

66246-5

66246-5

No. 66246-5-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

LISA LYNN TEGROTENHUIS,

Appellant,

v.

DAVID ALAN TEGROTENHUIS,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SAN JUAN COUNTY
THE HONORABLE DONALD E. EATON

2012 MAY 17 AM 10:03

BRIEF OF RESPONDENT

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I. INTRODUCTION

Before they married in 1997, the parties entered into a prenuptial agreement with the intent to preserve and protect the husband's net separate estate of \$2.75 million. During the marriage, the husband used a significant portion of his separate property to acquire and improve community (or marital) property. Less than twelve years later, at the end of the parties' marriage, the husband's net separate estate was worth less than \$1.5 million and the parties' net community estate had grown to \$1.7 million, even though the only marital income was the husband's wages from his dental practice.

Appellant's convoluted and often misstated rendition of Michigan law is irrelevant to the issues on appeal. The trial court properly interpreted and enforced the parties' prenuptial agreement to meet the parties' original intent, which was to preserve and protect each party's separate property and to equitably divide the parties' community (or marital) property. This court should affirm the trial court's equitable distribution of property, which left the husband with property worth less than the separate estate with which he entered the marriage, and the wife with \$775,000 more than when she entered the marriage.

II. RESTATEMENT OF FACTS

Respondent¹ David Tegrotenhuis, now age 63, and appellant Lisa Tegrotenhuis, age 44, were married on December 31, 1997. (II RP 45) They had no children. (II RP 45) David has adult children from a former marriage. (See II RP 69, 70) This was the second marriage for both parties. (I RP 14, 16) Lisa filed a petition for dissolution in San Juan County Superior Court on June 2, 2009. (CP 1) The parties were divorced on October 29, 2010 after a three-day trial before Judge Donald E. Eaton. (CP 92, 319)

A. The Parties' Prenuptial Agreement Was Intended To Preserve Each Party's Separate Property And To Prohibit The Other Party From Seeking An Interest In Separate Property On Divorce.

The parties met in 1992 in Ann Arbor, Michigan, where David, a dentist, owned a dental practice until he retired in 2009. (I RP 15, II RP 51) Lisa was employed as David's dental assistant. (I RP 15) Lisa is also certified as a cosmetologist, has a Bachelor of Science degree in geology, and completed a "wine immersion"

¹ Respondent filed a Notice of Cross-Appeal but does not now seek affirmative relief on appeal, instead asking this court to affirm the trial court's decision in its entirety. He notes in this brief instances where the trial court arguably erred in favor of the appellant, further justifying denial of any relief on appeal. See *State v. Kindsvogel*, 149 Wn.2d 477, 480-81, 69 P.3d 870 (2003) (a respondent is not required to cross-appeal or assign error if it seeks no further affirmative relief, but "may argue any ground to support a court's order which is supported by the record.").

course in California shortly after the parties separated. (I RP 13-14, 18, 191-92)

The parties executed a premarital agreement (the "Agreement") on December 24, 1997, in Michigan, where they were then living. (I RP 27; Ex. 216) Neither party challenged the enforceability of the Agreement at trial (See I RP 21), and appellant has not challenged its enforcement on appeal. (See App. Br. 9-10) When the parties married, David had a net worth of \$2.75 million and owned significant separate property, including his dental practice, his separate property home in Michigan, a sailboat and boat slips, investment and retirement accounts, an interest in commercial properties with his siblings, and his interest in family trusts created by his parents. (See Ex. 216; II RP 56-62) In 1998, David earned gross income of approximately \$280,000 from these separate property assets, in addition to income earned through his dental practice. (II RP 56-62; Ex. 383) Lisa had very little separate property and had a negative net worth, owing more than she owned. (Ex. 216)

It was the stated intention of the Agreement to allow each party to preserve separate property and the proceeds from separate property. (Ex. 216, ¶¶ 1, 2) Specifically, the Agreement

provided that the separate property of either party, “including any proceeds from the sale and disposition thereof, or any income earned therefrom or any property of any nature hereafter acquired in his [or her] own name shall be deemed as the sole and separate property of [the owner] for all purposes under this agreement.” (Ex. 216, ¶¶ 1, 2) The parties also acknowledged that their separate property estates “will probably increase from after the date of solemnization of the marriage, and that either party waives any rights with reference to such increase through the acquisition of additional assets.” (Ex. 216, ¶ 12) Thus, the Agreement contemplated that assets acquired using separate property or its proceeds would retain its separate character. A provision in the Agreement entitled “Divorce” provided that “neither party hereto shall have any right whatsoever in the separate property of the opposite party.” (Ex. 216, ¶ 6)

Under a provision entitled “Marital Property,” the Agreement provided that any property subsequently acquired by either party or both parties would become “marital property.” (Ex. 216, ¶ 3) The Agreement does not dictate how marital property would be divided in the event of divorce, except to provide that “any contributions to qualified retirement plans or individual retirement accounts made

after the date of their marriage and all earnings on such amount shall be divided equally in the event of their divorce.” (Ex. 216, ¶ 6)

