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SUPREME COURT  
OF THE STATE OF WASHINGTON

No. 59223-8-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 NOV 29 PM 1:30

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ARTHUR R. GILROY,

Respondent,

v.

ALICE MONTANO-GUERRERO, as successor Personal  
Representative of the ESTATE OF JEANNETTE L. BORGHI,

Petitioner.

---

PETITION FOR REVIEW

---

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

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## TABLE OF CONTENTS

A.	Identity Of Petitioner.....	1
B.	Decision Below.....	1
C.	Issues Presented For Review.....	1
D.	Statement Of The Case.....	2
E.	Argument Why This Court Should Grant Review. ....	5
	1.    The Court of Appeals Decision Conflicts With At Least 21 Other Appellate Decisions. ....	5
	2.    The Court of Appeals Decision Was Not Compelled By A 1914 Departmental Decision Of This Court. ....	7
	3.    The Court of Appeals Decision Is Wrong, And Needlessly Calls Into Question Other Settled Legal Principles. ....	10
F.	Conclusion.....	11

**TABLE OF AUTHORITIES**

**CASES**

***Denny v. Schwabacher***, 54 Wash. 689, 104 P.  
137 (1909) ..... 7

***Estate of Deschamps***, 77 Wash. 514, 137 P.  
1009 (1914) ..... 4, 6-11

***Hurd v. Hurd***, 69 Wn. App. 38, 848 P.2d 185,  
*review denied*, 122 Wn.2d 1020, 863 P.2d 1353  
(1993) ..... 4-11

***Marriage of Marshall***, 86 Wn. App. 878, 940 P.2d  
283 (1997) ..... 7

***Marriage of Olivares***, 69 Wn. App. 324, 848 P.2d  
1281, *rev. denied*, 122 Wn.2d 1009 (1993)..... 7

***Marriage of Pearson-Maines***, 70 Wn. App. 860,  
855 P.2d 1210 (1993) ..... 6

***Marriage of Skarbek***, 100 Wn. App. 444, 997  
P.2d 447 (2000) ..... 5, 6

***Scott v. Currie***, 7 Wn.2d 301, 109 P.2d 526  
(1941) ..... 7

**RULES AND REGULATIONS**

RAP 13.4 ..... 5, 6, 11

**A. Identity Of Petitioner.**

Alice Montano-Guerrero, successor personal representative of the Estate of Jeanette L. Borghi, respondent in the Court of Appeals, is the petitioner in this Court. She asks this Court to accept review of the Court of Appeals published decision designated in Part 2 of this petition.

**B. Decision Below.**

The Court of Appeals filed its decision reversing the superior court's order that certain real property titled in the names of Jeanette L. Borghi and her husband, Robert G. Borghi, was community property, thus passing to Mr. Borghi upon Mrs. Borghi's death, on October 22, 2007. (Appendix A) The Court of Appeals decision is published at \_\_ Wn. App. \_\_, 169 P.3d 847 (10/22/2007).

**C. Issues Presented For Review.**

1. Whether a spouse's use of his or her separate funds to purchase property titled in both spouses' names as "husband and wife," absent any other explanation, permits a presumption that the purchase or transaction was a gift to the community?

2. Whether using property titled in both spouses' names as "husband and wife," as security for a community debt for

improvements to the property that is thereafter paid by the community from community assets and income during the marriage, is direct and positive evidence of a spouse's intent that the property be community property?

**D. Statement Of The Case.**

The following facts are taken verbatim from the Court of Appeals' published decision:

"Mr. and Mrs. Borghi were married on March 29, 1975. On June 12, 1975, the Cedarview Development Co. executed a Special Warranty Deed to 'Robert G. & Jeannette L. Borghi, husband and wife.' The deed was recorded on August 13, 1979. The deed states that it was given in fulfillment of a real estate contract dated March 16, 1966. However, the real estate contract was not recorded and no copy of the contract has been found. The estate claims that the real estate contract would have been executed by either Mrs. Borghi as a single person under her previous name 'Gilroy' or with her former husband. The record contains no evidence of the timing or frequency of the payments under the contract." 169 P.3d at 848, ¶ 2.

"Mr. and Mrs. Borghi resided on the property as their primary residence from 1975 until 1990. In August 1979, Mr. and Mrs.

Borghgi used the property to secure a mortgage with Washington Mutual Savings Bank. They used the mortgage to purchase a mobile home to put on the property. Mr. and Mrs. Borghgi made most of the payments for the mortgage from their joint bank account. A satisfaction of the mortgage was recorded in July 1999.” 169 P.3d at 848, ¶ 3.

