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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 315231

**COURT OF APPEALS, DIVISION III,
FOR THE STATE OF WASHINGTON**

Jeannie Kile, Respondent

v.

Gordon Kendall, Appellant

BRIEF OF APPELLANT

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Finding of Fact No. 5 is in error to the extent that it appears to imply that ASCS documents were never filed by Gordon Kendall, and to the extent it implies that administrative ASCS labels of persons can characterize community property for purposes of distribution in a dissolution.

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Finding of Fact No. 6 is in error to the extent that it finds the forgiveness of the remainder of the equipment loan by Lester Kile was not a gift to the community, or was not a gift specifically to Gordon for his hard work. Community labor by Gordon was invested into a community business opportunity, to produce the funds that were used to pay for this equipment, until the equipment loan was forgiven by Lester Kile.

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Finding of Fact No. 7 is in error as to "benefit." Gordon Kendall is not making a claim on the 1200 acres of "Kile lands." Gordon's community property claim is only on the 317 acres of "Flood property," purchased by the family business, and he claims a share in its value as a business. Lester Kile offered Gordon and Jeannie a *community business opportunity*, and Lester Kile never tried to regulate how the Kendall's used their share of the profits from leasing his land, as long as he got his 1/3 crop share. Furthermore, it is error to include Lester's intentions as a basis for the court's decision, since *the intentions of Lester Kile regarding inheritance of his 1200 acres are completely irrelevant* in characterizing the other property that is presumed community. Gordon has always agreed that Jeanne Kile's inheritance of 1200 acres from Lester Kile would be Jeannie's separate property (which Jeannie could, for example, lease to the family business); however, Lester Kile's testamentary intentions

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Finding of Fact No. 8 is in error to include *Lester's intentions*, or his will, as a basis for court's decision as to characterizing *property agreements between Jeannie and Gordon Kendall*, and it is irrelevant that Lester Kile died after the parties separated. The ultimate effect of the court's focus on Mr. Kile's intentions is more prejudicial than probative as it implies that Lester Kile's purported intentions about his 1200 acres, or secret deals between Jeannie and Lester, could characterize property that is presumed at law to be community property from being acquired during the marriage with Gordon's community labor. Lester Kile does not have the power to characterize the property between Jeannie and Gordon Kendall. 5

Finding of Fact No. 9 is not objectionable, as long as "separate" is construed as *separate in time*, and not construed to mean "separate property." 5

Finding of Fact No. 10 is in error to the extent that it tries to conflate "mere name on the title" with the characterization of the property. The Flood properties were paid for by community labor as part of a community business project. (See FF No. 11, below.) 5

Finding of Fact No. 11 is in error to the extent that it does not reflect that the down payment on the Flood properties was a gift to the community, or was so commingled as to become community property, and it is in error to the extent that it finds that "no community funds were paid on the acquisition of the Flood ground." Gordon Kendall's community labor paid for the Flood properties. The contract buying the Flood land was a community purchase (no matter what name was on the title), and the land was paid for from Gordon Kendall's community labor. The Flood properties presented a *community opportunity* to buy land, just as Lester Kile presented Jeannie and Gordon with a *community opportunity* to lease his equipment and land. 6

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There has been an extravagant and skillful argument by Jeannie Kile to "pun" her way out of the presumptions of community property law of Washington State, and to the extent the trial court has been misled in this regard, error is assigned.

Finding of Fact No. 12 is in error to the extent it implies that Mr. Kendall was knowingly surrendering his community property rights when he signed the quit claim deeds on the Flood properties. Mr. Kendall was told that was a formality he had to sign, and he had no legal advice, and made no knowing waiver of his community property rights. *Jeannie Kile is trying to use Gordon's signature on the quit claim deed as property agreement, to gain all the benefits of a property agreement, without having to meet the burdens of actually achieving a proper property characterization agreement.* Again, while this is a skillful and cunning argument through misdirection, it is legal error. (Gordon's ignorance as to the Quit Claim deeds is properly noted in FF No. 13.) 6

Finding of Fact No. 18 is in error to the extent it characterized the Flood properties as Jeannie Kile's separate property. 7

Finding of Fact No. 20 is in error to the extent that it fails to account for Mr. Kendall being deprived of his livelihood, by Jeannie Kile, after a community decision that Mr. Kendall should farm, and has done so for over 20 years, and to the extent it does not reflect that maintenance should be ordered. The Conclusions of Law based upon the foregoing Findings of Fact are also in error. 7

Conclusion of Law No. 1 erroneously characterizes the Kendall community leasing of Lester Kile's lands as the separate property of Jeannie Kile. 7

Conclusion of Law No. 2 erroneously treats the community purchase of farm equipment from Lester Kile as the separate property of Jeannie Kile, given that it was community labor that paid for the equipment as part of a community business undertaking. 7

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Conclusion of Law No. 5 is in error, as it was Gordon's community labor which purchased the farm equipment for the family business. 8

Conclusion of Law No 6 erroneously deprives Gordon Kendall of his community interest in the Flood properties. 8

Conclusion of Law No. 7 is in error to accept a Quit Claim deed as a knowing waiver of community property interest, or to otherwise allow the college-educated Jeannie Kile to deprive her lesser-educated and guileless husband of his community interest in the Flood properties. For the quit claim deeds to function as a property agreement, all the requirements of a property agreement should have had to have been met, and they were not. 8

Conclusion of Law No. 9 is acknowledged by Mr. Kendall, except to the extent it tries to reach the Flood properties, the farm equipment, or the community farm profits. Gordon Kendall makes no claim to the 1200 acres that the community farm leased from Lester Kile. Lester Kile presented his property (1200 acres to be eventually inherited by Jeannie Kile in the Kile trust) to Gordon and Jeannie as a community opportunity for Gordon to farm on such a lease, at the market rate of a 1/3 share of the crop. Gordon leased the 1200 acres of land from Lester, and worked the land, as part of the community farm that included the 317 acres of Flood property. Gordon makes no claim upon the 1200 acres Jeannie was to inherit from Lester, except as Gordon asking that the court take her wealth into account in making the distribution, and the court consider the profits from the family farm as a community asset, and the community business is still farming the total of the 1517 acres (Lester's 1200 and the Flood 317). 8

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Issue No. 1: Did the trial court err to find that Lester Kile's *business opportunity offered to the Kendall community* to lease his land in exchange for Gordon's community labor, was a means by which the community opportunity was transmuted into Jeannie Kile's separate property by simply offering a lease to the Kendall community at market rates? (Answer, yes. The trial court erred to conflate the fact that Jeannie would one day inherit Lester's 1200 acres as separate property with the fact that all Lester was offering to Gordon and Jeannie was a community business opportunity to lease his land at the market rate, and the court erred to then deprive Gordon Kendall of his community interest in the community business activity of the farm, and its proceeds.) 9

Issue No. 2: Did the trial court err to find Gordon Kendall's signatures on the Flood property quit claim deeds were decisive in characterizing the Flood properties as Jeannie Kile's separate property. (Answer: Yes. The court erred to effectively treat the quit claim deeds as property agreements, and to thus evade the requirements that any waiver of Gordon's community property rights be a knowing waiver and that he have independent legal counsel, or the legal equivalent. Gordon did not knowingly waive his community property rights in the Flood properties, and Jeannie Kile breached her fiduciary duties to the community.) 10

Issue No. 3: Did the trial court err to deprive Gordon Kendall of a community interest in the farm, Flood lands, and its equipment? (Answer: Yes, Gordon Kendall gave up a career of 20 years at Montgomery Wards to enter upon a community project in the farm, and the tax returns filed during the life of the marriage, the commingling of family and farm funds, and the burden

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of proof upon Jeannie Kile to prove otherwise, mean that Gordon Kendall had a community interest in the farm and its fruits.)

