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Court of Appeals
Division II
State of Washington
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NO. 34532-2-11

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CATHERINE S. SHUBECK
Respondent

v.

JOHN R. SHUBECK and SHELLY A. WILLIAMS
Appellants

BRIEF OF APPELLANTS

John R. Shubeck
Shelly A. Williams
Appellants, Pro Se
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Fox Island, WA 98333
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	The trial court erred in not applying the law to identify the value of the assets at the time of the transfers in order to calculate the consideration due John, if any. The trial court further erred by not applying the law in the Amended Judgment, resulting in an inaccurate calculation of Shelly’s future liability.	
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	The trial court erred in concluding that all funds were community funds and all assets purchased using those funds were community property equally shared. The trial court made no attempt to trace the relative contributions into the funding used to purchase the assets. Without consideration of tracing the relative contributions toward the funding, the trial court failed to apportion John’s share of the community assets at the time of the transfer.	

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I. INTRODUCTION

This appeal arises, historically, out of a fraudulent transfer lawsuit filed by Plaintiff/Respondent Catherine S. Shubeck (“Cathy”) against Defendants/Appellants John R. Shubeck (“John”) and Shelly A. Williams (“Shelly”) in 2016. John and Shelly filed a prior notice of appeal from the trial court’s findings of fact and conclusions of law dated August 1, 2018 after a one week bench trial. In proceedings related to that first appeal, the Washington Appellate Court Division II heard oral arguments on November 27, 2018. As a result of the appellate court’s termination of review of the first appeal on September 4, 2019, the issue of the future scope of Shelly’s liability was remanded to the trial court for further proceedings.¹ In early 2020 the parties submitted briefs and, a telephonic hearing was held in the trial court on March 20, 2020 to determine the liability of Shelly Williams against any future judgments Cathy might bring against John for unpaid alimony. This second notice appeal filed by John and Shelly arises specifically from the Amended Judgment filed by the trial court on March 20, 2020. After a careful review of the filed briefs leading up to the remand hearing, the Verbatim Record, and the Amended Judgment on Extent of Defendant Williams’ Liability, it is clear that the findings and conclusions of law made by the trial court are inconsistent with Washington Statute or case law.

The assets at the heart of this appeal are a home purchased by Shelly on September 23, 2010 and sold on December 1, 2016 (“6th Lane Home”), a parcel of raw land purchased by Shelly as her separate property on February 24, 2014 (“Pilchuck Property”)², and a 2006 Dodge Ram pickup truck (“Dodge Truck”)

¹ AP B

² The Pilchuck Property was titled only in Shelly’s name and purchased as her separate property

purchased in March 2011. In its Amended Judgment, the trial court concluded that John transferred his community interest in these assets and that his portion of community interest was 50%. The court, in error, failed to apply provisions in the UFTA statute which provides for the protection of the transferee, specifically limiting the liability of a transferee to the value of the assets on the date of transfer.

For purposes of clarity, it is noted here that because of the timing of Cathy's original complaint in 2016, the pre-trial motions, and the bench trial during June 2017, the court applied the previous rendition of the Uniform Fraudulent Transfer Act as the statute in effect and continues to do so.

At issue here is the trial court's oversight, whether it be accidental or deliberate, in not considering in its Amended Judgment the following article of the UFTA code that defines the protections of a transferee in a judgment:

Washington RCW 19.40.081(c): **Defenses, liability, and protection of transferee.** *"If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgement must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require,"*

In addition, the trial court applied a finding that **all** of John and Shelly's funds and assets were community in nature and a conclusion of law that John and Shelly shared **equally** 50/50 in every single asset. In view of the facts that John and Shelly had 17 individual bank accounts and no joint accounts, were married only nine (9) months before the purchase of the 6th Lane Home while still residents of New Jersey,

and a trial record which contained 3,000 pages of bank records showing those individual accounts, it calls into question the court's use of discretion in applying such a broad brush. John and Shelly submit for the appellate court's consideration a highly visible and clear paper record of all 17 individual bank accounts and ask, based on the statute below, was a conclusion of law in the Amended Judgment assigning a 50/50 community interest in all funds and assets equitable to John and Shelly?

The trial court never made a finding of fact that John and Shelly's funds were so hopelessly commingled as to be impossible to distinguish or apportion John and Shelly's separate contributions to those funds. This is the benchmark a trial court must walk away from before it makes a finding that a married couple has a 50/50 community interest in all funds, and in turn a 50/50 share in the assets acquired by those funds. In hindsight, the trial court could not make that finding because every page of every bank account since their marriage in 2009 was in full view.

The following is a brief summary of errors made by the trial court leading up to and during the Remand Hearing on March 20, 2020.

1. The trial court ignored funds used in the purchase of assets that are directly traceable to separate funds in Shelly's *individual* bank accounts. (Violates RCW 26.16.010 – Definition of Separate Property)
2. The trial court entered oral findings of fact, stating that John is entitled to a 50% share of the \$314,000 (\$157,000) equity from the 6th Lane home when it was sold on December 1, 2016, ignoring the requirement to trace the origin and character of funds used in the purchase of the 6th Lane Home. (Violates RCW 26.16.010 –

Definition of Separate Property). The exhibit record showed that the funds used to purchase the 6th Lane Home came from the sale of Shelly Williams' separate property home at 20 Vista Drive, Flanders, New Jersey and from her individual bank accounts.

3. While the court concluded that John is entitled to \$157,000 equity in the 6th Lane Home, the court then concluded that he is entitled to this equity *again* from the Pilchuck Property after Shelly sold the 6th Lane Home and used her net proceeds towards building a new home on Pilchuck Property. This is the definition of double dipping. John's interest in the 6th Lane Home ended on October 11, 2012. He no longer has any interest in that home and therefore has no interest in the home being constructed on Pilchuck Heights when Shelly used her funds toward the construction of the Pilchuck Heights home. Nonetheless the trial court, in the Amended Judgement, inflated the value of John's community interest in the Pilchuck Property at 50% of an estimated \$1 million valuation with no date given for the valuation of the Pilchuck Property. The \$1 million valuation included the net proceeds Shelly used to improve the Pilchuck Property, in contradiction to RCW 19.40.081(c) which makes clear that the value of the 6th Lane Home must be established on October 11, 2012. This statute does not allow for a conclusion of law where the Plaintiff can collect on future investments made by Shelly in the Pilchuck Property.

4. The trial court ignored the requirement to identify the value of the asset on the date of "transfer" as required in RCW 19.40.081(c) on the Pilchuck Heights property. John relinquished his interests February 24, 2014, the date he was required to sign a QuitClaim Deed by Ticor Title. The QuitClaim deed paperwork clearly states this deed was required because Shelly was married but acquiring the property as her

separate property. This deed was mandatory by Ticor Title before they would close on Shelly's purchase of this property due to the fact that Washington is a community property state. John did not provide any of the funds for this property and had no financial interest in it.

In the first appeal and unpublished opinion filed on March 19, 2019, the Court of Appeals held that, in the absence of a verbatim report, the record was inadequate to review whether the trial court's findings of fact were supported by substantial evidence. As a result, the Court of Appeals treated the trial court's findings of fact dated August 1, 2017 as verities. John and Shelly now, however, are submitting a verbatim report from the remand hearing for the court's review of the Amended Judgment. It was John and Shelly's understanding and belief then, and they continue to assert now, that when an overwhelming trial exhibit record consisting of 3,000 pages of individual bank accounts and other records of separate funds was before the court, no testimony could possibly change the black and white of such a massive paper trail. In the first appeal, John and Shelly appropriately assigned error in each finding of fact they contend was improperly made, in accordance with RAP 10.3(g). In the first appeal, John and Shelly assigned errors to 27 Findings of Fact and used the exhibits at trial to disprove those Findings of Fact. John and Shelly believed that banking records, purchase and sale documents, wire transfers, and cashier's checks were more than adequate in proving whose funds were used to purchase assets. These documents showed the overwhelming contributions that Shelly made from her traceable separate funds toward the 6th Lane Home, the Pilchuck Property, and the

Dodge Truck, are more than adequate to determine Shelly's portion of interest in those properties, therefore, a holding that John and Shelly had a 50/50 community interest in all funds and assets is in error.

