Supreme Court No. 1000456
Court of Appeals, Division III No. 366197

THE SUPREME COURT OF WASHINGTON

DANIEL WATANABE,

Petitioner,

vs.

SOLVEIG WATANABE,
n/k/a SOLVEIG HERBJORG PEDERSEN,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

This answer to the Petition for Review is submitted on behalf of Solveig Pedersen ("Pedersen"; formerly known as Solveig Watanabe).

II. CITATION TO COURT OF APPEALS DECISION

In this marital dissolution action, Daniel Watanabe ("Watanabe") asks the Court to review a unanimous unpublished decision by the Court of Appeals applying settled law rejecting the joint title gift presumption. *In re Marriage of Watanabe*, 36619-7-III, 2021 WL 2768828, at *5 (Div. III, July 1, 2021) ("*Borghi* makes clear that the presumption no longer applies in Washington"); Petition, at 4-5. As a "secondary" issue, Watanabe also asks this Court to review the admissibility of extrinsic evidence in this case. Petition, at 15. Neither issue can satisfy the RAP 13.4(b) criteria for review.

At the outset, Watanabe fails to raise issues required for him to obtain any relief from the Court of Appeals decision affirming the trial court's division of certain real property known

by the parties as the Ford property. *See* RAP 13.7(b). Independent of the joint gift title presumption, the Court of Appeals found Watanabe's claimed error to be harmless:

> Here, the Ford property was completely or substantially paid for with Solveig's separate property. Thus, even if the trial court mischaracterized the Ford property and it was indeed community property as Daniel contends, the court was well within its discretion to award a disparate proportion of the Ford property to Solveig.

Watanabe at *6. Even if Watanabe could prevail on the alleged errors raised on review, the result would be this same.

Next, Watanabe mischaracterizes the Court of Appeals' decision affirming the trial court division of property known as the Clayton property. Watanabe describes the Clayton property as "overlooked", but the Court of Appeals found that Watanabe failed to adequately argue with respect to the Clayton property and refused to consider it. *Id.* at *3 n.4. Watanabe does not acknowledge or address the failure to preserve any error with respect to this issue.

Lastly, with respect to his argument that the Court of Appeals improperly affirmed the trial court's consideration of what Watanabe describes as extrinsic evidence, he also does not acknowledge or address his failure to preserve the error. *Watanabe* at *7.

None of the criteria for review are satisfied and review should be denied.

III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Can Watanabe re-argue the facts when he has not assigned error to the superior court's findings of fact, nor argued that they are unsupported by substantial evidence?

2. Did the Court of Appeals correctly apply the ruling in *Borghi* by rejecting the application of the "joint title gift presumption" when this Court "expressly reject[ed]" the presumption as "erroneous" and "at odds with well-established principles of community property law"?

3. Did the Court of Appeals correctly decline to apply the statement from *Skarbek* when the case predates *Borghi*, the rule it states was disapproved in *Borghi*, and in any event it held the presumption inapplicable under its own facts?

4. Did the Court of Appeals correctly find that extrinsic evidence was admissible when it was admitted to ascertain whether Pedersen intended to *transmute* her separate property

into community property *not* whether she transferred *title*, and thus the testimony was admitted to explain the circumstances under which the deed was signed – not to interpret the deed itself?

5. Are the alleged errors raised by Watanabe preserved?

IV. RESTATEMENT OF THE CASE

A. Background facts.

Solveig Pedersen and Daniel Watanabe married on January 2, 1999, before graduation from college. RP 23:25-24:5 & 709:8-10. At that time, they lived at Lake Goodwin, Washington. RP 709:17-19. Pedersen did not have a job, and Watanabe worked part-time. RP 24:14-19. The summer after getting married they moved to Mammoth Lakes, California, where Watanabe worked as a school teacher and Pedersen worked at a pack station and a reservation company. RP 26:22-27:11. After a year in Mammoth Lakes, they returned to Lake Goodwin and were living there when Pedersen's mother, Ingrid Olivia Pedersen, died in December 2000. RP 708:8-9, 709:23-25 & 710:7-11. After her mother's death, Pedersen and Watanabe

moved to property in Arlington that her mother had owned. RP 710:12-14.

