

NO. 66193-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of Hoffman

ALAN HOFFMAN,

Appellant/Cross Respondent,

v.

CAROLE HOFFMAN,

Respondent/Cross Appellant

2011/12/12 10:16:32

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Carol Schapira, Judge

APPELLANT'S BRIEF

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I. INTRODUCTION

Dr. Alan Hoffman, the Appellant/Cross Respondent, appeals the rulings of the trial court that were contained in the Findings of Fact and Conclusions of Law (CP 158-165), the Decree of Dissolution (CP 173-180), and the Order Denying Reconsideration (CP 270-271).

II. ASSIGNMENT OF ERROR

A. Assignment of Error No. 1. In Finding of Fact No. 2.8(1), the trial court erred when it characterized the Redmond "Trilogy" home as community property, and in Decree of Dissolution No. 3.3(1), awarded fifty percent (50%) of the home's stipulated value of \$975,000 to the wife.

Finding of Fact No. 2.8(1) states, "[t]he parties have real or personal community property as set forth in the prenuptial agreement referenced above and as otherwise ordered at trial. Redmond 'Trilogy' Home with a stipulated value of \$975,000. The Redmond 'Trilogy Home's joint title in the name of both the husband and the wife was substantial evidence of the Home's character as a community asset."

Decree of Dissolution No. 3.3(1) states, "[t]he wife is awarded as her separate property the following property: Fifty percent of the stipulated value (\$975,000) of the Redmond 'Trilogy' Home. . ."

- B.** Assignment of Error No. 2. In Finding of Fact No. 2.8(4), and in Decree of Dissolution No. 3.3(2), the trial court erred when it found the wife should be reimbursed \$75,000 for increase in value to the Woodinville home.

Finding of Fact No. 2.8(4) states, "[t]he parties have real or personal community property as set forth in the prenuptial agreement referenced above and as otherwise ordered at trial. \$75,000 reimbursement to the wife for increase in value to Woodinville home (owned by the husband prior to marriage), located at 14461 156th Ave. NE, Woodinville, WA 98022, sold during the marriage."

Decree of Dissolution No. 3.3(2) states, ""[t]he wife is awarded as her separate property the following property: \$75,000 as reimbursement for increase in value of the Woodinville home (owned by the

husband prior to marriage), located at 14461 156th Ave. NE, Woodinville, WA 98022, sold during the marriage. . ."

- C. Assignment of Error No. 3. In Finding of Fact No. 2.15, and in Decree of Dissolution No. 3.13, the trial court erred in awarding the wife attorney's fees despite the trial court's enforcement of the prenuptial agreement and the parties' understanding of the terms of the premarital agreement.

Finding of Fact No. 2.15 states, "[t]he wife has the need for the payment of attorney and expert fees and costs and the husband has the ability to pay the court-ordered fees. The wife provided evidence through testimony she incurred attorney and expert fees in the amount of \$120,000.00. The husband shall pay wife's fees and costs in the amount of \$70,000.00.

Decree of Dissolution No. 3.13 states, "[t]he husband shall pay wife's attorney and expert fees and costs in the amount of \$70,000.00 (Seventy Thousand Dollars). . ."

III. STATEMENT OF THE CASE

A. Procedural History

Carole Hoffman filed a Petition for Dissolution of Marriage on March 20, 2009. CP 1-6. Temporary orders were entered on or about April 9, 2009. The temporary orders granted Carole Hoffman sole occupancy of the Redmond "Trilogy" home and \$1,500 per month as a pre-distribution of assets (characterization of the pre-distribution reserved for trial). Carole Hoffman filed a motion for reconsideration; however, the court's only amendment of the temporary orders pertained to each parties' duties in relation to Carole Hoffman's occupancy of the Trilogy home. Both parties filed a motion for revision of the temporary orders and both motions were denied but for the court striking a portion of a third party declaration. Trial occurred in August 2010 in King County Superior Court before Judge Carol Schapira. Both parties filed a motion for reconsideration of Judge Carol Schapira's final orders, and both parties' motions were denied.

B. History of the Parties

Carole Hoffman was born on May 1, 1946 and was sixty four (64) years old at time of trial. RP, August 18, 2010, p.19. Dr. Alan Hoffman was sixty-eight and a half (68.5) years old at the time of

trial. RP, August 18, 2010, p. 539. The parties began residing together in April 1998 and were married on August 5, 2000. RP, August 18, 2010, p.19. Carole Hoffman was married two (2) times prior to marrying Dr. Alan Hoffman. RP, August 18, 2010, p. 19-21. Carole Hoffman's first two (2) marriages ended in dissolution in the years 1978 and 1989 respectively. RP, August 18, 2010, p. 19-20. One (1) child was born of Carole Hoffman's first marriage, Louie Kristoff LaRoche. RP, August 18, 2010, p. 20. Dr. Alan Hoffman was married two (2) times prior to his marriage with Carole Hoffman. RP, August 24, 2010, p. 540. Dr. Alan Hoffman has four (4) children and six (6) grandchildren. RP, August 24, 2010, p. 540.

Regarding Dr. Alan Hoffman's education, he earned a degree in engineering physics from Cornell at age twenty-one (21). RP, August 24, 2010, p. 541. Upon receiving a fellowship from NASA, Dr. Alan Hoffman attended Cal Tech, where he earned his Ph.D. in aeronautics and applied math. RP, August 24, 2010, p. 541. At time of trial, Dr. Alan Hoffman still worked part time for the University of Washington. RP, August 24, 2010, p. 540. His work included plasma physics, and nuclear fusion in the energy field. RP, August 24, 2010, p. 541. From his part time University of Washington employment, Dr. Alan Hoffman earned approximately

\$5,000 per month in net income. RP, August 24, 2010, p. 549. Dr. Alan Hoffman also received approximately \$3,000 per month from the Hoffman Family Trust (hereinafter "Trust") for the purpose of maintaining the Trust-owned Sun Valley home. RP, August 24, 2010, p. 550; Ex. 139. During the marriage, Dr. Alan Hoffman purchased that home titled in the name of the Trust in October 2007. RP, August 24, 2010, p. 593-594.