Cathy's fraudulent transfer lawsuit is based on unpaid alimony that was reduced to a judgment against John. Cathy named Shelly as a co-defendant, as she and John were formerly married but were legally separated at the time Cathy's case was filed. The central issue in the remand hearing was the portion, if any, of John's community interest in the 6th Lane Home, Pilchuck Property, and Dodge Truck. In order for the trial court to conclude that all property was community assets and both John and Shelly had a 50/50 share in those community assets, the trial court had to:

1. Set aside all the tracing provided to the trial court demonstrating that Shelly's contributions of funds toward the purchase of each asset from her individual bank accounts; and
2. Void John and Shelly's valid Prenuptial Agreement executed on August 1, 2009 and John and Shelly's valid Separate Property Agreement; and
3. Ignore that John and Shelly were not yet Washington residents when Shelly bought her home at 809 6th Lane, Fox Island, Washington, ("6th Lane Home") using only her separate funds from her New Jersey bank; and
4. Ignore that Shelly brought over one million dollars of separate funds and assets to Washington State from New Jersey from which she purchased the assets named in the fraudulent transfer lawsuit; and

5. Ignore that John and Shelly were legally separated prior to Cathy filing her lawsuit for fraudulent transfer.

The trial court misapplied the RCW 19.40.071 on remand, cited unrelated case law (*Clayton v. Wilson*)³ as the authority on extensive commingling of community property, and ignored case law that supported that the assets named in the lawsuit were capable of being apportioned by way of Shelly's traceable funds. The trial court concluded that *all property*, including Shelly's traceable funds earned prior to marriage and before moving to Washington, was community property.⁴

The trial court also concluded that Shelly did not provide the "reasonably equivalent value" when John "transferred" property to her. Had the trial court properly apportioned the source of funds used to purchase the assets, and identified the value and community share in the assets at the time of the transfers, the trial court would then have to acknowledge that the property named in the lawsuit was underwater in October 2012; therefore, John "transferred" debt to Shelly. Consequently, no consideration was required when Shelly corrected her titles.

Throughout the Findings of Fact and Conclusions of Law, and also in the Verbatim Report from the telephonic hearing on March 20, 2020, the trial court continues to find that John is insolvent and continues to remain insolvent.⁵ The facts do not support a finding of insolvency because:

1. John paid everything awarded to Cathy by the New Jersey courts, including approximately \$250,000 paid in 2012 from his retirement account; and

³ *Clayton v. Wilson*, 145 Wn. App. 86; 186 P.3d 348 (2008)

⁴ CP 29, Conclusion of Law 3

⁵ VR 23

2. John was current in his required support payments in 2012 and remained current for several years thereafter.
3. John has been current since 2017 and remains current.
4. At no time from 2001 through present did Cathy ever have a judgment against John and fail to collect on that judgment.

All told, John's support payments to Cathy since their separation in 2001 and as result of the New Jersey Support Order in 2012 total more than a million dollars.

That is why John has no assets today. This fact runs contrary to a finding that John is voluntarily insolvent and has no assets because he engaged in fraudulent transfer.

John and Shelly entered into a valid Prenuptial Agreement on August 1, 2009 in New Jersey, and a subsequent Separate Property Agreement on January 29, 2016. John and Shelly exercised every reasonable prudent action to retain the separate property characterization of their respective assets. In Washington State, if having a Prenuptial Agreement, a Separate Property Agreement, and maintaining only individual bank accounts does not preserve the separate characterization of funds and assets, or at a minimum preserve the portioning or share in a community asset, what is left for a married couple to do?

Finally, John and Shelly have come before the trial court four times in their attempts to obtain a judgment on scope that requires diligence from the court and an accurate application of law. In all four attempts, especially the last being the March 20, 2020 hearing on remand from the Appellate Division, the trial court has not followed statute. In the motion for reconsideration and motion for clarification following the trial in 2017, the court even declined to hear arguments. Since the trial

court has erred in its current analysis of the scope of Shelly's liability, and repeatedly shown no interest in investing due diligence to fully examine the exhibit record on remand, John and Shelly ask for a reversal and remand for further proceedings on the scope of Shelly's liability before a new judge.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court analyzed the issues on remand under the statutory scheme of RCW 19.40.071 (Uniform Fraudulent Transfer Act), but failed to consider or apply the limitations of relief specified in 19.40.071(1) subject to protections defined by RCW 19.40.081 and RCW 19.40.081(c)⁶.
2. The trial court failed to apply the law under 19.40.081(c) to set the value of the assets at the time of the transfers.
3. The trial court failed to diligently trace Shelly's individual funds in New Jersey bank accounts that were contributed toward the purchase of the 6th Lane House, an asset acquired only nine (9) months after marriage and before Shelly resided in Washington. RCW 26.16.010
4. The trial court failed to diligently trace Shelly's individual funds acquired during her years of employment as a single woman and, deposited in New Jersey bank accounts before marriage, that Shelly invested in the Pilchuck Property and Dodge Truck. RCW 26.16.010

⁶ VR 20

5. The trial court failed to apply the law under RCW 19.40.081(c) in its amended judgment defining scope of Shelly's liability for any future judgments against John, failing to cite the date of transfers, and the value of the assets at the time of transfers, and the consideration due John, if any, at the time of the transfers.
6. The trial court erroneously failed to apply the law in determining John's portion of community interest in the named assets by way of the tracing of funds, and in turn any consideration due John on the date of the asset transfers. RCW 19.40.081(c) RCW 26.16.010
7. The trial court erroneously cited case law of a 37 year marriage with extensive community assets (Clayton v. Wilson), citing it as the "authority" and "applicable" in this case, to John and Shelly's marriage of nine (9) months at the time of the purchase of the 6th Lane Home using Shelly's individual funds in New Jersey before moving to Washington State.
8. The trial court assigned an "estimated" value of \$1 million dollars to the Pilchuck Property, with no date of assessment given and again with no consideration of 18.40.081(c) as the governing statute to establish the value of the Pilchuck Property on the date of transfer February 24, 2014.
9. The court erred in not considering John's traceable \$5,000 contribution toward the Dodge Truck at the time of the purchase, causing an inaccurate calculation of his interest in the vehicle.

10. The trial court erred in calculating a 50/50 community share for the \$60,000 deposit Shelly made in the court registry when the documentation showed Shelly paid it using separate funds from her individual bank account?⁷
11. The trial court erred in concluding that, despite 3,000 pages of trial exhibits showing bank records for 17 individual bank accounts and zero joint accounts, that all assets purchased from the Shelly's individual bank accounts were community assets and John and Shelly had an equal 50/50 interest in those assets.
12. The trial court erred when it concluded that John is, and continues to remain insolvent when John pays all his bills, including the support to Cathy, from September 2001 through present?⁸
13. The Appellate Court also erred in its unpublished opinion filed on March 19, 2019 which documented as FACT that John's signing of the quit claim deed for Pilchuck Property occurred "Shortly thereafter",⁹ contradicting the oral hearing in the Appellate court, as well as the findings of the trial court, and possibly causing an adverse inference against the defendants by the trial court during the remand hearing on March 20, 2020.¹⁰

⁷ CP 81

⁸ VR 23

⁹ CP 39, CP 43

¹⁰ Wash. Court of Appeals oral argument, Shubeck v. Shubeck & Williams, No. 50979-2-II (Nov. 27, 2018), at 21 min., 20 sec. to 23 min., 13 sec., Id. at 24 min., 13 sec. to 25 min., 08 sec.

B. Issues Pertaining to Assignments of Error

1. Did the trial court file exceed its authority beyond the scope of wide latitude and discretion when it failed to apply the law under RCW 19.40.081 (Defenses, liability, and protection of transferee).¹¹
2. Did the trial court err in applying a conclusion of law under RCW 19.40.071 in the amended judgment, without considering the parameters for Appellant/Defendant's relief under the law in RCW 19.40.081 and 19.40.081(c)¹²
3. Did the trial court err in a finding of a 50/50 community interest of Shelly and John for the assets reviewed on remand. Did the trial court fail to consider Shelly's significant contributions toward the purchase of the assets by:
 - a. Not tracing her separate funds she brought from New Jersey before marriage to the purchase of the 6th Lane Home; and
 - b. Not tracing her separate funds used to the purchase of the Pilchuck Property; and
 - c. Not tracing the character of the funds in Shelly's individual bank accounts used to the purchase the assets on the dates of acquisition of the 6th Lane Home, the Pilchuck Property, and the Dodge Truck?
4. Did the trial court err by neglecting to define the consideration due John for each of the assets at the time of the transfers, as required by the Uniform Fraudulent Transfer Statue. RCW 19.40.081(c)

¹¹ VR 20

¹² VR 20

5. Did the Appellate Court Opinion filed on March 19, 2019 documenting, in error, the timeline of the date of the quit claim deed of the Pilchuck Property subsequently influence the trial court adversely against the Appellants during the remand hearing?
6. Does the scope of a trial court's discretion and wide latitude in civil procedure take precedence over considering the full extent of the applicable law?
7. Does the trial court's authority to grant "Any other relief the circumstances may require" exceed the scope of its latitude in matters of law?¹³