The Agreement also provided, under a provision entitled “Joint Assets,” that “if the marriage is terminated by divorce, each party shall be entitled to one-half (1/2) the value of any joint assets after settlement of all joint liabilities.” (Ex. 216, ¶ 13) Neither party testified at trial to the meaning of the term “joint assets” in the Agreement. Appellant concedes on appeal that the term “joint assets” has no established meaning under Michigan law (see App. Br. 32), which the parties agreed would be used to interpret the Agreement. (Ex. 216, ¶ 18)

B. Using The Husband’s Separate Property As The Down Payment, The Parties Acquired Substantial Real Property In Washington For Investment. The Parties Eventually Relocated To Washington From Michigan.

After vacationing in the San Juans in 1998, the parties decided that they wanted to buy property there. (I RP 33) They began acquiring investment real property in the San Juans starting in 1999. (See I RP 34; II RP 78-79) Lisa relocated to Washington in June 2004. (I RP 54) David, who initially planned to follow Lisa to Washington shortly thereafter, was delayed by issues that arose in selling his dental practice. (I RP 56; II RP 52-53) David finally

retired and moved to Washington in February 2009, less than four months before Lisa commenced this dissolution action. (II RP 44, 52-53)

David's separate property provided the down payment for each of their real property investments. (See II RP 69, 79, 123-25, 156, 184) Although they financed the remainder of the purchases with community credit, David's separate property and separate income was also used to service the debt and make improvements. (See I RP 35, 44-45, 183; II RP 158, 184) David's "regular" income from his dental practice largely went to the parties' living expenses in Washington and Michigan. (II RP 183) It is undisputed that the community did not have sufficient assets or income to have made all the payments or improvements for these real properties.

By the time of the property distribution, the parties owned four real properties in Washington State: Mount Dallas – a two-parcel 24-acre property with a barn; San Juan Drive – a home where both parties resided prior to separation; 80 First Street – a commercial building, also known as "Herb's Building;" and 80 Nichols Walk – a commercial building, also known as "Nichols Walk

Condominium.”² (See CP 267-69) The parties also had proceeds of nearly \$360,000 from the sale of Yacht Haven, a rental property that the parties sold while the dissolution was pending, which was being held in David’s attorney’s trust account. (CP 245, 270)

Mount Dallas was purchased in July 1999 for \$507,264. (II RP 78-79) The property was titled in both parties’ names as “husband and wife.” (Ex. 223) David made a separate down payment of approximately \$257,000, and the remainder of the purchase price was financed by the sellers through Islanders Bank. (II RP 79, 81, 84, 90-91) Both parties were obligated on the promissory note to the sellers. (I RP 35) David refinanced his separate property home in Michigan to make the initial down payment for this property. (II RP 79, 81)

David paid the promissory note (\$50,000 per year) on Mount Dallas with separate property funds in a premarital checking account in Michigan. (II RP 80, 91, 94) The original note was paid off in 2003 or 2004. (II RP 91) David also obtained a line of credit

² The parties had bought and sold five other properties in San Juan County: “Stuart Island,” “Afterglow,” “Westcott Bay,” “Yacht Haven,” and “Spring Street Condo.” Like the properties before the trial court for division, these properties were acquired with a combination of David’s separate property and community credit. (See II RP 105, 108, 110, 121, 133, 134-35, 142, 144, 150)

against his Michigan home for improvements on the Mount Dallas property, including construction of a barn. (II RP 93) David paid for other Mount Dallas improvements from his premarital checking account. (II RP 95-102) Mount Dallas was subdivided in 2009, as a 14-acre parcel with barn and 10-acre vacant parcel. (II RP 5-6, 103-04) At the time of trial, Mount Dallas was listed for sale and had a net value of \$576,000. (II RP 105; CP 268)

San Juan Drive was purchased in 2002 for \$617,653. (II RP 123) The property was titled in both parties' names as "husband and wife." (Ex. 236) David made a \$200,000 separate down payment, and the remainder of the purchase price was financed by the parties. (II RP 123) David obtained a loan against his separate property sail boat for the down payment. (II RP 123-25) David also used other separate property assets to improve this property. (II RP 166-73, 183; Ex. 370) For example, David used the proceeds from the sale of commercial property that he had owned with his siblings and from the sale of other assets that were held in a trust created by David's father for David's benefit to fund improvements for this property. (II RP 170-72)

The original mortgage on the San Juan Drive property was paid off when David sold other real property that he had acquired

using separate property funds. (II RP 121-22, 128-29, 133-34) The parties subsequently took out an additional \$1 million construction loan to build a house on the property. (II RP 168) At the time of trial, the parties still owed \$916,000 on this loan. (II RP 168) The San Juan Drive property had a net value of \$1.284 million. (II RP 168, CP 268)

