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No. 89862-6

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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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In Re the Marriage of

CHRISTOPHER LARSON,  
Appellant,

and

JULIA LARSON CALHOUN,  
Respondent.

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BRIEF OF AMICUS CURIAE  
PEGGY ANN BIERBAUM, LISA A. DUFOUR, CARL T. EDWARDS,  
SHANNON ELLMERS, PAULA L. MCCANDLIS, KERRY  
RICHARDS, SUSAN J. SHULENBERGER, ALEXIS SQUIER, AND  
ALEXANDRA MOORE-WULSIN

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**ORIGINAL**

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**I.**  
**IDENTITY AND INTEREST OF AMICI CURIAE**

Amici Curiae Peggy Ann Bierbaum, Lisa A. DuFour, Carl T. Edwards, Shannon Ellmers, Paula L. McCandlis, Kerry Richards, Susan J. Shulenberger, and Alexis Squier, and Alexandra Moore-Wulsin (“Amici”) are members of the Washington State Bar. As detailed in the Appendix to this Memorandum, they are each experienced lawyers who focus their practice on advising and representing clients in domestic relations, including the financial consequences of marriage and divorce. Amici encourage this Court to grant review of Division One’s published decision in *Marriage of Larson/Calhoun*, 178 Wn. App. 133, 313 P.3d 1228 (2013), to provide clear guidance to the lower courts, attorneys, and litigants on the increasingly troublesome issue of when separate property may be invaded in a marital dissolution – an issue that has yielded inconsistent results in many dissolution cases and uncertainty in the lower courts and family law bar.

**II.**  
**ISSUE PRESENTED**

Under what circumstances may a trial court award separate property of one spouse to the other in a marital dissolution?

**III.**  
**STATEMENT OF THE CASE**

Amici accept the statement of facts set out in the Court of Appeals decision. *Marriage of Larson/Calhoun*, 178 Wn. App. 133, ¶¶ 2-6, 313 P.3d 1228 (2013).

**IV.**  
**ARGUMENT**

This case poses an issue that is the product of two distinct but equally compelling principles relating to the division of property between divorcing spouses.

RCW 26.09.080 requires the trial court to make a “just and equitable” distribution of the marital estate at the end of a marriage – “either community or separate” – after consideration of all relevant factors, including but not limited to:

1. The nature and extent of the community property;
2. The nature and extent of the separate property;
3. The duration of the marriage; and
4. The economic circumstances of each spouse at the time the division of property is to become effective.

RCW 26.09.080.

While RCW 26.09.080 makes separate property available for distribution, this Court has long held that “right of the spouses in their

separate property is as sacred as is their right in their community property.” *Estate of Borghi*, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009); *Marriage of Chumbley*, 150 Wn.2d 1, 6, 74 P.3d 129 (2003); *Elam v. Elam*, 97 Wn.2d 811, 814, 650 P.2d 213 (1982); *Hamlin v. Merlino*, 44 Wn.2d 851, 857-58, 272 P.2d 125 (1954); *In re Dewey's Estate*, 13 Wn.2d 220, 226, 124 P.2d 805 (1942); *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911).

Neither this Court nor the Court of Appeals has clearly addressed the confluence of these two principles by enunciating the circumstances under which a spouse’s separate property should be awarded to the other spouse. Division One’s decision below restates the oft-cited, but never scrutinized, “rule” from this Court’s decision in *Konzen v. Konzen*, 103 Wn.2d 470, 477, 693 P.2d 97 (1985), that the character of property is a relevant factor to be “considered, but is not controlling,” when dividing the marital estate at the end of a marriage. 313 P.3d at 1231, ¶ 16.

In *Konzen*, this Court affirmed an award of a portion of the husband’s separate property retirement to the wife, by holding that it would not “single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors.” 103 Wn.2d at 478. However, beyond this statement, *Konzen* provided no further guidance as to when the trial court

may award separate property to the other spouse. And since *Konzen* was decided nearly 30 years ago, this Court has not addressed the character of property as a factor in distributing the marital estate at the end of a marriage.

In its decision below, Division One does not establish the level of “consideration” or “weight” the character of property should be given in dividing the marital estate, holding only that the trial court has within its “broad discretion” the authority to award separate property to the non-owning spouse. *Larson/Calhoun*, 313 P.3d at 1233, ¶ 23. Division One’s decision in this case and also its more recent decision in *Marriage of Wright*, -- Wn. App. -- , 319 P.3d 45, (Dec. 16, 2013), *reconsideration denied* (Feb. 3, 2014), *petition for review filed* (March 5, 2013), appear to grant trial courts unfettered discretion to invade separate property whenever it deems it just and equitable to do so, thereby eliminating the “sacred” character of separate property and giving the character of property *zero* weight.

In this case, Division One simply held that “separate property is no longer entitled to special treatment.” *Larson/Calhoun*, 313 P.3d at 1231, ¶ 16. In *Wright*, in affirming the trial court’s award of the husband’s post-dissolution separate property to the wife, Division One held that it is the trial court’s “objective” when spouses were in a long-term marriage of 25

years or more “to place the parties in roughly equal financial positions for the rest of their lives.” *Wright*, 319 P.3d 45, ¶ 7 (citing *Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007)). This “objective” is not codified under RCW 26.09.080, and raises the question of whether the character of property has any weight if a marriage lasts 25 years or more.

Amici ask this Court to accept review of the Court of Appeals decision to provide guidance to the lower courts, litigants and their counsel to the circumstances that warrant an award of one spouse’s separate property to the other spouse. Because there is no protocol for when or why a trial judge may award separate property of one spouse to the other, there is a level of uncertainty and unpredictability that prevents counsel from advising their clients regarding their interests in their separate property or that maintained by their spouses.

Parties contemplating marriage or in a marital relationship may have significant separate assets, acquired pre-marriage, through gift or inheritance, or from a previous divorce. Amici and their peers in the family law bar are often asked to advise clients on how to maintain and protect their separate property, including through the use of either prenuptial or postnuptial separate property agreements, or the creation of separate accounts, trusts, or other financial planning duties.

After a dissolution action is filed, counsel must advise clients whether to trace assets to establish their separate or community character. The forensic accounting costs and expert witness fees involved in such tracing can be significant. The lack of guidance on when the trial court may treat a spouse's separate property as "sacred" or when its character will be given no weight makes it difficult for counsel to advise clients when such efforts to protect separate property will be worthwhile.

The lack of guidance also makes it difficult to settle cases where separate property is at issue. Guidance from this court could ultimately advance the settlement of these cases through mediation, ultimately reducing the number of cases that require resolution in the trial courts throughout the state.

## V. CONCLUSION

The criteria for dividing separate assets upon divorce presents an issue of substantial public importance, RAP 13.4(b)(4), and provides the Court with an opportunity to provide much needed clarity in this important area. This Court should take this opportunity to address the circumstances under which separate property may be distributed upon divorce. Guidance from this Court will enable Amici and their peers to better counsel their

clients, save significant transaction and experts fees, and promote the settlement of dissolution cases.

DATED this \_\_\_\_\_ day of March, 2014.

Respectfully submitted,

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### **Certificate of Service by Mail**

I declare under penalty of perjury that on March 24, 2014, I served by email and/or First Class United States Mail, postage prepaid, one copy of the foregoing document on:

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## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
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**From:** Willie Brenc [mailto:willie@davidzuckermanlaw.com]  
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Attached for filing is the motion of counsel for Peggy Ann Bierbaum et al to file amicus curiae brief and the brief of amicus curiae of Peggy Ann Bierbaum et al in the above-referenced case. Both have corrected title pages.

Thanks your attention to this matter.

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