III. STATEMENT OF THE CASE

1. Procedural History

1. John consulted an attorney on January 26, 2016 after he and Shelly made the decision to legally separate. Upon the advice of counsel, John and Shelly entered into a Separate Property Agreement on January 29, 2016 for ease of dividing assets at their time of separation.
2. On March 7, 2016, Cathy obtained her first judgment against John for 60,021.56.
3. John and Shelly filed their Petition for Legal Separation on March 8, 2016, basing their division of assets on their Prenuptial Agreement and Separate Property Agreement. A Decree of Separation was final on July 15, 2016.
4. Shelly deposited \$60,000 of her separate funds into the Court Registry on November 3, 2016.¹⁴

¹³ VR 20

¹⁴ CP 81

5. Trial was held June 25 – 29, 2016 in Pierce County Superior Court.
6. Trial court ruled that John and Shelly did not abide by the terms of their Prenuptial Agreement, rendered it unenforceable, making all of Shelly's separate property now community property of the marriage, and concluded that John fraudulently transferred assets to Shelly.¹⁵
7. Judgment was entered on August 1, 2017 for \$67,524.53 to Cathy against both John and Shelly, and \$89,451.24 for attorney fees and costs.¹⁶
8. Stipulation and Order to Disburse Funds in Court Registry: The \$60,000 Shelly paid was released to Cathy on August 4, 2017.
9. Satisfaction of Judgment filed November 7, 2017: Showing that Shelly paid the remaining judgment balance.
10. John and Shelly filed a Motion for Reconsideration and to Amend Judgment on August 10, 2017. It was denied on September 13, 2017.
11. John and Shelly filed a Motion for Clarification to define scope on September 22, 2017. It was denied on October 9, 2017.
12. John and Shelly filed a Notice of Appeal and filed briefs under 50979-2. Hearing date with oral arguments was set for November 27, 2018.
13. Oral arguments in appeal 50979-2-II were presented before the Court of Appeals Division II panel of Judges Maxa, Melnick, and Sutton. During the oral arguments, Judge Maxa put on the record the quit claim deed signed by

¹⁵ CP 19-35

¹⁶ CP 15-17

John in February 2014 was required by the Equity Company and was required before Shelly closed on the Pilchuck Property.¹⁷

14. John and Shelly filed a Petition for Review with the Washington Supreme Court on May 17, 2019. The petition for review was denied on September 4, 2019.
15. The Appellate Court completed its review on September 4, 2019, and the matter of the scope Shelly's future liability was remanded to the trial court.
16. The trial court heard oral arguments telephonically on the issue of the scope of Shelly's future liability on March 20, 2020.
17. The trial court filed its Amended Judgment on March 20, 2020.¹⁸
18. John and Shelly filed a Notice of Appeal dated April 7, 2020, appealing from the amended judgment filed by the trial court on March 20, 2020.
19. This Brief of Appellants follows in support of the Notice of Appeal.

2. Statement of Facts

1. John and Shelly executed a Prenuptial Agreement on August 1, 2009 in Flanders, New Jersey, in anticipation of their November 20, 2009 wedding.
2. John and Shelly moved to Washington from New Jersey, establishing residency in Washington on September 24, 2010.
3. In September 2010, Shelly brought over a million dollars in separate assets to Washington State from New Jersey, including \$364,904.58 in liquid cash from Wachovia Bank,¹⁹ \$95,094.00 in liquid cash from Ally Bank.²⁰

¹⁷ Wash. Court of Appeals oral argument, *Shubeck v. Shubeck & Williams*, No. 50979-2-II (Nov. 27, 2018), at 21 min., 20 sec. to 23 min., 13 sec., *Id.* at 24 min., 13 sec. to 25 min., 08 sec.

¹⁸ Attachment to Notice of Appeal filed by the Appellants on April 7, 2020

4. Shortly after arriving in Washington State in 2010, Shelly was diagnosed with an incurable progressive illness and was found to be permanently disabled by a Social Security Administrative Law Judge.

ASSETS NAMED IN REMAND HEARING:

5. **6th Lane Home**: Purchased on September 23, 2010 for \$760,000, prior to being residents of Washington State. Residential Real Estate Purchase and Sale Agreement,²¹ Statutory Warranty Deed,²² and HUD Statement.²³
 - i. Personal check #2096²⁴ from Shelly's New Jersey separate Wachovia Bank account dated September 3, 2010, for \$7,000, earnest money on the 6th Lane Home.
 - ii. Personal check #2097²⁵ from Shelly's New Jersey separate Wachovia Bank account dated September 22, 2010 for \$267,839.99 deposited into Wells Fargo Bank account ending 8035, along with check #6443²⁶ from Shelly's separate Ally Bank account in the amount of \$95,197.13 for a total deposit of \$362,937.12^{27, 28}
 - iii. Wire transfer document noting that the money was received only from Shelly, from her separate Wells Fargo bank account to the Talon Group dated

¹⁹ EX 15 Page 2194 Davies Pearson redacted out one of Shelly's accounts at Wachovia with a balance of \$87,779.37, stating that it was beyond the scope of this lawsuit.

²⁰ EX 41, Pg. 2728

²¹ EX 20

²² EX 21

²³ EX 139

²⁴ EX 15, Pg. 2195

²⁵ EX 41, Pg. 2727

²⁶ EX 41, Pg. 2728

²⁷ EX 41, Pg. 2719, 2725

²⁸ EX 41, Pg. 2726 Statement showing the balance of \$100.00 going into account ending 0502.

- September 23, 2010 for the down payment on the 6th Lane Home, in the amount of \$347,718.46.²⁹
- v. Shelly's Columbia and US Bank statements showing that Shelly established an autopay from her separate bank account to Wells Fargo for the mortgage payments on the 6th Lane Home from October 2010 – December 2016.³⁰
 - vi. Record of payments made by Shelly from her separate bank accounts on the 6th Lane Home from October 2010 through December 2016 in the amount of \$72,780.48 (Monthly payments of \$3,032.52³¹ x 24 payments). Principal only during that period totaled \$44,895.64.³²
6. **The Pilchuck Property**: Purchased by Shelly on February 24, 2014 for \$185,000: Documents include Statutory Warranty Deed,³³ and Estimated Buyer's Statement.³⁴
- i. Check #3022, earnest money in the amount of \$3,500 paid from Shelly's separate checking account at Columbia Bank.³⁵
 - ii. Bank statement from Shelly's separate Premium Money Market Columbia Bank Account showing a withdrawal on February 24, 2014 in the amount of \$181,112.70 from account ending 3320,³⁶ the balance owing on the

²⁹ EX 105, EX 41, Pg. 2719

³⁰ EX 11, EX 13

³¹ EX 111

³² EX 110

³³ EX 115

³⁴ EX 117

³⁵ EX 9, Pg. 1123

³⁶ EX 10, Pg. 1016

property and the exact amount owing on the Estimated Buyer's Statement³⁷ and Ticor Title Receipt for Funds.^{38, 39}

- iii. QuitClaim Deed⁴⁰ required at closing by Ticor Title stating that this property is being purchased by Shelly Williams, a married woman, buying it as her separate property.⁴¹ Note: Box is checked that "this deed is given to create the separate property."

- 7. **2006 Dodge Ram Pickup Truck**: The Dodge Truck was purchased on April 7, 2011. Shelly paid \$21,667.25 by way of a cashier's check from her separate Columbia Bank account to Rainier Dodge.⁴² John paid \$5,000 on his VISA account.

FINANCIAL OVERVIEW IDENTIFIED IN THE REMAND HEARING:

8. John's Individual Bank and Investment Accounts:

- a. TD Bank/Commerce Bank account ending 5263.⁴³
- b. Columbia Bank accounts ending in 3338 and 3346.⁴⁴
- c. Red Canoe Credit Union account ending in 8873.⁴⁵

9. Shelly's Individual Bank and Investment Accounts:

³⁷ EX 117

³⁸ EX 116

³⁹ Funds in Shelly's Columbia Premium Money Market Bank Account were transferred from Shelly's separate Wachovia Bank Accounts when she moved to Washington State in 2010.

⁴⁰ EX 114

⁴¹ EX 113

⁴² EX 124

⁴³ EX 4

⁴⁴ EX 1, EX 2

⁴⁵ EX 3

- a. Wachovia Bank accounts ending 5890, 3720, 8765, 0717, 9092, et.al.^{46, 47}
- b. Ally Bank account ending 0538.^{48, 49}
- c. Wells Fargo Bank account ending 8035, 0502.^{50, 51}
- d. Columbia Bank accounts ending 3168,⁵² 3320,⁵³ 3354,⁵⁴ and 8581.⁵⁵
- e. US Bank accounts ending 3816, et al.⁵⁶
- f. Mass Mutual account
- g. Vanguard account ending 5049

10. Home Equity Line of Credit (HELOC) on 6th Lane Home

- a. Application from Columbia Bank – Note that the 6th Lane Home is listed as Shelly’s separate property.⁵⁷
- b. US Bank account 3824 HELOC Statements showing that Shelly made all payments from her individual bank account.⁵⁸
- c. Escrow Statement showing that Shelly paid of the HELOC with the net proceeds of the sale of her 6th Lane Home.⁵⁹

VALUE OF ASSETS SUBMITTED AT THE REMANDING HEARING

⁴⁶ EX 15 Davies Pearson redacted one of Shelly’s high balance High Performance Money Market Accounts.