Issue No. 4: Should Gordon Kendall receive maintenance for the remainder of his life, given that he has been deprived of his livelihood at age 60 by Jeannie Kile removing him from the farm? (Answer: Yes, Gordon Kendal should receive spousal maintenance.) 11

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I. INTRODUCTION

Gordon and Jeannie Kendall were married for 29 years (from 1984 until divorce was filed in 2011, and a decree was entered in 2013). In 1990, Gordon Kendall gave up a 20-year career at Montgomery Wards as a sales manager to begin working the community farm that consisted of 1200 acres leased from Jeannie Kendall's father, Lester Kile, and 317 acres (Flood properties) purchased by the community around the same time.

At the dissolution, Jeannie Kile contended that the farm, its equipment, and all of its leases belonged to her because the titles of the land and the leases were in her name, and that Gordon had been paid a reasonable wage and that he had no other interest in the farm.

Gordon Kendall contended that his quit claim deeds on the Flood properties, executed at the time of purchase were not knowing waivers of his community rights, and that he had been pressured to sign them, and that he had been told signing the quit claim deeds were mere formalities necessary to facilitate the sale.

Gordon has no designs upon Mr. Kile's 1200 acres, which Jeannie Kile inherited when Lester Kile died in 2012, but Gordon Kendall believes that the farm business he worked is community property, that its profits

and equipment the farm purchased is community property, and that the Flood properties (317 acres) purchased with his community labor on the community farm is community property. And Mr. Kendall does not believe that Jeannie Kile met her burden of proof to refute the presumption that these assets acquired during the marriage are community property.

The trial court found that the farm, its profits, its equipment, and the Flood properties were Jeannie Kile's separate property, and this appeal followed.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error

The Findings of Facts and Conclusions of Law are generally denied to the extent that they deny Gordon Kendall his community interest in the family farming business, its lands, and its equipment, as is the decree which rests upon these findings of fact and conclusions of law.

Additionally, the following findings under section 2.21 are assigned error:

Finding of Fact No.1 is in error for the court to find that the lease from Lester to Jeannie Kile was not paid for by the community labor of Gordon Kendall, and it is error to conflate *Jeannie Kile's potential inheritance of Lester Kile's 1200 acres as separate property* with *the community business interest of the community leasing Lester Kile's 1200 acres* at the normal

1/3 crop share during the life of Mr. Kile for the purpose of making a community profit, in the community business.

Finding of Fact No.2 is in error to the extent that it implies there was not an ongoing commingling of personal and business expenses, and to the extent it implies the segregation of business and personal accounts was either regular, or done with Gordon's knowledge that somehow separate property was being segregated and characterized.

Finding of Fact No. 3 is in error to the extent that it implies that there were not losses on the farm that were covered from other community funds, and to the extent that it implies that Gordon Kendall was fully compensated for his labor, and to the extent it implies that Gordon knew he was only receiving wages from the farm, and not community profits, and not building community wealth.

Finding of Fact No. 4 is in error to the extent that it fails to appreciate that Gordon Kendall had no idea his wages were to be his only compensation from the farm, and it is in error to the extent the finding obscures the fact that Gordon Kendall put his retirement funds into the farm on a year that suffered losses (and that, logically, Jeannie Kile put her community wages into the farm on some loss years), and it is in error to the extent it obscures that the farm account was regularly used for family expenses.

Finding of Fact No. 5 is in error to the extent that it appears to imply that ASCS documents were never filed by Gordon Kendall, and to the extent it implies that administrative ASCS labels of persons can characterize community property for purposes of distribution in a dissolution.

Finding of Fact No. 6 is in error to the extent that it finds the forgiveness of the remainder of the equipment loan by Lester Kile was not a gift to the community, or was not a gift specifically to Gordon for his hard work. Community labor by Gordon was invested into a community business opportunity, to produce the funds that were used to pay for this equipment, until the equipment loan was forgiven by Lester Kile.

Finding of Fact No. 7 is in error as to "benefit." Gordon Kendall is not making a claim on the 1200 acres of "Kile lands." Gordon's community property claim is only on the 317 acres of "Flood property," purchased by the family business, and he claims a share in its value as a business. Lester Kile offered Gordon and Jeannie a *community business opportunity*, and Lester Kile never tried to regulate how the Kendall's used their share of the profits from leasing his land, as long as he got his 1/3 crop share. Furthermore, it is error to include Lester's intentions as a basis for the court's decision, since *the intentions of Lester Kile regarding inheritance of his 1200 acres are completely irrelevant* in characterizing the other property that is presumed community. Gordon has always agreed that

Jeanne Kile's inheritance of 1200 acres from Lester Kile would be Jeannie's separate property (which Jeannie could, for example, lease to the family business); however, Lester Kile's testamentary intentions regarding his 1200 acres cannot "spillover" into characterizing all the property acquired during the marriage as Jeannie Kile's sole and separate property.

Finding of Fact No. 8 is in error to include *Lester's intentions*, or his will, as a basis for court's decision as to characterizing property agreements between Jeannie and Gordon Kendall, and it is irrelevant that Lester Kile died after the parties separated. The ultimate effect of the court's focus on Mr. Kile's intentions is more prejudicial than probative as it implies that Lester Kile's purported intentions about his 1200 acres, or secret deals between Jeannie and Lester, could characterize property that is presumed at law to be community property from being acquired during the marriage with Gordon's community labor. Lester Kile does not have the power to characterize the property between Jeannie and Gordon Kendall.

Finding of Fact No. 9 is not objectionable, as long as "separate" is construed as *separate in time*, and not construed to mean "separate property."

Finding of Fact No. 10 is in error to the extent that it tries to conflate "mere name on the title" with the characterization of the property. The

Flood properties were paid for by community labor as part of a community business project. (See FF No. 11, below.)

