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Superior Court Cause No.: 13-2-04785-8
Division III, Court of Appeals Cause No. 338274

THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEE L. MACKESSY,

Petitioner/Appellant,

v.

RICHARD J. ALLINGER,

Respondent.

PETITION FOR REVIEW

Brant L. Stevens, WSBA No.: 27249
222 W. Mission Ave., Suite 25
Spokane, Washington 99201
Phone (509) 325-3999
Fax (509) 325-0127
Attorney for Petitioner/Appellant

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A. IDENTITY OF PETITIONER

Petitioner and Appellant Lee Mackessy respectfully requests and asks the Supreme Court of the State of Washington to accept review of the Court of Appeals decision terminating review designate in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner Mackessy requests the Supreme Court accept review of the Court of Appeals Division III Unpublished Opinion filed by the Court of Appeals on December 15, 2016, Case No.: 338274 in its entirety. A true and correct copy of the decision is in the Appendix at pages A-1 through A-18. No motion for reconsideration was filed.

C. ISSUES PRESENTED FOR REVIEW

[1] Whether The Trial Court Erred In Holding The Petitioner Had No Legal Theory To Support Her Action And In Denying The Petition When The Court Made A Finding Of Fact That The Military Retirement Was Not Included Or Disposed Of In The Decree Of Dissolution.

[2] Whether The Trial Court Erred In Finding That (1) The Parties' Previous Legal Representation Disclosed And Discussed The Military Retirement And (2) That Allinger Was Still Burdened By Substantial Debt Taken From The Dissolution In 1998 When The Testimony By Both Parties Contradicts Such Findings.

[3] Whether The Trial Court Erred In Holding The Equitable Defenses Of Waiver, Laches, And Promissory Estoppel Applied When Insufficient Evidence Was Presented To Support The Defenses At Trial.

D. STATEMENT OF THE CASE

Petitioner Mackessy has requested the Supreme Court of the State of Washington Review the Court of Appeals, Division III Unpublished Opinion affirming the trial court's denial of Petitioner Mackessy's lawsuit to partition Respondent Allinger's Military Retirement as a matter of law as an undisposed community asset.

Allinger and Mackessy were lawfully married on November 1, 1986, in Aiken, South Carolina. CP4. Both Allinger and Mackessy were employed by the United States army at the time of their marriage. *Id.* Allinger joined the military on September 23, 1985. *Id.* Allinger was in and out of the Army and Reserves until 2012. *Id.* Mackessy retired from the Army during the marriage and prior to the dissolution. RP 39:21-14.

The parties initially filed for divorce in 1996, both were represented by counsel. Trial Exhibit P1. The parties reconciled and had their third child. RP 39:13. The parties then petitioned for divorce in 1998. CP 5. An order of Dissolution was entered on December 2, 1998, Cause Number 98-3-01639-4. The dissolution was approved by the then Honorable Commissioner Ellen Clark. CP 7-8. Section 2.8 of the Finings of Facts and Conclusions of Law was marked and listed the parties' community property. *Id.* Allinger's military retirement was not listed in Section 2.8. *Id.* Section 2.9 was marked and identified Allinger's and Mackessy's

separate property. *Id.* Allinger's military retirement was not listed as separate property of either of the parties. *Id.* Additionally, the military retirement was not referenced or listed or memorialized in the Decree of Dissolution. *Id.*

Mackessy left the military sometime between 1986 and 1988 because Allinger was activated out of reserves and Mackessy chose to quit the military in order to stay at home with their children while Allinger was in Iraq for over 15 months. RP 39:21-24; RP 58:9-10. Mackessy never returned to the military during the duration of the parties' marriage or after. Mackessy had been out of the military nearly ten (10) years without an intention to return at the time of the dissolution in 1998. *Id.*

Allinger's military retirement matured on July 31, 2012, and now receives monthly compensation directly correlated to the length of Allinger's service and rank upon retirement. Trial Exhibit R106. Allinger currently receives approximately $2,487.00 each month for his retirement benefits. *Id.*

The parties modified their residential schedule and parenting plan relating back to the 1998 dissolution several times: in 2005, 2010, and 2013.

Mackessy became aware of Allinger's military retirement through Allinger's financial disclosures during discovery relating to a petition for

modification filed by Allinger in 2013. RP 53:1-4. Mackessy brought this partition action on November 21, 2013, less than nine (9) months after learning of Allinger's military retirement. CP 1.

In March of 2015, Mackessy and Allinger filed cross motions for summary judgment. CP 34-41, 50-56. The Court denied both parties' motion for summary judgment holding that there was an issue of material fact as to the parties' agreement at the time of dissolution that prohibited a ruling on summary judgment. CP 115-116.

This matter went to trial on August 11, 2015. The Court heard testimony from Mackessy and Allinger.

At trial, counsel agreed that it is undisputed that Allinger receives military retirement benefits and the parties' community property interest was 35 percent of the retirement and Mackessy' separate property interest is 17.5 percent. The proper calculation would be 17.5 percent of Allinger's retirement to Mackessy or approximately $435.00 per month if the Court were to partition the asset. RP 31:2-4.

At trial, Mackessy testified that in the initial divorce, Mackessy was represented by Peter Karademos and Allinger Represented by Mary Schultz. RP 38:14-16. Mackessy testified that neither attorney ever mentioned a pension or separation of Allinger's military pension as community property. RP 38:16-18; 39:7-8. Upon questioning by the

Court, Mackessy testified that for six months of the dissolution proceedings in 1996, the parties were actively litigating the divorce with discovery ongoing. RP 73-75. During redirect, Mackessy testified that the entirety of the litigation and discovery was focused exclusively on the Parenting Plan. RP 80:11-17.