Regarding the Trust, Dr. Alan Hoffman testified the purpose of the Trust, set up in 2006 by his mother's will after her death in December 2005, was for the benefit of Dr. Alan Hoffman's family. RP, August 24, 2010, p. 550. It was Dr. Alan Hoffman's understanding the trust funds were established for his children who are listed as the ultimate beneficiaries of the trusts. RP, August 24, 2010, p. 551-552. Dr. Alan Hoffman is the trustee of the nonexempt and the exempt trusts held within the Trust. RP, August 24, 2010, p. 635; Ex. 139. Dr. Alan Hoffman's sister is the special trustee for his trust funds and he fills the same role for his sister's trust funds. RP, August 24, 2010, p. 635; Ex. 139. At time of trial, according to Dr. Alan Hoffman, the exempt trust and the non-exempt trust were worth approximately \$11,000,000, which included the Sun Valley home. RP, August 24, 2010, p. 638. Dr.

Alan Hoffman also had a trust set up by his father containing approximately \$1,000,000 at time of trial. RP, August 24, 2010, p. 639; Ex. 141.

Dr. Alan Hoffman hired expert, Steve Kessler, CPA, to review the trust funds and to generate a tracing report. RP, August 25, 2010, p. 728; Ex. 142; Ex. 143. Mr. Kessler reviewed Dr. Alan Hoffman's Smith Barney IRA with the last four (4) digits #2418 and concluded the account balance as of December 31, 1998 was \$729,637 and no community contributions were made to the account. RP, August 25, 2010, p. 731-734. Mr. Kessler reviewed Dr. Alan Hoffman's Smith Barney IRA ending in #6E436 and concluded the account balance as of September 1, 2006, the date the account opened, \$54,154, was traceable to inheritance from Dr. Alan Hoffman's mother and no community contributions were made to the account. RP, August 25, 2010, p. 734-736. Mr. Kessler reviewed Dr. Alan Hoffman's Roth IRA with the last four (4) digits #1468 and concluded the account balance as of December 31, 1998 was \$20,026 and no community contributions were made to the account. RP, August 25, 2010, p. 736-737. The Roth IRA #1468 was awarded to Carole Hoffman according to the terms of the prenuptial agreement. CP 173-180; Ex. 147. Mr. Kessler

reviewed Dr. Alan Hoffman's Smith Barney Account #0139 and concluded the account balance as of December 31, 1998 was \$468,037 and the limited activity in the account could be traced to Dr. Alan Hoffman's separate source of funds; thus, the account retained its separate property character. RP, August 25, 2010, p. 738-741.

Mr. Kessler reviewed Smith Barney Account with the last four (4) digits #5177, and titled Dr. Alan Hoffman and Carole Mawson and TTEE is Trustee of the Hoffman Family Trust, and concluded there was an initial deposit of \$10,024,333 on December 31, 2006. RP, August 25, 2010, p. 734. Mr. Kessler testified that but for the \$900,000 deposit made on April 10, 2007, which came from the proceeds of Dr. Alan Hoffman's Woodinville home, the activity in this account was essentially all disbursements. RP, August 25, 2010, p. 747. Thus, Mr. Kessler concluded the Smith Barney Account with the last four (4) digits #5177 retained its separate property character. RP, August 25, 2010, p. 747.

Regarding Carole Hoffman's education, she earned her Bachelor's degree in psychology from the University of Montana. RP, August 18, 2010, p. 21. Subsequently, Carole Hoffman attended graduate school at Idaho State University and earned her

Master's of Science degree in zoology ecology. RP, August 18, 2010, p. 21.

When the parties commenced residing together, Carole Hoffman worked for Eagle Satellite Incorporated, a company that installed and sold residential and commercial satellite television equipment. RP, August 18, 2010, p. 25. Carole Hoffman was the owner and president of the company. RP, August 18, 2010, p. 25-26. As owner and president of the company, Carole Hoffman's duties included hiring employees and managing the company's finances. RP, August 18, 2010, p. 26. Eagle Satellite Incorporated commenced operations in 1996 and ceased operations in March of 2000. RP, August 18, 2010, p. 27. RP, August 18, 2010, p. 29. Carole Hoffman alleged the business ceased to be a going concern because she was having difficulty spending enough time at the company. RP, August 18, 2010, p. 27. Prior to Eagle Satellite Incorporated, Carole Hoffman's work history included various employment fields, including administration work for temporary agencies, owning her own environmental consulting firm (LaRoche Environmental Resources), retail clothing sales, bookkeeping, and working as an administrative assistant at Merrill Lynch. RP, August

18, 2010, p. 30. RP, August 18, 2010, p. 32. RP, August 18, 2010, p. 38-40.

Carole Hoffman first became a licensed real estate agent in 1978 in Idaho. RP, August 18, 2010, p. 31. Sometime after 1988, in the State of Washington, Carole Hoffman obtained her real estate broker's license. RP, August 18, 2010, p. 33. Carole Hoffman's broker license terminated in the year 2009. RP, August 18, 2010, p. 34.

During the marriage, Carole Hoffman also worked at Choice Lending finding new loan customers. RP, August 18, 2010, p. 42. This position lasted approximately six (6) months. RP, August 18, 2010, p. 43. Carole Hoffman claimed she ceased employment with Choice Lending due to Dr. Alan Hoffman's desire she travel with him. RP, August 18, 2010, p. 44. Dr. Alan Hoffman testified the parties' vacations were not related to Carole Hoffman's ability to work. RP, August 24, 2010, p. 545. Dr. Alan Hoffman's expectation was that Carole Hoffman be employed. RP, August 24, 2010, p. 544. This was evidenced in the parties' premarital agreement, addressed further below, which specified Carole Hoffman was entitled to retain the first \$75,000 of her earned income as separate property. Ex. 146.