80 First Street, also known as “Herb’s Building,” was purchased in October 2004 for \$1.24 million. (II RP 151-52) Herb’s Building is owned by Ketonk, LLC. (II RP 71) The members of Ketonk LLC are Lisa and David. (II RP 69-71, 151-52) Both parties testified that the property was acquired through this LLC solely for “liability issues.” (I RP 59, II RP 71) In acquiring the property, David made a separate down payment of \$442,000, and the remainder of the purchase price was financed by the parties. (II RP 70) It is undisputed that David borrowed money from his adult children’s trust accounts, for which he is trustee, for the down payment. (I RP 183, II RP 69, 73) David’s children authorized him to use their trust funds to purchase the property. (II RP 70)

At the time of trial, there was a balance of approximately \$681,474 owed on the mortgage. (II RP 154) The loan to the bank is paid from the rental income. (II RP 155) Herb’s Building had a

net value of approximately \$400,000, not including the amount still owed to David's children's trust. (CP 269) It is undisputed that David owes the trust approximately \$442,000. (I RP 183; II RP 69, 70) Thus, Herb's Building had a negative net value.

80 Nichols Street, also known as the Nichols Walk Condominium, was purchased in May 2005 for approximately \$300,000. (II RP 156) Like Herb's building, the Nichols Walk Condominium is owned by Ketonk, LLC. (II RP 72, 156) In acquiring the property, David made a separate down payment of approximately \$149,300, and the remainder of the purchase price was financed by the parties. (II RP 156) David used the proceeds from the sale of separate real property in Homer, Alaska for the down payment. (II RP 156) By the time of trial, the parties owed approximately \$130,000 on the mortgage. (II RP 158) Like Herb's Building, the rental income from the property is sufficient to pay the mortgage. (II RP 159-60) Nichols Walk Condominium had a net value of \$214,000. (CP 269)

Yacht Haven was purchased in September 2003 for \$871,021. (II RP 135) The property was titled in both parties' names as "husband and wife." (Ex. 242) In acquiring the property, David made a separate down payment of approximately \$315,000,

and the remainder of the purchase price was financed by the parties. (II RP 135-36) Approximately \$295,000 of the down payment came from a Section 1031 exchange from the sale of Stuart Island, another property acquired using David's separate property assets. (II RP 105-06, 135) The remaining \$20,000 of the down payment came from David's separate property account. (II RP 135)

Yacht Haven was sold while the dissolution action was pending, with net proceeds of \$519,419.10. (II RP 142) After court-ordered pre-distributions to each party, approximately \$360,000 was remaining at the time of trial. (CP 245)

The parties' numerous real property transactions during the marriage had significantly diminished David's separate property as listed in the parties' prenuptial Agreement. (II RP 166-67; Ex. 370) David had entered the marriage with \$2.75 million in separate property assets. (Ex. 216) By the time of trial, the trial court found that those assets, not including David's interest in the real properties acquired after marriage, but including the debt he owed to his children's trusts, were worth only \$553,000 – a fifth of their value 12 years earlier. (CP 270-71) Further, while David had been receiving substantial income (over \$20,000 a month) from his

separate property assets at the start of the marriage, by the time of trial the only income David received was \$3,500 monthly from a family trust, and the rental income from Herb's Building and Nichols Walk Condominiums that was used to service the debt on those properties. (II RP 68, 75, 76, 155, 159-60, 183)

C. At The End Of A 12-Year Marriage, The Trial Court Enforced The Prenuptial Agreement, Awarded Each Party Their Separate Property And Equitably Divided The Community Property.

Lisa petitioned to dissolve the parties' marriage on June 2, 2009. (CP 1) While the dissolution action was pending, David paid Lisa monthly spousal maintenance of \$2,500 from December 1, 2009 through March 1, 2010; thereafter he paid monthly spousal maintenance of \$3,500 until trial. (CP 7-9, 11) The court also ordered a pre-distribution of a portion of the proceeds from the Yacht Haven property that was sold while the dissolution was pending. (CP 18-20, 89-91, 131-32, 252-53) Lisa received approximately \$87,000 for her living expenses and attorney fees. (CP 245-46, 252-53) David received approximately \$129,000 to assist in servicing the parties' debt of approximately \$25,000 per month and maintenance of the real properties, and \$70,000 for attorney fees. (CP 245-46, 252-53)

1. The Trial Court Interpreted The Prenuptial Agreement To Preserve Separate Property, To Allow For The Accumulation Of Community Property, And To Give The Court Discretion In Dividing The Community Property.