B. Solveig Pedersen's inheritance.

Pedersen's mother's will included a trust provision for Pedersen and her sister, Olivia Gunn. RP 708:12-13 & 711:4-10; Ex. R-102 (will). The trust provided for equal distributions to Pedersen and Gunn. RP 711:20-22. Distributions were scheduled at ages 25, 30, and 35, but the will also allowed distributions before age 25. RP 711:23-712:5. The superior court found that the distributions to Pedersen included the following:

> Testimony and exhibits show that shortly after Respondent's mother's death she received an IRA and annuity totaling over $40,000 in the year 2000, the sum of $45,000 on April 15, 2002, a partial distribution in the sum of $59,032 from her mother's estate (after turning 25 on December 19, 2002), and an additional $100,000 from the "Lake Sale" on or about August 4, 2005[.]

CP 168:4-9 (citing Ex. R-156; brackets added). Pedersen received two distributions from the IRA, amounting to $16,729.22 and $24,007.85. RP 718:5-719:20; Ex. R-109, at 2-3. She received a partial distribution from the trust in the amount

of $59,032 when she turned 25. RP 925:3-15; Ex. R-156. She inherited a 25% interest in the Lake Goodwin property where she and Watanabe had previously lived, which she sold for $100,000. RP 720:24-722:15. Pedersen also inherited a 50% interest in the Arlington property owned by her mother. RP 736:13-18.

C. Purchase of the Ford property.

Pedersen and Watanabe lived on the Arlington property until 2005. RP 737:3-10. At that time, they wanted to escape western Washington weather and move to a more suitable location where they could raise Norwegian Fjord horses as a business. RP 739:11-13; RP 742:9-19. They landed in Ford, Washington, because "[i]t was a much larger piece of property, and [they] were under the impression that [they] could potentially hay part of the property." RP 740:1-3 (brackets added).

In order to finance the purchase of the Ford property, Pedersen and Watanabe borrowed money from Flagstar Bank, with the Arlington property inherited from Pedersen's mother

pledged as collateral for the loan. RP 738:19-739:1; Ex. R-155 (deeds of trust). The superior court found that "[t]he parties simply did not have sufficient community income or cash flow to pay anything towards the Ford purchase." CP 168:11-17; *accord* RP 34:18-19 ("We didn't have that much money at the time other than the sale of the Arlington property").

One of the conditions required by Flagstar to obtain the loan for the Ford property was that Pedersen had to add Watanabe to the title for the Arlington property. Ex. R-158 (specific condition #01); RP 1160:12-1161:8 (testimony of Stacey Pedersen). To satisfy this condition, Pedersen signed a quitclaim deed to herself and Watanabe. Ex. R-155. The deed included language that it was "[t]o Establish Community Property." Ex. R-155; *accord* RP 743:11-14. However, the superior court found that:

> Testimony from Stacey Pedersen and Exhibit R-158 specifically show that Flagstar Bank required Petitioner be added on title to the Arlington home as a condition of the loan. Petitioner even testified that he had good credit and Respondent had none. Respondent signed the deed at

> closing of the Arlington property to be able to finance the purchase of the Ford property[.]

CP 169:7-12. Pedersen did not recall signing the quitclaim deed. RP 747:1-3. She did not understand the quitclaim deed to have any significance other than as a condition of bank financing. RP 748:12-21. She had never signed a quitclaim deed before. RP 748:19-21. There is no evidence that she even had any experience with real estate transactions.

The Flagstar loan was intended as a short-term "bridge loan" until the Arlington property could be sold. RP 41:19-23; RP 748:8-11. Pedersen had already found a buyer for the property. RP 741:17-20. She explained the reason for the delay in closing on the sale of the property as follows:

> I had sold to a property development person who was looking at how many lots that they could put on an acreage. So they were having to go through county permitting and the final price was going to be determined by how many lots they could get on to the property.

RP 742:5-9. The Arlington property eventually sold to that buyer. RP 742:18-21. The sale proceeds were used to pay off the

Flagstar loan on the Ford property. CP 142 & 167:17-23; Ex. R-155; Ex. P-3.