“Mrs. Borghgi died intestate on June 25, 2005. Her surviving heirs were Mr. Borghgi and Arthur Gilroy, her son from a previous marriage. Mr. Borghgi became the personal representative. He obtained a title report which shows that the title of the land is vested in ‘Robert G. Borghgi ... as his separate estate and the Heirs and Devisees of Jeanette L. Borghgi, deceased.’ Mr. Borghgi filed a petition for declaratory judgment to determine title to the real property. In September 2006, a superior court commissioner ruled that the real property was the community property of Mr. and Mrs. Borghgi. Under intestate succession, the property would pass to Mr. Borghgi. Arthur Gilroy filed a motion for revision of the ruling which was denied. Gilroy appealed, seeking a declaration that the real property was Mrs. Borghgi's separate property such that he would inherit an undivided one-half interest in the property.” 169 P.3d at 848, ¶ 4.

Division One reversed. Division One held that the evidence presented below “leads us to the conclusion that Mrs. Borghi intended the deed [to the real estate] to reflect a gift of her separate property to the community,” consistent with the reasoning of *Hurd v. Hurd*, 69 Wn. App. 38, 848 P.2d 185, review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993). 169 P.3d at 852, ¶ 18. *Hurd* held that a “spouse’s use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation, permits a presumption that the purchase or transaction was intended as a gift to the community.” 69 Wn. App. at 51. However, Division One held that it was “constrained” by a departmental decision of this Court, *Estate of Deschamps*, 77 Wash. 514, 137 P. 1009 (1914), to “reach the opposite conclusion.” 169 P.3d at 852, ¶ 18. Division One “reluctantly conclude[d]” that the property was Mrs. Borghi’s separate property, and reversed the trial court. 169 P.3d at 852, ¶ 18, 19.

The successor personal representative seeks review.

**E. Argument Why This Court Should Grant Review.**

**1. The Court of Appeals Decision Conflicts With At Least 21 Other Appellate Decisions.**

Division One's decision in this case abrogated its earlier decision in *Hurd* that a "spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation permits a presumption that the purchase or transaction was a gift to the community." *Borgh*, 169 P.3d at 850-51, ¶¶ 11, 13. This holding of *Hurd* has been the law in Washington for at least fourteen years. *Hurd* has been relied on for its community titling presumption by countless litigants, their counsel, trial courts, and, since 1997, by all three divisions of the Court of Appeals – in *Marriage of Skarbek*, 100 Wn. App. 444, 450, 997 P.2d 447 (2000), and in nineteen unpublished decisions, five of which this Court, as it did in *Hurd*, declined to accept for review. These unpublished cases, collected in Appendix B, are not referenced as authority, but to demonstrate that Division One's abrogation of *Hurd* raises an issue of substantial public interest that should be determined by this Court under RAP 13.4(b)(4), and because Division One's decision is inconsistent with decisions of all

three divisions of the Court of Appeals, justifying review by this Court under RAP 13.4(b)(2).

In abrogating *Hurd*, Division One, without allowing oral argument, relied on a 93-year-old opinion of a department of this Court in *Estate of Deschamps*, 77 Wash. 514, 137 P. 1009 (1914), a case that neither party had cited in either the trial or appellate court. Indeed, the courts of this state have cited *Deschamps* only twice in the last sixty years. *Deschamps* was last cited by Division Three, as part of a string cite also containing *Hurd*, for the proposition that a spouse who with separate property purchases an asset that he or she places in the other spouse's name has the burden to rebut the presumption of a gift to the community "by providing an explanation for the transfer sufficient to convince the court that the true intention of the parties was to keep the property separate." *Skarbek*, 100 Wn. App. at 450, citing *Hurd*, 69 Wn. App. at 50; *Deschamps*, 77 Wash. at 514; and *Marriage of Pearson-Maines*, 70 Wn. App. 860, 868, 855 P.2d 1210 (1993). In other words, *Deschamps* was last cited for

precisely the titling presumption that Division I has disavowed in this case.<sup>1</sup>

**2. The Court of Appeals Decision Was Not Compelled By A 1914 Departmental Decision Of This Court.**

Even if Division One was correct in abrogating the community titling presumption based on *Deschamps*, it erred in reversing the trial court's decision that the real property titled in both spouses' names was community property when it acknowledged that the evidence "leads us to the conclusion that Mrs. Borghi intended the deed to reflect a gift of her separate property to the community." 169 P.3d at 852, ¶ 18. The decision of a department of this Court in *Deschamps* did not "constrain" Division One from affirming the trial court's decision, 169 P.3d at

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<sup>1</sup> Division One's rejection of the community titling presumption also calls into question the long-established rule that a spouse's purchase of property in the other spouse's name is presumed to be a gift to the grantee spouse. See *Scott v. Currie*, 7 Wn.2d 301, 307-08, 109 P.2d 526 (1941); *Denny v. Schwabacher*, 54 Wash. 689, 692, 104 P. 137 (1909); *Marriage of Marshall*, 86 Wn. App. 878, 883, fn. 5, 940 P.2d 283 (1997); *Marriage of Olivares*, 69 Wn. App. 324, 336, 848 P.2d 1281, rev. denied, 122 Wn.2d 1009 (1993); *Hurd v. Hurd*, 69 Wn. App. 38, 51, 848 P.2d 185, review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993). There is no reason why a presumption of gift should arise when property is placed in the name of one spouse but not when it is placed in the name of both spouses. Division One's opinion does not address or attempt to explain this inconsistency.