The parties appeared before San County Superior Court Judge Donald Eaton on July 12, 2010 for a three-day trial. Although neither party challenged the validity of the prenuptial Agreement, they disputed how the Agreement should be interpreted and applied. (See I RP 20-21, 28-29)

After hearing the evidence at trial, the trial court found that the separate property listed in the Agreement for each party, “and the proceeds from any sale or disposition of the same, remain their sole and separate property (Paragraph 1), and that, in the event of divorce, neither party would have any right whatsoever to the separate property of the other (Paragraph 6).” (CP 95; Finding of Fact (FF) 2.7, CP 267) The trial court noted that in addition to separate property, the Agreement identified two other types of property: “marital property” and “joint assets.” (CP 96) The court concluded that for “property acquired in both names after the marriage, [the Agreement] expresses the unambiguous intention of the parties that all such property is to be the property of both, being characterized in Paragraph 3 as ‘marital property.’” (CP 96; FF 2.7,

CP 267) The court found that the term “joint assets” was intended to describe assets that were titled to the parties as “joint tenants.” (CP 96; FF 2.7, CP 267)

With regard to how property other than separate property would be divided upon the divorce, the court noted “the Agreement is less than clear concerning the parties’ intentions with respect to property acquired after the execution of the Agreement.” (CP 96, emphasis in original) The court pointed out that “Paragraph 6 of the Agreement, while entitled ‘Divorce,’ actually offers little additional help, other than to provide that contributions to qualified retirement plans or IRAs, made after the date of marriage, and all earnings on such amounts, are to be divided equally in the event of divorce.” (CP 95-96) The court also determined that “Paragraph 13 of the Agreement, while referencing divorce, has no significance in the present circumstances because the parties do not own any of their properties as ‘joint tenants.’” (CP 96) The court did “not conclude that the parties intended the equal sharing provision in Paragraph 13 to apply to marital property, as the paragraph unambiguously and repeatedly refers only to joint assets.” (CP 96-97; FF 2.7, CP 267)

Thus, “the Court conclude[d] that, while the Prenuptial Agreement is binding, does make provision for protecting each party’s separate property and the proceeds thereof, and does provide that properties acquired after the marriage in both names are to be marital properties, belonging to both parties, the Agreement does not contain a provision that expressly addresses the parties’ intention concerning the distribution of marital property in the event of divorce.” (CP 97) The trial court determined that “since the parties are now residents of Washington and are seeking a dissolution of their marriage in this State, . . . the distribution of their property and liabilities must be accomplished under the applicable provisions of Washington law, but in a manner that is not inconsistent with their intentions to the extent they are expressed in the Prenuptial Agreement.” The trial court also found that those properties characterized as “marital property” under Michigan law would be characterized as community property for purposes of the parties’ dissolution. (CP 97, 100)

Recognizing that the properties acquired during the marriage were largely purchased with down payments from David’s separate property, and consistent with *Marriage of Chumbley/Beckham*, 150 Wn.2d 1, 8, 74 P.3d 129 (2003), the court “concluded that

[David] has a proportional separate property interest in each of the parties' Washington real estate properties as a result of the financial contributions he made from his separate property to the purchase price of each property." (CP 101) While the court found there was clear and convincing evidence that David made the down payment for the acquisition of each of the remaining real properties in Washington with his separate property (CP 101; FF 2.8, CP 267-69), it "could not conclude that Respondent has proven by clear and convincing evidence that all of the separate property contributions he claims to have made toward payment of the parties' debts and expenses for their mixed character real properties, and to the costs for the improvements made to those properties." (CP 105-06) Nevertheless, the court was "convinced that very substantial financial contributions were made and must be considered." (CP 105-06)

2. The Trial Court Awarded The Husband His Separate Property And A Percentage Of The Community Property That Reflected His Separate Property Contributions.

The trial concluded that the real properties acquired after marriage had a mixed character, and determined David's separate interest in the real properties based solely on the initial down

payments he made on each of the properties. (CP 101, 105-06; FF 2.8, CP 267-70) Although the trial court “was convinced that very substantial financial contributions” were made by David to the real properties beyond the initial down payment, it declined to give David any specific credit for those contributions. (CP 105-06) Recognizing David’s separate property interest in the down payments, the trial court found that the net value of the parties’ real properties should be characterized as follows:

<u>PROPERTY</u>	<u>NET VALUE</u>	<u>COMMUNITY</u>	<u>DAVID-SEPARATE</u>
Mount Dallas	\$ 576,000	(50%) \$ 288,000	(50%) \$288,000
702 San Juan Drive	\$1,284,000	(68%) \$ 873,120	(32%) \$410,880
80 First Street	\$ 400,000 ³	(62.5%) \$ 250,000	(37.5%) \$150,000
80 Nichols Street	\$ <u>214,000</u>	(50%) \$ <u>107,000</u>	(50%) \$ <u>107,000</u>
TOTALS	\$2,474,000	\$1,518,120	\$955,880

(FF 2.8, CP 267-69)

³ To the extent necessary to support the trial court’s property distribution, respondent assigns error to the trial court’s finding that the 80 First Street property had a net value of \$400,000. (FF 2.8, CP 270) The trial court should have considered the obligation of \$442,000 owed to David’s children’s trust for the funds borrowed to acquire the property, which was undisputed. (I RP 183, II RP 71) Had it done so, the court would have recognized that the net value of the First Street property was negative \$42,000. See *supra* at 9-10.

