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STATE OF WASHINGTON

**NO. 80925-9**

**SUPREME COURT OF THE STATE OF WASHINGTON**

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ARTHUR R. GILROY,

Respondent,

vs.

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

Petitioner.

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**Answer to Petition for Review**

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**A. ANSWER TO ISSUES PRESENTED FOR REVIEW IN PETITION**

1. In this case, the property was purchased by the decedent, Mrs. Borghi, nine years before marriage. Its status was separate at the time of marriage and remained so throughout. As will be discussed herein, acquiring title post-marriage is not sufficient of direct and positive evidence of a spouse's intent to establish community property.

2. As will be discussed herein, the use of property already titled in both spouses' names as security for a mortgage has already been established in Washington case law as insufficient of direct and positive evidence of a spouse's intent to establish community property.

**B. STATEMENT OF THE CASE**

The statement of the case is adequately addressed in pages 2 and 3 of the Petition for Review.

What is essential for the Court to understand in this case is that there is no direct and positive evidence that Mrs. Borghi intended to convert her separate property to community. There are

no writings such as a Quit-Claim Deed or Community Property Agreement. There are no statements from Mrs. Borghi expressing her intent or from any witness that observed her to express her intent. Although Division One reached the right decision based upon the entirety of the case law, their conclusion that Mrs. Borghi intended the deed to reflect a gift is unsupported by any evidence.

In *In re Marriage of Hurd*, 69 Wn. App. 38, 848 P. 2d 185, review denied, 122 Wn. 2d 1020 (1993), which is cited by the Estate of Borghi and Division One, there was direct and positive evidence by the testimony of Mr. Hurd himself that he intended the Deed to be titled in both names for love and affection and that interest was created during the marriage.

**C. ARGUMENT WHY THE COURT SHOULD NOT GRANT REVIEW**

The facts in *Hurd* are entirely dissimilar. The holding of *Hurd* was: “We 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.” *Hurd*, at 51.

Mr. Hurd owned a vendor's interest in a parcel of property. When the purchaser could no longer keep up with the payments, and, at Mr. Hurd's direction, conveyed the property to both Mr. Hurd as husband and wife. **Hurd at 51 – 52.** The court stated, "... *Mr. Hurd's act of requesting that the deed be conveyed back in the names of both parties permits the presumption that he intended to make a gift to the community.*" **Hurd at 52.** The interest in property in that case was acquired during the marriage and there was testimony as to Mr. Hurd's statement of intent.

Despite having the opportunity to do so, the Estate of Borghi did not produce any direct and positive evidence that Mrs. Borghi intended to title the property in both spouses' names. The property was acquired by Mrs. Borghi on March 16, 1966; nine years prior to marriage, as her separate property. It was never "purchased and titled" in both spouses' names while the community was in existence, as in **Hurd**.

**1. The law is that the property was separate property.**

The rule regarding time and manner of acquisition was recognized by the court in the ***Matter of the Estate of William F. P.***

**Binge v. Mumm**, 5 Wn.2d 446, 484, 105 P.2d 689 (1940) where the court announced:

It is the rule in this state that the status of property, whether real or personal, **becomes fixed as of the date of its purchase or acquisition; and that the status, when once fixed, retains its character until changed by agreement of the parties or operation of law. Property acquired through contractual obligation**, as between husband and wife and all others claiming under them, has its origin **and is acquired as of the date when the obligation becomes binding, and not as of the time when the money is paid or the thing is delivered or conveyed**. The fruit of the obligation is legally acquired as of the date when the obligation becomes binding. [Emphasis added]

When acquiring property by real estate contract, the ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase. **Stokes v. Polley**, 145 Wn. 2d 341, 37 P. 3d 1211 (2001); **Beam v. Beam**, 18 Wn. App. 444, 453, 569 P.2d 719 (1977).