852, ¶ 18, because the result in *Deschamps* turned not any particular rule of law but on the weight of the evidence in that case.

In *Deschamps*, neither the probate court nor a department of this Court was persuaded that the “true and intent and purpose of the parties” was to convert the wife’s separate property to community property. 77 Wash. at 518. This conclusion was supported by the fact that the wife in *Deschamps* left a will that devised the disputed real property to her daughter of a former marriage and specifically excluded the husband from receiving the property, the husband provided no support for his testimony that he had made payments towards the real property’s mortgage, and the “conduct of the husband after the death of the wife is such as to warrant a belief that he did not at the time regard the property as his own,” because the wife’s daughter, not the husband, made all mortgage and tax payments on the property after the wife’s death. *Deschamps*, 77 Wash. at 514-16.

Here, to the contrary, both the probate court *and* Division One determined that the evidence supported the conclusion that the wife intended to gift the real property to the community. The probate court found that the intent of the parties by accepting the deed on the property in both names was a “modification” of the real

estate contract the wife had executed before marriage (Finding of Fact (FF) 18, CP 153), and that the parties' acceptance of the deed in both their names was a "change by deed' in the character of the property converting it from separate property of one spouse to community property of both spouses." (FF 20, CP 153) The probate court found that the wife's intent to change the character of the real property can be "inferred from such conduct as conveying or mortgaging the property" (FF 22, CP 154); the parties had used the property as security for a mortgage on which they were both liable, and the community had made "all payments due under the mortgage." (FF 10, 24, CP 152, 154)

Division One agreed that the evidence "leads us to the conclusion that Mrs. Borghi intended the deed to reflect a gift of her separate property to the community." 169 P.3d at 852, ¶ 18. That being so, nothing in ***Deschamps*** prevented Division One from affirming the probate court's decision based on this evidence. Division One went far beyond ***Deschamps*** in *creating* a "summary" 169 P.3d at 851, ¶ 14, and in effect irrebuttable, presumption that separate property can *never* be converted to community property by gift deed. Even if there was no ***Hurd*** community titling presumption, this Court should accept review and hold that this

direct and positive evidence was sufficient to overcome any presumption to the contrary under *Deschamps*.

**3. The Court of Appeals Decision Is Wrong, And Needlessly Calls Into Question Other Settled Legal Principles.**

As the Court of Appeals acknowledged, “a summary presumption that a gift was *not* intended does not serve to protect property holders but may thwart legitimate attempts to gift to the community.” *Borghi*, 169 P.3d at 851, ¶ 14 (emphasis added). To the contrary, “*Hurd* appropriately protects separate property from inadvertent changes in character but allows for gifts by deed” by providing for the community titling presumption to be overcome by “proof that community benefit was not intended, such as evidence of accommodation of a mortgagor, duress or deception, or an unsolicited act of a third party in preparing the document.” *Borghi*, 169 P.3d at 851, ¶ 16. This Court should accept review to resolve the issue of substantial public interest raised by Division One’s abrogation of the *Hurd* community titling presumption in favor of an irrebuttable presumption to the contrary based on the 1914 decision of a department of this Court in *Deschamps*.

Finally, the Court of Appeals’ decision in this case, disavowing this single holding of *Hurd*, is even more significant

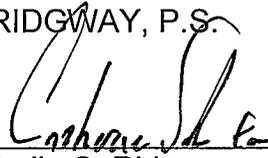
because *Hurd* is widely cited as the primary or only authority for several other legal propositions, irrelevant in this probate case, that govern the existence and characterization of deferred compensation, pension rights, and bequests as divisible property on dissolution. A Westlaw keycite search reveals 145 citing references to *Hurd*. (Appendix C) Although *Hurd* presumably remains good law for these other legal principles, the sweeping breadth of Division One's published statements concerning the case, see, e.g., 169 P.3d at 851, ¶ 13 ("As a result, we must agree that *Hurd* was improperly decided"), supports review by this Court to ensure that any overruling of *Hurd* is limited to its holding that a presumption of gift arises from taking title in both spouses' names.

