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No. 662465

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

LISA LYNN TEGROTENHUIS,
Appellant,

v.

DAVID ALLEN TEGROTENHUIS,
Respondent.

REPLY BRIEF OF APPELLANT

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DIVISION I
FRIDAY HARBOR, WA

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III. ARGUMENT

A. In light of Michigan law, the only reasonable interpretation of Paragraph 13 of the Prenuptial Agreement defines the term “joint assets” as “assets in joint names.”

Mr. TeGrotenhuis pieces together the following argument:

1. Marital property in Michigan is essentially the same as community property in Washington upon dissolution of the marriage. Br. of Resp. at 20–22.
2. The prenuptial agreement protects the parties’ separate property, thus preventing recharacterization of that property as marital or community property. *Id.* at 22.
3. Ms. Hill agrees that property not characterized or distributed by the prenuptial agreement should be divided according to Washington law. *Id.*¹
4. Ms. Hill “concedes” that Michigan law gives “the court” discretion to divide “marital (i.e. community)” property equitably.²

¹ Respondent’s Brief grossly misquotes Ms. Hill’s opening brief. *See* Br. of Resp. at 22 (citing Br. of App. at 40–41). But the misquote captures the intended meaning closely enough.

² Ms. Hill has not conceded that Michigan law gives a Washington court discretion to divide “marital property.” *See* Br. of App. at 41 (“‘Marital property’ is a Michigan concept not applicable to divorces in Washington.”). However, with regard to community property, Mr. TeGrotenhuis’s assertion is correct to the extent the prenuptial agreement does not override the court’s discretion.

5. Ms. Hill does not dispute the characterization of certain property that Mr. TeGrotenhuis brought into Washington as his separate property. Br. of Resp. 22–23.³

Except for some finer points, each step in the above logic is true. These steps lead to two erroneous conclusions: First, that property the agreement protects as separate includes property traceable to separate sources notwithstanding title, and second that property the agreement does not protect as separate was properly before the trial court for equitable division.

The problem with this line of reasoning can be found in step #2. This step, while true as far as it goes, is erroneous in what it leaves out. The prenuptial agreement does more than protect each party’s separate interests. It defines a third class of property—separate from “his separate” and “her separate” property—that it terms “joint assets.” And, it provides for the even division of that third class.

As Mr. TeGrotenhuis recognizes, the key dispute in this appeal is the interpretation of Paragraph 13 of the agreement. With no support

³ Ms. Hill does not assign error to the trial court’s findings that Mr. TeGrotenhuis refers to. However, she does assign error to several findings the trial court used to justify ignoring the prenuptial agreement’s division of property titled in both names, particularly with regard to Paragraph 13 of the agreement. While the trial court’s findings that Mr. TeGrotenhuis references are correct pursuant to RCW 26.09.080, the prenuptial agreement’s division of this property eliminated the trial court’s need to engage in this analysis.

whatsoever, Mr. TeGrotenhuis concludes that “the term ‘joint assets’ required that the assets be held by the parties as joint tenants.” Br. of Resp. at 25. Having summarily swept aside Paragraph 13 with a single sentence, Mr. TeGrotenhuis applies Washington community property law to the property he claims is not addressed under the agreement, which is everything the agreement does not declare as separate property. *Id.*^{4 5}

Mr. TeGrotenhuis does attack Ms. Hill’s interpretation of the term “joint assets” in Paragraph 13 by attacking a premise underlying that interpretation: that the prenuptial agreement classifies all property on the basis of title. Br. of Resp. 24. Mr. TeGrotenhuis cites Michigan divorce

⁴ Mr. TeGrotenhuis applies community property law as the trial court did: by characterizing the property as “marital property” and then equating that property to community property. As established in Ms. Hill’s opening brief, “marital property” is not a class of property that exists other than in the context of a Michigan divorce. *See* Br. of App. at 23–26 (and cites therein). However, Ms. Hill acknowledges that, in a Washington divorce, property not covered under the prenuptial agreement has to be classified pursuant to RCW 26.09.080. The trial court and Mr. TeGrotenhuis need not have invoked Michigan marital property law to reach this conclusion.