It is the well-settled the rule that property is characterized as of the date of acquisition. Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §11.6 (1997). *In re*

***Marriage of Skarbek***, 100 Wn. App. 444, 997 P.2d 447 (2000); ***In re Marriage of Gillespie***, 89 Wn. App. 390, 948 P.2d 1338 (1997); ***In re Marriage of Sedlock***, 69 Wn. App. 484, 849 P.2d 1243, *review the denied*, 122 Wn.2d 1014 (1993).

*"Property is not characterized by title or the name under which it is held."* Kenneth W. Weber, 19 Washington Practice, Family and Community Property Law, §10.7 (1997); ***In re Marriage of Skarbek***, 100 Wn. App. 444, 448, 997 P. 2d 447 (2000); ***In re Marriage of Hurd***, 69 Wn. App. 38, 848 P. 2d 185, *review denied*, 122 Wn. 2d 1020 (1993).

Additionally, Professor Harry M. Cross in his seminal article states:

The author [Cross] thus believed it desirable that there be clear adoption of the mortgage rule in installment acquisitions: the ownership character of an asset acquired in performance of a contractual purchase obligation should be the same as the character of the initial obligation. (Harry M. Cross, THE COMMUNITY PROPERTY LAW IN WASHINGTON, Vol. 49: 729, 762 1974).

***Professor Cross also quotes: "McKay insisted that an asset conveyed after marriage in fulfillment of an antenuptial contract was necessarily separate property."*** (Harry M. Cross,

THE COMMUNITY PROPERTY LAW IN WASHINGTON, Vol. 49: 729, 760  
1974 quoting: G. McKay, COMMUNITY PROPERTY ch. 31 (2d ed.  
1925). According to Professor Cross:

***Property acquired through contractual obligation, as between husband and wife and all others claiming under them, has its origin and is acquired as of the date when the obligation becomes binding, and not as of the time when the money is paid or the thing is delivered or conveyed. The fruit of the obligation is legally acquired as of the date when the obligation becomes binding.*** Harry M. Cross, THE COMMUNITY PROPERTY LAW IN WASHINGTON, Vol. 49: 729, 1974, citing ***Binge***, supra.

This is what separates this case from ***Hurd***. That is also one of the errors the probate court made in this case that was corrected by Division One.

**2. The property was never converted to community property.**

The law in Washington is: *"that specific real or personal property once becoming separate property remains so, unless by voluntary act of the spouse owning it its nature is changed."* ***Volz v. Zang***, 113 Wash. 378, 382, 194 Pac. 409 (1920). Also, ***In the Matter of the Estate of Dewey T. Verbeek, Sr. v. Irene L. Verbeek***, 2 Wn. App. 144, 467 P. 2d 178 (1970) the court stated:

*“that mere joinder in a contract, mortgage or deed by husband and wife or by two parties living together prior to marriage is insufficient to convert property into community property.”*

In this case Mrs. Borghi had the means available to express her intent to convert her separate property into community; however, she did not take such action. For the characterization of property to change there must be a specific and voluntary act that expressed Mrs. Borghi's intent to make the property community, rather than to allow it to remain separate property.

The requirement of express intent is reiterated in **Volz v. Zang**, 113 Wash. 378, 382, 194 Pac. 409 (1920 quoting **Guye v. Guye**, 63 Wash. 340, 115 Pac. 731 (1911), where the Court explained: “We think the statute meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed.”

“In order to convert separate property into community property, the mutual intention of the parties must be evidenced by a

writing.” *Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P. 2d 8 (1989). ‘Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary.’ *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P. 2d 447 (2000); see also RCW 26.16.010. And in general, ‘[t]he burden is on the spouse asserting that separate property has transferred to the community to prove the transfer by clear and convincing evidence, *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P. 2d 447 (2000), *Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P. 2d 8 (1989).

Therefore, while Mr. Borghi’s name may appear on the Statutory Warranty Deed, Washington Courts have uniformly held that this is not enough to allow a presumption that the property that was initially characterized as separate property should be considered community property.

Had the parties intended on creating community property they should have created a conveyance. Mrs. Borghi could have executed a Quit Claim Deed to the community or the parties could

have executed a Community Property Agreement. They did neither.