**F. Conclusion.**

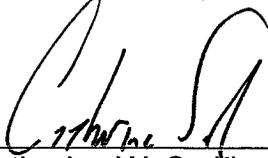
Division One succinctly sets out the policy reasons that the *Hurd* community titling presumption should be the law of this state. This Court is not constrained to follow its 1914 departmental decision in *Deschamps*. This Court should accept review under RAP 13.4(b)(2) and (4), reverse the Court of Appeals, and reinstate the trial court's decision.

DATED this 21<sup>st</sup> day of November, 2007.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 21, 2007, I arranged for service of the foregoing Petition For Review to the court and the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Kenneth L. Taylor Sheila Ridgeway Attorney at Law 900 4th Avenue, Suite 1111 Seattle WA 98164	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Robert K. Ricketts 8849 Pacific Avenue Tacoma, WA 98444	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

**DATED** at Seattle, Washington this 21<sup>st</sup> day of November, 2007.



\_\_\_\_\_  
Daniel F. King

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169 P.3d 847

Page 1

169 P.3d 847  
 (Cite as: 169 P.3d 847)

In re Estate of Borghi  
 Wash.App. Div. 1,2007.

Court of Appeals of Washington, Division 1.  
 In the Matter of the ESTATE OF Jeanette L.  
 BORGHI, Deceased.

Bobby G. Borghi, Personal Representative of the  
 Estate of Jeanette L. Borghi, Respondent,

v.

Arthur R. Gilroy, Appellant.  
 No. 59223-8-I.

Oct. 22, 2007.

**Background:** Decedent's husband, who was also personal representative of decedent's estate, sought declaratory judgment to determine title to real property left by decedent. The Superior Court, King County, Michael J. Fox, J., ruled that the property was community property and that title passed to husband under rules of intestate succession. Decedent's son from a former marriage appealed.

**Holding:** The Court of Appeals, Appelwick, C.J., held that the property was separate property, rather than community property, as it was purchased by decedent prior to marriage.

Reversed.  
 West Headnotes

[1] Husband and Wife 205 ⇨ 272(4)

205 Husband and Wife  
 205VII Community Property  
 205k272 Dissolution of Community  
 205k272(4) k. Actions for Dissolution or  
 Partition. Most Cited Cases  
 The Court of Appeals reviews de novo a trial court's  
 classification of property as community or separate.

[2] Husband and Wife 205 ⇨ 272(4)

205 Husband and Wife  
 205VII Community Property  
 205k272 Dissolution of Community  
 205k272(4) k. Actions for Dissolution or  
 Partition. Most Cited Cases  
 In a review of a trial court's classification of  
 property as community or separate, findings of fact  
 are reviewed for substantial evidence.

[3] Husband and Wife 205 ⇨ 249(5)

205 Husband and Wife  
 205VII Community Property  
 205k249 Property Acquired During Marriage  
 in General  
 205k249(5) k. Time When Character  
 Determined; Continuance of Character. Most Cited  
 Cases  
 For purposes of determining whether property is  
 community or separate, the character of property is  
 established at acquisition.

[4] Husband and Wife 205 ⇨ 248.5

205 Husband and Wife  
 205VII Community Property  
 205k248.5 k. Property Acquired Before  
 Marriage. Most Cited Cases  
 Property acquired before marriage is separate  
 property. West's RCWA 26.16.010, 26.16.020.

[5] Husband and Wife 205 ⇨ 262.1(1)

205 Husband and Wife  
 205VII Community Property  
 205k261 Evidence as to Character of Property  
 205k262.1 Presumptions  
 205k262.1(1) k. In General. Most  
 Cited Cases

Husband and Wife 205 ⇨ 262.2

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App. A

169 P.3d 847

Page 2

169 P.3d 847

(Cite as: 169 P.3d 847)

205 Husband and Wife  
 205VII Community Property  
 205k261 Evidence as to Character of Property  
 205k262.2 k. Burden of Proof. Most Cited  
 Cases

When it appears that property was once separate property, rather than community property, it is presumed to maintain that character until there is some direct and positive evidence to the contrary, and the proponent of community property has the burden of proving the change in character of the property.

**[6] Husband and Wife 205↔266.1**

205 Husband and Wife  
 205VII Community Property  
 205k266 Transactions Between Husband and  
 Wife

205k266.1 k. In General; Transmutation of Character of Property. Most Cited Cases  
 A writing is required to show spouses' mutual intention to convert property from separate into community property.

**[7] Vendor and Purchaser 400↔52**

400 Vendor and Purchaser  
 400II Construction and Operation of Contract  
 400k52 k. Operation of Contract in General.  
 Most Cited Cases  
 The ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase.

**[8] Husband and Wife 205↔249(5)**

205 Husband and Wife  
 205VII Community Property  
 205k249 Property Acquired During Marriage  
 in General  
 205k249(5) k. Time When Character  
 Determined; Continuance of Character. Most Cited  
 Cases

The time of payment, delivery or conveyance does not affect the initial characterization of property as either community or separate.