Although the trial court gave credit to David for his separate property contributions towards the down payment on the real properties that were before the court at trial, it declined to do so for the proceeds from the sale of Yacht Haven. David presented evidence of his separate property contributions to the acquisition of Yacht Haven (II RP 105-06, 135-36, 142), but the trial court nevertheless concluded that the proceeds were “100% community property.”⁴ (FF 2.8, CP 270)

While the trial court did not give David any specific credit for his “very substantial” separate property contributions toward the real properties acquired, the trial court “considered” the contributions in dividing the community property. (CP 105-06) The trial court awarded David slightly more community property than Lisa, while also ordering him to pay nearly all of the community debts:

⁴ To the extent necessary to support the trial court’s property distribution, respondent assigns error to the trial court’s finding that the Yacht Haven property was “100% community property.” (FF 2.8, CP 270) At a minimum, the trial court should have characterized the proceeds by recognizing David’s separate interest for the down payment on the property. Had it done so, the Yacht Haven proceeds would have been 36% David’s separate property, and 64% community property. *See supra* at 10-11.

<u>COMMUNITY PROPERTY/LIABILITY</u>		<u>LISA</u>	<u>DAVID</u>
Mount Dallas Properties (including David's separate property interest) ⁵	\$ 288,000.00	\$576,000.00	(\$288,000.00)
702 San Juan Drive	\$ 873,120.00		\$873,120.00
80 First Street	\$ 250,000.00		\$250,000.00 ⁶
80 Nichols Street	\$ 107,000.00		\$107,000.00
Montana Ski Cabin	(\$ 95,000.00)		(\$ 95,000.00)
34 Foot Powerboat	\$ 75,000.00		\$ 75,000.00
Yacht Haven Proceeds	\$ 359,766.60 ⁷	\$160,000.00	\$199,766.60 ⁸
Personal Property	\$ 142,585.00	\$ 19,635.00	\$122,950.00
David Credit Card	(\$ 48,475.00)		(\$ 48,475.00)
Lisa Credit Card	(\$ 12,336.00)	(\$ 12,336.00)	
Tax Prep	(\$ 31,000.00)		(\$ 31,000.00)
Income Taxes	<u>(\$ 200,000.00)</u>	<u> </u>	<u>(\$200,000.00)</u>
TOTALS:	\$1,708,660.60	\$743,299.00	\$965,361.60
		43.5%	56.5%

⁵ Although the trial court concluded that neither party should be awarded the other party's separate property, it in fact awarded all of Mount Dallas to Lisa, including David's separate interest.

⁶ The net value of the community interest in 80 First Street should have been negative \$26,250, to account for the \$442,000 owed to David's children's trust. *See supra*, footnote 3.

⁷ The community interest in the Yacht Haven proceeds should have been \$230,250.65 had the trial court properly characterized it and accounted for David's separate interest due to his separate property contribution to its acquisition. (II RP 105-06, 135-36, 142) *See supra*, footnote 4.

⁸ \$24,637.54 of this amount had been distributed to David to service community debts. (CP 246) Since those funds had been expended by the time the decree was entered, the amount David received was actually less than noted in the court's property distribution. (CP 91)

(CP 270-71, 290, 292-93) In addition to awarding each party a share of the community property estate, the trial court also awarded each party their separate property estate, as provided by the parties' unchallenged Agreement.

Thus, at the end of the parties' 12-year marriage, David was left with ten percent less than he entered the marriage. Lisa, who had a negative net worth when the parties married, left the marriage with three quarters of a million dollars.

Lisa appeals.

III. ARGUMENT

A. The Trial Court Properly Interpreted And Applied The Parties' Prenuptial Agreement.

For reasons never made clear in her opening brief, appellant goes to great length to argue claimed differences between Washington community property law and the Michigan "common law property regime." (See App. Br. 17-25) But in fact the property regimes are in practice quite similar on divorce, despite Michigan's use of the term "marital property" rather than "community property." Under Michigan law, "[g]enerally, marital property is that which is acquired or earned during the marriage, whereas separate property

is that which is obtained or earned before the marriage,” ***Cunningham v. Cunningham***, 289 Mich. App. 195, 795 N.W.2d 826, 830 (2010), just as in Washington, community property is presumably any property “acquired after marriage” RCW 26.16.030, and separate property is property “owned by a spouse before marriage.” RCW 26.16.010.