⁴⁷ Funds moved to Columbia Bank

⁴⁸ EX 41, Pg. 2728

⁴⁹ Funds moved to Wells Fargo 9/2010 toward down payment on 6th Lane Home

⁵⁰ EX 41

⁵¹ Funds moved to Columbia Bank

⁵² EX 9

⁵³ EX 10

⁵⁴ EX 11

⁵⁵ EX 12

⁵⁶ EX 13

⁵⁷ EX 19

⁵⁸ EX 18, Pg. 2406 - 2435

⁵⁹ EX 140

Values assigned at the time the titles were corrected in October 2012 were provided by John and Shelly at trial and the remand hearing and were unrebutted. The trial court did identify an approximate value for the 6th Lane Home.⁶⁰ The parties agree that the top line equity on October 12, 2012 was approximately \$314,000.⁶¹ However, this does not take into account the traceable contributions made by Shelly from her separate bank accounts, contributions totaling \$399,614.10, as outlined above in 5.i through 5.iii.⁶² After crediting Shelly's traceable contributions, the equity is reduced to -\$85,182.33.⁶³ Based on the values John and Shelly submitted at trial, the net debt "transferred" to Shelly was \$79,083.38.⁶⁴ The trial court did not identify the value of the Pilchuck Property at the time of the quit claim deed for purposes of consideration due John, if any.

⁶⁰ RCW 19.40.081(c) if the judgment under subsection "2" of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

⁶¹ EX 107, EX 110

⁶² EX 41 Pages 2719, 2725, 2726, 2727, and 2728, EX 15 Page 2195

⁶³ CP 71

⁶⁴ CP 72

IV. ARGUMENT

A. SCOPE

The trial court erred in not applying the law to identify the value of the assets at the time of the transfers in order to calculate the consideration due John, if any. The trial court further erred by not applying the law in the Amended Judgment, resulting in an inaccurate calculation of Shelly's future liability.

The trial court erred in limiting its analysis of the issues on remand under RCW 19.40.071 without including the limitations found in RCW 19.40.081. RCW 19.40.071 reads:

RCW 19.40.071 Remedies of creditors.

(1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in RCW 19.40.081, may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee if available under applicable law; and

(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) Any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

RCW 19.40.071(1) specifies that the remedies for a creditor are subject to the limitations of RCW 19.40.081. RCW 19.40.081(c) specifies that the scope of the judgment must be as of the date of the transfer. RCW 19.40.081 reads:

RCW 19.40.081 Defenses, liability, and protection of transferee.

(a) A transfer or obligation is not voidable under RCW 19.40.041(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under RCW 19.40.071(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or

(2) Any subsequent transferee other than a good-faith transferee or obligee who took for value or from any subsequent transferee or obligee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on or a right to retain any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under RCW 19.40.041(a)(2) or 19.40.051 if the transfer results from:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) Enforcement of a security interest in compliance with Article 9A of Title 62A RCW.

(f) A transfer is not voidable under RCW 19.40.051(b):

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) If made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

The UFTA limits a creditor's judgment remedy to the adjusted value of the transferred assets or the amount of the creditor's claim, whichever is less. RCW 91.40.081(b). On remand, if the trial court determines that CMYC transferred any "assets" subject to the UFTA, it must determine the adjusted value of those assets as provided in RCW 19.40.081(c). Judgment against any transferee of CMYC should be limited to either the aggregate adjusted value of the transferred assets, or the amount of Eagle Pacific's claim, whichever is less. RCW 19.40.081(b) *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 934 P.2d 715 (1997)

We hold that a creditor may recover a money judgment from a transferee of a fraudulent conveyance who has knowingly accepted the property with an intent to assist the debtor in evading the creditor and has placed the property beyond the creditor's reach. Such a transferee is liable for the value of the property conveyed, up to the amount that the debtor owes to the creditor. *Deyong Management v. Previs*, 47 Wn. App. 341, 735 P.2d 79 (1987)

Following original trial in June 2017, the trial court's findings of fact and conclusions of law were premised on the previous Uniform Fraudulent Transfer Act. On remand, the trial court subsequently analyzed the issue of Shelly's liability during the March 20, 2020 hearing under the statutory scheme of the UFTA. In the remand hearing, trial court cited its authority to exercise wide latitude in applying equity

under RCW 19.40.071.⁶⁵ The trial court, in error, relied on RCW 19.40.071 as the authority to apply equity as the circumstances may require but neglected consideration of RCW 19.40.081 which is a critical article of law which defines the protections of the transferee.

In *Thompson v. Hanson*, the Washington Supreme Court makes clear how the law is applied in evaluating the timing of a transfer and the value of the asset transferred:

By statute, a creditor may recover judgment from the debtor's transferee. RCW 19.40.071, .081. However, the statute only allows “the creditor [to] recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less.” RCW 19.40.081(b). Subsection (c) allows for adjustment of the value of the asset transferred “as the equities may require.” RCW 19.40.081(c). The official comments to the UFTA contemplate such an adjustment for a good faith transferee that has enhanced the value of the asset through discharge of liens. Unif. Fraudulent Transfer Act, 7A pt. II U.L.A. § 8 cmt. 3. The statutory provision protecting good faith transferees from outsized judgments operates “[n]otwithstanding voidability of a transfer” and entitles a good faith transferee to “[a] reduction in the amount of the liability on the judgment” up to “the value given the debtor for the transfer or obligation.” RCW 19.40.081(d)(3) *Thompson v. Hanson*, 168 Wn.2d 738, 239 P.3d 537 (2009)

The better reading of the statute is that adopted by the Court of Appeals: RCW 19.40.081(b) limits liability to the value of the property received by the transferee and, for good faith transferees, subsection (d) further limits liability to the net value received (i.e., the value of the asset transferred less the value given the debtor). The value given the debtor, including any debt assumed, is deducted from the value of the asset transferred prior to determining the measure of judgment. Subsection (c) is the means by which this occurs, as it allows for the adjustment to the value of the asset transferred. *Thompson v. Hanson*, 168 Wn.2d 738, 239 P.3d 537 (2009)

The trial court based the amended judgement on its valuation of the assets transferred but failed to apply the critical section in the law that sets the date the value

⁶⁵ VR 20

of the assets are to be calculated and, in turn, the boundaries and limits of relief available to the creditor under 19.40.081(c).

At the end of the original trial, the court found that the value of the 6th Lane Home at the time John signed the quit claim deed on October 11, 2012 was \$688,000. The trial court further found there was a balance of \$374,000 on the mortgage at the time the 6th Lane Home was sold in December 2016, giving resulting in approximately \$314,000 in equity. (FF/CL Page #6, Finding of Fact #17) The court concluded that the community share of the 6th Lane Home was found to be the net equity in its entirety. However, the court, in error, assigned John and Shelly each a 50/50 community interest in the net equity of the 6th Lane Home when it was sold in December 2016. The correct application of the statute would have been to stop the clock on John's community interest when he signed the quit claim deed in October 2012. Even if John's community interest in the 6th Lane Home equity was apportioned at 50% at the time it was sold in December 2016, then John's interest was still only half of the net equity, although according to RCW 19.40.081(c) the timing of John's calculated interest this would be in error.

The trial court also found that the value of the Pilchuck Property at the time of the transfer on February 2014 was approximately \$180,000.⁶⁶ John signed the quit claim deed on the Pilchuck Property **before** Shelly proceeded on the closing with Ticor Title, ending his interest, if any, at that moment in time. If RCW 19.40.081(c) was accurately applied and, even if the community interest was apportioned at 50/50, John transferred his community interest in the Pilchuck Property for half the equity, or \$90,000.

⁶⁶ CP 24-25

The trial court, in error, avoided the law and instead rolled the net equity from the sale of the 6th Lane Home forward into the Pilchuck Property, then assigned an estimated value of the Pilchuck Property to be “\$1 million” for the purposes of the amended judgment. The trial court, however, cited no date in its finding as to when the Pilchuck Property was valued at \$1 million. The finding was already made that the Pilchuck Property was worth approximately \$180,000 when John signed the quit claim deed in February 2014. This is a critical error, and profoundly influences an accurate calculation as to the scope of Shelly’s liability in the future.