Finding of Fact No. 11 is in error to the extent that it does not reflect that the down payment on the Flood properties was a gift to the community, or was so commingled as to become community property, and it is in error to the extent that it finds that "no community funds were paid on the acquisition of the Flood ground." Gordon Kendall's community labor paid for the Flood properties. The contract buying the Flood land was a community purchase (no matter what name was on the title), and the land was paid for from Gordon Kendall's community labor.

The Flood properties presented a *community opportunity* to buy land, just as Lester Kile presented Jeannie and Gordon with a *community opportunity* to lease his equipment and land.

There has been an extravagant and skillful argument by Jeannie Kile to "pun" her way out of the presumptions of community property law of Washington State, and to the extent the trial court has been misled in this regard, error is assigned.

Finding of Fact No. 12 is in error to the extent it implies that Mr. Kendall was knowingly surrendering his community property rights when he signed the quit claim deeds on the Flood properties. Mr. Kendall was told that was a formality he had to sign, and he had no legal advice, and made

no knowing waiver of his community property rights. *Jeannie Kile is trying to use Gordon's signature on the quit claim deed as property agreement*, to gain all the benefits of a property agreement, *without having to meet the burdens of actually achieving a proper property characterization agreement*. Again, while this is a skillful and cunning argument through misdirection, it is legal error. (Gordon's ignorance as to the Quit Claim deeds is properly noted in FF No. 13.)

Finding of Fact No. 18 is in error to the extent it characterized the Flood properties as Jeannie Kile's separate property.

Finding of Fact No. 20 is in error to the extent that it fails to account for Mr. Kendall being deprived of his livelihood, by Jeannie Kile, after a community decision that Mr. Kendall should farm, and has done so for over 20 years, and to the extent it does not reflect that maintenance should be ordered.

The Conclusions of Law based upon the foregoing Findings of Fact are also in error.

Conclusion of Law No. 1 erroneously characterizes the Kendall community leasing of Lester Kile's lands as the separate property of Jeannie Kile.

Conclusion of Law No. 2 erroneously treats the community purchase of farm equipment from Lester Kile as the separate property of Jeannie Kile,

given that it was community labor that paid for the equipment as part of a community business undertaking.

Conclusion of Law No. 3 erroneously states farm revenues are separately Jeannie Kile's, when the farm was a community endeavor, fueled by Gordon's community labor.

Conclusion of Law No. 4 is an overbroad extension of Jeannie Kile's attempts to retain all benefits of the labor of Gordon Kendall on behalf of the community for herself.

Conclusion of Law No. 5 is in error, as it was Gordon's community labor which purchased the farm equipment for the family business.

Conclusion of Law No 6 erroneously deprives Gordon Kendall of his community interest in the Flood properties.

Conclusion of Law No. 7 is in error to accept a Quit Claim deed as a knowing waiver of community property interest, or to otherwise allow the college-educated Jeannie Kile to deprive her lesser-educated and guileless husband of his community interest in the Flood properties. For the quit claim deeds to function as a property agreement, all the requirements of a property agreement should have had to have been met, and they were not.

Conclusion of Law No. 9 is acknowledged by Mr. Kendall, except to the extent it tries to reach the Flood properties, the farm equipment, or the community farm profits. Gordon Kendall makes no claim to the 1200

acres that the community farm leased from Lester Kile. Lester Kile presented his property (1200 acres to be eventually inherited by Jeannie Kile in the Kile trust) to Gordon and Jeannie as a community opportunity for Gordon to farm on such a lease, at the market rate of a 1/3 share of the crop. Gordon leased the 1200 acres of land from Lester, and worked the land, as part of the community farm that included the 317 acres of Flood property.

Gordon makes no claim upon the 1200 acres Jeannie was to inherit from Lester, except as Gordon asking that the court take her wealth into account in making the distribution, and the court consider the profits from the family farm as a community asset, and the community business is still farming the total of the 1517 acres (Lester's 1200 and the Flood 317).

Conclusion of Law No. 10 does not properly account for Gordon Kendall losing his livelihood on the farm, and his need for maintenance, and the court did not account for the relief Gordon requested on the terms of the *In re Marriage of Rockwell*, 141 Wn.App. 235, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055, 187 P.3d 752 (2008).

B. Issues on Appeal

Issue No. 1: Did the trial court err to find that Lester Kile's *business opportunity offered to the Kendall community* to lease his land in exchange for Gordon's community labor, was a means by which the

community opportunity was transmuted into Jeannie Kile's separate property by simply offering a lease to the Kendall community at market rates? (Answer, yes. The trial court erred to conflate the fact that Jeannie would one day inherit Lester's 1200 acres as separate property with the fact that all Lester was offering to Gordon and Jeannie was a community business opportunity to lease his land at the market rate, and the court erred to then deprive Gordon Kendall of his community interest in the community business activity of the farm, and its proceeds.)

Issue No. 2: Did the trial court err to find Gordon Kendall's signatures on the Flood property quit claim deeds were decisive in characterizing the Flood properties as Jeannie Kile's separate property. (Answer: Yes. The court erred to effectively treat the quit claim deeds as property agreements, and to thus evade the requirements that any waiver of Gordon's community property rights be a knowing waiver and that he have independent legal counsel, or the legal equivalent. Gordon did not knowingly waive his community property rights in the Flood properties, and Jeannie Kile breached her fiduciary duties to the community.)

Issue No. 3: Did the trial court err to deprive Gordon Kendall of a community interest in the farm, Flood lands, and its equipment? (Answer: Yes, Gordon Kendall gave up a career of 20 years at Montgomery Wards to enter upon a community project in the farm, and the tax returns filed

during the life of the marriage, the commingling of family and farm funds, and the burden of proof upon Jeannie Kile to prove otherwise, mean that Gordon Kendall had a community interest in the farm and its fruits.)

Issue No. 4: Should Gordon Kendall receive maintenance for the remainder of his life, given that he has been deprived of his livelihood at age 60 by Jeannie Kile removing him from the farm? (Answer: Yes, Gordon Kendal should receive spousal maintenance.)

III. STATEMENT OF THE CASE

Jeannie and Gordon Kendall were married in 1984, and divorce was filed by Jeannie on December 13, 2011. CP: 3

Gordon Kendall had worked at Montgomery Wards for twenty years as of 1989. TR: 78 & CP: 465. Jeannie Kile had worked at Montgomery Wards for thirteen years by that date. TR: 78-79. Lester Kile, Jeannie's father, had his son-in-law, Gordon Kendall, do odd jobs around the farm during the 1980's. CP: 466.

Lester Kile began discussing with Gordon having Gordon take over the farm, and about a year later, in 1989 or 1990, Lester Kile presented Jeannie and Gordon with the offer to lease his land to farm and for Gordon to farm it. CP: 466.