⁵ Mr. TeGrotenhuis takes a statement in Ms. Hill’s opening brief out of context to claim inaccurately Ms. Hill’s agreement on an important point. *See* Br. of Resp. at 24. “As appellant acknowledges, where title to property is not clear, ‘a court must review all of the circumstances of acquisition of the property, e.g. who purchased it, source of funds, evidence of a gift, to determine title to it.’” *Id.* (quoting Br. of App. at 21– 22 (citing *Le Blanc v. Sayers*, 202 Mich. 565, 168 N.W. 445 (1918))). Mr. TeGrotenhuis then goes on to equate this principle with the principle in Washington community property law that title is not dispositive of a property’s character. *Id.* (citing *Estate of Borghi*, 167 Wn.2d 480, 488, 219 P.3d 932 (2009)). However, Ms. Hill’s quoted comment referred to property with no obvious title. In *Le Blanc*, the property was a piano to which a creditor’s rights depended on ownership between spouses. *Le Blanc*, 202 Mich. at 565–66. In no way does *Le Blanc* stand for the proposition espoused in *Borghi* that title of property is not dispositive of ownership during the marriage.

cases for the proposition that title does not necessarily determine what property is separate and what is “marital.” *Id.* However, because the “marital property” concept exists only in the context of a Michigan divorce, Mr. TeGrotenhuis’s analysis misses the point.

Interpreting the prenuptial agreement accurately requires an appreciation of three facts, already covered in Ms. Hill’s opening brief: (1) the prenuptial agreement is to be interpreted under Michigan law; (2) under Michigan law, title is generally dispositive of ownership issues except in the context of a divorce where the “marital property” concept springs into play; and (3) the prenuptial agreement resolves property ownership issues not just in the dissolution of the marriage but in all aspects of the marriage and the marriage’s end, including by death.

To resolve property ownership issues, the prenuptial agreement divides the parties’ property into three classes: Mr. TeGrotenhuis’s separate property, Ms. Hill’s separate property, and “joint assets.” The prenuptial agreement expressly classifies each party’s separate property as property titled in that party’s name. Ex.216 (prenuptial agreement), ¶¶ 1, 2 (including as separate property “any property of any nature hereafter acquired in [his/her] own name”). Of course, property not titled in only one party’s name is titled in the names of both parties, i.e. joint assets. This taxonomy covers all of the parties’ property.

During the marriage, the classification of an asset determines its ownership—and therefore its control. It also determines the rights of creditors.

The prenuptial agreement also provides for disposition of all of the property at the end of the marriage. At death, property classified as the decedent’s separate property is disposed of by will or intestate laws. The surviving spouse has no interest in that separate property. Ex. 216, ¶¶ 4, 5 (releasing “any dowry rights, any rights to a distributive share in the event of intestacy, any right of election to take against a will . . .”, etc.).

However, the surviving spouse receives all of the joint assets. Ex. 216, ¶ 13. If the marriage ends in a dissolution, each spouse receives his/her own separate property, with all other property split evenly between the spouses. Ex. 216, ¶¶ 1, 2, 4, 5, 13.

Except in his summary conclusion that “joint assets” in Paragraph 13 apply only to assets in joint tenancies, Mr. TeGrotenhuis does not attempt to harmonize the use of the term “joint assets” in Paragraph 13 with the rest of that paragraph. He does not dispute that the term “assets acquired in joint names” refers to all assets that are titled in both names, including tenants in common, joint tenancies, tenancies in the entirety, and as husband and wife. All of these titles are “in joint names.”