If the trial court had diligently apportioned the community interest in the Pilchuck Property, it would have found Shelly’s contribution of \$185,000 and John’s contribution of zero (\$0) dollars. Even so, John quit claimed any interest he might have had in the Pilchuck Property title **before** closing. The quit claim deed was a requirement made by the Ticor Title before Shelly could close on the Pilchuck Property as her individual asset. Even in the extreme of a 50/50 community share each in the Pilchuck Property, again with no tracing the funding, John’s community interest transferred to Shelly would have been only \$90,000.

The appellate court’s interpretation of the UFTA with respect to the protection of the transferee under the law is made clear in the 2007 published opinion in *Thompson v. Hanson*.

RCW 19.40.081 protects a transferee's legitimate interest in the transferred property. Transferees are liable only for the amount they receive, which is determined based on the value received minus the value given. Subsection (b) limits liability to the value of the property received, and subsection (d) further limits liability to the net value received. Subsection (c) also requires the value to be determined at the time of transfer and subject to equity. We conclude the trial court's interpretation and application

of RCW 19.40.081 correctly effectuated the intent of the statute. *Thompson v. Hanson*, 142 Wn. App. 53, 174 P.3d 120 (2007)

B. APPORTIONING COMMUNITY PROPERTY

The trial court erred in concluding that all funds were community funds and all assets purchased using those funds were community property equally shared. The trial court made no attempt to trace the relative contributions into the funding used to purchase the assets. Without consideration of tracing the relative contributions toward the funding, the trial court failed to apportion John's share of the community assets at the time of the transfer.

In Washington, an asset is separate property if:

- A. It is acquired before the marriage,
- B. Acquired during the during marriage by gift or inheritance, or
- C. Acquired during the marriage with the traceable proceeds of separate property.

RCW 26.16.010 Separate property of spouse.

Property 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, shall not be subject to the debts or contracts of his or her spouse, and he or she may manage, lease, sell, convey, encumber or devise by will such property without his or her spouse joining in such management, alienation or encumbrance, as fully, and to the same extent or in the same manner as though he or she were unmarried.

An asset is separate property if acquired before marriage, acquired during marriage by gift or inheritance, acquired during marriage with the traceable proceeds of separate property, or, in the case of earnings or accumulations, acquired during permanent separation. *In re Marriage of White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001)

Separate property brought into the marriage will retain its separate character as long as it can be traced or identified. *In re Marriage of Schwarz*, 192 Wn. App. 180, 190, 368 P.3d 173 (2016)

However, only when money in a joint account is hopelessly commingled and cannot be separated is it rendered entirely community property. *Pearson-Maines*, 70 Wn. App. at 866. (1993) If the sources of the deposits can be traced and identified, the separate identity of the funds is preserved. Id. at 867.

The question of the character of real property was settled by the State Supreme Court in *Rustad v. Rustad*, 61 Wn.2d. 176, 377 P.2d 414 (1963):

In this state, the situs of the land in question, the applicable rules are:

(1) The community or separate character of real property is determined by the character of funds used in its purchase. *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914 (1907)

Property acquired during the marriage has the same character as the funds used to buy it. *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999)

The trial court did not make a finding of the consideration due John on the date the quitclaim deeds were signed, or the portions of John's community interest in each asset. Instead, the court lumped all assets together and found in the amended judgment that John had a 50% community interest ALL the assets of the marriage.

In a case where 3,000 pages of trial exhibits showed 17 individual bank accounts and no joint bank accounts, and where John and Shelly were married only nine (9) months at the time of the purchase of the 6th Lane Home, to apply a 50/50 community share to every single asset appears to an outsider as a conclusion of law far beyond the scope of wide latitude and discretion the court is entitled to.

The trial court erred in concluding that all property was community and shared equally by John and Shelly when the funds used to purchase the assets are traceable directly to Shelly's separate bank accounts, money which she earned in New Jersey and brought to Washington just prior to purchasing the assets from September 23, 2010 – April 4, 2011. This is the only timeframe where on a few assets Shelly gratuitously allowed John's name on title.

The appellant's response brief leading up to the remand hearing exhaustively provided details to the trial court directing its attention to the tracing of funds use to purchase the named assets.⁶⁷ Those details are incorporated here for consideration by the panel as to the level of detail available to the trial court in support of tracing of funding and the apportioning the community interest of John and Shelly in the assets. A brief summary of the most important facts follow.

At no time, from trial through motions for reconsideration and finally the remand hearing from which this appeal is made, did trial court make any effort to trace or evaluate the separate funding contributions made by John and Shelly to accurately apportion community interest in the named assets. The record of tracing, however, was always available in plain sight through 3,000 pages of bank statements and asset documents in evidence which clearly show the sources, origins, and dating of funds. At no time did John and Shelly have a joint bank account. The trial court accepted exhibits showing 17 individual bank accounts. Several of Shelly's individual bank accounts predate her marriage to John and originated in New Jersey. It is important to note here that New Jersey is not a community property state. It cannot be

⁶⁷ CP 62-83

overstated here that the earnest money payment and 100% of down payment for the 6th Lane Home was made by Shelly, from her separate Wachovia bank account in New Jersey, before moving to Washington State. John and Shelly were only married nine (9) months and residents of New Jersey at the time Shelly made the down payment and the 6th Lane Home was purchased. It is impossible for John to have had a 50% community share in those funds when the 6th Lane Home was purchased. The significance of this is profound when a court is to evaluate the portions of community interest John and Shelly had in the 6th Lane Home. If the value of the assets at the time of the transfers is to be evaluated for scope, then also the sources of John's toward the 6th Lane Home and Pilchuck Property must be evaluated to determine what interest, if any, he transferred to Shelly.

The trial court made no effort to evaluate community interest, even though all bank statements and asset documents in evidence were available to accurately apportion the Appellants' community share in the assets. The trial court concluded, in error, that simply because John contributed toward household expenses, and his name was on the title of the 6th Lane Home, that he had a 50% community share in that asset. Had the Court evaluated John's community interest in the 6th Lane Home based on the tracing of funds, his share on the date of the transfer would have been minimal. In the case of the Pilchuck Property, John's portion of community interest would have been zero.

The trial court relies heavily on Clayton v. Wilson as the authority to ensure that the "wife", who was the beneficiary of the transferred assets, remained liable to

the plaintiff for the community property that was transferred to her.⁶⁸ While Clayton v. Wilson is a case where the Wilsons were married for **37 years** and had extensive joint funds and an extensive array of community funds and assets. While it is accurate on the one hand to cite Clayton v. Wilson insofar as that scope must be applied to a judgment under the UFTA, it fails on the other hand to be relevant toward the tracing of funds and in turn the apportionment of community property. A 37 year marriage is expected to have extensive commingling of assets and in turn the community nature of assets purchased by those funds. That is hardly the case here, where the 6th Lane Home was purchased only nine (9) months into a marriage before even moving to Washington State. Indeed, Clayton v. Wilson funds were hopelessly commingled and untraceable. John and Shelly's funds, in contrast, are all easily traceable.

Despite the trial court's lack of diligence in tracing the source of funds, it nonetheless was willing to do so when it cited an \$80,000 check John gave to Shelly in August 2010 while they were still living in New Jersey, and deposited into Shelly's individual bank account in New Jersey, as proof that John established a community interest in the 6th Lane Home. It is plain to see that the trial court relied heavily on tracing John's \$80,000 check written from his New Jersey Bank account as a significant factor in its findings of fact and conclusions of law. The trial court had no difficulty in identifying and tracing a check John gave to Shelly back in 2010, but any tracing beyond that, in particular Shelly's separate bank accounts, was ignored. The trial court erred in considering only a single data point for the purpose of a finding of a community interest, but failed to trace the source of funds in 17 other bank accounts. The claim, in direct terms, is that considering only a small fraction of the

⁶⁸ VR 23

available data to establish and apportion a community interest in marital assets is not only an error, it is a gross error.