At trial, Allinger also testified that the 1996 petition for divorce focused exclusively on the parenting plan. RP 94:15-25; 95:1-3. Allinger stated that the only issues discussed in the divorce were the parenting plan and the parties never got to the financial issues. *Id.*

Mackessy testified that there was absolutely no discussion regarding the military retirement between Allinger and Mackessy when discussing what was allocated as assets in the dissolution in 1998. RP 41:8-20. Mackessy testified that had the military retirement been discussed it would have been written down and included in the dissolution. RP 65:12-14.

Mackessy testified that she first spoke to Allinger regarding the military retirement about three years ago in 2012, after Allinger requested a modification of the parenting plan and his retirement pension was disclosed on the financial worksheet. RP 53:1-4.

Allinger testified that the military retirement was discussed during the dissolution in 1998, but admitted that there were some things that were not included in the dissolution paperwork. 95-96.

Allinger argued that at each modification of the parenting plan, Mackessy waived and "re-waived" her rights to Allinger's military pension. CP 50-56. However, the military pension was never mentioned in any of the paperwork filed with the court. RP 107:16-19. Allinger testified that the petition for modification in 2013 was purely for housekeeping in order for the paperwork to reflect an accurate record of the agreement by the parties. RP 108:9-15. Allinger further testified that he was an organized person who likes to have his ducks in a row. RP 108-109.

Evidence was presented during the Summary Judgment proceedings and trial that Allinger discharged a significant portion of the debt he "took" from the dissolution in a chapter 7 bankruptcy filed on August 30, 2000, discharging the $32,671.08 in unsecured debt from the divorce. CP 70-96.

The Court gave its ruling orally on August 13, 2015. The ruling is fully integrated into the Order. CP 177-180. The Court found that there is no dispute that Allinger's retirement was not mentioned in any of the divorce documents. RP 153:13-15. The Court added that a number of things were not included in the final divorce documents, although the documents were very well done and very thorough for pro se litigants. RP 153:16-25.

The Court explicitly emphasized that the fact that the military retirement was not an undisclosed asset. RP 154:23-24. The Court also focused on the fact that the parties had counsel in the initial petition for dissolution in 1996. The Court stated,

> In my opinion, there is simply no chance, there is just no chance that, with attorneys of this caliber, that the military retirement, when the initial divorce was filed, that the military retirement and any retirement for that matter would not have been fully explored through discovery... Again, my point is, there is no undisclosed asset here. Ms. Mackessy knew the husband had retirement points, as we would call them. And Mr. Allinger knew that his wife had accumulated retirement points. So I guess the question before the Court is: Why not mention that in the divorce decree? And none of us can go back in time and climb into a time machine and figure all this out and be there. Only the parties know, and they have their—each of them have their perspective about what happened. Could be all sorts of reasons for this.

RP 156:14-25; 157:1-9. The Court continued:

> Now, really, the biggest problem that I have is, I'll just call it Ms. Mackessy's theory of the case. And that really runs contrary to public policy that we want to promote in Washington State, and that policy is to allow people to contract between themselves and to settle cases without the necessity of time-consuming, expensive litigation."

RP 158:18-23. The Court continues to explain further issues with Mackessy's theory of the case when there is no purposely concealed property. RP 161: 22-23. The Court stated it understood partition actions wherein property is left out based on deception or fraud, but the Court

found that Mackessy had no theory of the case as nothing was hidden, nothing was concealed. RP 163:10-11.

The Court found that the military retirement was not included in the dissolution because it "just wasn't important enough for the parties to mention because the retirement doesn't amount to anything. It didn't amount to anything when they got divorced in December of 1998. And so, Ms. Mackessy walked away from the retirement." RP 164:2-6.

The Court concluded based on the fact that Mackessy knew the retirement benefits existed and were not listed in the dissolution that Mackessy has no valid, legal theory. "Ms. Mackessy, well, she shouldn't have signed off on the decree and the findings if she had any intention whatsoever of laying claim to the military retirement at a later date. There simply is no valid, legal theory that supports her argument. There is no fraud. There was no deception. There was no concealment." RP 166:2-6.

The Court continued to hold that Allinger had multiple theories, some of which were advanced to the Court, and some of which he didn't, that support denying the petition. RP 166:16-18. First, was the legal defense of waiver, the court found Mackessy waived any future claim to the retirement. "First and foremost would be waiver by the wife as to any future claim to retirement, and her actions clearly dictate that that's

exactly what she did." RP 166:19-21. The Court made no other findings relating to the defense of waiver.

The Court also held that the equitable theory of laches applied. The Court found Mackessy chose not to pursue the retirement plan for 16 years. RP 166:25-167:1. The Court found that Mackessy knew about the military retirement "from day one" and waited 16 years to pursue a claim. RP 167:5-9. The Court made no other findings under the theory of laches.

Finally, the Court proposed the equitable defense of detrimental reliance, which the Court found applied to this case. The Court stated, "When the wife signed that decree, Mr. Allinger relied on the fact that she wouldn't, at some future time, lay claim to the military retirement, and husband then relies on that to his detriment." RP 167:14-17. The Court continues, "So, arguendo, Mr. Allinger, who is disabled and he is the sole source of income in his household, supporting a wife and young child and sounds like an adult child too, relies on every penny of his military retirement probably in planning his finances and his life." RP 167:17-21. The Court continues, "When one considers that [sic] factor that the Court was made well aware of that Mr. Allinger is still laboring to pay off the huge amount of unsecured debt that it appears he took on after the divorce." RP 168:2-4. The Court made no other findings relating to the legal theory of detrimental reliance.

Based on these findings and conclusions, the Court denied the Partition action as it pertains to the military retirement in total. RP 168, 8:9. The Court also held that each party was responsible for its own attorney fees and costs. RP 169:19-22.