**[9] Husband and Wife 205↔264(1)**

205 Husband and Wife  
 205VII Community Property  
 205k261 Evidence as to Character of Property  
 205k264 Weight and Sufficiency  
 205k264(1) k. In General. Most Cited  
 Cases

Once property has been established to be separate property, the proponent of community property status must demonstrate some direct and positive evidence of a change in its character.

**[10] Husband and Wife 205↔248.5**

205 Husband and Wife  
 205VII Community Property  
 205k248.5 k. Property Acquired Before  
 Marriage. Most Cited Cases

**Husband and Wife 205↔249(5)**

205 Husband and Wife  
 205VII Community Property  
 205k249 Property Acquired During Marriage  
 in General  
 205k249(5) k. Time When Character  
 Determined; Continuance of Character. Most Cited  
 Cases

Real property that wife purchased nine years prior to marriage was separate property, rather than community property, even though a statutory warranty deed to the property was issued to both wife and husband after their marriage.

\*848 Robert Kendall Ricketts, Attorney at Law, Tacoma, WA, for Appellant.  
 Sheila Conlon Ridgway, The Law Office of Vance & Ridgway PS, Seattle, WA, Paulette Elaine Peterson, Law Offices, Bainbridge Island, WA, for Respondent.  
 APPELWICK, C.J.

¶ 1 Jeannette L. Borghi died intestate. Prior to her marriage to Mr. Borghi, she entered into a real estate contract to purchase property. After her marriage, a statutory warranty deed was issued to both Mr. and Mrs. Borghi. Upon Mrs. Borghi's death, the court determined that the real property was community property. Arthur Gilroy, Mrs. Borghi's son from a previous marriage contends that

169 P.3d 847

Page 3

169 P.3d 847

(Cite as: 169 P.3d 847)

the property was his mother's separate property. Early Washington Supreme Court precedent requires a finding that the property was the separate property of Mrs. Borghi. We reverse.

#### FACTS

¶ 2 Mr. and Mrs. Borghi were married on March 29, 1975. On June 12, 1975, the Cedarview Development Co. executed a Special Warranty Deed to "Robert G. & Jeannette L. Borghi, husband and wife." The deed was recorded on August 13, 1979. The deed states that it was given in fulfillment of a real estate contract dated March 16, 1966. However, the real estate contract was not recorded and no copy of the contract has been found. The estate claims that the real estate contract would have been executed by either Mrs. Borghi as a single person under her previous name "Gilroy" or with her former husband. The record contains no evidence of the timing or frequency of the payments under the contract.

¶ 3 Mr. and Mrs. Borghi resided on the property as their primary residence from 1975 until 1990. In August 1979, Mr. and Mrs. Borghi used the property to secure a mortgage with Washington Mutual Savings Bank. They used the mortgage to purchase a mobile home to put on the property. Mr. and Mrs. Borghi made most of the payments for the mortgage from their joint bank account. A satisfaction of the mortgage was recorded in July 1999.

¶ 4 Mrs. Borghi died intestate on June 25, 2005. Her surviving heirs were Mr. Borghi and Arthur Gilroy, her son from a previous marriage. Mr. Borghi became the personal representative. He obtained a title report which shows that the title of the land is vested in "Robert G. Borghi ... as his separate estate and the Heirs and Devisees of Jeanette L. Borghi, deceased." Mr. Borghi filed a petition for declaratory judgment to determine title to the real property. In September 2006, a superior court commissioner ruled that the real property was the community property of Mr. and Mrs. Borghi. Under intestate succession, the property would pass to Mr. Borghi. Arthur Gilroy filed a motion for

revision of the ruling which was denied. Gilroy appeals, seeking a declaration that the real property was Mrs. Borghi's separate property such that he would inherit an undivided one-half interest in the property.

¶ 5 Mr. Borghi died in October 2006. Mrs. Borghi's sister became the successor personal representative for Mrs. Borghi's estate. The personal representatives for both estates maintain that the real property was community property.

#### DISCUSSION

[1][2][3][4][5][6] ¶ 6 We review de novo a trial court's classification of property as community or separate. *In re Marriage of Chumbley*, 150 Wash.2d 1, 5, 74 P.3d 129 (2003). Findings of fact are reviewed for substantial evidence. *In re Marriage of Skarbek*, 100 Wash.App. 444, 447, 997 P.2d 447 (2000). The character of property is established at \*849 acquisition. *Id.* Property acquired before marriage is separate property. *See, Hurd v. Hurd*, 69 Wash.App. 38, 50, 848 P.2d 185 (1993) *review denied*, 122 Wash.2d 1020, 863 P.2d 1353 (1993); RCW 26.16.010; RCW 26.16.020. "When it appears that property was once separate, it is presumed to maintain that character until there is some direct and positive evidence to the contrary." *In re Estate of Madsen*, 48 Wash.2d 675, 676-77, 296 P.2d 518 (1956) (citing *Hamlin v. Merlino*, 44 Wash.2d 851, 272 P.2d 125 (1954)). The proponent of community property has the burden of proving the change in character of the property. *Jones v. Davis*, 15 Wash.2d 567, 569, 131 P.2d 433 (1942). A writing is required to show the parties' mutual intention to convert property from separate into community property. *In re Estate of Verbeek*, 2 Wash.App. 144, 158, 467 P.2d 178 (1970).