Prior to the parties' marriage, they jointly prepared and executed a premarital agreement. RP, August 18, 2010, p. 49; Ex. 146. Carole Hoffman executed the premarital agreement on August 1, 2000. RP, August 18, 2010, p. 50. She testified discussions of the premarital agreement commenced in early July 2000. RP, August 18, 2010, p. 50. Carole Hoffman retained attorney Margaret Langley to review and obtain legal advice regarding the premarital agreement. RP, August 18, 2010, p. 54. Carole Hoffman's meetings with Margaret Langlie were, in part, memorialized in a billing statement from Ms. Langley's office. RP, August 18, 2010, p. 56-57. Carole Hoffman met with Margaret Langlie in her office on two (2) occasions regarding the terms of the premarital agreement and to execute the premarital agreement. RP, August 18, 2010, p. 57, 67. Carole Hoffman also testified to telephonic conversations and facsimile communication with Margaret Langley regarding the premarital agreement. RP, August 18, 2010, p. 190-191. Regarding the premarital agreement's terms, Margaret Langlie drafted a letter on behalf of Carole Hoffman dated July 24, 2000 to Dr. Alan Hoffman's attorney, Hugh Judd, requesting changes to the draft prenuptial agreement. RP, August 18, 2010, p. 185-186; Ex. 147. A draft of the premarital agreement

was dated July 27, 2000, and another draft of the premarital agreement was dated August 1, 2000. RP, August 18, 2010, p. 186-188; Ex. 148; Ex. 149.

Regarding Carole Hoffman's experience with contractual documents and her general legal acumen, Carole Hoffman performed contractual-related work for her business, Eagle Satellite Incorporated. RP, August 18, 2010, p. 191. As president of the company, Carole Hoffman negotiated leases for office space and reviewed contracts with manufacturers. RP, August 18, 2010, p. 191-192. In addition, Carole Hoffman spent the first five (5) years of the marriage working on her Piper Jaffray lawsuit. RP, August 24, 2010, p. 545.

Dr. Alan Hoffman recalled discussing the terms of the premarital agreement between himself and Carole Hoffman in June and July 2000. RP, August 24, 2010, p. 556-557. Hugh Judd, at the direction of Dr. Alan Hoffman, generated a first draft of the premarital agreement based on the parties' discussions. RP, August 24, 2010, p. 557. Subsequently, the first draft of the premarital agreement was changed pursuant to Carole Hoffman's request through counsel, Margaret Langlie. RP, August 24, 2010, p. 557. Dr. Alan Hoffman testified Carole Hoffman expressed no

concern regarding the premarital agreement. RP, August 24, 2010, p. 558. Carole Hoffman signed the final draft of the premarital agreement on August 1, 2000 and Dr. Alan Hoffman signed the final draft of the premarital agreement on August 2, 2000. Ex. 146. The attorneys, Hugh Judd, signed the final draft of the premarital agreement on August 2, 2000, and Margaret Langlie signed the final draft of the premarital agreement on August 1, 2000. Ex. 146. The Court found the premarital agreement was entered into voluntarily and was both fair procedurally and substantively. CP 158-165.

During the parties' marriage, the marital community spent more than it earned. RP, August 18, 2010, p. 613. Carole Hoffman retained Christian Drakeley as a financial expert. RP, August 19, 2010, p. 220. Ms. Drakeley began tracing Dr. Hoffman's financial accounts beginning in February 2008, over a year before Carole Hoffman filed for dissolution. RP, August 19, 2010, p. 221-225. Ms. Drakeley testified as to funds Ms. Drakeley characterized as community spent on the Woodinville home owned by Dr. Alan Hoffman prior to marriage. RP, August 19, 2010, p. 282. Ms. Drakeley testified the amount spent from community funds was \$96,481. RP, August 19, 2010, p. 282.

Dr. Alan Hoffman testified he was the party responsible for working with Don Bosancu, the person performing most of the work on the Woodinville home, and Dr. Alan Hoffman paid approximately \$28,000 to \$30,000 for the Woodinville home improvements. RP, August 24, 2010, p. 590-591. The remodeling project was funded through Dr. Alan Hoffman's separate savings, which was paid back by the \$62,000 Dr. Alan Hoffman retained out of the proceeds of the Woodinville home sale--the amount not returned to the Trust. RP, August 24, 2010, p. 591.

Ms. Drakeley calculated the value of Carole Hoffman's labor on the Woodinville home at \$22,605, which was \$55 per hour multiplied by 411 hours. RP, August 19, 2010, p. 279, 282. Thus, Ms. Drakeley calculated the community contribution to the Woodinville home was \$119,086. RP, August 19, 2010, p. 282. Ultimately, Ms. Drakeley testified labor and appreciation for the Woodinville home throughout the marriage was \$274,842. RP, August 19, 2010, p. 283-284. Ms. Drakeley also provided documents and testimony as to many other items Dr. Hoffman purchased for his children, a sailboat he partially owned from before marriage, and that pursuant to Carole Hoffman's direction, she listed hundreds of thousands of dollars that should be

considered community. RP, August 19, 2010, 263-265, 292-295, 299-302. However, in cross-examination, Ms. Drakeley was forced to admit that large portions of so-called contributions to his children were actually transfers into and out of Dr. Hoffman's bank account on the same day, and that she should not have listed them as community 345-354. The same analysis applied to Dr. Hoffman's sailboat, where he actually put net money into his account from sales of shares to new partners. 342-344.

To reach 411 hours of work allegedly performed on the Woodinville home, Carole Hoffman generated a work log. RP, August 23, 2010, p. 377. Carole Hoffman created the log in anticipation of litigation. RP, August 23, 2010, p. 378. The log was created unbeknownst to Dr. Alan Hoffman. RP, August 23, 2010, p. 378. Carole Hoffman also created a work log in anticipation of litigation for the Sun Valley home for work she allegedly performed on the home. RP, August 23, 2010, p. 384-385. Carole Hoffman's testimony unveiled a portion of the work log entries were trips to the home for vacation. RP, August 23, 2010, p. 387.

Carole Hoffman also included drive time and flight time in her request for reimbursement work log. RP, August 23, 2010, p. 386-388.