The Trial Court's findings and conclusions were appealed by Petitioner Mackessy to the Court of Appeals. Division III and a notice of appeal was filed on October 6, 2015.

The Court of Appeals ruled in favor of Respondent, denying the relief requested by Petitioner Mackessy on December 15, 2016. The Court of Appeals ruled without allowing oral argument on the matter and filed an Unpublished Opinion with one opinion written by Honorable Judge Korsmo, with Judge Lawrence-Berrey concurring. A separate concurring opinion was written by Honorable Judge Fearing.

In the majority opinion, the Court affirmed the trial court concluding that the failure to list a community asset in a dissolution decree does not permit later division by a court if the asset is not "overlooked." Further, the majority opinion affirmed the trial court's ruling that the Petitioner waived her interest in the military retirement even if the community asset was "overlooked" and subject to division.

The concurring opinion challenges and undercuts the legal analysis contained in the majority opinion; the concurring opinion argues first that

an analysis of an "overlooked asset" is misplaced and misguided as no Washington decisions use the term or element "overlooked" as a part of the legal analysis. Rather, courts use and analyze the terms "undisposed" or "unadjudicated."

Secondly, the concurring opinion discredits the majority's finding of waiver and equitable defenses as the majority does not even list the rules of waiver or analyze the application of the waiver doctrine. The concurring opinion questions whether the doctrine even applies.

The concurring opinion affirms the trial court's findings and conclusions by arguing that Washington should permit oral agreements to be reached by divorcing parties and upheld by trial courts based upon law from other jurisdictions, namely Florida, that allow enforcement of such oral agreements. There are no Washington cases or courts that support the concurring opinions position that oral agreements should be enforced during a dissolution by the courts.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals, Division III Majority Opinion and Concurring Opinion completely flip on its head Washington's longstanding rule that community property of the spouses not disposed of by a divorce decree vests equally in the parties as tenants in common as a matter of law. The Majority takes this clear rule and gouges out a new exception for

community assets that are not disposed of by the trial court in the dissolution decree, but not "overlooked" by the parties to rule against Petitioner in this case. The Concurring Opinion simply wants oral agreements as enforced by other jurisdictions to apply in Washington despite contrary statutes and case law.

The legislature, in the Dissolution of Marriage Act found in RCW 26.09, mandates not only disclosure, but disposition of the property of the parties by the trial courts. The specific requirement that the trial court shall make a just and equitable division of property, while considering the nature and extent of community and separate property, inherently requires the divorcing parties to disclose *all of* the assets and agreements between the party to the trial court. If the trial court is unaware of an asset it cannot adjudicate and dispose of the property. If the trial court is unaware of an asset, it cannot make a just and equitable division of property. When a community asset is not disposed of in a dissolution, as a matter of law at the time of divorce, the parties' interest in the asset is converted to joint tenants in common, subject to partition. Several cases support and reaffirm this longstanding rule.

This is exactly what happened in this case, and rather than partition the asset as a matter of law and pursuant to Washington statutes and case law, the trial court and court of appeals denied petitioner's request for partition.

The trial court found "no legal theory" or cause of action to partition the asset for the Petitioner. The Court of Appeal's Majority opinion found an exception to undisposed assets if they were not "overlooked" by the parties, without any case law support for the exception. The Majority Opinion also applied the equitable defenses of waiver and laches without any analysis of the defenses. And the Concurring Opinion affirmed the trial court arguing that oral agreements should be enforced in a divorce subsequent to dissolution, regardless of what the trial court knew or didn't know, disposed of or didn't dispose of, at the time of the decree of dissolution.

1. General Legal Importance and Policy Implications

The Trial Court and Court of Appeals disregarded current Washington laws and precedent, violating the legislative intent for fair and just dissolutions, by holding that an unadjudicated asset in a dissolution, that was found to not be included in the dissolution nor known of by the court, should not be partitioned because the divorcing parties knew the community asset existed at the time of the dissolution. It was not an "overlooked" asset by the parties. Although this outcome favors policies related to the finality of judgments and the right to freely contract, it completely undercuts the clear policy, mandate, and intent of the legislature for all of the assets, community or separate, in a dissolution to

be known by the trial court in order to affect a just and fair distribution of assets.

The favoring of finality and freedom of contract over disclosure of assets for a fair and just dissolution undercuts the very purpose behind RCW 26.09. By allowing parties to freely contract, without any evidence of an agreement by writing, and without requiring disclosure to the trial court at the time of dissolution, the trial court and court of appeals are carving out a legal exception that creates chaos within the current state of the law, and creates a legal basis for parties to either defraud the court or manipulate the other party in a divorce. The Court of Appeals creates law that parties could take advantage of by hiding community assets from the trial court at the time of dissolution, yet subsequently being able to defend a partition action such as this by stating that the other party "knew about the asset/the asset wasn't overlooked." All the while, the deceiving party retains the asset as separate property despite its community property nature of the asset at the time of dissolution. The Court of Appeals does not require a specific level of evidence to successfully defend the partition action, not even a writing. This ruling actually encourages parties to *not disclose* community assets to the trial court with the intention of successfully defending a partition action, as long as the asset was not "overlooked." This exception and its extension, flips the legislative intent

for full disclosure, specificity of assets, and a fair and just division, on its head. The opinion not only creates law, by adding an exception not found in the statutory scheme, but it creates bad law that would encourage one party to take advantage of the other party through nondisclosure to the courts of a known asset. The policy implications of this ruling does nothing but harm and confuse the current state of the law and violate long standing policies and intentions for fair and equitable dissolutions created by the legislature.

2. Limited Washington Case Law on Point- Lower Courts Erred by Disregarding Applicable Law on Point; Appellate Court Drastically Conflicted on the Legal Application and Basis to Support Its Conclusion Creating the Appearance of Outcome Based Jurisprudence in an Unpublished Opinion.