Gordon Kendall left Montgomery Ward to begin farming fulltime under the tutelage of Lester Kile in 1990. CP: 467. Gordon "shared work,

shared proceeds, shared everything" with Gordon continuing to learn the farming business. CP: 467. Jeannie Kile continued to work, and subsequently worked for Amica Insurance for the 12 years preceding the dissolution. TR: 67. Jeannie Kile is college-educated. TR: 67.

In his opening comments, on behalf of Jeannie Kile, Mr. Salina stated: "By way of very brief back ground...In this circumstance these folks were both employed; and Les Kile, Jeannie's dad, approached them in the late '80's with a proposition." TR: 12, emphasis added.

Gordon began farming in 1990 on a "handshake deal" with Lester Kile, or a verbal agreement. CP: 473-74. Three and a half years later, Gordon was completing a transition to making most of the decisions about the farming, and Lester pulled back from training Gordon. CP: 469-70. Lester Kile got a share of the crop for his 1200 acres being farmed by Gordon. CP: 479. And Gordon also paid Lester \$40,000 per year on the equipment lease for the equipment to farm the land. CP: 479 & TR: 100. During these years, Gordon signed paperwork for the Agriculture Stabilization and Conservation Service. CP: 481.

The \$40,000 per year equipment lease of Lester Kile's equipment became a lease-to-own in 1998, and the remainder of the loan, if any, was forgiven by Lester in 2005, and the farm owned all equipment it used, thereafter. TR: 251. Gordon believes that once the contract became rent-

to-own that the payment dropped to \$32,500 per year until the loan was forgiven. TR: 480.

In addition to the 1200 acres that the Kendalls leased from Lester Kile, they also farmed the 317 acres of "Flood property" purchased from Sally Flood (160 acres) and Everett Flood (157 acres). TR: 103 & 109, and TR: 73-78 & CP: 500-02. Jeannie Kile testified that Lester's 1/3 crop share as a land lease was standard (market rate) for Eastern Washington dryland farming leases. TR: 76. Lester did not get a 1/3 crop share from the Flood lands. CP: 500-01.

Each parcel of Flood acreage was purchased for approximately \$146,000, each (\$292,000, total). TR: 103-05 & Ex. 104 & 108. There were annual payment terms on each contract. Id. Jeannie Kile never worked the farm, as Jeannie worked 40 hours per week in Spokane, but even though only Gordon worked the farm, it is Jeannie's view that Gordon has been fully compensated by being paid a "reasonable wage." TR: 97. However, if Gordon had not taken the community opportunity to farm the land, the Flood properties could have never been purchased. TR: 510.

When purchasing the Flood properties, Gordon Kendall signed quit claims deeds because they were presented to him as something he needed to sign so that Sally and Everett Flood would be comfortable selling their

land on contract. TR: 349-51, esp. 350. If Gordon Kendall had known that he would not be accumulating any wealth by leaving his job at Montgomery Wards to farm, he could not have given up that job to begin farming. TR: 352. Gordon invested his accumulated funds in getting the community farm started. TR: 353 & Ex. R-101. Jeannie Kile told Gordon, "Well, it's your business deal. Go – go get it done," and so Gordon invested his retirement funds in starting the community farm up and running. TR: 353. Jeannie Kile never worked on the farm. TR: 353. Gordon wrote all the checks for the farm. TR: 364. And Jeannie Kile stipulated that many family expenses were paid for from the farm accounts. TR: 367.

In terms of his wages, Gordon believed that his wages were payment to the family (essentially a draw against profits), as Gordon stated under his deposition, admitted at trial: "I think the family was compensated fairly for the services I provided." CP: 485, emphasis added. Gordon was never advised by Jeannie, and had no reason to believe, that he was not building community wealth by his labors on the farm. TR: 511.

And Gordon testified, after being queried about why his "wages" varied, Gordon said that it "Depends on how much money was available at the farm on how much money we were going to get paid. If we had a

good year, we got a little bit extra money. If we had a bad year, we got less." CP: 484, emphasis added. And Gordon later added, "I don't think I was an employee at all. I was – I felt like we were in this together as a family, as an owner." CP: 485.

Jeannie Kile admitted that the farm account made personal and family purchases, and, for example, the farm account purchased meat for the family. TR: 253. And Gordon and Jeannie's son, Cody, had most of his daily living expenses paid out of the farm account. TR: 252-53. Groceries would be purchased from the farm account, and Jeannie was not sure how or if such family purchases were made taxable. TR: 253. Rental expenses on a rental home the Kendalls owned in Cheney were paid out of the farm account. TR: 271. Taxes on the family's William's Lake property were paid out of the farm account. TR: 272. After Ms. Kile presented re-calculated tax returns, her expert, Mr. Carlson, answered that farm revenues had been previously under-reported. TR: 312.

For purposes of dissolution litigation, the Kendall's taxes were re-calculated for trial so that Ms. Kile could indicate at trial that the farm had the profits to make the payments on the Flood properties (as opposed to the actually-filed tax returns that showed losses in many years). TR: 307 & TR: 376 & 378. Jeannie Kile was unable to provide an account of why the version of the tax returns prepared for litigation (but never filed as

amended returns) might be accurate. TR: 314. When asked if she had previously under-reported income in the tax years that showed losses, Ms. Kile stated, "Not that I know of." TR: 315.

Gordon Kendall testified that the farm never had the money indicated by Mr. Carlson. TR: 373-78, esp. 372. For example, Mr. Carlson's recalculation of tax year 2003 showed that the Kendall family took \$108,000 out of the farm as profit. TR: 376. The filed tax return showed a \$58,000 loss. TR: 376.

Jeannie Kile testified that Gordon Kendall had to put his 401(k) into the farm account to pay taxes on the farm in 1997. TR: 329-30. And Gordon had to put his own money into the farm at the outset. TR: 353. At trial, Gordon Kendall presented extensive lists of farm checks that went to pay family expenses, from Rug Rats expenses at TR: 365 until Mr. Salina made the following stipulation: Mr. Salina said, "...we'll stipulate that this family with regularity made personal expenditures out of the farm account for personal items and household expenses." TR: 367.

Jeannie Kile believes that the farm and its profits are solely hers, because, for example, her name was on the lease with Lester and she was formally named as the "operator" on the USGA checks. TR: 83. Jeannie Kile also relies upon the IRS Schedule F listing her as the "proprietor" in their tax returns. TR: 87. By Jeannie Kile's testimony, the farm was

always listed as a "sole proprietorship" during the life of the community.

TR: 89-90. Jeannie called the business "Kile Farms" to distinguish it from her father's "Kile Farms, Inc." TR: 90.

When asked whether she had any property agreements with Gordon Kendall, Jeannie Kile responded as follows:

Mr. Mason: Did you ever have any agreement with Gordon Kendall characterizing what would be and what would not be separate or community property?