Steve Kessler, CPA, provided expert witness testimony for Dr. Alan Hoffman regarding the issue of tracing. RP, August 25, 2010, p. 727-859. Mr. Kessler generated a tracing report for the matter. RP, August 25, 2010, p. 728-729; Ex. 142; Ex. 143. Mr. Kessler's tracing report demonstrated that essentially all of Dr. Alan Hoffman's monthly salary, the community income, was exhausted each month by the community's expenses. RP, August 25, 2010, p. 760-761. Two (2) bank accounts were primarily used to pay community expenses, including Bank of America Account #4410 and Bank of America Account #0662. RP, August 25, 2010, p. 759-760. The history of both bank accounts evidenced they were continuously replenished from a separate source after Dr. Alan Hoffman's salary was exhausted. RP, August 25, 2010, p. 759-761. Carole Hoffman maintained a separate bank account (#5757) in her name alone with a Kirkland, Washington post office box address; the account was unbeknownst to Dr. Alan Hoffman and Carole Hoffman transferred money from the parties' joint Bank of America Account #0662 to her secret account. RP August 18, 2010, p. 203-205; RP, August 23, 2010, p. 373; RP August 24, p. 565-566. During the marriage, Carole Hoffman wrote checks totaling \$13,650 to her son, Chris LaRoche out of the account

without the knowledge or consent of Dr. Alan Hoffman. RP, August 23, 2010, p. 392-394.

In addition to an individual breakdown of Bank of America Account #4410 and Bank of America Account #0662, Mr. Kessler provided a global analysis of all community income juxtaposed to disbursements during the marriage. RP, August 25, 2010, p. 769. As there was an issue regarding whether trustee fees should be considered community income per the terms of the premarital agreement, Mr. Kessler's analysis provided for two (2) scenarios-- one (1) with trustee fees included and one (1) without trustee fees included. RP, August 25, 2010, p. 769. Mr. Kessler acknowledged not all of the disbursements could be identified; however, he testified assuming a fifty percent (50%) margin of error, which he did not believe was appropriate, there was still a negative community. RP, August 25, 2010, p. 770. Mr. Kessler testified the term "negative community" represented spending or use of funds in excess of the community sources of money. RP, August 25, 2010, p. 771. Regarding the Hoffmans' negative community, Mr. Kessler's expert opinion was a negative community of \$2,020,689. RP, August 25, 2010, p. 770. Based on his analysis, Mr. Kessler determined all of the community funds were consumed during

marriage, and, as Dr. Alan Hoffman's separate funds were the only other available funds, the remainder of the community's expenses were paid by Dr. Alan Hoffman's separate funds. RP, August 25, 2010, p. 771.

During the parties' marriage, Dr. Alan Hoffman purchased a home in Redmond (hereinafter "Trilogy home") in November 2006 for \$1,350,000. RP, August 18, 2010, p. 79. For trial purposes, the value of the Trilogy home was stipulated at \$975,000. Ex. 1. Because the home far exceeded the parties' income, and Dr. Alan Hoffman had not yet sold his Woodinville home, Dr. Alan Hoffman obtained his sister's permission to purchase the home with trust funds. RP, August 24, 2010, p. 576-577. Upon the sale of the Woodinville home, Dr. Alan Hoffman immediately wrote a check out of the \$962,000 proceeds for \$900,000 and returned this amount to the Trust to pay back the Trust after subtracting slightly more than the sale preparation costs. RP, August 24, 2010, p. 581.

Character of the Trilogy home was a litigated issue at trial. Procedurally, when the Trilogy home purchase and sale agreement was signed, Carole Hoffman did not sign the agreement--it was signed in Dr. Alan Hoffman's name alone. RP, August 18, 2010, p. 83; Ex. 134. Notwithstanding Carole Hoffman's testimony she was

not present for the signing of the purchase and sale agreement, Dr. Alan Hoffman testified that both Carole Hoffman, and Beverly Lanthorn, the parties' real estate agent, were both present at the signing of the agreement. RP, August 24, 2010, p. 577. Moreover, Carole Hoffman's signature was on the age verification page, confirming she exceeded fifty-five (55) years of age, and assumption of risk page contained within the purchase and sale agreement. RP, August 23, 2010, p. 399; Ex. 134. Carole Hoffman testified at trial she did not sign the above-referenced purchase and sale agreement documents on October 6, 2006 because she was in a medical procedure. RP, August 23, 2010, p. 397-398. However, Carole Hoffman's signature on the assumption of risk was dated for October 6, 2006. Ex. 134. The entirety of the contractual purchase and sale documents were filled out in Dr. Alan Hoffman's sole name and signed exclusively by Dr. Alan Hoffman. RP, August 24, 2010, p. 577; Ex. 134. The Trilogy home was paid with funds wired from the Trust to Dr. Alan Hoffman's personal bank account. RP, August 24, 2010, p. 579.

Carole Hoffman called Ms. Lanthorn to testify regarding her role as real estate agent in the purchase of the Trilogy home. RP, August 23, 2010, p. 484-504. Ms. Lanthorn testified she was

involved in the parties' search for a home for a couple of years prior to the purchase of the Trilogy home. RP, August 23, 2010, p. 495. However, she testified during that timeframe she had no direct involvement with Dr. Alan Hoffman regarding the parties' search for a home. RP, August 23, 2010, p. 495. She did not testify to any direct knowledge of her understanding of Dr. Alan Hoffman's intent in purchasing the home by way of working with the parties. RP, August 23, 2010, p. 495.

Carole Hoffman received a referral fee for the purchase of the Trilogy home without consulting with Dr. Alan Hoffman or informing him of the transaction. RP, August 23, 2010, p. 375. Ms. Lanthorn confirmed she did not have a discussion with Dr. Alan Hoffman regarding the amount of the referral fee. RP, August 23, 2010, p. 497. Regarding the referral fee, Carole Hoffman testified 1099's were not used by real estate agents; however, this was contradicted in Ms. Lanthorn's testimony. RP, August 23, 2010, p. 377, 502. Carole Hoffman also acknowledged receiving referral fees for the sale of Dr. Hoffman's Woodinville house, and purchase of the Trust's Sun Valley home. RP, August 18, 2010, p. 45. Dr. Hoffman testified that he was previously unaware of any of these fee agreements. RP, August 24, 2010, p. 584-588, 597. Beverly

Lanthorn, a previous friend of Carole Hoffman's, and also the real estate agent for the Woodinville home sale, testified that she also did not inform Dr. Hoffman of her fee agreement regarding the Woodinville sale. RP, August 24, 2010, p. 491-494, 497. Sue Engelmann, another previous acquaintance of Carole Hoffman and real estate agent for the Sun Valley home purchase, testified that she did not inform Dr. Hoffman of her fee agreement with Carole Hoffman prior to purchase of the Sun Valley home. RP, August 25, p. 862-863.