[7][8] ¶ 7 "The ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase." *Beam v. Beam*, 18 Wash.App. 444, 453, 569 P.2d 719 (1977). The time of payment, delivery or conveyance does not affect the initial characterization of the property. *In re Estate of Binge*, 5 Wash.2d 446, 484, 105 P.2d

169 P.3d 847

Page 4

169 P.3d 847

(Cite as: 169 P.3d 847)

689 (1940). The parties do not dispute that Mrs. Borghi entered into the real estate contract prior to the marriage and that Mr. Borghi was not a party to the contract. Even though the warranty deed was issued after marriage, the obligation was incurred prior to the marriage. As a result, the real estate was, at least initially, Mrs. Borghi's separate property.

[9] ¶ 8 Once property has been established to be separate property, the proponent of community property status must demonstrate some "direct and positive evidence" of a change in its character. *Binge*, 5 Wash.2d at 485, 105 P.2d 689. The estate contends that acceptance of the deed issued to Mr. and Mrs. Borghi, as husband and wife provides evidence of the community nature of the property. To rebut this argument, Gilroy relies on the proposition that "mere joinder in a contract, mortgage or deed by husband and wife ... is insufficient to convert property into community property." *Verbeek*, 2 Wash.App. at 155, 467 P.2d 178. Gilroy claims that a change from separate to community property requires a specific, voluntary act of the owning spouse to manifest intent, and that a warranty deed prepared by the grantor does not overcome the presumption of separate property.

¶ 9 Two published cases reach opposite results on similar facts. *In re Estate of Deschamps*, a 1914 Washington Supreme Court decision, is directly on point. 77 Wash. 514, 137 P. 1009 (1914). When she married, Anna Deschamps already owned an apartment building. Since property status is fixed at acquisition, the building was Mrs. Deschamps' separate property. *Deschamps*, 77 Wash. at 515, 137 P. 1009. Upon Mrs. Deschamps' death, her husband claimed the building as community property, partly based on the fact that the deed named him as a joint grantee. *Deschamps*, 77 Wash. at 517, 137 P. 1009. However, "unless divested by deed, by due process of law, or the working of an estoppel" the property remains separate property. *Id.* at 515, 137 P. 1009.

¶ 10 In support of his claim of community property, Mr. Deschamps presented evidence of his wife's intention to convert her separate property to community property. One witness testified, "as we

were going down to get the deed signed up, Mr. Deschamps asked Mrs. Deschamps if she was willing for his name to appear in the deeds both the same, and she said Yes, to have them; he wanted his name in the deed." *Id.* at 517, 137 P. 1009. Another witness corroborated the evidence that Mr. Deschamps inclusion on the deed was not inadvertent or accidental.

[S]o when the deed was drawn, I asked Mrs. Deschamps, ...'Now Mrs. Deschamps, do you want this deed in your name or in your husband's?' I asked Mr. Deschamps first, 'Do you want this deed in your name?' He says, 'Ask my wife. Whatever she says.'... So she says, 'Why certainly, ... the property belongs equal between us both.

*Id.* at 517-18, 137 P. 1009. This direct evidence, from two independent witnesses to the transaction, demonstrated that Mrs. Deschamps knew of the option to title the property\*850 in her name only and intentionally added her husband to the title. Yet, the court found that the building remained separate property. The property had been purchased with Mrs. Deschamps' separate property and the court concluded that "[i]t is not shown that the wife ever intended to give up a one-half interest in the property or that she understood that her husband could assert a greater interest in the property than would be represented by his advances, if any." *Id.* at 518, 137 P. 1009. The inability of the wife to testify as to her intentions led the court to err on the side of protecting her assets. The mouth of the wife is closed in death, and there is no one to speak for her unless it be the law, so often declared, that, where property standing in the name of either spouse, or in the name of both spouses, is presumed to be community property, such presumption is rebuttable and that courts will not be bound by the terms of the deed but will look beyond it and ascertain, if possible, the true intent and purpose of the parties. Having this principle in mind, and considering the whole record, we are not satisfied that the husband has made out a case that would warrant this or any other court in decreeing him to be the owner of a one-half interest in the property.