Ms. Kile: Verbally, yes.

Mr. Mason: Did you ever have any written agreement?

Ms. Kile: "The quitclaim deeds? I mean, I didn't sign the quitclaim deeds. He signed them and put them in my – saying they were my separate property. And the – the contracts were to me as a sole person?"

Mr. Mason: So are you arguing those were property agreements between you and Gordon?

Ms. Kile: I'm not understanding the question. You asked me if I had signed something saying that they were agreements of the purchase of the land. I'm not sure what you're asking me."

Mr. Salina: We will stipulate there are no status agreements relative to characterization, no community property agreements, and no separate property agreements.

TR: 277-78.

The points in contention on appeal can be found, first, in Jeannie Kile's theory of the case, versus Gordon Kendall's.

Jeannie's theory of the case begins with the argument that the intentions of Lester Kile were that Jeannie Kile have his farm as her separate property. TR: 13.

However, Mr. Kendall points out that Lester's testamentary intention to eventually devise the 1200 acres to Jeannie cannot characterize the property status of the community labor on the community farm, which paid Lester Kile a fair crop-share rent on the 1200 acres owned by Lester during the life of the marriage. Gordon Kendall has consistently noted that the testamentary intentions of Lester Kile regarding his 1200 acres that were leased by the community cannot characterize property between Jeannie and Gordon Kendall. See, e.g., CP: 565-77 & 610-16.

Mr. Salina summarized Jeannie's theory as the following: "The farm is Ms. Kile's separate property and that the rents, issues, and profits generated from that farm, to the extent they can be traced into acquisitions, are also separate property." TR: 14. Mr. Salina presented this theory of the case, even as was just noted, above, Mr. Salina stipulated that there were no written property agreements. TR: 277-78.

Mr. Kendall's summary of the case is that acquisitions during marriage are presumed community unless that presumption is rebutted by clear and convincing evidence, and that such evidence is lacking. See,

e.g., CP: 565-77 & 610-16, and testimony and exhibits referenced above and submitted with this appeal.

The issues in contention are: Whether Jeannie Kile has rebutted, with clear and convincing evidence, the presumption of community property for assets acquired during marriage regarding the family farm, the Flood properties, and the fruits of the family farm; and whether Gordon Kendall's should be granted spousal maintenance.

IV. SUMMARY OF THE ARGUMENT

Gordon Kendall gave up a 20-year career to engage in the community project (Kile Farms) of farming Jeannie's father's 1200 acres of land, and an additional 317 acres (the Flood properties). Gordon Kendall worked the land, and made community purchases of land and equipment, while paying Lester Kile fair-market value for the use of the land. Gordon reasonably presumed that he was accumulating community wealth, and the lax book-keeping, and commingling of home and farm funds, was part and parcel of any small community property business. There were no property agreements, and Gordon had no notice that his community labor was, in fact, being solely accumulated by Jeannie Kile as her separate property.

The presumption in favor of the farm, its equipment, and the Flood properties being community has not been rebutted at all, let alone by clear

and convincing evidence. Further, Gordon should be granted spousal maintenance after giving up a prior career to labor on this community farm for twenty-one years.

V. ARGUMENT

The starting point for analysis is *In re Marriage of Mueller*, 140 Wn.App. 498, 167 P.3d 568 (2007).

A. Standard of Review: De Novo

The *Mueller* court states the long-standing proposition that a review of a community or separate property characterization is de novo:

The trial court's characterization of property as community or separate is a question of law that we review de novo.

In re Marriage of Mueller, 140 Wash.App. 498, 503-04, 167 P.3d 568 (2007).

B. Presumption: Property Acquired During Marriage is Community

The *Mueller* court continues:

All property acquired during a marriage is presumed to be community property. The law favors characterization of property as community property unless there is no question of its separate character.

In re Marriage of Mueller, 140 Wash.App. 498, 504, 167 P.3d 568 (2007)
(internal citations omitted).

Application to the Kendall Case: All property at issue – the farm, its profits, its equipment, and the Flood properties – were acquired during at 28 year marriage.

C. "Clear and Convincing" Evidence Is Required to Rebut the "Heavy Presumption" in Favor of Community Property

Again, the *Mueller* court is four-square on the Kendall case:

A spouse may overcome this heavy presumption with clear and convincing evidence of the property's separate character. Simply placing one's own earnings into a bank account in that spouse's name for management purposes is not sufficient to change the legal character from community to separate property. Likewise, one spouse's control over community funds does not change the character of the property.

In re Marriage of Mueller, 140 Wash.App. at 504 (internal citations omitted).

Application to the Kendall Case: Jeannie Kile has college education that Gordon does not, and she may have had private intentions, and her father may have had private intentions, but Gordon Kendall was engaged in community labor, creating community assets, and Jeannie Kile has not overcome the presumption in favor of community property for the assets at issue. It is clear error of law for the court to find that the farm, equipment, lands purchased, and profits were separate property.

Jeannie Kile has not met her burden of proof against this "heavy presumption" in favor of community property.

D. Lack of Any Property Characterization Agreement

The *Mueller* court goes on to state:

Spouses may change the status of their community property to separate property by entering into mutual agreements. These agreements may be oral or written. A spouse seeking to enforce an agreement, whether oral or written, that purports to convert community property into separate property must establish with clear and convincing evidence both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout their marriage. Because oral agreements are more difficult to prove, courts will overturn an oral property agreement if the parties do not consistently adhere to the agreement during their marriage.

In re Marriage of Mueller, 140 Wash.App. 498, 504-05, 167 P.3d 568

(2007) (internal citations omitted).

Application to the Kendall Case: Jeannie Kile has stipulated that there were no property agreements:

We will stipulate there are no status agreements relative to characterization, no community property agreements, and no separate property agreements. TR: 277-78 (quoting Ms. Kile's counsel, Mr. Salina).

Without a property agreement, then the presumption of community property in Mr. Kendall's favor cannot be overcome by Jeannie Kile.

E. Even the *Mueller* Fact Pattern Supports Gordon Kendall

Jeannie's attempted abuse of her "operator" or managerial role is not legally sufficient to change Gordon's community labor into Jeannie's

separate property. *Marriage of Mueller*, 140 Wn.App. 498, 167 P.3d 568 (2007), *reconsideration denied and publication ordered* Sept. 12, 2007.

As the *Mueller* court wrote:

Washington courts have held “on several occasions” that placing one's paycheck into a bank account in that person's own name is insufficient to rebut the presumption that wages earned during a marriage are community property. Likewise, a spouse's physical management and control over community property is allowed by statute and does not change its legal character. More is required.

In re Marriage of Mueller, 140 Wash.App. at 505-06 (footnotes omitted).