Carole Hoffman's financial expert, Dr. Christien Drakeley, testified she determined the funds used to purchase the Trilogy home, except for the earnest money, unequivocally came from the Trust. RP, August 19, 2010, p. 268, 270. Further, Dr. Christien Drakeley testified she reviewed documents regarding the Trilogy home's closing, including authorization from Dr. Alan Hoffman's sister for the funds to be released from the Trust for Dr. Alan Hoffman's use. RP, August 19, 2010, p. 268. \$1,300,000 was transferred from Dr. Alan Hoffman's separate trust funds into Bank of America Account #4410 and \$1,294,160 was used to pay the balance of the Trilogy home. RP, August 19, 2010, p. 270. Regarding the \$65,000 earnest money payment, Dr. Christien

Drakeley testified her review of the financial records evidenced \$100,000 was deposited into the Bank of America Account #4410 the day prior to the \$65,000 earnest money payment. RP, August 19, 2010, p. 269. The \$100,000 came from Dr. Alan Hoffman's Smith Barney Account #5301. RP, August 19, 2010, p. 269.

Carole Hoffman based her contention the Trilogy home was community property, in part, on the fact the home was titled in both parties' names. RP, August 18, 2010, p. 80. Carole Hoffman testified it was Dr. Alan Hoffman's intent to have her included on title to the home. RP, August 18, 2010, p. 81. She stated Dr. Alan Hoffman presented her with a quit claim deed the day the house was scheduled to close and cried to Dr. Alan Hoffman regarding her name not being put on the title. RP, August 18, 2010, p. 80-81. Carole Hoffman stated there were no discussions prior to Dr. Alan Hoffman's presentation of the quit claim deed regarding joint title of the Trilogy home. RP, August 18, 2010, p. 81. Further, after moving into the home, Carole Hoffman testified the parties never discussed the Trilogy home being Dr. Alan Hoffman's separate property. RP, August 18, 2010, p. 84. Specifically, Carole Hoffman's testimony was that it was Dr. Alan Hoffman's "will" to have her on the title to the home. RP, August 18, 2010, p. 81.

Dr. Alan Hoffman testified he was unaware of a requirement Carole Hoffman sign a quit claim deed with reference to ownership of the Trilogy home until closing. RP, August 24, 2010, p. 577. Further, Dr. Alan Hoffman testified he could not title the home in the Trust's name because the premarital agreement required Dr. Alan Hoffman provide Carole Hoffman with a home that she could remain in until her death in his will. RP, August 24, 2010, p. 578.

Dr. Alan Hoffman testified, in his previous marriage with a premarital agreement, the parties' home was titled in both parties' names, and Dr. Alan Hoffman understood, and it was so divided at the end of the marriage, it was the source of the funds used for the purchase that would be controlling should a dissolution occur. RP, August 24, 2010, p. 578-579. Dr. Alan Hoffman testified he already paid \$65,000 in earnest money and would lose the money if he backed out of the purchase when Carole Hoffman would not sign the quit claim deed. RP, August 24, 2010, p. 578. Dr. Alan Hoffman also testified that he allowed Carole Hoffman's name to be on the title after she and Beverly Lanthorn presented him with the quit claim deed on the day before closing and Carole Hoffman refused to sign it. RP, August 24, 2010, p. 577.

Because Dr. Alan Hoffman wanted to provide a home for Carole Hoffman if he predeceased her, his will, written after the purchase of the Trilogy home, contained a provision that the Trilogy home be put in a trust allowing Carole Hoffman to remain in the house until her death, but clearly asserting the Trilogy home was his separate property. RP, August 24, 2010, p. 617-618; Ex. 140. This was agreed upon in the premarital agreement, and Dr. Alan Hoffman assured such a provision was included in his will. RP, August 24, 2010, p. 617. Dr. Alan Hoffman understood he could not leave a home for Carole Hoffman if it was titled in the name of the Trust; thus, although trust funds were used to purchase the home, it was not titled in the name of the Trust. RP, August 24, 2010, p. 578-579. In Section 3.1, Article III, of Dr. Alan Hoffman's will, executed on August 4, 2007, it provided the home was purchased with separate property from the Trust. RP, August 24, 2010, p. 619-620; Ex. 140. Further, Article 5.1 and 8.2 provided further provisions regarding the Trilogy home for Carole's benefit. RP, August 24, 2010, p. 620; Ex. 140. Dr. Alan Hoffman testified Carole Hoffman partook in the discussions regarding the terms of the will. RP, August 24, 2010, p. 621.

Barbara Miller testified for Alan Hoffman regarding her knowledge of the purchase of the Trilogy home. RP, August 25, 2010, p. 719-727. Ms. Miller met Carole Hoffman through a friend and was a friend and confidant of Carole Hoffman's from before her marriage to Dr. Alan Hoffman until Ms. Miller informed Dr. Alan Hoffman, just after Carole Hoffman served him with dissolution papers, of Carole Hoffman's deceit throughout their marriage, and its acceleration after his family trusts were established in 2006. RP, August 25, 2010, p.719-721. Ms. Miller testified she approached Dr. Alan Hoffman regarding Carole Hoffman's actions because Carole Hoffman told Ms. Miller the plan was to have Dr. Alan Hoffman arrested after suddenly serving him with dissolution papers. RP, August 25, 2010, p. 721, 726-727. Ms. Miller testified to her discussion with Carole Hoffman regarding, *inter alia*, the Trilogy home. RP, August 25, 2010, p. 724. Specifically, Ms. Miller testified it was her understanding based on statements of Carole Hoffman that she would not sign paperwork regarding the Trilogy home unless Dr. Alan Hoffman put her name on the deed to the Trilogy home, and that she would not inform Dr. Alan Hoffman of this until the last moment. RP, August 25, 2010, p. 724. Ms. Miller further inquired of Carole Hoffman whether the parties' realtor knew

of Carole Hoffman's refusal to sign paperwork, and Carole Hoffman confirmed the realtor was aware of Carole Hoffman's plan to get her name on the deed to the home. RP, August 25, 2010, p. 725. Ms. Miller testified she was aware Carole Hoffman made copies of Dr. Alan Hoffman's financial statements and was preparing documents to try and assert commingling of funds back to 2005, when his mother died. RP, August 25, 2010, p. 723. Ms. Miller testified Carole Hoffman told Ms. Miller she was copying the records to demonstrate Dr. Alan Hoffman was commingling funds and Carole Hoffman wanted to file for dissolution and to break the premarital agreement. RP, August 25, 2010, p. 723.