**3. The parties' refinance did not create community property.**

This very issue was raised in *Guye v. Guye*, 63 Wash. 340, 352-53; 115 Pac. 731 (1911) where the court held:

[T]he right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character *until some direct and positive evidence to the contrary is made to appear. Nor do we think the fact that the spouses have joined in mortgaging property sufficient evidence on which to found a claim that the property mortgaged is community property.* While the statute allows a husband or wife to sell and encumber his or her separate property, yet no prudent purchaser or mortgagee will ever take the separate deed or mortgage of a married man or married woman even when the other spouse sits by and disclaims interest. Such a deed or mortgage always requires explanation in subsequent dealings with the property whenever either of them forms a part of the chain of title, rendering the property less easy of disposition than it otherwise would be. *The fact that both spouses joined in the encumbrances put on the property in this instance is, therefore, little or no evidence that the property was community rather than separate property.* [Emphasis added]

According to Casemaker, **Guye** has been cited through the years and as recently by this Court in 2003.

*As this court has explained before:*

"[T]he right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear." **In re Dewey's Estate**, 13 Wn.2d 220, 226-27, 124 P.2d 805 (1942) (quoting **Guye v. Guye**, 63 Wash. 340, 352, 115 P. 731 (1911));

***In re Marriage of Chumbley***, 150 Wn.2d 1, 74 P.3d 129 (2003).

See also: ***Hamlin v. Merlino***, 44 Wn.2d 851, 857-858, 272 P.2d 125 (1954) and ***Marriage of Elam***, 97 Wn.2d 811, 814; 650 P.2d 213 (1982).

#### **D. CONCLUSION**

The common theme in the above cases is that in order to convert separate property to community property there has to be direct and positive evidence. The mere acceptance of a statutory warranty deed during marriage in fulfillment of a pre-community separate contract does not constitute direct positive evidence.

Refinancing a parcel of separate property by joining in a mortgage does not constitute direct and positive evidence.

There are well-established means to effectuate such an intention. The parties may execute a Quit-Claim deed. A party may enter into a community property agreement. These are affirmative acts. As the court has noted, the right to separate property is a sacred right and any action to change that should be a positive act and not passive acquiescence.

If the Court accepts this Petition for review, the court will precariously place cases such as *Marriage of Chumbley*, *Marriage of Skarbek*, *Marriage of Shannon*, *Marriage of Elam*, *Hamlin v. Merlino*, *Dewey's Estate*, *Volz v. Zang*, *Guye v. Guye*, and scores of other cases into confusion. All require some type of direct and positive act on behalf of the spouse who owns the separate property to convert it to community property.

*Skarbek and Shannon* place the burden of proof on the spouse asserting that separate property has been transferred to prove by clear and convincing evidence to overcome the

presumption of separate property. That will change if this case is reversed.

It is not clear why Division One put the cases of *Estate of Deschamps*, 77 Wash. 524, 137 P. 1009 (1914) and *Hurd* into controversy. The facts in both of those cases had direct and positive evidence or dealt with property acquired after marriage, and were remarkably dissimilar from this case.

Division One states that *Hurd* properly protects separate property from inadvertent changes in character, but allows for gifts by deed. The key language used: “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 property acquired by separate funds changes the character of the property to community.” [Emphasis added] See 169 P. 3d 852 Paragraph 16.

What is missing in Borghi is an **expression of desire** to add her spouse to the title. There is no evidence that Mrs. Borghi expressed any desire that any of previously cited case law or commentary would recognize. A direct and positive expression of

intent is mandated. Division One speculated to make their own factual determination. This is the opposite of direct and positive evidence. For all we know Mr. Borghi, without Mrs. Borghi's knowledge or consent, contacted the contract vendor and directed his name to be added. We do not know.

The presumption for separate property must be overcome by clear and convincing evidence by the one asking that the change of character of property being made. This is the law according to **Shannon** and **Skarbeck**. That would be changed if this case is reversed

The Petition must be denied.

Respectfully submitted this 24th day of December, 2007.



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