Because Shelly contributed all down payment funds toward the 6th Lane Home prior to living in Washington State, the following case outlines how the State Supreme Court evaluated a similar circumstance in *Brookman v. Durkee*, 46 Wash. 578, 90 P. 914 (1907):

Eugene R. Durkee conducted a manufacturing business in the state of New York, and accumulated as the profits of such business a considerable fortune. In 1888, a year prior to the death of his wife, he used a portion of the fortune so accumulated in the purchase of certain real property situated in Pierce county in this state...But while the statute broadly construed gives countenance to the contention of the respondents, we cannot think it was the intention of the legislature that no distinction should be made between property acquired wholly within this state by the joint efforts of husband and wife, and property acquired by them elsewhere and brought within this state. If it were the intent of the statute that property acquired in another jurisdiction and brought within the state should become community property, its legality might be seriously questioned. It would destroy vested rights. It would take from one of the spouses property over which he or she had sole and absolute dominion and ownership, and vest an interest therein in the other, and if the spouse should be the wife it would not only take away her absolute title, but would take away from her her right to control and manage the property, and make it subject to the separate debts of the husband whether or not she derived any benefit from their contracting, or had any legal or moral obligation to pay them. Therefore, without entering further into the reasons for the rule, we are clear that personal property acquired by either husband or wife in a foreign jurisdiction, which is by law of the place where acquired the separate property of one or the other of the spouses, continues to be the separate property of that spouse when brought within this state; and it being the separate property of that spouse owning and bringing it here, property in this state, whether real or personal, received in exchange for it, or purchased by it if it be money, is also the separate property of such spouse. While this question has not been directly before this court, analogous cases sustaining the rule can be found. In *Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732, certain personal property had been seized on an execution against the husband for which the community was liable. The wife sought to recover the property seized, on the ground that it was her separate property, having been acquired by her by purchase with money

which she acquired in the state of Kansas and brought into this state. The court held the property to be her separate property, saying that the property was her separate property in the state of Kansas and did not change its status by being brought across our state border.

While the appellants' former claim was that the trial court erred its findings of separate vs. community property on the 6th Lane Home and the Pilchuck Property, the appellants recognize that the trial court's findings as to the community nature of those properties are verities. The appellants do, however assign error to the trial court due to a lack of diligence in tracing John and Shelly's contributions to the community assets. There has been no finding made that funds have been hopelessly commingled, and in turn untraceable as to applying the conclusions of law. The tracing of funds matters, apportioning of community assets matter, and diligence in reviewing the source of funding to achieve accuracy of community share matters. Settling for a broad brush of assigning a 50/50 joint share of assets across the board was a premature surrender that tracing could not be done.

Schwarz v. Schwarz, 192 Wn. App. 180, 189 (2016) supports a conclusion that apportioning of a 50/50 share of the assets is in error.

An asset is separate property if “acquired before marriage; acquired during marriage by gift or inheritance; acquired during marriage with the traceable proceeds of separate property;” ...the requirement that assets be traced required Ms. Champagne to demonstrate by clear and convincing evidence that any acquisition of “new” assets she claimed as separate was with the proceeds of separate assets. ***Schwarz v. Schwarz***, 192 Wn. App. 180, 189 (2016)

The trial record and exhibits proved that Shelly traced to bank records that the source of funds for each came overwhelmingly from her individual bank accounts. It is important to note that Shelly earned nearly all of this money before she was married to John and earned all of it while living in New Jersey. *In re Marriage of*

Skarbek, 100 Wn. App. 444 (2000) illustrates that the character of property acquired during marriage follows the character of the funds used to acquire it. Further, once the characterization of the property is established, it retains that status unless a very overt action occurs to change it:

Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary. In *re Estate of Witte*, 21 Wash.2d 112, 125, 150 P.2d 595 (1944); In *re Estate of Madsen*, 48 Wash.2d 675, 676-77, 296 P.2d 518 (1956). Separate property will remain separate property “through all of its changes and transitions” so long as it can be traced and identified. In *re Estate of Witte*, 21 Wash.2d at 125, 150 P.2d 595; *Baker v. Baker*, 80 Wash.2d 736, 745, 498 P.2d 315 (1972); In *re Marriage of Pearson-Maines*, 70 Wash. App. 860, 865, 855 P.2d 1210 (1993). The burden is on the spouse asserting that separate property has transferred to the community to prove the transfer by clear and convincing evidence, usually a writing evidencing mutual intent. In *re Marriage of Shannon*, 55 Wash. App. 137, 140, 777 P.2d 8 (1989).

Gage v. Gage, 78 Wash. 262, 138 Pac. 886; *Volz v. Zang*, 113 Wash. 378, 194 Pac. 409 explains it even more specifically:

It is undoubtedly true that husband and wife may, by proper agreement or conveyance, change their separate property into community property and their community property into separate property. But in determining whether separate property has, in fact, been changed from separate into community property, the following rules have been definitely settled by this court and are to be kept in mind: (1) The status of property, whether separate or community, is to be determined as of the date of its acquisition; (2) this rule is true with reference to personal property as well as with reference to real property; (3) if the property is once shown to have been separate property, the presumption is that it continues separate property until that presumption is overcome by evidence; (4) separate property continues to be separate property through all its changes and transitions, as long as it can be clearly traced and identified; (5) the rents, issues and profits of separate property remain separate property. In *re Brown's Estate*, 124 Wash. 273, 214 Pac. 10; *Rogers v. Joughin*, 152 Wash. 448, 277 Pac. 988.

In *Guye v. Guye*, 63 Wash. 340, 115 PAc. 731, 37 L.R.A. (N.S.) 186, it was said:

Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to

appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.

A credible argument on the question of the character of community property comes from the appellate brief filed by Mr. Skarbek's counsel *In re Marriage of Skarbek*, 100 Wn. App. 444 (2000):

The nature of the property will not change throughout a marriage absent some specific change in character. *In re Estate of Madsen*, 48 Wn.2d 675, 677, 296 P.2d 518 (1956). A spouse's separate property is that owned prior to marriage, along with "rents, issues and profits thereof." RCW 26.16.010, RCW 26.16.020. On the other hand, property acquired during marriage is presumed to be community property. *Madsen v. Commissioner of the Internal Revenue Service*, 97 Wn. 2d 792, 796, 6540 P. 2d 196 (1982). The presumption can be overcome with a showing of clear and convincing proof. *Id.* To rebut the presumption, a party asserting that property acquired during marriage is separate property must be able to trace "with some degree of particularity" the separate source of the funds used for the acquisition. *Pollock v. Pollock*, 7 Wn. App. 394, 400, 499 P. 2d 231 (1972); *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950). If separate assets are commingled with community assets, the entire asset is presumed to be community unless the separate funds can be traced or identified. *Mumm v. Mumm*, 63 Wn.2d 349, 352, 387 P.2d 547 (1963). If the party is able to trace the separate property interest from the commingled asset, then the separate property interest is preserved. *Id.*

The appellate court ruled that Skarbek satisfactorily traced his funds, proving that the assets in question were his separate property. Shelly thoroughly traced her funds to each of the assets listed in the fraudulent transfer lawsuit; however, the trial court never even acknowledged it and ignored her proof entirely.

The trial court concluded that John and Shelly deviated from their Prenuptial Agreement because John provided funds to Shelly for expenses, which she deposited into her separate bank account, the only checking account from which she paid all household expenses and her separate bills. There is no provision in the Prenuptial Agreement that states that they are not permitted to give funds to each other as

needed in the ordinary course of operating as a married couple or that by doing so, it would convert their separate bank account into a joint account.

There is a case that bears similarity to this case. In an unpublished opinion by the United States District Court, in *LaRoche v. Billbe*, et al, No. 2:2013cv01913 - Document 30 (W.D. Wash. 2014) the Court stated:

With regard to the equitable remedy of rescission by conduct, the ways in which Hoffman is alleged to have disregarded the Prenuptial Agreement are: (i) depositing community income into separate accounts; (ii) discontinuing required contributions to a retirement account in LaRoche's name; and (iii) using community property to improve the Woodinville house, which Hoffman owed before, and sold during, the marriage. *See* Respondent/Cross-Appellant Brief at 48-49, Ex. 13 to Billbe Decl. (docket no. 18-1). The Court is satisfied that the King County Superior Court would not have found these grounds for rescission persuasive.

The obvious similarity is that both Hoffman and John deposited their income into separate accounts. The court called Hoffman's conduct a "deviation of the Prenuptial Agreement" and stated that is was not significant enough to warrant a rescission of their agreement, and that ignores the fact that Hoffman had two addition "deviations." The Hoffman Court *did not conclude* that his income deposited in separate bank accounts resulted in commingled funds, nor did the Hoffman Court conclude that anything purchased from those separate accounts were now community property of the marriage. The Hoffman Court held that the designation of a separate bank account remained regardless from where those funds originated.

Here is how the *LaRoche v. Billbe* Court responded to Mr. Hoffman's deviations of the Prenuptial Agreement:

The Court concludes that the minor ways in which Hoffman deviated from the provisions of the Prenuptial Agreement would not have convinced the King County Superior Court to grant LaRoche the equitable remedy of

rescission. This case is entirely different from *Fox* and *Sanchez*, in which the failures to comply with the terms of the Prenuptial Agreement were mutual and involved virtually all of the parties' assets.

The trial court concluded that John and Shelly' Prenuptial Agreement was unenforceable and voided the entire Prenuptial Agreement, providing no citations of case law that supported that conclusion. The *LaRoche* Court, which is closest case to this case, did take a stand on the issue of funds being deposited into a separate bank account and saw it as being “**insignificant.**”

Through the tracing of funds in the individual bank records of Shelly, it is clear that she extensively used her separate funds to make each purchase noted in Cathy's fraudulent transfer lawsuit. In evaluating community interest, it is clear to the appellants that Shelly was entitled to a majority share, and John was entitled to a minimal share. The trial court should have made every reasonable attempt to trace the source and character of funding, and in turn arrive at an accurate apportioning of Shelly and John's community interests.