Application to the Kendall Case: Jeannie Kile has not shown this “more” that is required. Jeannie Kile's attempts to use the fact that federal checks were in her name, or that she was formally the “operator” of the farm fail under *Mueller*. Nothing presented by Jeannie Kile is sufficient to rebut the community property presumption.

F. Despite Her Stipulation That There Were No Property Agreements, Jeannie Kile Attempts to Substitute the Quit Claim Deeds as Substantively De Facto Property Agreements

There is a sly misdirection in Jeannie Kile's attempts to use the quit claim deeds on the Flood properties as proof of some community property agreement, even as she stipulates to the absence of property agreements.

RCW 26.16.030 reads, in relevant part (emphasis added):

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property. Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property...

The *Mueller* court, in reversing the trial court's finding of separate property, addressed the idea of agreement, implicit or explicit (emphasis added):

But the trial court's legal conclusion, that this oral agreement to manage funds changed the legal character of the property, does not follow from this finding of fact. Unlike the wife in *Dewberry*, John offered no evidence that Shauna intended to change the legal ownership of the property. He did not mention the legal status of the property in his conversations with Shauna or explain to her that she would be waiving her community interest in his half of the income. There is simply no evidence in the record that this agreement to manage funds separately was any more than an agreement to manage their community property.

In re Marriage of Mueller, 140 Wash.App. at 507.

Application to the Kendall Case: Jeannie Kile is trying to receive the benefits of an explicit and fully-advised property agreement, through assertions of verbal agreements and quit-claim-deeds-as-agreements, while stipulating that there were no formal property agreements.

It was clear error of the trial court to find that Gordon Kendall's twenty-one years of labor on the farm left him with nothing but a stack of old W-2's, and left him without community interest in his life's work.

**G. *Marriage of Marzetta*: One Spouse May Not Unilaterally
Declare "Reasonable Wage," nor Abuse Quit Claims**

In re Marriage of Marzetta, 129 Wash.App. 607, 120 P.3d 75

(2005) the court did not allow the husband to unilaterally declare what was a "reasonable wage" to his benefit. *Id.* at 618. The court also disallowed the husband from using quit claim deeds as proof of agreement. *Id.* at 618. (*Marzetta* has been superseded on child support issues, only, and the remainder of the case is good law.)

Application to the Kendall Case: *Marzetta* is also four-square on-point in the Kendall case. The *Marzetta* court saw that allowing quit claim deeds to act as written property agreements would be wrong in law and equity unless they met all the standards of explicit, written, property agreements. That applies in this case, too, where Gordon Kendall agreeably signed the quit claims with no knowledge of their legal implications for his rights. Likewise, Jeannie Kile's retroactive imputation of "reasonable wages" to Gordon cannot suddenly create an agreement where there is none, nor create equity where Jeannie Kile suddenly seeks to deprive Gordon Kendall of his community rights, and where Jeannie seeks to claim all accumulated value from Gordon's community labor.

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H. Law of Property Agreements

Despite her protestations and stipulations, Jeannie Kile is, in fact, trying to impute a property agreement to Gordon Kendall, and so the law of property characterization agreements will be briefly explored, herein.

The starting point for analyzing a property agreement is *In re Marriage of Hadley*, 88 Wash.2d 649, 565 P.2d 790 (1977), in which this standard of a property agreement is articulated:

The tests are: (1) whether full disclosure has been made by respondent of the amount, character and value of the property involved, and (2) whether the agreement was entered into fully and voluntarily on independent advice and with full knowledge by the spouse of her rights.

Marriage of Hadley, 88 Wash.2d at 654.

Application to the Kendall Case: Gordon Kendall never received a full disclosure of the character and the property involved, and he never received independent advice, as he was not given notice of the need to do so, and as he had no full knowledge of what was at stake. The trial court erred to deny Gordon Kendall a community interest in the Flood property, the farm, and its equipment, is an error of law.

Moreover, the *Marzetta* case, mentioned, above, and discussed below, is directly on point to show why this court should protect Gordon Kendall's presumptive interests in the Flood grounds, the farm, its equipment, and its profits.

1. Model Case: *In re Marriage of Marzetta*, 129

Wash.App. 607, 120 P.3d 75 (2005).

In re Marriage of Marzetta offers a basic model for analyzing *Kile v. Kendall*.

In *Marzetta*, Mr. Marzetta paid himself what he characterized as a “reasonable wage” for operating his business, and he then asserted that the rest of the earnings (e.g., “bonuses”) from this business were his separate property. The *Marzetta* court explicitly rejected this unilateral characterization of a “reasonable wage.”

This is precisely what Jeannie Kile led the trial court to do – to unilaterally characterize the farm income as her separate property having unilaterally asserted that the Kendall community was fully compensated by Gordon Kendall’s “reasonable wage.” *Marzetta* precludes this.

Here is the argument of Mr. Marzetta which was rejected:

Mr. Marzetta maintains that his bonuses were not salary because he paid himself a “reasonable salary” as required by the prenuptial agreement. In his view, any amount over a reasonable salary constituted his separate property. To support this argument, he provided expert testimony establishing that the salary he received was greater than the salaries of comparable executives.

In re Marriage of Marzetta, 129 Wash.App. at 618. Mr. Marzetta’s argument was rejected by the court. *Id.* at 619.

Next, Mr. Marzetta argued that he could characterize what was his "bonus" (the way Jennie Kile wishes characterize her "profits"):

Mr. Marzetta also argues that because he could take the money as a bonus or a stock dividend, he was entitled to take a bonus, for tax advantages, and then, upon divorce, call the bonus a stock dividend.

In re Marriage of Marzetta, 129 Wash.App. at 619.

Division III responded to that argument with the following:

This argument is completely without merit. This type of unilateral decision is not authorized under the terms of the prenuptial agreement.

In short, the trial court erred by characterizing Mr. Marzetta's bonus income as separate property because this determination is contrary to the prenuptial agreement and RCW 26.16.030.

Sullivan Road Property. Mr. Marzetta purchased two parcels of land on Sullivan Road. Mr. Marzetta concedes that the first parcel was purchased for \$320,000 with bonus money. He also concedes that the second parcel was purchased with a payment of \$109,000 from bonuses, with the remainder of the purchase price paid for with money from another source. Because these properties were purchased with bonuses, the court should have considered Ms. Marzetta's interest in this property when determining the division of marital property.

Appleway and Marzetta Limited Properties. In part, the Appleway and Marzetta Limited properties were purchased with bonus income. For that reason, the court should have considered Ms. Marzetta's interest in these properties when determining the division of marital property.

In re Marriage of Marzetta, 129 Wash.App. at 619.

Application to the Kendall Case: *Marzetta* is directly on point to show that Gordon Kendall's community property interest in the Flood

properties, the farm, its profits, and the farm equipment should be acknowledged and protected by the court, and that Jeannie Kile should not be allowed success with some secret or retrospective, unilateral, plan to re-characterize Gordon's community labor as nothing more than low-wage labor for the community, and then to use the remaining surplus of Gordon's labor to enrich her separate property.