In addition, Mr. TeGrotenhuis does not dispute that the title of the paragraph, “Joint Assets,” can only refer to “assets acquired in joint names.” The term “Joint Assets” could not refer to a class of assets larger than the class of “assets acquired in joint names” because this class would have to include assets in the name of only one party, which are expressly reserved as separate property in Paragraphs 1 and 2. And, the term “Joint Assets” should not refer to a class of assets smaller than the class of “assets acquired in joint names” if the term “Joint Assets” is meant as a heading that covers the entire paragraph. Thus, the term “Joint Assets” used in the heading of Paragraph 13 must be synonymous with the term “assets acquired in joint names” as used within that paragraph.

Further, Mr. TeGrotenhuis does not explain how the use of the term “Joint Assets” in the heading of Paragraph 13 would have a different meaning than that of the same term inside the paragraph. And, he does not explain how the term “joint assets” should mean “joint tenancies” when the term “joint liabilities,” used in the same sentence, could not refer to joint tenancies.

Finally, Mr. TeGrotenhuis has no explanation as to why the drafter, an attorney, did not simply use the term “joint tenancies” if that is what was intended.

The prenuptial agreement provides for the disposition of all of the parties' property. All property titled in both names, and all liabilities for which the parties are jointly responsible, must be split evenly. The trial court erred when it did not do so.

B. Mr. TeGrotenhuis applies incorrect analysis in supporting the trial court's decision to not award an equitable right of reimbursement for the \$1 million construction loan.

First, Mr. TeGrotenhuis mischaracterizes Ms. Hill's assignment of error when he states, "The wife alleges that because the community obtained a \$1 million construction loan for the property she is entitled to a 'right of reimbursement' of \$320,000." Br. of Resp. at 33. In fact, the *community* is entitled to the reimbursement, not Ms. Hill.

Second, Mr. TeGrotenhuis alleges that no money was expended by the community giving rise to the right of reimbursement. *Id.* In fact, it is undisputed that the loan proceeds went into the construction of the house. RP(III) 64. The loan was a community obligation. CP 44.

Finally, Mr. TeGrotenhuis claims that, since he was awarded the community debt, the loan should not result in a right of reimbursement. Br. of App. at 33. However, Mr. TeGrotenhuis was given credit for taking that community debt. When the trial court considered the total division of community property, Mr. TeGrotenhuis received community assets to

compensate him for this community debt assigned to him. This assignment does not modify the right of reimbursement.

Put another way, the community was saddled with a \$1 million dollar debt. Yet the resulting increase in the value of the real property, created through application of this \$1 million, was not entirely a community increase. Instead, the increase in value of the property was correctly characterized based on the initial ownership division between Mr. TeGrotenhuis's separate property (32%) and the community (68%).

The community therefore should be compensated for its contribution of \$1 million to the property. It already owned 68% of that property, and thus 68% of this contribution has already been characterized as community value. Thus, a right of reimbursement to the community exists for 32% of the amount contributed, or \$320,000.

C. The trial court abuses its discretion if it lazily refuses to analyze the contributions made to an asset and yet relies on the nature of those contributions to justify a disproportionate award.

Mr. TeGrotenhuis was unsuccessful in proving by clear and convincing evidence that the contributions made to the 702 San Juan Drive property was made from his separate funds. Mr. TeGrotenhuis claims that, nevertheless, the trial court could, with a wave of the judicial hand, award Mr. TeGrotenhuis a disproportionate share of the community

property based on the unsubstantiated assumption that at least some of the property must have been his separate. This methodology defeats the purpose of the statutory requirement to determine the parties' community and separate interests and so is an abuse of discretion.

Mr. TeGrotenhuis points to *Marriage of Nuss* as support for the trial court's decision. *See* Br. of Resp. at 27–28. In *Nuss*, the husband quit claimed to the community his interest in a house he brought into the marriage. 65 Wn. App. 334, 336, 828 P.2d 627 (1992). He did so in conjunction with a refinance of the home. *Id.* The trial court considered the quit claim deed to be the husband's gift to the community. *Id.* at 337. Apparently this conclusion was not challenged on appeal. The trial court awarded half of the community equity in the home to the husband based on the husband's pre-marital contribution of the house. *Id.* The appellate court held this decision to be within the trial court's discretion. *Id.* at 342.