The trial court relied on little to no statutory or case law to support its decision. However, the trial court did state that the issues presented in this case were "novel" and "new" despite the judge being involved with "hundreds, if not thousands" of divorce proceedings. The Appellate Court issued two opinions from three judges. The Majority Opinion creates a new exception for undisposed community property that is not "overlooked" by the parties, without any case law to support such an exception. The Concurring Opinion spent a large percentage of its opinion discrediting and challenging the Majority's analysis, legal applications, and reasoning. The Concurring Opinion then supports its conclusion using

foreign case law, requesting an extension of the current law in divorce proceedings to include oral agreements.

Despite the clear, longstanding case law that a party is entitled to partition as a matter of law if a community asset is not disposed of in a dissolution as the parties' interests convert to joint tenants in common, neither Court granted the Petitioner's request for partition on grounds currently unsupported by Washington Law.

The Court of Appeals chose to file an Unpublished Opinions although the Majority Opinion creates a new legal exception and the Concurring Opinion requests an extension of the current law to include oral agreements as seen in other jurisdictions. Typically these types of opinions are published creating precedent and persuasive authorities for future cases with similar facts. However, despite this exception and extension of the law, the Court of Appeals elected to file an Unpublished Opinion, leaving the exception created in the Majority Opinion, and the extension requested in the Concurring Opinion without any precedential weight or authority for future cases. The lower courts erred by violating the Petitioner's right as a matter of law to partition the undisposed of community property.

F. CONCLUSION

As the trial court's ruling and the court of appeal's affirmation was not founded in nor supported by current Washington State law, and are contrary to the legislative intent and policies behind RCW 26.09, Petitioner Mackessy respectfully requests The Supreme Court of The State of Washington accept her Petition for Review.

Respectfully Submitted this 17th day of January, 2017.

By: 

Brant L. Stevens, WSBA No.: 27249
Attorney for Appellant

APPENDIX

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FILED
DECEMBER 15, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In re:	)	
	)	No. 33827-4-III
LEE L. MACKESSY, fka LEE L. ALLINGER,	)	
	)	
Appellant,	)	
	)	UNPUBLISHED OPINION
v.	)	
	)	
RICHARD J. ALLINGER,	)	
	)	
Respondent.	)	

KORSMO, J. — This case illustrates one of the many difficulties that arise when parties dissolve their marriage without the assistance of legal counsel. After hearing testimony, the trial court concluded that the parties had agreed to walk away from the marriage without claiming any interest in the other's potential military pension. As the record supports this determination, the inchoate pension rights were not overlooked property negligently excluded from the dissolution decree. We affirm the trial court's decision to deny partition of the husband's military pension.

FACTS

Lee Mackessy and Richard Allinger met while each was serving in the U.S. Army. They married November 1, 1986. Ms. Mackessy left the army in 1988, the same year the couple's first child was born. Mr. Allinger left the army by the end of 1989; the couple's second child was born in 1992. Mr. Allinger returned to service in the reserves in August 1995.

The parties, each then represented by counsel, filed for dissolution in 1996. They subsequently reconciled for a period of time and halted the dissolution proceedings. Their third child was born in December 1996. The parties, proceeding pro se, instituted a new dissolution action in 1998. There was no written property settlement agreement. Instead, the decree of dissolution entered December 2, 1998, awarded the husband seven named items such as a TV and VCR, along with "everything already taken." Clerk's Papers (CP) at 8. The decree awarded the wife five categories of items, including the family house and furnishings. CP at 8-9. The decree did not recognize any other assets: no bank accounts, insurance policies, retirement plans, or the like were listed in the decree. A separate appendix indicated all of the credit card debt was awarded to the husband, while the wife took the car and house payments. The decree indicated that the parties had no separate property.

The parties occasionally modified the parenting plan over the years. Mr. Allinger's reserve unit was activated for service in Iraq and, after the tragic events of 2001, he went to active duty. Ms. Mackessy spent a brief time in the reserves before ending her service. Mr. Allinger remained in the service and his military retirement vested in 2012. He thereafter took his retirement and also received a disability retirement.

When she became aware of the military retirement income, Ms. Mackessy sued to partition it, claiming 17.5 percent of it as her share of an undivided community asset.[1] After competing motions for summary judgment were denied, the matter eventually proceeded to trial. Both parties testified that they earned "points" toward military retirement benefits while in the active service and in the reserves, and each was aware that both of them had accumulated points during the marriage. Mackessy testified that the topic of the retirement points had not been discussed during the marriage, while

[1] The calculation does not add up. The original motion for summary judgment incorrectly claimed that 92 months of the pension time were acquired during the marriage. CP at 40. It appears that during the marriage, Mr. Allinger was a service member for the period of November 1, 1986 to December 31, 1989 (38 months), and again from August, 1995 to the date of final separation on July 1, 1998 (35 months). CP at 17. However, community property is not acquired when the parties are living separate and apart. RCW 26.16.140. Based on trial testimony, there was a four to six month period in 1996 that also should be subtracted from that total. However, one exhibit used at trial, but not provided on appeal, suggests the parties had a different document from which the military retirement points were calculated. *E.g.*, Report of Proceedings at 133, 139 et seq.

Allinger testified that they had decided to each keep their own points and walked away from the other's points since neither anticipated serving sufficiently long to obtain a military retirement. Mr. Allinger testified that the couple had talked about it during the dissolution and again several years later when he decided not to seek support from Mackessy during a time when he had custody of all three children.