*Id.* The direct evidence from the witnesses in *Deschamps* showed that Mrs. Deschamps

169 P.3d 847

Page 5

169 P.3d 847  
 (Cite as: 169 P.3d 847)

considered the property to be that of the community, yet the court maintained its separate character because of the separate nature of the funds used in its acquisition.

¶ 11 Seventy-nine years later, in contrast to *Deschamps*, the Court of Appeals reached a different conclusion from similar facts in *Hurd*, 69 Wash.App. at 51, 848 P.2d 185. In *Hurd*, the husband purchased the vendor's rights under a real estate contract for the sale of a lot on Guemes Island several years prior to marriage. *Hurd*, 69 Wash.App. at 42, 848 P.2d 185. While the Hurd's were married, the purchaser of the lot could not make the required payments. *Id.* at 51-52, 848 P.2d 185. Mr. Hurd directed that the deed be conveyed to both himself and his wife, for "love and consideration." *Id.* From this set of facts, the court made a presumption of community property. "Mr. Hurd's act of requesting that the deed be conveyed back in the names of both parties permits a presumption that he intended to make a gift to the community." *Id.* at 52, 848 P.2d 185. In reaching this conclusion, the court articulated a new rule:

[w]e now hold that a spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation, permits a presumption that the purchase or transaction was intended as a gift to the community. We also hold that there must be clear and convincing proof to overcome such a presumption.

*Id.* at 51, 848 P.2d 185.

¶ 12 Based on this rule, the indirect evidence of the community name on the deed is sufficient to raise the presumption of a community property. *Id.* at 52, 848 P.2d 185.

¶ 13 Although the Court of Appeals presumption is directly contrary to *Deschamps*, *Hurd* does not discuss or cite *Deschamps*. *Washington Practice* gives a strong critique of *Hurd*. "If the *Hurd* rule<sup>[FN1]</sup> was applied to the facts in *Deschamps*, the result would have undoubtedly been different. *Hurd* did not mention, let alone distinguish, *Deschamps*." Kenneth W. Weber, 19 *Washington Practice: Family and Community Property Law Sec. 10.7*, at 142 n. 4 (1997). Weber contends that *Hurd* "

appears most unfortunate" and is unsupported by the cited case law. 19 *Washington Practice: Family and Community Property Law Sec. 10.7*, at 142 n. 4 (1997). The Washington Supreme Court denied review of *Hurd*, but since the opinion did not mention *Deschamps*, the conflict was not called to the attention of the court. To date, our Supreme Court has not revisited *Deschamps* and the high bar it has set for the evidence required to convert separate property to community property by deed. Furthermore, our Supreme Court does not overrule binding precedent sub silentio. *State v. Studd*, 137 Wash.2d 533, 548, 973 P.2d 1049 (1999); *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wash.App. 334, 160 P.3d 1089 (2007). As a \*851 result, we must agree that *Hurd* was improperly decided. We are constrained by the binding precedent set by *Deschamps*.

FN1. *Hurd*, 69 Wash.App. 38, 848 P.2d 185.

¶ 14 However, given the strength of the direct evidence from independent witnesses and the indirect evidence of the community name on the deed, we are firmly convinced that *Deschamps* was wrongly decided. A finding of separate property in the face of such clear evidence does not advance the policy concerns articulated. The harm to be avoided is a change in the character of the property when a change was not intended. Inclusion of both names on a deed could create an inadvertent change without a request, writing or document showing intent. Indeed, the harm is most likely in scenarios where an express documentation of the gift is lacking. When both spouses appear on a deed for previously separate property, and no writing exists, we should strive to determine the intent of the separate property holder. A weighing of the evidence is required to determine donative intent. A summary presumption that a gift was not intended does not serve to protect property holders but may thwart legitimate attempts to gift to the community as in *Deschamps*.

¶ 15 *Deschamps* is clearly not a case where the deed was titled to the community through inadvertence or pressure from a third party or to

169 P.3d 847

Page 6

169 P.3d 847  
 (Cite as: 169 P.3d 847)

accommodate the requirements of a mortgagor. The testimony shows that Mrs. Deschamps believed that the property belonged equally to both herself and her husband. *Deschamps*, 77 Wash. at 517-18, 137 P. 1009. Based on the independent witness testimony, there is no doubt that she knew of her option to have title in her name only, yet she expressed her desire to include her husband. *Id.* Her intent that they equally own the property was clear. Similarly, Mr. Hurd's instructions to title the property in the name of the marital community was not inadvertent or at the request of a third party. He indicated no reason to include his wife other than "for love and consideration." This expresses a desire to benefit the community.<sup>FN2</sup>

FN2. Since the trial court did not enter findings as to whether Mr. Hurd intended a gift to the community, the Court of Appeals requested that the trial court take additional evidence on Mr. Hurd's intent. "In view of Mr. Hurd's testimony that he often placed property in both parties' names for 'love and consideration,' upon remand the court needs to determine what Mr. Hurd meant by that phrase." *Hurd*, 69 Wash.App. at 52, 848 P.2d 185.