It is important to note that the trial court's decision in *Nuss* to consider the quit claim deed to be a gift is questionable under today's law. The Supreme Court has recently clarified that, under Washington community property law, title is not dispositive of characterization. *Estate of Borghi*, 167 Wn.2d 480, 490, 219 P.3d 932 (2009). In dicta, the lead opinion in the *Borghi* case mentioned a quit claim deed as possible clear and convincing evidence of intent to gift the property. *Id.* at 488 – 89

(four justices); *but see id.* at 492 (Madsen, J. concurring but not reaching prerequisites for evidence of a gift). The question of whether or not, and under what conditions, a quit claim deed would be evidence of a gift is still unclear. However, it seems likely that a quit claim deed executed only to accommodate a lender's wishes during a refinance would not alone be sufficient.

So, the *Nuss* court essentially used equity to rectify a situation that was relatively unique. Although it did not address the quit claim deed's effect on the characterization of the home, it addressed the inequity that the trial court evidently felt exists when a spouse executes a deed that has the unintended effect of gifting a separate property to the community. In other words, the *Nuss* court approved the use of equity to accomplish what the *Borgh*i court later held should have been accomplished through proper characterization of the property.

The *Nuss* facts are not applicable to the case at bar. Here, there is no allegation that Mr. TeGrotenhuis gifted separate property to the community through a deed or any other means. Instead, there is simply no proof how much separate property Mr. TeGrotenhuis contributed. The trial court characterized all of the contributions as community, then, based on an unsupported assumption that Mr. TeGrotenhuis did contribute

separate property, the trial court awarded Mr. TeGrotenhuis a disproportionate share.

If community property law is applied to the funds Mr. TeGrotenhuis acquired in Michigan, then he contributed substantial community property. For example, he earned over \$2 million during the marriage. *See* Br. of App. at 50–51. Mr. TeGrotenhuis made no effort to trace his separate and community money back to their sources prior to the marriage, instead tracing only so far as Michigan accounts in his name. Thus, the trial court had no firm basis for making the decision it made.

D. To the extent the trial court based its disproportionate award on Michigan property law, it failed to compensate for the inequitable interaction of Michigan and Washington law.

Once again, Mr. TeGrotenhuis fails to understand that “marital property” in Michigan does not exist during the marriage but only at dissolution of the marriage, and then only as an aid to Michigan courts in equitably dividing the property. *See* Br. of Resp. at 31. Frankly, Ms. Hill would prefer Mr. TeGrotenhuis’s understanding of “marital property.” This understanding would require the trial court to trace contributions made to the couple’s real property back to their source, just as would be required under Washington’s community property law. However, since the contributions made to the real properties were made prior to

dissolution, the characterization of these contributions has nothing to do with “marital property.”

Because the trial court found all contributions to the real properties, other than to their initial purchase prices, to be community property, and yet evoked Mr. TeGrotenhuis’s separate property contributions as justification for a disproportionate award of community property, the trial court’s legal basis for determining that some of the contributions were from Mr. TeGrotenhuis’s separate property is unclear. For example, did the trial court consider Mr. TeGrotenhuis’s income from his dental practice to be community or separate? There is nothing in the record that answers this question.

To the extent that the trial court considered any money flowing from Michigan accounts in Mr. TeGrotenhuis’s name to be his separate property, this characterization is unfair to Ms. Hill. The reasons for this are fully explained in the Brief of Appellant and won’t be restated here. *See* Br. of App. at 48–51.

E. Other factors do not justify the disproportionate award.

Mr. TeGrotenhuis points to other factors to justify the disproportionate award to Ms. Hill. First, he claims that the award is justified by his age and the fact that he is retired. Br. of Resp. at 29. The trial court considered this factor in Ms. Hill’s favor:

Both parties are in reasonably good health and have the education and experience to be gainfully employed. Although Respondent has very recently retired, he is relatively young for a retiree and has the ability to earn significantly more than Petitioner should he elect or be required to resume the practice of dentistry. On the other hand, Respondent [sic] has not been employed for many years in any of the several fields for which she is qualified by education and experience. Her future employment prospects, at least immediately, are likely limited to relatively low paying work.