The most significant difference between Michigan and Washington law is the manner in which property may be divided when the marriage is dissolved. In Michigan, “[a]s a general principle, when the marital estate is divided each party takes away from the marriage that party's own separate estate with no invasion by the other party,” ***Cunningham***, 795 N.W.2d at 830, whereas in Washington, all property – community or separate – is available for division. RCW 26.09.080. Even this difference is not that profound, as in Washington only extraordinary circumstances justify invasion of a spouse’s separate property. ***Moore v. Moore***, 9 Wn. App. 951, 953, 515 P.2d 1309 (1973) (“While the court may under certain circumstances award part or all of one spouse's separate property to the other, the situations which warrant such action are exceptional”). And that difference disappears here, because the court’s authority to distribute a party’s separate property to the

other spouse may be limited by the execution of a valid prenuptial agreement, such as the parties had here. See *Marriage of Burke*, 96 Wn. App. 474, 477-78, 980 P.2d 265 (1999) (courts are bound to enforce parties' validly executed agreements regarding the parties' rights to their property, but not rights to their children).

The wife does not challenge the validity of the prenuptial Agreement. The wife does not challenge that the Agreement was intended to "protect each spouse's sole ownership of the property that the spouse brought into the marriage or received by gift or inheritance, [and that] these protections clarify the separate ownership in the face of potential claims the other spouse may have to that property either during marriage or at the marriage's end." (App. Br. 27) The wife also concedes that Michigan, like Washington, gives the court discretion to divide marital (i.e. community) property equitably, and that "since the parties sought dissolution in Washington, the laws of Washington apply." (App. Br. 40)

The wife also agrees that "to the extent that the prenuptial agreement does not provide for the characterization or distribution of the property, the trial court was to apply Washington law." (App. Br. 40-41) Finally, the wife does not assign error to the trial court's

finding that the husband proved by clear and convincing evidence that his separate property funded the down payments for the acquisition of real property during the marriage, giving him a separate property interest in properties that would have otherwise been presumably community property. See **Marriage of Chumbley/Beckham**, 150 Wn.2d 1, 8, 74 P.3d 129 (2003) (“real property purchased with both community funds and clearly traceable separate funds will be divided according to the contribution of each”); **Estate of Parker**, 153 Wash. 392, 394-96, 279 P. 599 (1929) (where down payment is made with separate funds and community takes on the remaining mortgage, property is separate to the extent of the separate down payment); **Marriage of Brewer**, 137 Wn.2d 756, 766, 976 P.2d 102 (1999) (unchallenged findings are verities on appeal).

Instead, the wife’s appeal is based solely on her claim that the undefined term “joint assets” in the Agreement means any and all assets titled in both parties’ names, based on her assertion that under Michigan law if an asset is “jointly owned” “each spouse has a separate interest in that property.” (App. Br. 34) The wife claims that the trial court consequently erred in not equally dividing the real properties titled in both parties’ names. But contrary to appellant’s

claim that “in Michigan, title determines legal ownership between spouses,” (App. Br. 18-21) “the mere fact that property may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital.” **Cunningham**, 795 N.W.2d at 830; see also **Korth v. Korth**, 256 Mich. App. 286, 662 N.W.2d 111, 115 (2003). This is in fact the same as the rule in Washington, where “the name on a deed or title does not determine the separate or community character of the property.” **Estate of Borghi**, 167 Wn.2d 480, 488, ¶ 13, 219 P.3d 932 (2009).

As appellant acknowledges, where title to property is not clear, “a court must review all of the circumstances of acquisition of the property, e.g. who purchased, source of funds, evidence of a gift, to determine title to it.” (App. Br. 20-21, citing **Le Blanc v. Sayers**, 202 Mich. 565, 168 N.W. 445 (1918)). Similarly in Washington, “title to real property taken in the name of one of the spouses may be the separate property of the spouse taking the title, the separate property of the other spouse, or the community property of both of the spouses, owing to the source from which the fund is derived which is used in paying the purchase price of the property.” **Borghi**, 167 Wn.2d at 488, ¶ 13 (quoting **Merrit v. Newkirk**, 155 Wash. 517, 520-21, 285 P. 442 (1930)).

The trial court properly concluded that the term “joint assets” as used in the Agreement did not mean any asset titled in both parties’ names, and that the term “joint assets” required that the assets be held by the parties as joint tenants. In particular, the two most significant real properties in dispute here were acquired during marriage and titled to the parties as “husband and wife;” the wife failed to rebut the presumption that the property was anything other than marital (or community) property. The trial court properly concluded that these assets were “marital property” under Michigan law, and presumptively community property in Washington. ***Marriage of Gillespie***, 89 Wn. App. 390, 400, 948 P.2d 1338 (1997) (a party is required to rebut the presumption that the property acquired during the marriage is something other than community property). As the trial court concluded that the intent of the Agreement was that assets acquired after marriage were “marital property,” and that the Agreement did not dictate how those assets would be divided, the trial court properly exercised its discretion in equitably dividing these properties. (CP 97, 101)

Finally, the trial court’s interpretation of the Agreement yielded the fairest result in light of the parties’ clearly stated, and unchallenged, intention to protect separate property. When the

parties married, the wife had no separate property, the husband had separate property of \$2.75 million, and there was no community estate. The husband leaves the marriage twelve years later with a fraction of the separate estate (and the separate income he enjoyed from it) that he had at the start of the marriage. The wife leaves the marriage with property valued at three-quarters of a million dollars. The trial court properly interpreted and applied the parties' prenuptial agreement.