Pedersen testified that she never intended to convert the Arlington property to community property. RP 748:22-25. The superior court agreed that signing the quitclaim deed required by Flagstar "does not establish an intention to convert her half interest in Arlington to community property." CP 169:12-14. The superior court noted that, while the Ford property was titled in both of their names, "the entire proceeds were from Respondent's separate property gifts and inheritances." CP 169:18-19.[1]

D. Purchase of the additional Ford property.

In early 2008, Pedersen received another distribution from the trust funds inherited from her mother, this time in the amount of $732,678.87, of which $707,673.87 was deposited into her

[1] The superior court characterized $210,000 of the value of the Ford property as community property to account for community labor and improvements. CP 193:23-28 & 207. Watanabe did not challenge this part of the superior court's characterization on appeal.

separate Cascade Federal account. CP 170:25-28; Ex. R-156; Ex. R-104; RP 726:15-25. Shortly thereafter, Pedersen and Watanabe acquired additional property adjacent to the Ford property ("additional Ford property"). CP 170:18-20. The additional Ford property was also titled in both Pedersen's and Watanabe's names. Ex. R-147. Although the earnest money of $1,000 was not specifically accounted for, Pedersen paid the remaining $32,355.94 of the purchase price for the additional Ford property directly from her separate Cascade Federal account. CP 170:20-25; RP 775:18-776:7; Ex. R-104.

E. Home built on the Ford property.

In 2009, Pedersen and Watanabe built a home on the Ford property. CP 173:17-21. The superior court found that the cost of building the home must have been paid from Pedersen's separate funds because there were inadequate community funds available to pay for it. *Id.* The superior court determined that all of the Ford property (including the home and the additional Ford property) was Pedersen's separate property because it was "paid

either directly or indirectly from [her] separate funds." CP 193:15-194:5.

F. Purchase of the Clayton property.

Pedersen and Watanabe could not raise hay to feed their horses on the Ford property because it lacked adequate irrigation and would be too expensive to install an irrigation system. RP 778:17-20 & 779:6-18. Instead, they decided to purchase property in Clayton, Washington, where they could grow hay more economically. RP 749:14-25. The Clayton property was purchased from three different sellers: Romero, Ostness, and Beck. CP 173:24-25; RP 749:14-18. Pedersen paid for two of the purchases (Romero and Ostness) directly out of her separate Cascade Federal account. CP 173:26-174:4; RP 783:4-19; Ex. R-104, at 85. The superior court determined that these properties were Pedersen's separate property because they were paid for from this separate property source. CP 194:6-11.

The remaining purchase of the Clayton property (from Beck) was paid for out of Pedersen and Watanabe's joint Bank

of America account. CP 174:9-12. The superior court noted that earnest money was unaccounted for. CP 174:12-14. The superior court also found that there were three significant, unexplained deposits into the joint Bank of America account around the time of the Beck purchase. CP 174:14-18. Nonetheless, the court characterized the Beck parcel as community property. CP 194:12-14.

G. Procedural history.

After a trial spanning eight days, involving 15 witnesses and 220 exhibits, the superior court issued a detailed memorandum opinion, CP 141-64, and equally detailed findings of fact and conclusions of law, CP 165-222. From the court's division of property, Watanabe appealed.[2] He limited his assignments of error to two issues: (1) the superior court's characterization of the Ford and Clayton property; and (2) the court's consideration of testimony regarding execution of the

[2] The Court of Appeals also summarized the foregoing facts. *Watanabe* at *1-3.

quitclaim deed required to obtain bridge financing for the purchase of the Ford property. App. Br., at 5. He did not assign error to any of the superior court's findings of fact, nor did he argue that any of the court's findings were unsupported by substantial evidence. *See, e.g., Watanabe* at *4 & *6 (no challenge to the finding that the funds to purchase the Ford property came from Pedersen's separate property). The Court of Appeals affirmed.

V. RESPONSE TO WATANABE'S STATEMENT OF THE CASE

Watanabe attempts to reargue facts despite not assigning error to the superior court's factual findings. With respect to the Ford property purchase, he claims:

> The down payment was paid from the parties' joint checking account. RP 192, lines 2-16. The parties had been able to save money because of their minimal living expenses. RP 192, line 17 - RP 193, line 6.

Petition, at 7. The superior court specifically rejected the latter claim in its findings and conclusions:

> ***The parties simply did not have sufficient community income or cash flow to pay anything towards the Ford***

> ***purchase***. Every single corporate tax return (Exhibit R-125 through R-138) shows both the net taxable income and the cash flow from Olivia Farm Inc.'s (hereinafter referred to as OFI) ranch and horse operations were conducted at a loss so that ***payments could not have been from Petitioner's earnings on the ranch nor did they likely have sufficient savings from prior accumulated earnings to do so***.