At the conclusion of trial, the Court issued an oral ruling. RP, August 26, 2010, p. 943-963. In that ruling, the Court stated it found the Trilogy home to be a community asset. RP, August 26, 2010, p. 952. Specifically, the Court stated:

I'm not saying that every minute of this transaction that was Dr. Hoffman's intent, but the signatures speak loud and clear. That doesn't mean the assets didn't come from the separate funds. The signatures, however, certainly to me indicate that it is just as likely as not, more likely than not, that this was intended as a community house. The fact that that now seems like a bad decision or that there's a shadow on so many of the things that happened to this couple doesn't change that.

RP, August 26, 2010, p. 952-953. Further, the Court awarded Ms. Hoffman \$5,500 (\$55 hour x 100 hours) for her work on the Woodinville home and \$75,000 for improvement to the Woodinville home. RP, August 26, 2010, p. 953. Regarding attorney's fees, the Court ordered Dr. Alan Hoffman pay Ms. Hoffman \$75,000 in fees. RP, August 26, 2010, p. 955.

IV. ARGUMENT

A. Standard of Review.

A court has broad discretion regarding property division in a dissolution proceeding. *In re Marriage of Olivares*, 69 Wn. App. 324, 328 (1993). Such discretion shall be disturbed only upon a "manifest abuse of discretion." *Id.* A court's improper characterization of property may constitute reversible error. *Id.* at 330 (citing *Blood v. Blood*, 69 Wn.2d 680, 682 (1966)). Mischaracterization of the character of property serves as a basis to reverse a property award. *In re Marriage of Bepple*, 37 Wn. App. 881, 884 (1984). The trial court mischaracterized property in this case and it should be reversed as an abuse of discretion.

B. The Trial Court's Characterization of the Redmond "Trilogy" Home as Community Property and Award of Fifty Percent (50%) of Its Value to Petitioner was Improper.

The Trial Court determined the Redmond "Trilogy" home was community property. CP 158-165. The Trial Court found substantial evidence the home should be characterized as community property based on the fact it was titled in both of the parties' names. CP 158-165. Further, the Trial Court upheld the prenuptial agreement, which provided under Section 3.1, titled, "Division of Property," "[e]ach party shall be entitled to possession of his or her separate property." Ex. 146. The Trial Court abused its discretion when it characterized the Redmond "Trilogy" home as community property and awarded Petitioner fifty percent (50%) of its value.

Assets acquired during marriage are presumptively community property. RCW 26.16.030. Separate property is property acquired "before marriage and that acquired by him or her afterwards by gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof." RCW 26.16.010. The characterization of property is determined on the date of acquisition. *In re Estate of Borghi*, 167 Wn.2d 480, 484 (2009).

When property is characterized as separate, there is a presumption the property retains its separate property characterization. *Id* at 484 (stating “a presumption arises that it remain[s] separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property”); *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 865 (1993) (providing “the character of [] separate property continues through changes and transitions if it can be traced and identified”); *In re Marriage of Zahm*, 138 Wn.2d 213, 223 (1999) (stating “[p]roperty acquired during marriage has the same character as the funds used to purchase it”).

Regarding the nature, importance, and policy underlying separate property rights, the Washington State Supreme Court provides the following:

[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.*

Borghi, 167 Wn.2d at 484 (2009); *In re Marriage of Chumbley*, 150 Wn.2d 1, 6 (2003) (quoting *In re Dewey's Estate*, 13 Wn.2d 220, 226-27 (1942)). Any increase in value to separate property

presumptively retains its characterization as separate property. *Elam v. Elam*, 97 Wn.2d 811, 816 (1982). This presumption is rebutted with “direct and positive evidence that the increase is attributable to community funds or labors.” *Id.* A spouse is entitled to only the amount proven to be increased with community efforts. *Id.* at 816-17.

Prior to the Washington Supreme Court case of *Borgh*, there was a joint title gift presumption. *In re Marriage of Hurd*, 69 Wn. App. 38 (1993), *overruled by In re Estate of Borghi*, 167 Wn.2d 480 (2009). The joint title gift presumption established a spouse’s use of separate property to purchase property in the names of both spouses was presumptively a gift to the community. *Hurd*, 69 Wn. App. at 51. Furthermore, once the presumption applied, the onus to overcome it was on the party asserting the separate property characterization, and it had to be proven through clear and convincing evidence. *Id.*

In *Borgh*, the wife purchased a parcel of real estate prior to marriage. *Borgh*, 167 Wn.2d at 482. After the wife and husband married, a special warranty deed was drafted and named the parties as “Robert G. & Jeanette L. Borghi, husband and wife.” *Id.* The deed provided it was to complete the real estate contract. *Id.*

Subsequently, the parties used the property as a means to purchase a mobile home for the parcel of property. *Id.* After the wife was deceased, litigation ensued regarding the characterization of the property. *Id.*

The Washington Supreme Court used the abovementioned facts to overrule the *Hurd* presumption. *Id.* at 486. The Court reiterated the touchstone separate property presumption—to change the character of separate property to community property, “the evidence must show the intent of the spouse owning the separate property to change its character.” *Id.* at 485. Because the property at issue was real property, the Court provided a “writing is generally required” and examples of sufficient evidence include a quit claim deed or equivalent transfer, or a community property agreement. *Id.* Specifically, the Court provided, “[w]e take this opportunity to clarify the applicable community property principles and disapprove any reading of *Hurd* and *Olivares* that suggests a gift presumption arising when title to property is changed from the name of a single spouse to both spouses.” *Id.* at 486.