¶ 16 We believe that *Hurd* appropriately protects separate property from inadvertent changes in character but allows for gifts by deed. When the separate property owner has expressed a desire to add their spouse to the title to the separate property, a presumption should arise that the names of both spouses on the title of property acquired by separate funds changes the character of the property to community. The presumption can be overcome by clear and convincing proof that community benefit was not intended, such as evidence of accommodation of a mortgagor, duress or deception, or an unsolicited act of a third party in preparing the document. This protects against inadvertence or avarice but allows separate property owners, like Mrs. Deschamps, to demonstrate a gift of property through the deed.

[10] ¶ 17 In this case, we know that Mrs. Borghi entered into a real estate contract on the property

nine years prior to her marriage to Mr. Borghi. Fourteen days after the marriage, Mr. and Mrs. Borghi took title. The record provides no evidence that Mr. Borghi had made payments, either separate or community, or otherwise acquired an interest in the property. As Mrs. Borghi entered the contract either as a single person or with her previous husband, a deed in escrow at the time of purchase could not reflect the Borghi marital community. While there is no evidence that anyone communicated with Cedarview Development Co., the company had to be informed of the very recent remarriage in order to title the property to "Robert G. & Jeannette L. Borghi, husband and wife." To include Mr. Borghi, who was not a party to the real estate contract, the issuer had to have direction that Mr. Borghi was entitled to be on the deed. This would have required an affirmative act to apprise Cedarview of the existence of a spouse and the desirability of adding him to the deed. While someone other than Mrs. Borghi could have given Cedarview this direction,<sup>\*852</sup> there is no evidence that Mrs. Borghi protested the addition of her husband. She accepted the deed and eventually recorded the deed.

¶ 18 The evidence leads us to the conclusion that Mrs. Borghi intended the deed to reflect a gift of her separate property to the community. We believe this is the proper outcome. This is the result we would reach under *Hurd*. However, we are constrained by *Deschamps* to reach the opposite conclusion. We reluctantly conclude that the property was Mrs. Borghi's separate property.

¶ 19 We reverse.

WE CONCUR: AGID and COLEMAN, JJ.  
 Wash.App. Div. 1, 2007.  
 In re Estate of Borghi  
 169 P.3d 847

END OF DOCUMENT

1. ***Marriage of McVay-Tackett and Tackett***, 2007 WL 1417297, 138 Wash. App. 1042 (Div. 2, 2007)
2. ***Moseley v Mattila***, 2005 WL 1178063, 127 Wash. App. 1027 (Div. 1, 2005)
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10. ***Marriage of Lamp***, 2004 WL 2307422, 123 Wash. App. 1042 (Div. 3, 2004), *rev. denied*, 154 Wn.2d 1016 (2005)
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- 1 In re Estate of Borghi, 169 P.3d 847, 849+ (Wash.App. Div. 1 Oct 22, 2007) (NO. 59223-8-I) ""★  
★★★ **HN: 30,31,32 (P.2d)**

*Declined to Extend by*

- ▷ 2 Bratcher v. Bratcher, 26 S.W.3d 797, 800 (Ky.App. Aug 18, 2000) (NO. 1999-CA-001194-MR)★  
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*Distinguished by*

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- H** 4 In re Marriage of Wright, 52 P.3d 512, 515+, 147 Wash.2d 184, 189+, 29 Employee Benefits Cas.  
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Jan 23, 2003) (NO. 20283-6-III) **HN: 28,32 (P.2d)**
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**App. C**

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- 62 In re Marriage of Werstiuk, 1997 WL 530686, \*3, 87 Wash.App. 1043, 1043 (Wash.App. Div. 2 Aug 28, 1997) (NO. 19341-8-II) "" **HN: 24,32 (P.2d)**
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- 145 David VANCE, individually, and as beneficiary of the Estate of Reba V. Vance; and Larry Vance and Chastity Vance, husband and wife and their marital community comprised thereof; and Larry Vance, individually, and as beneficiary of the Estate of Reba D. Vance; and Larry Vance as Personal Representative of the Estate of Reba D. Vance, Plaintiffs, v. ANDREW M. TSOI, M.D., INC., P.S. and ""Jane Doe Tsoi, husband and wife and their marital community comprised thereof,, 2004 WL 5322159, \*5322159 (Trial Motion, Memorandum and Affidavit) (Wash.Super. Aug 28, 2004) **Defendants Enkema's and South Hill's Motion to ...** (NO. 03-2-08722-5)★

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