CP 168:11-17 (emphasis added). The superior court also did not credit Watanabe's claim about the alleged down payment and did not mention it in its findings and conclusions. *See* CP 167:11-28. Watanabe provided no written evidence to confirm his testimony regarding the down payment. RP 517:21-518:17 (alleged written documentation illegible).

Watanabe insinuates that the Clayton property was purchased with community funds. Petition, at 8-9 & 18. However, the superior court found that only one of the three parcels comprising the Clayton property (Beck) was purchased with funds from the joint account, CP 174:9-12; and the superior court determined that that parcel was community property, CP 194:12-14. The other two parcels (Romero and Ostness) were

paid for directly from Pedersen's separate account and determined to be separate property. CP 173:26-29; CP 194:6-11.

VI. ARGUMENT IN OPPOSITION TO REVIEW

A. Overview of separate property and the proof required to establish a change in character of separate property.

Separate property refers to property and pecuniary rights owned by each spouse before marriage or acquired afterwards by gift, bequest, devise, descent or inheritance. *Brewer v. Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102, 109 (1999); RCW 26.16.010. "[T]he right of the spouses in their separate property is as sacred as is the right in their community property[.]" *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932, 935 (2009), *as corrected* (Mar. 3, 2010) (quoting *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911); brackets added). As a result, separate property is presumed to remain separate property. *Borghi*, 167 Wn.2d at 484. It "continues to be separate property through all of its changes and transitions so long as it can be clearly traced and identified, and its rents, issues, and profits likewise are and

continue to be separate property." *Witte's Estate*, 21 Wn.2d 112, 125, 150 P.2d 595, 601 (1944); *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447, 450 (2000) (citing *Witte* for this proposition). "Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof[.]" *Binge's Estate*, 5 Wn.2d 446, 484, 105 P.2d 689, 705 (1940) (brackets added).

The burden is placed on the party challenging the characterization of separate property to prove that the spouse owning the separate property intends to "transmute" the property from separate to community property. *In re Estate of Borghi*, 167 Wn.2d 480, 484-85, 219 P.3d 932, (2009). The quantum of proof required to satisfy this burden is clear and convincing evidence. *Id*. at 485 n.4. This means there must be sufficient proof of intent to change the character of the property to be "highly probable." *Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062,

1067 (1997). The name on the title of the relevant property is insufficient to satisfy this burden, as explained below.

B. There is no conflict with this Court's decision *Borghi* because the Court of Appeals interpreted and applied the decision correctly to the unchallenged facts of this case.

Watanabe first suggests that the Court of Appeals improperly "extended" the ruling in *Borghi*. Pet Rev., at 4-5.[3] To support this theory, Watanabe tries to distinguish property acquired before marriage (and later jointly titled) from property acquired after marriage (and jointly titled at the time of acquisition). Petition, at 10-11. The Court of Appeals disagreed and interpreted *Borghi* in light of its expressed rationale.

> The *Borghi* court's disapproval of the joint title gift presumption did not rest on whether the property was acquired before or after marriage. The court instead

[3] The lead opinion and the concurrence in *Borghi*, representing a 5-Justice majority of the Court, agreed regarding all the matters at issue in this case. 167 Wn.2d at 483-91 (Stephens, J., lead op.); *id.* at 491-92 (Madsen, J., concurring). The concurrence merely declined to join the portion of the lead opinion stating that "an acknowledged writing is generally required" to overcome the separate property presumption on grounds that it was not necessary to reach that issue. *Id.* at 485 & 492.

> discussed the inherent problems with relying on title alone to determine intent.

Watanabe at *5. This was correct. "We have consistently refused to recognize any presumption arising from placing legal title in both spouses' names and instead adhered to the principle that the name on a deed or title does not determine the separate or community character of the property, or even provide much evidence." *Borghi*, 167 Wn.2d at 488; *Watanabe* at *5 (quoting *Borghi* for this proposition). The Court in *Borghi* rejected the joint title gift presumption in broad terms, calling it "erroneous" and "expressly reject[ing]" it. *Borghi*, 167 Wn.2d at 482 (brackets added). The Court found that the joint title gift presumption is "at odds with well-established principles of community property law" that look beyond title to ascertain the true intent and purpose of the parties. *Id.* at 487-88. This presumption elevates form over substance and ignores the good business reasons "to create joint title that have nothing to do with any intent to create community property." *Id.* at 489. It also

creates an irreconcilable conflict with the presumption that separate property remains separate property:

> to apply a presumption based on a change in the name or names in which title is held would create a situation in which a court is asked to resolve an evidentiary question based on nothing more than conflicting presumptions …. Applying these presumptions simultaneously, the court reaches an impasse. If we somehow reason that the community property presumption must prevail because it is later in time, then what became of the rule that clear and convincing evidence of actual intent is needed to overcome the original separate property presumption? In sum, applying a gift presumption to counter the separate property presumption in these circumstances would reduce community property principles to a game of King's X. **We refuse to do so and instead adhere to the well-settled rule that no presumption arises from the names on a deed or title.**

Id. at 489-90 (ellipses & emphasis added; citation omitted). The Court of Appeals' decision is not in conflict with *Borghi* and thus RAP 13.4(b)(1) does not apply.

C. The Court of Appeals decision does not conflict with *Skarbek*, which has been superseded by *Borghi*.

After attempting to distinguish *Borghi*, Watanabe then relies on *In re Marriage of Skarbek*, 100 Wn.App. 444, 997 P.2d 447 (2000). Petition, at 4-5. *Skarbek* predates *Borghi* and recognized

the joint title gift presumption. *Skarbek*, 100 Wn.App. at 450 ("A rebuttable presumption arises that property acquired with separate funds during the marriage is presumed to be a gift to the community"; citing *In re Marriage of Hurd*, 69 Wn.App. 38, 51, 848 P.2d 185 (1993), *rev. denied*, 122 Wn.2d 1020 (1993) and *In re Marriage of Pearson-Maines*, 70 Wn.App. 860, 868, 855 P.2d 1210, 1215 (1993)). However, *Borghi* expressly rejected the joint title gift presumption. The same proposition from *Hurd* that *Skarbek* cites was directly quoted and described as "at odds with well-established principles of community property law." *Borghi*, 167 Wn.2d at 487. The Court of Appeals in this case correctly concluded that "*Borghi* disapproves of the joint title gift presumption discussed therein." *Watanabe* at *5 (referring to *Skarbek*).

The Court of Appeals also found Watanabe's citation unconvincing because *Skarbek* held that the presumption was inapplicable and offered a counterfactual "***[i]f*** Mr. Skarbek had spent his money on an unrelated asset and put that asset in Ms.

Skarbek's name, the rebuttable presumption ***would have*** attached." *Skarbek*, 100 Wn.App. at 450 (emphasis & brackets added); *see Watanabe* at *5. Because *Skarbek* found the presumption inapplicable, the holding here does not directly contradict it. Because the joint title gift presumption was found inapplicable and the discussion of it in *Skarbek* has already been impliedly disapproved by this Court, there is no conflict and RAP 13.4(b)(2) is inapplicable.

Watanabe offers two other cases as potential sources of conflict to justify review. Petition at 17 (citing *Hurd* and *Pearson-Maines*). The conflict with *Hurd* is irrelevant because *Hurd* was already expressly disapproved in *Borghi*. 167 Wn.2d at 487. Watanabe quotes *Hurd* for the proposition that "[h]owever, a spouse's use of his or her separate funds to purchase property in the name of the other spouse, absent any other explanation, permits the presumption that the transaction was intended as a gift." Petition, at 11 (quoting *Hurd*, 69 Wn.App. at 51; brackets added). This statement is inapplicable

to this case because it is referring to purchases ***solely*** in the name of the other spouse. *Hurd,* 69 Wn.App. at 51 (citing *Scott v. Currie,* 7 Wash.2d 301, 308–09, 109 P.2d 526 (1941)). The *Hurd* court then used this to justify its conclusion that "a spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation, permits a presumption that the purchase or transaction was intended as a gift to the community." *Id.* But this language is expressly disapproved in *Borghi*. 167 Wn.2d at 487.[4] Watanabe's attempt to evade the disapproved language does not show a conflict justifying review under RAP 13.4(b)(2).

[4] Watanabe claims than an unpublished decision has continued to cite *Hurd* as controlling. Petition, at 10 (citing *Marriage of Lee, noted at* 198 Wn. App. 1069, 2017 WL 2171975, at *4 (Div. 1, May 8, 2017)). However, *Lee* does not cite *Hurd* for the joint title gift presumption. *Lee*, 2017 WL 2171975, at *4. Cases citing *Hurd* after *Borghi* was decided have noted that the joint title gift presumption has been disapproved. *E.g.*, *Marriage of Shapiro, noted at* 175 Wn. App. 1007, 2013 WL 2382281, at *6-7 (Div. 3, May 30, 2013).