In this case, Dr. Alan Hoffman's separate funds were used to purchase the Trilogy home. RP, August 19, 2010, p. 269-270. The earnest money of \$65,000 was paid from a \$100,000 transfer from

Dr. Alan Hoffman's Smith Barney Account #5301. RP, August 19, 2010, p. 269. The Smith Barney Account #5301 was found to be Dr. Alan Hoffman's separate property. CP 158-165. The remainder of the payment owing on the Trilogy home of \$1,294,160 was paid from a \$1,300,000 transfer from Dr. Alan Hoffman's separate trust funds. RP, August 19, 2010, p. 270. The premarital agreement addressed each of the parties' separate property in the event of a dissolution as "[e]ach party shall be entitled to possession of his or her separate property." Ex. 146.

In addition to the source of the funds used to purchase the Trilogy home being separate in character, Dr. Alan Hoffman was the only party to execute the contractual documents within the purchase and sale agreement. Ex. 134. The October 9, 2006 letter to Dr. Alan Hoffman with enclosure of executed and accepted contract terms was addressed to Dr. Alan Hoffman alone. RP, August 18, 2010 p. 83; Ex. 134. The following documents were executed solely by Dr. Alan Hoffman: (1) Residential Real Estate Purchase and Sale Agreement and Escrow Instructions; (2) Record of Cash Receipt; (3) Builder-Buyer's Agent Registration Form; (4) Tax form W-9; (5) Addendum A Buyer's Contingency; (6) Addendum B Community Documents; (7) Addendum C New Home

Warranty; (8) Addendum D Mold Disclosure; (9) Receipt for Community Documents; (10) Ratification of Agreement; (11) Affiliated Business Arrangement Disclosure Statement; (12) Addendum 1 #1 Optional Items; (13) Addendum 5A Special/Miscellaneous Provisions; (14) Option Selection Policy; (15) Request to Not Share your Information; (16) Receipt for Law of Agency Booklet; (17) Seller Disclosure Statement; (18) Attachment to Real Property Transfer Disclosure Statement; (19) Pre-Closing Process Acknowledgment; and (20) Disclosure and Buyer Acknowledgement Regarding Sound Transmission. Ex. 134. All of the above contractual documents were signed on October 6, 2006, the same day Carole Hoffman executed the Assumption of Risk document. Ex. 134. Carole Hoffman signed only the Age Verification and the Assumption of Risk. RP, August 23, 2010, p. 399; Ex. 134. Evidenced by the date on the Assumption of Risk signature, Carole Hoffman was not in surgery the day the purchase and sale agreement was signed--she was present but not a part of the transaction.

Dr. Alan Hoffman's will executed on August 4, 2007 further evidenced his intent and belief the Trilogy home was a separate asset. RP, August 24, 2010, p. 617-618; Ex. 140. Specifically,

Article 3.1 of the will provides, "[m]y personal residence in Trilogy is titled in both my and my spouse's names, but was purchased with separate property from the trust established by my mother." Ex. 140. The will was executed approximately eighteen (18) months prior to Carole Hoffman's Petition for Dissolution of Marriage. CP 1-6; Ex. 140.

Barbara Miller was an acquaintance of Carole Hoffman and a person Carole Hoffman confided in regarding her plan to force Dr. Hoffman to put her name on the deed of the Trilogy home. RP, August 25, 2010, p. 719-727. Specifically, Ms. Miller testified, "[Carole Hoffman] wasn't going to sign the papers unless Alan put her name on the house in Trilogy." RP, August 25, 2010, p. 724. This corroborated Dr. Alan Hoffman's statement Carole Hoffman effectively forced him to include Carole Hoffman's name on the deed of the Trilogy home.

The only evidence Carole Hoffman provided to the Trial Court regarding the Trilogy home being a community asset was the Trilogy home's deed and her self-serving testimony it was the parties' intent to make the home a community home. RP, August 18, 2010, p. 80-84. Carole Hoffman had the parties' real estate agent, Beverly Lanthorn, testify to her involvement with the

purchase of the Trilogy home. RP, August 23, 2010, p. 484-504. Ms. Lanthorn provided no information to the Court regarding her perception of Alan Hoffman's intent when the parties were searching for a new home.

Title in real property alone is not sufficient to render the Trilogy home community property. See *Borghi*, 167 Wn.2d 480. The property was purchased with separate funds, all of the purchase and sale contractual documents were executed solely by Dr. Alan Hoffman (but for age verification and assumption of risk), the Trilogy home was labeled as separate in Dr. Alan Hoffman's will, and Barbara Miller, a confidant of Carole Hoffman, testified it was Carole Hoffman's plan to force her way onto title for the property. The Trilogy home was separate at the inception of title and retained its character as such throughout the life of the marriage. Because the premarital agreement, which the Trial Court upheld, provided each party was entitled to his and her separate property upon dissolution of marriage, Dr. Alan Hoffman should be awarded the entire value of the home.

C. The Trial Court Erred in Awarding Petitioner \$75,000 for Increase in Value to the Woodinville Home.

The Trial Court found the prenuptial agreement executed by the parties to be lawful and enforceable. CP 158-165. Specifically, the Trial Court found, "[t]here was no evidence presented demonstrating the agreement was signed under duress despite Ms. Hoffman's argument she did not have enough time to understand the agreement. The prenuptial agreement was entered into voluntarily and was both fair procedurally and substantively." CP 158-165. Furthermore, in the Decree of Dissolution, Dr. Alan Hoffman was awarded "as his separate property the property set forth in the prenuptial agreement executed by petitioner on August 1, 2000 and the respondent on August 2, 2000." CP 173-180.

