering the financial

[23] See paragraph 1(d) of the Agreement: "[T]he marital community shall have a community property lien on the party's separate property . . . until the appropriate changes in title are completed."

resources of both parties." After reviewing the parties' financial declarations, we exercise our discretion to deny Jennifer's request for fees.

Affirmed.

Leach, J.

WE CONCUR:

Dwyer, J.

Spearman, J.

MASTERS LAW GROUP PLLC

August 03, 2017 - 10:49 AM

Transmittal Information

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Appellate Court Case Title:	John Gregory, Appellant v. Jennifer Gregory, Respondent
Superior Court Case Number:	14-3-08323-1

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