Watanabe's second citation is to *Pearson-Maines*. Petition, at 17. *Pearson-Maines* also predates *Borghi* and offers a counterfactual analysis similar to *Skarbek*: "[w]e note that a different result would occur ***if*** the Lake Ki proceeds had been used to purchase some asset unrelated to Ms. Pearson–Maines' separate property." 70 Wn.App. at 868 (brackets & emphasis added). The decision never directly refers to "title" at all, let alone a "joint title gift presumption". The Court of Appeals decision is not in conflict with *Pearson-Maines*, or alternatively it has been impliedly disapproved by *Borghi* – either way, review is not justified on this basis either under RAP 13.4(b)(2).[5]

[5] Watanabe asserts in passing that the Court of Appeals' holding involves an issue of substantial public interest "as to its effect on real property acquired in the names of both spouses after marriage[.]" Petition, at 17-18 (brackets added). This decision applying settled law does not involve "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4); *cf. State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903, 904 (2005) (finding a case to be a "prime example of an issue of substantial public interest" when the Court of Appeals reasoning invited "unnecessary litigation" and created "confusion generally").

D. Watanabe admits that his extrinsic evidence argument does not independently justify review, he fails to address the Court of Appeals holding, and the Court of Appeals correctly found his argument misapplies to this case.

Watanabe admits that his extrinsic evidence argument is "secondary". Petition, at 15. He does not attempt to provide reasons justifying review under RAP 13.4(b) on this issue, nor does he explain why it should be accepted secondarily. Watanabe fails to address the Court of Appeals holding that he did not preserve his argument. *See Watanabe* at *7. Watanabe does not address the reasons for the holding on extrinsic evidence either. *Id.* As explained by the Court of Appeals, Watanabe's argument misapplies the law.

Watanabe fundamentally misses the point because the evidence is not offered to interpret the deed, but rather the deed is one piece of evidence relating to the question of whether a gift of separate property to the community was intended:

> Allowing a presumption to arise from a change in the form of title inappropriately shifts attention away from the relevant question of whether a gift of separate property to the community is intended and asks instead the irrelevant

> question of whether there was an intent to make a conveyance into joint title.

Borghi, 167 Wn.2d at 489. The distinction between intent to form joint title and the intent to make a gift of separate property explains why courts are not bound by the terms of deeds:

> The instances in which we have held that property purchased from the separate funds of one of the spouses and title taken in the name of the spouse furnishing the funds is the separate property of that spouse, and the instances in which we have held that property purchased with community funds is the property of the community, notwithstanding the title may have been taken in the name of one of the spouses, are too numerous to admit of citation here.

Merritt v. Newkirk, 155 Wash. 517, 520–21, 285 P. 442, 444 (1930) (brackets added); *accord Deschamps' Estate*, 77 Wash. 514, 518, 137 P. 1009, 1011 (1914) (stating "courts will not be bound by the terms of the deed but will look beyond it and ascertain, if possible, the true intent and purpose of the parties …. and considering the whole record"). *Borghi*, *Deschamps*, and *Merritt* all make it clear that the terms of a deed do not control the question of whether the property is community or separate.

The parol evidence rule does not apply in this context. None of the cases cited by Watanabe involve alleged gifts, let alone gifts of separate property to a marital community. Even before the erroneous joint title gift presumption was disapproved in *Borghi*, it was recognized that a gift presumption could be rebutted by parol evidence. *Scott*, 7 Wn.2d at 308 ("This presumption of a gift is, however, rebuttable. It rests only on the probable intention of the husband, and may be rebutted by matter contained in the deed, ***or by parol evidence*** which establishes a contemporaneous intent of the husband to make his wife only a trustee of the property"; emphasis added); *see also Watanabe* at *7 (citing *Scott* for this proposition). Watanabe's extrinsic evidence argument does not merit review on its own or in conjunction with the primary issue in his petition under RAP 13.4(b).

VII. CONCLUSION

The Court should deny Watanabe's Petition for Review.

This document complies with RAP 18.17, and the number of words contained in the document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (e.g., photographs, maps, diagrams, and exhibits) total 4,993.

Respectfully submitted this 1st day of September, 2021.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I electronically filed the foregoing with the Washington State Appellate Court's Secure Portal system, which will send notification and a copy of this document to all counsel of record:

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