The trial judge rejected the motion to partition the retirement benefit and found no basis to award attorney fees to either side. The court entered findings of fact largely consistent with Allinger's testimony. The court concluded that the parties had discussed the retirement benefit and had agreed to leave each with their own points, largely because no one believed they would ever amount to anything. The court concluded that Ms. Mackessy had waived any interest in her ex-husband's possible pension, and that the doctrine of laches would also bar recovery. In support of its reasoning, the court noted that numerous other items were divided by the parties, but not listed in the decree of dissolution.

Ms. Mackessy then timely appealed to this court.

ANALYSIS

Ms. Mackessy presents three arguments on appeal, but we believe they are really only two. Accordingly, we address first the dispositive issue that we believe is present in

this case—is the failure to list an item of property in a dissolution decree conclusive evidence that it is an overlooked community asset subject to later division by a court? We answer that question in the negative. We also conclude that substantial evidence supports the determination that Ms. Mackessy waived her right to any future pension benefits.

Were the Retirement Credits Overlooked

Ms. Mackessy argues that the trial court erred in finding that she had "no valid, legal theory" supporting her argument and that the failure to list the retirement in the decree means that it is an overlooked asset as a matter of law. The trial court did not err.

The law governing division of marital assets and community property is primarily statutory and the general principles have long been settled. In a dissolution, all property, separate or community, is before the court for distribution. RCW 26.09.080. A property settlement entered into by the parties is binding on the court unless it finds the agreement unfair at the time of execution. RCW 26.09.070(3). Similarly, during the marriage the parties are free to dispose of their interests in community or separate property, including changing the characteristics of the property. RCW 26.16.030, .050, .120.

In the event that community property is not called to the attention of the court during a dissolution and, thus, not awarded to either party, the property is held by the former couple as tenants in common. *Chase v. Chase*, 74 Wn.2d 253, 257-258, 444 P.2d 145 (1968), *overruled on other grounds by Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d

652, 689 P.3d 46 (1984). However, the question of whether an asset is "overlooked" is not one which has attracted much attention in the case law. We thus turn to that question.

First, however, some preliminary comments are in order. Ms. Mackessy repeatedly argues that the military *pension* was an overlooked asset at the time of the decree. It was not. The pension right was not vested in either the husband or the wife, and neither expected to stay in the military long enough to obtain a pension. The property right at issue was the community's interest in the pension credits (points) accumulated during the marriage. As those credits were earned during the marriage, they were community assets. That is the item of community property at issue here.

An additional preliminary matter concerns the trial court's determination, later reduced to writing, that there was "no valid, legal theory" supporting the argument for partition. CP at 179. Ms. Mackessy argues that this statement indicates that the judge did not believe he had any basis on which to grant her claim for relief and asks that we remand for a new hearing since partitioning of an overlooked asset is permissible. This argument is an overreaction to what is, at most, use of colloquial language that is erroneously treated as a term of art. The trial court did not make the statement in response to a motion for judgment as a matter of law under CR 12(b)(6). It came during the summation of the evidence in the course of ruling at the conclusion of a bench trial. The statement simply reflected the judge's conclusion that petitioner did not have a winning case. It did not reflect a misunderstanding of his authority to entertain her

request. The language may have been imprecise in context, but it was nothing more than recognition that plaintiff did not have a winning argument.

With those preliminaries aside, it is time to turn to the actual issue presented—what constitutes an overlooked asset for purposes of the distribution of property during a dissolution? The most instructive case is *In re Marriage of Knight*, 75 Wn. App. 721, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995). There the parties had entered into a written property settlement agreement that gave the family business to the wife; the couple believed that the business had no value. *Id.* at 724-725. After the dissolution, the business prospered greatly and the husband moved to set aside the agreement due to undue influence and concealment of assets. *Id.* at 724. The trial court found the claims unproven, but sua sponte determined that the parties had not understood the concept of "goodwill," valued the goodwill of the business, and awarded half of that figure to the husband as an overlooked asset. *Id.* at 725. This court reversed that ruling after pointing to evidence developed at the hearing that the parties understood and discussed all of the factors that constituted goodwill, even though they did not understand that word's technical meaning as an accounting concept. *Id.* at 726-727. Accordingly, the parties "possessed and considered the information necessary to value all the component parts of the business." *Id.* at 728. The fact that they erroneously valued the business was not a basis for reopening the agreement. *Id.*

This case is in a very similar posture. Although there was no written agreement, the parties in both cases discussed their property settlement and sought to resolve all issues. Unlike the Knights, the parties here did not detail all of the property they were distributing to each other. As noted previously, there is no indication that the parties had any bank accounts to distribute, whether as either separate or community property, but they actually did. The dissolution decree indicates that neither party had any separate property, but, again, they clearly did. Each agreed, for instance, that Ms. Mackessy got to keep her jewelry and Mr. Allinger got to keep his musical instruments, including a piano and a guitar. Although it was not listed among the debts distributed to the wife, both of them agreed that Ms. Mackessy undertook responsibility for her student loan. Both agreed that Mr. Allinger was paid $6,000 to buy out his interest in the equity in the house awarded to Ms. Mackessy. However, nothing in the decree indicates that was to be done. There are many other examples found in the testimony of the parties. It was undisputed that the decree did not list all assets owned by the parties or indicate how they were distributed. If the pension points were an overlooked asset, so were many other items.

Like *Knight*, the trial judge here heard evidence whether the pension points were an overlooked asset or not. While whether they discussed the points was a matter of dispute, eventually resolved at trial in the husband's favor, it is undisputed that both knew about the military pension points each had earned during the marriage. Both were aware how military pensions worked. Both knew that the points had value if either of them

were to continue with the military and obtain a pension. In short, as in *Knight*, they "possessed and considered" the relevant information. The pension points were not an overlooked asset.

The trial court correctly determined that the parties knew about the pension points and had agreed among themselves to leave each person his or her own points. In accordance with the analysis in *Knight*, they were not an overlooked community asset.