V. CONCLUSION

This opening brief in support of the notice of appeal is submitted by Appellant Shelly Williams.

Recently, a significant event occurred that brought the trial court's ruling in this matter into sharp focus. John received notice that he was being laid off from IBM in 30 days. Because of the economic downturn as a result of COVID-19 and due to John's advanced age, finding a new job could be challenging at best. Shelly evaluated how his loss of employment would impact her personally.

It knocked Shelly to her knees to realize that only because she married John and moved to Washington State, she would now be responsible to pay John's ex-wife's alimony of \$5,000 per month for as long as Catherine or John live! And this is despite the fact that John and Shelly legally separated prior to Catherine filing this lawsuit. John could conceivably walk away from paying alimony for any reason and Shelly will forever be responsible to pay it in the future. Should John get sick and not be able to work, Shelly will have to pay Catherine's alimony. Should John not be able to find work, Shelly will have to pay Catherine's alimony. Is this really the intention of the court to take away John's personal responsibility to pay ongoing alimony to Catherine and to place that burden on Shelly forever? Shelly is not a party to John and Catherine's relationship. She has done everything humanly possible to keep herself clear of any potential entanglements, including the use of contracts to protect her separate property and maintaining separate bank accounts. This is financially devastating to Shelly to put her in the position to have to pay ongoing

alimony should John, for any reason, not be able to pay in the future. Shelly not only paid Catherine's judgment at the conclusion of the trial, she also paid the nearly \$100,000 in Catherine's legal fees for the trial and \$20,000 for Catherine's attorney fees for the appeal. These are funds Shelly will never recover as a result of her illness (explained below). Her ability to rebuild financial security is gone.

Shelly, like Catherine, found herself a single parent of three children with a college education. Shelly, unlike Catherine, divorced in Washington State and did not receive any alimony. Shelly was expected to work to support herself and her three children. Shelly had a very successful career as an executive in human resources. She worked hard and saved every dollar she could so that she would be able to support herself successfully through retirement. Near the end of her career, she met John. They married just six months before Shelly's employment ended in March 2010. Shelly spent many months being seen by several doctors until it was discovered that she has an incurable progressive illness. She has never been able to work again. She was found fully disabled and now lives on Social Security Disability in the amount of \$1,973 per month. Unlike Shelly, Catherine made the decision to not work and support herself or her children. From 2001 until now, John has fully supported Catherine and their three children through private schools, private colleges, paying her mortgage payments, taxes, insurance, all utilities, etc. John paid every expense of his ex-wife and their children. Shelly hopes that the appellate court will understand that for these reasons, Shelly had considerable wealth when she met and married John. John was broke, lived in a rundown one bedroom apartment with his youngest son, Billy, who occupied the bedroom. John slept on the couch from 2001

until he moved into Shelly's home in 2005. John had considerable debt, had no savings, and was the only parent contributing to their children's living expenses and education expenses. His financial future was bleak. In 2010, John expected that his requirement to pay support would be over. Their Property Settlement Agreement stated that the end of his requirement to pay was triggered by their youngest son's graduation from high school. Instead of finally getting financial relief, Catherine went back to court in New Jersey and asked for a new order of alimony and child support and sought an 830% increase in her alimony – from \$7,500 per year to \$60,000 per year! Catherine neglected to have John served so the New Jersey court entered an order of default in October 2012. John's appeal was denied. Just when John thought he would finally be able to save money, build a retirement during his last few years of employment, the rug was pulled out from under him and once again, he was broke. John's income has increased considerably since he retired from EMC and went to work for IBM, so he can now begin to rebuild some financial security in the few years he has left to work.

Yes, Shelly corrected the titles to her home and the truck in October 2012 once she understood that John was going to have a lifelong financial requirement to Catherine. Shelly had good reason to do her best to protect her own assets. Catherine filed a lawsuit in New Jersey when John and Shelly first started dating in 2005 and asked the New Jersey Court double her alimony and child support due to Shelly's income and assets. Fortunately, the trial court denied her motion. However, once Catherine sought such a significant increase in support and the court signed that order, Shelly feared that Catherine would come after her again so Shelly took

appropriate precautions to protect her investments. It is important to note that there was no judgment against John at the time this happened in 2012. Therefore, there was no motive to engage in a fraudulent transfer. John liquidated his investments and used those funds to pay the new award and to have extra cash on hand due to the monumental increase in support he was now paying. Shelly's decision to correct the titles on her home and truck was the prudent thing to do. In no way was there any intent to commit fraud.

How the trial court can see these facts - Shelly's personal wealth, and John's lack of financial resources - which are all supported in the 3,000 pages of banking records, and make a finding that John equally contributed to the assets named in this lawsuit and is entitled to 50% of their value is illogical and untrue.

Upon moving to Washington in 2010, Shelly followed the Washington State statutes for owning separate property while married. John and Shelly sought legal advice prior to their marriage and had a Prenuptial Agreement drawn up. This agreement states that all homes owned are Shelly's separate property, as she was the only person who invested in these assets. However, the trial court rejected the fact that Shelly and John have a valid Prenuptial Agreement and ruled that it is unenforceable. That is outrageous! The trial court further rejected the fact that John and Shelly maintained ONLY separate bank accounts since they began living together in 2005, keeps their assets carefully separated. Since John and Shelly married very late in life and after both of their individual families were raised and on their own, both John and Shelly intend to pass on their respective assets to each of their own children. The trial court does not even acknowledge any of these facts and lumps

everything Shelly owns into one bucket and says that everything is community property. The trial court did not do its job. This was an abuse of discretion.

Shelly is on the brief independent of John as her interests and John's interests are now opposed. John benefits from the decisions of this court while Shelly is harmed by them. It is baffling to Shelly why the court has targeted her with such unjust findings when Shelly adhered to Washington law when she moved back here in 2010. (As a reminder, Shelly owned her own home in New Jersey. She sold that home and used those funds and other funds from her separate New Jersey bank accounts to purchase the 6th Lane home in September 2010. At that time, John and Shelly had been married just nine months. All of her income was earned as separate income in New Jersey and nearly 100% of those funds were earned before she married John in November 2009. Shelly purchased the 6th Lane home before becoming a resident of Washington State. These facts make it clear that ownership of the 6th Lane Home was belonged to Shelly as her separate property. With the Pilchuck Heights property, Shelly purchased this piece of property in February 2014 with funds from her separate money market account – an account from which John never deposited any funds whatsoever. John was required to sign a quitclaim deed PRIOR to Ticor Title closing the transaction, which only had Shelly's name on title. Ticor Title state clearing on the quitclaim deed that it was required as Shelly was married but acquiring the asset as a separate asset. There was never a transfer of the Pilchuck Property.) Washington law is absolutely clear that these assets are both Shelly's separate property, based on the Prenuptial Agreement identifying them as

Shelly's separate property and based on the fact that Shelly used traceable separate funds for their purchase.

Shelly met with an attorney to discuss the predicament she now finds herself since when she filed the initial appeal, the appellate court elected to not consider or review the exhibits that prove all the facts above, citing that it was because John and Shelly did not file a verbatim report of the trial, and affirmed the trial court's findings of fact and conclusions of law as verities. When John and Shelly filed that appeal, they discussed with the appellate court contact whether a verbatim report was required if the exhibits proved the case. The appellate court contact indicated that a verbatim report was not required. Therefore, unknowingly, this sealed John and Shelly's fate in the first appeal. While Shelly clearly understands that since the appellate court affirmed the trial court's findings, she cannot challenge those findings again. However, what can this appellate panel consider is:

1. Whether the trial court correctly determined the value of the assets on the date they were allegedly transferred; and
2. Whether the trial court determined a fair valuation of the assets on the date of the alleged transfer; and
3. Whether the amount the trial court determined was the scope of the judgment that Catherine can collect from Shelly was equitable.

Shelly is asking this appellate panel to consider the requirements from the Fraudulent Transfer Statute Remedies RCW 19.40.081, which state that the amount Shelly should pay John is identified on the date of the alleged transfer and that the amount must be equitable.

It is not equitable that when John signed the quitclaim deed for the 6th Lane home on October 11, 2012, that he be granted a 50% interest in the home at the time the home sold on December 1, 2016. Shelly contributed \$390,000, money from the sale of her New Jersey home and funds from her separate bank accounts. John provided no contribution. If there was any community interest in the 6th Lane Home, it should have been established as of October 11, 2012, the date John signed the quitclaim deed. John's legal right to the property ended that day. John would not be entitled to any future investment or appreciation. That is the requirement of the statute. The trial court ignored the fact that the 6th Lane home lost \$80,000 of value between September 2010 and October 2012 due to the recession. John actually gave Shelly debt as a result of this transaction.