B. The Trial Court Did Not Abuse Its Discretion In Awarding A Slightly Disproportionate Share Of The Community Property To The Husband, Whose Separate Property Was The Source For All The Marital Estate.

Trial courts have broad discretion in the distribution of property and liabilities on dissolution. "The trial court is in the best position to assess the assets and liabilities of the parties and determine what is 'fair, just and equitable under all the circumstances.'" *Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). In light of the trial court's broad discretion, a trial court's property distribution will not be reversed on appeal absent a showing of a manifest abuse of discretion. *Brewer*, 137 Wn.2d at 769.

The trial court's decision to award slightly more community property to the husband was not an abuse of discretion in light of the significant separate property contributions that he made, above and beyond the down payment, to the acquisition and improvement of the real properties that made up the vast majority of the marital estate. *Marriage of Nuss*, 65 Wn. App. 334, 828 P.2d 627 (1992). In *Nuss*, the court held that as well as the statutory factors under RCW 26.09.080, the trial court may also consider "one party's separate property [] as a reason for awarding all or a disparate share thereof to that party."

While the current statute, RCW 26.09.080, does not list the party through whom the property was acquired as one of the factors the trial court must consider, the statute's list of factors is not exclusive. Moreover, one of the factors from the former statute was barred from consideration under the new statute-marital misconduct-while the factor at issue here was not. We hold that the origin of community property as one party's separate property may still be considered in appropriate cases as a reason for awarding all or a disparate share thereof to that party.

65 Wn. App. at 341.

In *Nuss*, the husband had converted his separate property residence acquired before marriage to a community asset by quit claiming his interest to the marital community. The Court of Appeals affirmed an unequal award of the residence to the

husband, holding that the origin of the residence as the husband's separate property could be considered in appropriate circumstances. *Nuss*, 65 Wn. App. at 341; see also *Marriage of Glorfield*, 27 Wn. App. 358, 360-61, 617 P.2d 1051 (1980) (the "source" of the property may be considered in dividing the property), *rev. denied*, 94 Wn.2d 1025 (1980).

In total, under the trial court's decision, the husband received approximately \$222,000 more community property than the wife. But he had contributed significantly more than that towards the community property and community liabilities during the marriage. There is no dispute that the community did not have the funds to acquire and improve the real properties that comprised the community estate during the marriage. There is also no dispute that the husband's separate property was significantly diminished during the marriage, while the community property significantly appreciated. It was not an abuse of discretion for the trial court to take those contributions into consideration, as well as the parties' original intent that the husband would be able to preserve his separate property, to award the husband slightly more community property.

Further, an award of slightly more community property to the older and retired spouse after a relatively short-term marriage is not an abuse of discretion. **Marriage of Rockwell**, 141 Wn. App. 235, 243, ¶ 12, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008). Here, the husband is nineteen years older than the wife, and recently retired from a nearly forty-year career as a dentist. As he is now relocated to Washington, he cannot – even if he chose to do so – resume his dental practice, as he is not licensed in Washington. (II RP 53) Meanwhile, the wife is in her mid-40s, in good health, and has a greater ability to be employed. (II RP 71-75)

An award of slightly more community property to the husband also was appropriate in light of the fact that he has greater financial obligations than the wife, including being saddled with nearly \$300,000 in community debt. **Ovens v. Ovens**, 61 Wn.2d 6, 9, 376 P.2d 839 (1962) (awarding the husband a greater portion of all of the property as “equitable in view of [the husband]’s inheritance and the obligations of support, alimony, court costs and attorneys’ fees, which were imposed upon him.”). The husband must also repay \$442,000 to his children’s trust for the funds he borrowed to acquire “Herb’s Building.” (i RP 183, II RP 71) In total, the husband owes more than three-quarters of a million dollars in

debt, plus he is responsible to service the debt on those properties that he was awarded. Meanwhile, the wife was left with relatively little debt, and she can anticipate netting over half a million dollars from Mount Dallas, the real property she was awarded, which was listed for sale at the time of trial.

The foregoing analysis presumes a disproportionate division in favor of the husband. But, in reality, the wife received more of the community property. Had the trial court properly characterized the Yacht Haven proceeds and properly accounted for the 80 First Street debt it would have recognized that the wife received a greater proportion of the community property. In valuing 80 First Street, the trial court should have considered the undisputed obligation of \$442,000 owed to David's children's trust for the funds he borrowed to acquire the property. (II RP 71) The correct value of the community interest in 80 First Street was negative \$26,250, and not \$250,000. In dividing the Yacht Haven proceeds, the trial court should have, at a minimum, characterized the proceeds consistent with its characterization of the parties' other real properties, recognizing David's separate interest due to the down payment on the property. The community's proceeds were

\$260,250, not \$359,766.60. Taking these errors into consideration,

Lisa in fact received 57% of the community property:

<u>COMMUNITY PROPERTY/LIABILITY</u>		<u>LISA</u>	<u>DAVID</u>
Mount Dallas Properties (including David's separate property interest)	\$ 288,000.00	\$576,000.00	(\$288,000.00)
702 San Juan Drive	\$ 873,120.00		\$873,120.00
80 First Street	(\$ 26,250.00)		(\$26,250.00)
80 Nichols Street	\$ 107,000.00		\$107,000.00
Montana Ski Cabin	(\$ 95,000.00)		(\$ 95,000.00)
34 Foot Powerboat	\$ 75,000.00		\$ 75,000.00
Yacht Haven Proceeds	\$ 230,250.62	\$160,000.00	\$ 70,250.62
Personal Property	\$ 142,585.00	\$ 19,635.00	\$122,950.00
David Credit Card	(\$ 48,475.00)		(\$ 48,475.00)
Lisa Credit Card	(\$ 12,336.00)	(\$ 12,336.00)	
Tax Prep	(\$ 31,000.00)		(\$ 31,000.00)
Income Taxes	(\$ 200,000.00)		(\$200,000.00)
TOTALS:	\$1,302,894.62	\$743,299.00	\$559,595.62
		57%	43%

Finally, the wife inexplicably complains that the trial court erred by "not considering the built-in inequity that occurs when the property in Michigan is brought to Washington and then dissolve the marriage." (App. Br. 48) First, the wife complains about the increased value of the husband's Michigan dental practice over the course of the marriage, which would have been his separate property. (App. Br. 50) But the wife does not explain how that

matters when neither the dental practice nor the proceeds from the sale of the dental practice existed at the time of trial. Second, the wife's complaint of a "built-in inequity" appears to be based on her inaccurate statement that earnings in Michigan are the party's separate property. In fact, just as in Washington, Michigan "income earned by one spouse during the duration of the marriage is generally presumed to be marital property." *Cunningham v. Cunningham*, 795 N.W.2d at 830; *Brown v. Brown*, 100 Wn.2d 729, 737, 675 P.2d 1207 (1984). Even if the income the husband earned in Michigan were his separate property, it was spent to support the parties' living expenses in both Washington and Michigan. Regardless of the character of the husband's employment income, the wife benefited from it throughout the marriage. There simply is no "inequity" in this situation.

C. The Wife Is Not Entitled To An Equitable Right Of Reimbursement.

Just as there is no basis for the conclusion that an equal division of marital/community property owned by the parties was required under their Agreement, there is no basis for the wife's demand that she is entitled to an "equitable right of reimbursement" on the San Juan Drive property that was awarded to the husband

as 68% community property and 32% separate property. (App. Br. 41) The wife alleges that because the community obtained a \$1 million construction loan for the property she is entitled to a “right of reimbursement” of \$320,000. (App. Br. 45) What the wife fails to recognize is that the husband remains solely liable for repayment of that loan, on which \$961,000 was still owed at the time of trial. (II RP 168)

As the wife recognizes, “the right of reimbursement resulting from improvement of property is usually measured by the money expended.” *Jones v. Davis*, 15 Wn.2d 567, 131 P.2d 433 (1942). (App. Br. 43-44) Here, no money was expended by the community, and certainly not the \$320,000 that the wife demands. Instead, the husband, recently retired and with no means of repayment, is responsible for a \$1 million construction loan that has been paid down only \$39,000 since it was taken out four years ago.

To the extent any party was entitled to an “equitable” right of reimbursement, it would be the husband, who contributed substantial amounts of his separate property to the acquisition and improvement of community property for which he received no direct credit. For example, there was evidence that the original mortgage for San Juan Drive of approximately \$400,000 was paid off six

years before trial with the proceeds of real property that was acquired with the husband's separate property funds. (II RP 127-34) There were also other improvements to this property beyond those funded by the construction loan of more than \$2 million that could not come from anywhere but the husband's separate property. (See II RP 167, 168-73, 183-84)

Further the trial court found that the Yacht Haven proceeds were "100% community property" (FF 2.8, CP 270) even though there was evidence that a significant portion of the acquisition and improvement of this property came from the husband's separate property. (II RP 134-45) The trial court could have, under those circumstances, awarded the husband an equitable right of reimbursement for those contributions that he made, but declined to do so. If any party is entitled to an equitable right of reimbursement against the assets awarded to the other party, it is the husband, not the wife.

IV. CONCLUSION

In keeping with the intent of the parties' prenuptial agreement, the trial court enforced the agreement to award the husband his interest in separate property that the trial court found he traced by clear, cogent, and convincing evidence. Of the

separate property that the trial court found that the husband could not clearly trace, it concluded it was community property and divided it equitably between the parties considering the husband's separate property contributions, which the trial court was "convinced" were made and taking into account the parties' ages and economic circumstances. Any errors made by the trial court benefitted the wife. This court should affirm.

Dated this 16th day of May, 2011.

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