Sufficiency of the Evidence to Support Findings

The final issue is whether the evidence supported the trial court's findings concerning the pension points. It did.

This court reviews challenges to factual findings for substantial evidence. *Clark v. Clark*, 72 Wn.2d 487, 492, 433 P.2d 687 (1967). Substantial evidence exists if the evidence is sufficient to persuade a fair-minded rational person of the truth of the evidence. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Appellate courts do not find facts and cannot substitute their view of the facts in the record for those of the trial judge. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Accordingly, the presence of conflicting evidence does not prevent evidence from being "substantial." *E.g.*, *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Ms. Mackessy challenges the findings that she waived her rights to the pension points and that the doctrine of laches would also bar recovery. Because the evidence

supports the waiver conclusion, we need not address laches.[2] Ample evidence supports the findings upon which the waiver determination rests.

It is undisputed that both parties were serving in the military at the time they married and both were serving in the reserves at the time the marriage ended. They were familiar with how military pensions worked and that the points earned during the marriage would be useful toward eventually earning a military pension. Mr. Allinger testified that they had discussed the points while working out the property division. They assigned no value to the assets since neither intended to make the military a career. Accordingly, each left the marriage with their own points and no claim on the other's points. As trier of fact, the trial court was free to credit that information.

The evidence in the record supports the trial court's findings, which in turn support the determination that the parties each waived any claim on the pension points earned by the other during the marriage. The trial court did not err in denying the motion to partition the husband's military pension.

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[2] The laches ruling is understandable. Since property must be distributed equitably, it is arguably unfair to go back to just one piece of the property distribution scheme without considering all of the assets that were distributed without being identified in the decree. A trial judge likely would have a difficult time valuing and awarding assets at this late time, especially since some of them (such as the house) are no longer held by either party. The trial court could reasonably determine that it would be inappropriate or impossible to fairly divide the 1998 property holdings in 2015.

The judgment is affirmed. We exercise our discretion and decline to award either party their attorney fees in this court.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

I CONCUR:

Lawrence-Berrey, J.

No. 33827-4-III

FEARING, C.J. (concurring) — I write separately because, although I agree with the majority's conclusion, my analysis emphasizes other facts, factors, and principles.

Paragraph 3.2 of the 1998 marital dissolution decree between Lee Mackessy and Richard Allinger reads:

> [X] The husband is awarded as his separate property the following property (list real estate, furniture, vehicles, pensions, insurance, bank accounts, etc.):
>
> Chevy Blazer
> Piano
> love seat
> Stereo
> VCR
> t.v.
> boat
> everything already taken

Clerk's Papers (CP) at 8. Paragraph 3.3 of the decree contains a similar provision for the wife, Lee Mackessy, without the language "everything already taken." CP at 8. Richard Allinger does not contend on appeal that the language "everything already taken" included his taking of his full pension rights. The dissolution decree does not otherwise expressly address the disposition of other assets and liabilities. The decree makes no mention of either party accruing a military retirement pension.

The trial court found that Lee Mackessy and Richard Allinger knew, at the time of the 1998 marriage dissolution, that the other was accumulating time toward a military retirement pension. The trial court further found that the parties agreed that each would own the entire rights to his or her pension. In other words, both Mackessy and Allinger agreed that she or he would not later assert an interest in the other's pension.

Lee Mackessy does not assign error to the trial court's finding of fact 2.28 that both Richard Allinger and she agreed to keep his or her own military pension rights. Mackessy assigns error to the trial court's finding that their respective legal counsel, during an earlier divorce proceeding, disclosed and discussed military pension rights. This assignment is immaterial, however, to whether Lee Mackessy knew of pension rights through other means or whether the parties agreed to forego an interest in the other's pension rights. Since Mackessy does not assign error to the finding that the parties reached an agreement with respect to pension rights, this finding is established as truth on appeal.

RAP 10.3(g) reads, in relevant part:

> A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Unchallenged findings of fact are verities on appeal. *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999); *Cascade Valley Hospital v. Stach*, 152 Wn. App. 502, 507, 215 P.3d 1043 (2009).

On appeal, Lee Mackessy relies on the longstanding Washington rule that community property of the spouses not disposed of by a divorce decree vests equally in the parties as tenants in common. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 206, 580 P.2d 617 (1978); *Chase v. Chase*, 74 Wn.2d 253, 257-58, 444 P.2d 145 (1968); *Pittman v. Pittman*, 64 Wn.2d 735, 737, 393 P.2d 957 (1964); *Olsen v. Roberts*, 42 Wn.2d 862, 864, 259 P.2d 418 (1953); *Ambrose v. Moore*, 46 Wash. 463, 466, 90 P. 588 (1907); *In re Marriage of Monaghan*, 78 Wn. App. 918, 929, 899 P.2d 841 (1995); *In re Marriage of de Carteret*, 26 Wn. App. 907, 908, 615 P.2d 513 (1980); *Seals v. Seals*, 22 Wn. App. 652, 655, 590 P.2d 1301 (1979); *Martin v. Martin*, 20 Wn. App. 686, 688, 581 P.2d 1085 (1978). This rule of tenancy in common applies to retirement fund benefits. *Chase v. Chase*, 74 Wn.2d at 258; *Pittman v. Pittman*, 64 Wn.2d at 737-38; *In re Marriage of de Carteret*, 26 Wn. App. at 908. Although military retirement benefits may not be characterized as community property under federal law, the Uniformed Services Former Spouses' Protection Act allows a Washington court to treat the retirement fund as if it is community property and award up to half of the disposable retirement pay to the nonmilitary spouse. 10 U.S.C. § 1408; *In re Marriage of Smith*, 100 Wn.2d 319, 323, 669 P.2d 448 (1983).