What the trial court did instead was to extend John's right to Shelly's continued financial investment and the appreciation from an improved housing market from October 2012 to December 2016 and granted John a continued 50% ownership in the 6th Lane Home. That is an unjust enrichment for John and harms Shelly financially.

With regard to the Pilchuck Property - it was never transferred, an important fact that was acknowledged by Chief Judge Maxa during oral arguments on November 27, 2018. Nothing was due to John on the date Shelly purchased this property. It is not equitable that John was granted 50% of the improved value of the Pilchuck property as of August 2017 for two reasons:

1. The date that John signed the quitclaim deed was February 24, 2014. That ended any interests that he may have had in the property.

2. Shelly contributed the full purchase price of \$185,000 on February 24, 2014 and John contributed zero.

One of the easiest assets to evaluate is the 2006 Dodge Ram Pickup Truck. On the date of transfer, October 11, 2012, the trial court established a value of \$22,000. The trial court again just gave John 50% ownership of this asset despite the fact that Shelly produced documents proving she paid \$22,000 from her own separate funds and John contributed \$5,000 from his separate funds. It is clearly not equitable for the trial court to give equal ownership based on such an unequal contribution. The trial court also ignored the fact that Shelly repaid John his full \$5,000 and did not give her credit for that repayment.

The trial court also did not take into consideration the \$176,000.69 Shelly paid to John in an effort to make him whole in the court's eyes so that she could extract herself from the ongoing litigation between John and Catherine and maintain her own separate assets safely. Shelly gave back whatever funds Catherine complained about, despite the fact that she did not owe him that money just to separate herself from the legal disputes that continue between John and Catherine. Whether or not this was sufficient was never even addressed by the trial court despite the fact that Shelly provided proof of that payment three years ago during the remand hearing.

Finally, Shelly paid to the Court Registry \$60,000 from her separate bank account during the pretrial period in order to be granted permission to sell her 6th Lane Home. The trial court used those funds to pay Catherine her original judgment, yet the trial court did not give Shelly full credit for that payment. Instead, the trial

court split the credit for that payment 50% to John and 50% to Shelly. The trial court erred in not giving Shelly full credit for that \$60,000 payment.

During the remand hearing, the trial court stated that he has wide discretion in how he ruled in this case; but wide discretion does not mean that he can rule outside the requirements of the statutes. The trial court did not adhere to the requirements of RCW 19.40.081 and therefore, the judgment should be reversed.

Shelly requests that the appellate court remand this case back to a new trial court and that the new trial court determine an equitable scope for any future judgment, if any, that belongs to Shelly alone. The trial court has had four opportunities to get this right; the trial, the Motion for Reconsideration, the Motion for Clarification and now the remand for scope directed by the appellate court. The trial court has yelled at Shelly, ordered her to hire an attorney on more than one occasion, and displayed disdain for her as a litigant, including silencing her during the trial and requiring that only John speak. Contrasting his treatment of Shelly with the original judge on the case, Judge Culpepper, is black and white. Judge Culpepper was very fair, treated Shelly with respect, and even advised her that since John was never on title to the Pilchuck Property, he would dismiss it from the lawsuit at Summary Judgment. When Judge Culpepper discovered that Catherine had filed a garnishment with IBM to collect her judgment against John, he stated that as soon as she began collecting, he would deal with this fraudulent transfer case. Judge Culpepper's position was:

1. Catherine got a judgment.
2. Within 60 days, she had a garnishment.

3. She began collecting very shortly thereafter.
4. Catherine was not hindered or delay in receiving her judgment.
5. John was not insolvent.
6. The fraudulent transfer case would be over.

Unfortunately, John and Shelly were notified that Judge Culpepper was retiring and they had been reassigned to Judge Nevin. From that point on, this lawsuit has been a nightmare. This is Shelly's last opportunity to get justice from the court and she is pleading with this appellate court to consider the voluminous evidence.

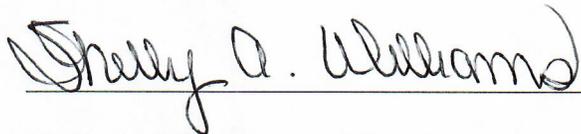
In conclusion, Shelly respectfully ask this court to:

1. Reverse the trial court's amended judgment on the extent of Shelly Williams' liability; and
2. Remand to the trial court to establish the value of the assets allegedly transferred on October 11, 2012 and February 24, 2014; and
3. Remand for further proceedings to establish John's interest in each asset on those dates, based on each parties' financial contribution in the purchase of the assets; and
4. Reverse the trial court's 50/50 split of the \$60,000 Shelly paid to the Pierce County Superior Court Registry and remand to the trial court for further proceedings to credit Shelly for this payment from her separate funds; and
5. Reverse and remand to the trial court for further proceedings to credit Shelly for the \$176,000 payment to John post trial from her separate funds; and

6. Order the assignment of a new superior court judge for remanded proceedings; and
7. Order in favor of the appellants for attorney fees and court costs.

August 20, 2020

Respectfully submitted,

A handwritten signature in black ink that reads "Shelly A. Williams". The signature is written in a cursive style and is positioned above a horizontal line.

Shelly A. Williams, Appellant Pro Se

APPENDIX A

**Clerk's Papers Per Request of Appellant
To the Court of Appeals, Division II**

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

CATHERINE S SHUBECK

Plaintiff

June 18, 2020

vs.

JOHN R SHUBECK

SHELLY A WILLIAMS

Defendant

No.: 16-2-06813-3
Court of Appeals No.: 54532-2

CLERK'S PAPERS PER
REQUEST OF APPELLANT
TO THE
COURT OF APPEALS,
DIVISION II

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Attachments

EXHIBIT #'S 1-4, 9-13, 15, 18-21, 41, 105, 107, 110, 111, 113-117, 124, 139 AND 140 - SENT UNDER SEPARATE COVER

APPENDIX B

Appellate Court Mandate Dated October 14, 2019

October 23 2019 2:14 PM

KEVIN STOCK
COUNTY CLERK
NO: 16-2-06813-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CATHERINE S. SHUBECK,

Respondent,

v.

JOHN R. SHUEBECK and SHELLY A.
WILLIAMS,

Appellants.

No. 50979-2-II

MANDATE

Pierce County Cause No.
16-2-06813-3

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on March 19, 2019 became the decision terminating review of this court of the above entitled case on September 4, 2019. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor: Respondent, Catherine S. Shubeck is awarded \$18,409.00,
in attorney fees and \$292.31 in costs:

Judgment Debtor: Appellants, John R. Shubeck and Shelly A. Williams: \$18,701.31



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 14th day of October, 2019.

Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

Page 2
Mandate 50979-2-II

John R. Shubeck
Shelly A. Williams
1350 Pilchuck Heights FL
Fox Island, WA 98333

Thomas Dashiell
Davies Pearson, P.C.
920 Fawcett Ave
Tacoma, WA 98402-5606
tdashiell@dpearson.com

Hon. Jack F. Nevin
Pierce County Superior Court Judge
930 Tacoma Ave South
Tacoma, WA 98402

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

CATHERINE S. SHUBECK,

Respondent,

vs.

JOHN R. SHUBECK AND SHELLY A.
WILLIAMS

Appellants.

No. 54532-2-II

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on the date below, I did the following:

On the 20th day of August, 2020, I served a true copy of a BRIEF OF APPELLANTS filed in this matter by mailing it on this date to Thomas L. Dashiell, attorney for the Plaintiff/Respondent, by priority and certified mail to the following address:

920 Fawcett Ave., Tacoma, Washington 98402.

Dated: 8-20-2020

Signature:



JOHN R. SHUBECK
Appellant, Pro se

JOHN SHUBECK - FILING PRO SE

August 20, 2020 - 1:18 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54532-2
Appellate Court Case Title: John Shubeck, Shelly Williams, Appellants v Catherine Shubeck, Respondent
Superior Court Case Number: 16-2-06813-3

The following documents have been uploaded:

- 545322_Affidavit_Declaration_20200820131550D2028898_7630.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was 54532-2 DECLARATION OF SERVICE.pdf
- 545322_Briefs_20200820131550D2028898_5495.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 54532-2 BRIEF OF APPELLANTS.pdf

A copy of the uploaded files will be sent to:

- tdashiell@dpearson.com

Comments:

Sender Name: John Shubeck - Email: jrshubeck@gmail.com
Address:
1350 Pilchuck Heights
Fox Island, WA, 98333
Phone: (253) 303-0135

Note: The Filing Id is 20200820131550D2028898