Further, *Marzetta* addresses the issues of the quit claim deeds:

Quitclaim Deeds. Mr. Marzetta next contends that the bonuses might have been community property when received, but Ms. Marzetta transferred her interest to him by executing quitclaim deeds when he used the bonuses to purchase property. He argues that this transaction is evidence of the parties' intent to characterize the bonus income as separate property to be placed in the trust for the children.

36 This argument fails for two reasons. First, the prenuptial agreement provides that “[i]f either party should ... execute any instrument affecting title to the property of the other, such act shall not be construed as affecting ... or abrogating the terms [of this agreement].” CP at 51.

37 Second, Mr. Marzetta has the burden of showing that Ms. Marzetta's transfer of her interest in the property for inadequate consideration was made freely, and that the transaction was fair and just. See *Yeager v. Yeager*, 82 Wash. 271, 274, 144 P. 22 (1914).

Here, the evidence establishes that Ms. Marzetta did not understand that she was conveying a community property interest when she executed the quitclaim deeds. She received no consideration for the transfer of her interest in the property and she was not represented by counsel when the quitclaim deeds were executed.

In re Marriage of Marzetta, 129 Wash.App. at 619 (emphasis added).

Application to the Kendall Case: Again, this case directly applies to Gordon Kendall's situation. Gordon Kendall had no understanding that he was conveying a community interest. (Please recall the burden of proof is on Jeannie Kile to show that Gordon did know these things, with clear and convincing evidence.) Gordon received no consideration for the transfer of his interest, and Gordon had no counsel nor had any other means of making a knowing waiver of his rights. Applying *Marzetta*, it is directly on-point that Gordon Kendall's community interest in the Flood property, the farm, its profits, and farm equipment should be protected by this court.

2. No Disproportionate Accumulation Without Knowing

Agreement: *Marriage of Bernard* (Avoiding Substantive Unfairness)

This quote from the *Bernard* case reinforces *Marzetta* with the *Bernard* court's definition of substantive unfairness (emphasis added):

an agreement disproportionate to the respective means of each spouse, which also limits the accumulation of one spouse's separate property while precluding any claim to the other spouse's separate property, is substantively unfair. See *Matson*, 107 Wash.2d at 486, 730 P.2d 668; *Friedlander*, 80 Wash.2d at 301, 494 P.2d 208.

Marriage of Bernard, 165 Wn.2d 895, 905, 204 P.3d 907 (2009).

Application to the Kendall Case: Applying *Bernard* to Gordon

Kendall's case: The quit claim deeds at issue cannot be properly considered a property agreement, and to so construe them, in form or in substance, violates *Hadley*, supra. The Kendall trial court has violated

Bernard when it construed the Flood property, and the farm business, as Jeannie Kile's separate property. The trial court decision means that Jeannie Kile can disproportionately benefit from Gordon's community labor, accumulating property while Gordon accumulates none.

In summary, for the trial court to grant Jeannie the existence of such an agreement, the characterization "limits the accumulation of [Gordon's] separate property while precluding any claim [of Gordon Kendall] to [Jeannie Kile's] separate property."

The *Bernard* court is correct about the governing law, when the *Bernard* court states that such an outcome is "substantively unfair." *Marriage of Bernard*, 165 Wn.2d at 905.

Jeannie Kile is hoping that the equivalent of placing her earnings in a retro-actively constructed, separated accounting can overcome all of the flaws in any alleged property-agreement-through-quit-claim, and can overcome the presumption of community property.

The Kendall trial court clearly erred to go along with this deprivation of Gordon's community property interests. *See also, In re Marriage of Shannon*, 55 Wn.App. 137, 140, 777 P.2d 8 (1989) ("In order to convert separate property into community property, the mutual intention of the parties must be evidenced by a writing").

Jeannie Kile did not, and cannot, present any “mutual intention evidenced by a writing.” There is no basis in law or fact to presume that any secret mutual intentions between Lester and Jeannie Kile can bind Gordon Kendall to a characterization of his community interests. *And see Marriage of Matson*, 107 Wn. 2d 479, 482-83, 730 P.2d 668 (1986) (*Matson* also makes clear that none of the requisites for depriving Gordon of the fruits of his community labor are present in this case).

I. Other Applicable Law: *Matson* Fiduciary Duty

Spouses have a fiduciary duty toward each other. *Marriage of Matson*, 107 Wn. 2d 479, 730 P.2d 668 (1986). The Kendalls had been married for 7 years before Jeannie Kile persuaded Gordon to give up his 20 year career and sales manager job to become a career farmer for the community for the next 21 years.

Jeannie owed Gordon a fiduciary duty to protect his interests. *Id.* *Matson* references RCW 26.16.210 which places the burden of proof to show good faith upon the party asserting their good faith. *Matson*, 107 Wn. 2d at 484. And both spouses have a fiduciary duty to the other (emphasis added):

The demise of the rule in this state that the husband was deemed to be the sole manager of all community property in favor of the “equal manager” concept (*see* RCW 26.16.030) has not resulted, however, in the demise of a fiduciary duty. Rather, the duty has become gender neutral. *Cf.* RCW 26.16.210. To uphold the

validity of a prenuptial agreement under Washington law still requires full disclosure by both parties of all aspects of each party's assets, with the agreement entered into fully and voluntarily on independent advice and with full knowledge by each spouse of the individual rights of each party. *Whitney*, 90 Wash.2d at 110, 579 P.2d 937.

Matson, 107 Wn. 2d at 484.

Upholding the court of appeals in voiding a property agreement, the *Matson* court states:

when an agreement, as here, attempts to eliminate, totally, community property rights, the court must zealously and scrupulously examine it for fairness.

Id. at 486.

Application to the Kendall Case: With the court zealously and scrupulously examining Gordon's situation for fairness, and scrupulously looking at whether Jeannie Kile achieved a sufficient agreement to strip Gordon of all community rights in the farm and its purchases, any reasonable court must answer that Jeannie has not met her burden, which is one of clear and convincing evidence. *Marriage of Mueller*, 140 Wn.App. 498, 167 P.3d 568 (2007). Jeannie did not meet her fiduciary duties to Gordon, and she did not meet her burdens of proof to the court

Lester Kile made an offer of an *opportunity to the community*, and the community took that opportunity to lease Lester's land at market rates of crop share, and to buy his equipment, and to buy the Flood properties,

and to create an ongoing source of profit. This was a community effort to build a community asset.

Perhaps Jeannie Kile would have a separate property lien on the community property for Lester Kile's initial small down payment on the Flood properties (even though it was a gift to the community at the time), but even Lester's gift could have been lost if Gordon's community labor had not paid off the Flood land contract.