In Washington, as a matter of public policy, courts generally favor freely and voluntarily executed prenuptial agreements because they are "conducive to marital tranquility and the avoidance of disputes about property in the future." *Dewberry v. George*, 115 Wn. App. 351, 364 (2003)¹ (quoting *Friedlander v.*

¹ The husband in *Dewberry* argued Washington law prohibited prenuptial agreements because of their affect on community property law and the public policy underpinning community property law. *Id.* With regard to the husband's argument, the Court stated, "[t]his is not an accurate statement of Washington

Friedlander, 90 Wn.2d 293, 301 (1972)). A prenuptial agreement is a contract between parties in a marriage. *Id.* Thus, when a court interprets a prenuptial agreement, principles of contract law apply. *Id.* The burden of proof regarding the enforcement of a prenuptial agreement is on the party requesting the agreement be enforced. *Friedlander*, 80 Wn.2d at 300.

Regarding whether to enforce a prenuptial agreement, Washington courts utilize the two (2) prong *Matson* test. *In re Marriage of Matson*, 107 Wn.2d 479, 482-83 (1986); *In re Marriage of Foran*, 67 Wn. App. 242, 249 (1992); *In re Marriage of Bernard*, 165 Wn.2d 895, 902 (2009). First, the two (2) prong test requires a court to analyze the fairness of the agreement. *Matson*, 107 Wn.2d at 482. If the first prong is met, the analysis ends and the agreement may be enforced; however, if the first prong is not met, a court must determine the agreement contained full disclosure and was entered voluntarily on independent legal advice. *Id.* at 483. Therefore, assuming *arguendo* a court finds a prenuptial agreement lacks fairness, it still may validate a prenuptial agreement if the party not seeking enforcement of the agreement voluntarily executed the agreement based upon independent legal advice. *Id.*

law.” *Id.* Further, the Court proclaimed Washington courts have long held that a husband and wife may contractually modify the status of their property.

Washington courts consider a wide range of factors in determining whether the execution of a prenuptial agreement is executed knowingly and voluntarily. These factors include, but are not limited to the following:

The bargaining positions of the parties, sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date are some of the factors involved in the circumstances surrounding the document signing.

Id. Other considerations include the identity of the person who prepared the agreement, the relative business experience of each spouse, the relative values of the parties' estates at the time the agreement is signed, the amount of time the parties had in which to review the agreement once drafted, whether or not both parties received a copy of the agreement, the amount of time between the drafting of the agreement and the assertion of rights under the agreement, and the number and nature of instances in which the parties revisit or review the agreement. *See Hamlin v. Merlino*, 44 Wn.2d 851, 866 (1954); *In re Marriage of Crawford*, 107 Wn.2d 493, 497-98 (1986).

The premarital agreement in this case contained a specific provision regarding the sale of the Woodinville home--Section Six

(6), titled "Residence." Ex. 146. Subsection 6.3 provided, "[u]pon sale of the residence Alan shall retain all proceeds as separate property. Upon divorce, Alan shall retain the residence." Ex. 146. Notwithstanding the Trial Court upholding the premarital agreement, it awarded Carole Hoffman \$75,000 for improvements to the Woodinville home. RP, August 26, 2010, p. 953 and CP 173-180. In addition, the Court awarded Carole Hoffman \$5,500 (100 hours x \$55 per hour) for her work on the Woodinville home.

Because the premarital agreement was upheld and found to be enforceable, the Trial Court erred in awarding Carole Hoffman \$75,000 for improvements to the Woodinville home. The premarital agreement was a contract between the parties regarding the disposition of assets upon dissolution of the parties' marriage. When the Trial Court found Carole Hoffman entered the agreement voluntarily with an understanding of its terms, it found Carole Hoffman understood Subsection 6.3 addressed above. Because the premarital agreement provided Dr. Alan Hoffman shall retain the proceeds from the sale of the Woodinville home, the Trial Court erred in awarding Carole Hoffman \$75,000 for improvements to the residence.

D. The Prenuptial Agreement Prohibits the Trial Court's Award of \$70,000 in Expert and Attorney's Fees.

The Trial Court found the prenuptial agreement executed by the parties to be lawful and enforceable. CP 158-165. Section Three (3) of the premarital agreement addressed each parties' rights upon dissolution. Ex. 146. Subsection 3.2 provides, "[u]pon a legal separation or divorce neither party shall assert or accept any interest in the separate property of the other or accept any interest in the separate property of the other or assert any claim or accept any payments for support or other maintenance." Ex. 146. Although the premarital agreement does not specifically reference attorney's fees, Ms. Hoffman testified she understood the terms of the premarital agreement to be that in the event of a dissolution of marriage neither party would request spousal maintenance or attorney's fees. RP, August 23, 2010, p. 400-401. Thus, the parties had a meeting of the minds regarding the premarital agreement that no attorney's fees would be requested in the event of a dissolution.

Because the Trial Court enforced premarital agreement, and the parties' understanding of the premarital agreement was attorney's fees would not be sought in the event of a dissolution,

the Trial Court erred in awarding Carole Hoffman \$70,000 for expert and attorney's fees.

V. CONCLUSION

The Trial Court failed to sufficiently take into account the initial separate property character of the Trilogy home and Carole Hoffman's failure to evidence Dr. Alan Hoffman's intent to transmute the property to community property. After upholding the parties' premarital agreement, the Trial Court failed to properly enforce the terms of said agreement by awarding Carole Hoffman a fifty percent (50%) interest in the Trilogy home, awarding her \$75,000 for improvements to the Woodinville home, and awarding her \$70,000 in expert and attorney's fees.

The Trial Court should be reversed on these issues, and the Appellate Court should find the Trilogy home is Dr. Alan Hoffman's separate property and he be awarded the entire value of said property, Carole Hoffman should be awarded no monetary award for improvements to the Woodinville home, and Carole Hoffman should be awarded no monetary award for expert and attorney's fees.

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Dated: May 12, 2011

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'P. Eagle', written over a horizontal line.

Paul F. Eagle
WSBA No. 22477
Attorney for Appellant/Cross Respondent
Alan Hoffman

A smaller, stylized handwritten signature in black ink, appearing to read 'J. Blake Hilty', written over a horizontal line.

J. Blake Hilty
WSBA No. 40819
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Alan Hoffman