CP 12 (Memorandum Opinion) at 5.⁶

Mr. TeGrotenhuis also claims that the disproportionate award to him is justified by the additional debt load he took on. Br. of Resp. at 29. However, he did not receive just a disproportionate award of the couple's community assets, he received a disproportionate award of the net community wealth—assets less liabilities. Mr. TeGrotenhuis's citation to *Owens v. Owens* is inapposite since, in *Owens*, the disproportionate award was justified on factors not already included in the division of property: child support, alimony, court costs, and attorney fees. 61 Wn.2d 6, 9, 376 P.2d 839 (1962).

Finally, Mr. TeGrotenhuis summarily claims that the trial court erred in two respects: characterizing the loan to him from certain trusts as his separate debt, and characterizing the Yacht Haven property as community property. See Br. of App. at 17 n.3, 18 n.4, 30. Mr.

⁶ It appears that this paragraph's second reference to "Respondent" was in error and should have stated "Petitioner."

TeGrotenhuis withdrew his cross appeal. *See* RAP 2.4(a). In addition, Mr. TeGrotenhuis does not support his assertions with specific facts and citations to law. *See* RAP 10.3(a)(6); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009) (“Without adequate, cogent argument and briefing, this court should not consider an issue on appeal.”) (internal quotation marks omitted); *Mudarri v. State*, 147 Wn. App. 590, 616, 196 P.3d 153 (2008) (“A parties’ passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”).

The trial court determined that the loan from the trusts was to Mr. TeGrotenhuis personally as his separate debt. CP 12 (Memorandum Opinion) at 14; CP 26 (Findings) at 6. Mr. TeGrotenhuis is a trustee of both trusts. RP(II) 58. There was no documentation of the loan. *See* RP(II) 155 (Mr. TeGrotenhuis explaining how much is owed on the loan by evoking the trusts terms as they apply to him.) Mr. TeGrotenhuis states that this debt should have been tied to the 80 First Street property. Br. of App. at 17 n.3. However, he does not present evidence that the debt was a community obligation.

The trial court found that Mr. TeGrotenhuis failed to substantiate by clear and convincing evidence that the down payment on the Yacht Haven property was his separate property. CP 26 (Findings) at 5. Mr.

TeGrotenhuis argues that most of the down payment came from a 1031 exchange with his separate assets, the Stuart Island property. Br. of App. 10–11. However, he fails to analyze the character of the Stuart Island property. Also, he cites only to testimony to support his assertions. *Id.* at 10–11. However, his own self-interested testimony is not clear and convincing evidence of the separate character of the property. *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950).

Thus, the only factor that the trial court used to justify a disproportionate award to Mr. TeGrotenhuis was the unproven separate property contributions to the real estate, especially to 702 San Juan Drive. The court apparently balanced this factor against several factors in Ms. Hill’s favor, including Ms. Hill’s uncompensated contributions of time to the increased value of the property, Mr. TeGrotenhuis’s greater earning potential, and Mr. TeGrotenhuis’s sizeable separate estate. CP 12 (Memorandum Opinion) at 14–16.

IV. CONCLUSION

The trial court erred when it did not give full effect to Paragraph 13 of the Prenuptial Agreement by dividing all property titled in both names evenly between the parties. In the alternative, it erred (1) by not giving the community a right of reimbursement for its contribution to 702 San Juan Drive of the \$1 million proceeds of the construction loan, (2) by

considering unproven separate contributions to the real estate, and (3) by not considering the built-in inequity that occurs when a spouse earns money in a common law property state and brings it into a community property state where the divorce is had.

Respectfully submitted,

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Dated: June 13, 2011

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