The majority phrases the issue on appeal as being whether a failure to list an item of property in the dissolution decree renders the item an "overlooked" community asset subject to later division of a court? Majority at 5. None of the Washington decisions use the term "overlooked." Instead all decisions, except one, focus on how to handle

property "undisposed" in the divorce decree, and the other decision references addressing property "unadjudicated." *Ambrose v. Moore*, 46 Wash. at 466 (1907). "Overlooked" carries a different meaning from "undisposed" and "unadjudicated." We stray from precedence by asking whether Lee Mackessy and Richard Allinger "overlooked" the military pensions.

Richard Allinger does not dispute that the dissolution decree failed to expressly dispose of the parties' respective and prospective retirement benefits. The question this court then faces is whether a later court may enforce an oral agreement between divorcing spouses when the dissolution decree fails to confirm the agreement. No Washington decision directly addresses this issue. None of the cases that apply the tenants in common rule involve facts where the divorcing parties agreed outside of the dissolution decree to dispose of assets. I conclude based on tangential principles of law and foreign decisions that a court should enforce such an oral agreement.

Idaho maintains a statute that requires all contracts for marriage settlements be in writing and signed. Idaho Code § 32-917. No Washington statute precludes the enforcement of an oral agreement between spouses either before or during a marital dissolution proceeding. RCW 19.36.010(3) requires a writing for agreements made on consideration of marriage, but not on consideration of divorce or separation.

A conveyance between spouses of community real property should be by deed. RCW 26.16.050. But no statute addresses a conveyance of an intangible community asset, such as an interest in a pension. RCW 26.09.070 allows parties to a marriage to

enter a "written" separation contract providing for the maintenance of one of them and disposition of property. The statute assumes that the parties will not immediately divorce. It provides no answer as to the enforcement of oral agreements pending the severing of bonds of matrimony. RCW 26.09.080 impliedly directs the trial court, in a marriage dissolution proceeding, to dispose of all community and separate property of the spouses, but the statute does not provide a remedy for a failure to dispose of all assets. Nor does the statute preclude the parties from agreeing outside of the divorce decree to a disposition of some of their assets. The parties are not required to place all agreements into the dissolution decree.

People are generally free to bind themselves to any contract, barring illegality of subject matter or legal incapacity. *Fosmo v. Department of Personnel*, 114 Wn. App. 537, 540, 59 P.3d 105 (2002); *Howick v. Salt Lake City Corp.*, 2013 UT App 218, 310 P.3d 1220, 1227. Generally, people have the right to make their agreements entirely oral, entirely in writing, or partly oral and partly in writing. *Barber v. Rochester*, 52 Wn.2d 691, 698, 328 P.2d 711 (1958); *Lopez v. Reynoso*, 129 Wn. App. 165, 171, 118 P.3d 398 (2005). Parties to a settlement are free to enter into a binding oral contract without memorializing their agreement in a fully executed document, even if they intend to subsequently reduce their agreement to writing. *Willey v. Willey*, 2006 VT 106, 180 Vt. 421, 426, 912 A.2d 441.

A writing helps to impress on the parties the importance of the agreement. At the same time, we wish to encourage settlements and finality of agreements even when settlements are not reduced to writing.

In the following cases, foreign courts enforced an oral agreement reached by divorcing parties. *Willey v. Willey*, 2006 VT 106, 180 Vt. 421, 912 A.2d 441; *Cain v. Swiderski*, 864 So. 2d 549 (Fla. Dist. App. 2004); *In re Marriage of Sherrick*, 214 Ill. App. 3d 92, 573 N.E.2d 335 (1991); *Silva v. Silva*, 467 So. 2d 1065 (Fla. Dist. App. 1985). More examples could be given. In each decision, the parties or the court after a hearing incorporated the agreement into the dissolution decree. Nevertheless, I see no reason to distinguish between an agreement incorporated into a decree and an agreement never memorialized in writing as long as the proponent of the oral agreement carries the burden of proving its existence.

Contrary to the majority, I do not consider *In re Marriage of Knight*, 75 Wn. App. 721, 880 P.2d 71 (1994), helpful. The decision's subject is Yelm's world famous channeler of Ramtha, but this court merely enforced an agreement memorialized in writing.

The Washington decision most apt is *Wagers v. Goodwin*, 92 Wn. App. 876, 964 P.2d 1214 (1998). Virgil Goodwin and Chong Lon Wagers obtained a divorce decree without legal representation. Although Goodwin served in the Army during the entire length of the marriage, the dissolution decree made no reference to his military pension. Seven years later, Wagers sued for partition and distribution of the pension. She relied

on the rule that property not distributed by decree remains an asset held by both divorcing parties as tenants in common. Evidence showed that Wagers knew, at the time of the dissolution, of the pension. During settlement negotiations, she stated she did not want a part of the pension and desired other property instead. The court estopped Wagers from acquiring rights in Goodwin's military pension. If Wagers is estopped by knowing of her former husband's pension and declining an interest therein during settlement talk, a court should enforce an agreement between separating spouses that each party retains full interest in his or her retirement fund regardless of whether the dissolution decree integrates the agreement.

Richard Allinger also contends that this court should apply equitable estoppel, waiver, and laches to preclude Lee Mackessy from obtaining an interest in his military retirement fund. The majority also holds that Lee Mackessy waived any right to Richard Allinger's pension benefits. Nevertheless, the majority does not list the rules of waiver or analyze the application of the waiver doctrine. I question whether the doctrine applies. Since the appeal can be resolved solely on the basis that the parties disposed of the military retirement benefits by oral agreement, I would avoid holding that waiver precludes recovery for Mackessy.

Fearing, J.
Fearing, C.J.