Jeannie Kile has not overcome the presumption that the down payment was a gift to the community, and she has not overcome the problem of commingling. See, *In re Marriage of Hurd*, 69 Wash.App. 38, 848 P.2d 185 (1993), and see *Marriage of Chumbley*, 150 Wn.2d 1, 5-6, 74 P.3d 129 (2003) ("Property acquired with separate funds during a marriage is presumed to be a gift to the community," at 6).

In any event, this opportunity for the community to lease 1200 acres, and equipment, offered by Lester Kile, created just another instance in which each spouse owed a fiduciary duty to each other, regarding the community business opportunity. As the *Skalman* court makes clear, Jeannie's duty was of the highest order to the community (emphasis added):

However, it is a special form of partnership with the spouses not only owing each other the highest fiduciary duties, but also with the husband (and since 1972 the wife) charged with the statutory

duty to manage and control community assets for the benefit of the community. Cross, *The Community Property Law in Washington*, 49 Wash.L.Rev. 729 (1974). *Komm v. Department of Social and Health Servs.*, 23 Wash.App. 593, 597 P.2d 1372 (1979).

Peters v. Skalman, 27 Wash.App. 247, 251, 617 P.2d 448 (1980).

A remand to enter an order consistent with Gordon's community ownership of the farm and all it purchased in equipment and land, and of his reasonable share of future profits, is requested.

K. Applicable Law on Maintenance: *In re Marriage of Rockwell*, 141 Wn.App. 235 (2007)

Finally, Gordon Kendall asks this court to put him in a position financially equivalent to that of Jeannie Kile. As the court said in the *Marriage of Rockwell* (emphasis added):

In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. Washington Family Law Deskbook, § 32.3(3) at 17 (2d. ed.2000); *see also Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321 (1909) (finding that for a marriage lasting over 25 years, “after [which] a husband and wife have toiled on together for upwards of a quarter of a century in accumulating property ... the ultimate duty of the court is to make a fair and equitable division under all the circumstances”). The longer the marriage, the more likely a court will make a disproportionate distribution of the community property. Where one spouse is older, semi-retired and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community **577 property. *In re Marriage of Schweitzer*, 81 Wash.App. 589, 915 P.2d 575 (1996).

In re Marriage of Rockwell, 141 Wn.App. 235, 170 P.3d 572 (2007),
review denied, 163 Wn.2d 1055, 187 P.3d 752 (2008).

Gordon Kendall's maintenance request at trial was specific: To be placed in a financial position "roughly equal" to Jeannie's for the rest of his life. This result is requested on appeal.

The marriage at issue is a 28 year marriage in which Mr. Kendall committed his life to the family farm for over two decades, and now Gordon cannot find other reasonable employment.

Jeannie Kile has recently come into a substantial inheritance, and if the court, post-appeal, Jeannie will likely have control of the farm wealth, and then Jeannie will have an ongoing source of revenue to pay a monthly maintenance if the court prefers that mode of distribution to addressing maintenance via property distribution.

Spousal maintenance is requested to be defined by this court, and to be established by order on remand.

L. Attorney's Fees Below and on Appeal

Gordon Kendall requests that his fees on appeal be paid by Jeannie Kile as he has need and she has ability to pay under RCW 26.09.140, and error is also assigned to the court's failure to award fees in the trial. An affidavit of financial need shall be filed by Mr. Kendall, per RAP 18.1, at least 10 days prior to oral argument.

VI. CONCLUSION

The property at issue was acquired after marriage, and it is presumed community property.

Jeannie Kile has not carried her burden to prove otherwise by clear and convincing evidence, and the trial court erred to find otherwise.

This case has been distorted by the fact that "one day" Jeannie Kile would receive 1200 acres from Lester Kile as her separate property. This separate property was but a testamentary promise when the Lester Kile offered a community business opportunity Jeannie and Gordon Kendall.

That offer from Lester was for the community to pay market-rate rent on his 1200 acres and on his farm equipment, to be paid from the fruits of the community labor of Gordon Kendall.

The "source of funds" for the accumulation of wealth in the family farm came from "start up" money from Gordon Kendall's retirement plan, circa 1990 (and again Gordon had to make contributions in 1997 to the farm). And, to start up the purchase of the Flood properties, Lester Kile also made a presumptively community gift for the down payment on the Flood properties contracts.

These contracts were performed by monies from Gordon's community labor, and the Flood lands were finally and subsequently

purchased on those contracts, which were paid for by the proceeds from Gordon Kendall's community labor.

In addition to the two initial contributions, listed above, there were community contributions during the "loss years" of presumably Jeannie's community salary, as Jeannie's wages were the only logical source of funds, outside of Gordon's retirement fund contributions.

The work on the farm was done by Gordon, with Jeannie working in Spokane, and never working on the farm. And Gordon had no notice that he was not accumulating wealth for the community as he built the wealth on the farm.

Within the long-established precedents of Washington courts, cited above, the Flood properties, the farm, and the equipment and profits of the farm, are community property. Jeannie Kile has utterly failed to rebut the presumption of community property with evidence that meets the clear and convincing standard of proof.

A remand to the trial court to make a new division of the property, characterizing the assets at issue as community property, is requested.

Mr. Kendall also requests spousal maintenance and attorney's fees and costs in the court below and on appeal.

Respectfully submitted,

10/14/13

A handwritten signature in black ink, appearing to read 'Craig Mason', with a long horizontal flourish extending to the right.

Craig Mason, WSBA#32962
Attorney for Gordon Kendall

VII. APPENDIX

Statutes:

RCW 26.09.140 – "Payment of costs, attorneys' fees, etc."

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

The court may order that the attorneys' fees be paid directly to the attorney who may enforce the order in his or her name.

RCW 26.16.030 – "Community property defined — Management and control."

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property. Either spouse or either domestic partner, acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property, except:

(1) Neither person shall devise or bequeath by will more than one-half of the community property.

(2) Neither person shall give community property without the express or implied consent of the other.

(3) Neither person shall sell, convey, or encumber the community real

property without the other spouse or other domestic partner joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners.

(4) Neither person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase.

(5) Neither person shall create a security interest other than a purchase money security interest as defined in *RCW62A.9-107 in, or sell, community household goods, furnishings, or appliances, or a community mobile home unless the other spouse or other domestic partner joins in executing the security agreement or bill of sale, if any.

(6) Neither person shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses or both domestic partners participate in its management without the consent of the other: PROVIDED, That where only one spouse or one domestic partner participates in such management the participating spouse or participating domestic partner may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse or nonparticipating domestic partner.

RCW 26.16.210 -- "Burden of proof in transactions between spouses or domestic partners."

In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.

Court Rules:

RAP 18.1 – "Attorney Fees and Expenses"

- (a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.
- (b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.
- (c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.
- (d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.
- (e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.