26.09.050
Decrees—Contents—Restraining orders—Enforcement—Notice of termination or modification of restraining order.

(1) In entering a decree of dissolution of marriage or domestic partnership, legal separation, or declaration of invalidity, the court shall determine the marital or domestic partnership status of the parties, make provision for a parenting plan for any minor child of the marriage or domestic partnership, make provision for the support of any child of the marriage or domestic partnership entitled to support, consider or approve provision for the maintenance of either spouse or either domestic partner, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders including the provisions contained in RCW 9.41.800, make provision for the issuance within this action of the restraint provisions of a domestic violence protection order under chapter 26.50 RCW or an antiharassment protection order under chapter 10.14 RCW, and make provision for the change of name of any party.

(2) Restraining orders issued under this section restraining or enjoining the person from molesting or disturbing another party, or from going onto the grounds of or entering the home, workplace, or school of the other party or the day care or school of any child, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, shall prominently bear on the front page of the order the legend: VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST.

(3) The court shall order that any restraining order bearing a criminal offense legend, any domestic violence protection order, or any antiharassment protection order granted under this section, in addition to the law enforcement information sheet or proof of service of the order, be forwarded by the clerk of the court on or before the next judicial day to the appropriate law enforcement agency specified in the order. Upon receipt of the order, the law enforcement agency shall enter the order into any computer-based criminal intelligence information system available in this state used by law enforcement agencies to list outstanding warrants. The order is fully enforceable in any county in the state.

(4) If a restraining order issued pursuant to this section is modified or terminated, the clerk of the court shall notify the law enforcement agency specified in the order on or before the next judicial day. Upon receipt of notice that an order has been terminated, the law enforcement agency shall remove the order from any computer-based criminal intelligence system.

26.09.070
Separation contracts.

(1) The parties to a marriage or a domestic partnership, in order to promote the amicable settlement of disputes attendant upon their separation or upon the filing of a petition for dissolution of their marriage or domestic partnership, a decree of legal separation, or declaration of invalidity of their marriage or domestic partnership, may enter into a written separation contract providing for the maintenance of either of them, the disposition of any property owned by both or either of them, the parenting plan and support for their children and for the release of each other from all obligation except that expressed in the contract.

(2) If the parties to such contract elect to live separate and apart without any court decree, they may record such contract and cause notice thereof to be published in a legal newspaper of the county wherein the parties resided prior to their separation. Recording such contract and publishing notice of the making thereof shall constitute notice to all persons of such separation and of the facts contained in the recorded document.

(3) If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage or domestic partnership, for a decree of legal separation, or for a declaration of invalidity of their marriage or domestic partnership, the contract, except for those terms providing for a parenting plan for their children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution. Child support may be included in the separation contract and shall be reviewed in the subsequent proceeding for compliance with RCW 26.19.020.

(4) If the court in an action for dissolution of marriage or domestic partnership, legal separation, or declaration of invalidity finds that the separation contract was unfair at the time of its execution, it may make orders for the maintenance of either party, the disposition of their property and the discharge of their obligations.

(5) Unless the separation contract provides to the contrary, the agreement shall be set forth in the decree of dissolution, legal separation, or declaration of invalidity, or filed in the action or made an exhibit and incorporated by reference, except that in all cases the terms of the parenting plan shall be set out in the decree, and the parties shall be ordered to comply with its terms.

(6) Terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms.

(7) When the separation contract so provides, the decree may expressly preclude or limit modification of any provision for maintenance set forth in the decree. Terms of a separation contract pertaining to a parenting plan for the children and, in the absence of express provision to the contrary, terms providing for maintenance set forth or incorporated by reference in the decree are automatically modified by modification of the decree.

(8) If at any time the parties to the separation contract by mutual agreement elect to terminate the separation contract they may do so without formality unless the contract was recorded as in subsection (2) of this section, in which case a statement should be filed terminating the contract.

26.09.080
Disposition of property and liabilities—Factors.

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering 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 or domestic partnership; and

(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

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Subject: Electronic Filing for Petition for Review; Mackessy v. Allenger

Dear Washington Supreme Court Clerk,

Please find attached Petitioner Mackessy's Petition for Review. The Petition for Review is in .pdf format with the appendix included. The Case information is as follows:

Mackessy v. Allinger;
Spokane County Superior Court No.: 13-2-04785-8
Court of Appeals Div III No.: 338274

Respectfully Submitted by Petitioner's Attorney:

Brant L. Stevens, WSBA No. 27249
222 W. Mission Ave., Suite 25
Spokane, WA 99201
Phone (509) 325-3999
Fax (509) 325-0127
brantstevens2010@gmail.com

The $200 filing fee has been mailed to The Washington Supreme Court Clerk, pursuant to the instructions of the Washington Supreme Court Clerk in a telephone conversation on 1/17/2017, and should arrive in the next few days.

Please let me know if you have any questions or concerns. I greatly appreciate your time, assistance, and attention on this matter.

--
Respectfully,

Brant L. Stevens
Attorney at Law

94050-9

Superior Court Cause No.: 13-2-04785-8
Division III, Court of Appeals Cause No. 338274

THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEE L. MACKESSY,

Petitioner/Appellant,

v.

RICHARD J. ALLINGER,

Respondent.

CERTIFICATE OF SERVICE

Brant L. Stevens, WSBA No.: 27249
222 W. Mission Ave., Suite 25
Spokane, Washington 99201
Phone (509) 325-3999
Fax (509) 325-0127
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I, Brant L. Stevens, hereby certify that on January 18, 2017, a true and exact copy of the Petition for Review was mailed via standard mail postage prepaid to the following:

[X] Richard Allinger
2306 S. Veracrest
Spokane Valley, WA 99037

Respectfully Submitted this 18th day of January, 2017.

Brant L. Stevens, WSBA No.: 27249
Attorney for Petitioner/ Appellant