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## **2. INTRODUCTION**

This case is about a couple who, as the evidence showed, had an agreement to keep their property separate throughout their marriage. This was denied by the Petitioner at trial, but the history of her actions told a different story.

The court awarded attorney fees without consideration of a cost bill, without indicating on the record which method of calculation was used to determine the fees it awarded, and without making a determination the paying party had the funds to pay the award and the receiving party had a need for the fees. In fact, the record shows the receiving party had significantly more funds than the paying party.

The trial court credited the Respondent, as his separate property, the property belonging to others at the time of trial. The court did not fairly, justly, or equitably divide property in the trial and, given the errors mentioned above, this appeal was filed.

## **3. ASSIGNMENT OF ERROR**

**One:** The trial court erred when it did not rule on the issue of the unwritten prenuptial agreement the parties initially agreed to, was denied by the wife, but followed throughout their marriage.

**Two:** The trial court erred when it recognized a community interest in separate property after recognizing the property as coming from separate funds of the Respondent Appellant which predated the marriage.

**Three:** The trial court erred when it assigned property belonging to a third party at the time of trial, as separate property belonging to Respondent Appellant in order to equalize the division of property in the dissolution matter?

**Four:** The trial court erred when it awarded attorney fees to a party who could pay, without requesting a cost bill, without a determination the assigned party has the ability to pay and the other has the need for fee reimbursement, and without stating on the record which method was used to determine the fees?

#### **4. STATEMENT OF CASE**

Jackie C. Foster started his real estate career in 1964 as a licensed real estate salesman at the age of 23. (CP30,1) He became a broker in 1972 at the age of 31. (CP30, 1) He was successful at his vocation and built two businesses. (CP30,1) One of those businesses was a real estate brokerage in Yakima. (CP30,1) He ultimately sold his share in those companies and moved to Packwood where he would build yet another very successful business. (CP30, 1) After 30 years in the business, sold his business and the building which housed it and retired. (CP30, 1) He then lived on social security and the income producing real

estate contracts he was holding. (CP30, 1) He did not work after he retired. (CP30, 1)

Mr. Foster purchased several pieces of real estate and gave them to his grandchildren, to be used by them to fund their educations. (CP30, 2; Feb 2, 2009 RP 164 L 19-24) The only stipulation Mr. Foster placed on the properties he gave to his children was that he was to be reimbursed his initial cost of the property when they were sold or subdivided.(CP30, 2; Feb 2, 2009 RP 166, L 6-10; RP 167 L 17-19)

When the couple decided to marry, they made an oral agreement not to have joint accounts or have property which could be considered community in nature. (CP30, 1; Feb. 2. 2009 RP 169 L 14-17) They chose not to sign a prenuptial agreement as they believe it to be a premeditated divorce. (CP30, 1 Feb 2. 2009 RP 169 L 14-17) They chose, instead, to keep titles to property separate, checking and savings account separate and investments separate. (CP30,1; CP30, 2; Feb 2, 2009 RP 25 L 22-24) Throughout their entire marriage, property and investments were kept separate. (Feb 2, 2009 RP 25 L 22-25)

During the marriage, the couple lived in a home in Packwood which was the separate property of Respondent, (Feb 2, 2009 RP 32 L25 and RP 34 L1-4) and which he had deeded to his children (RP 33, L 9-10) The couple paid no rent, but Respondent agreed that they would pay the taxes and upkeep on the home in return for living there rent free. (CP30, 1; Feb 3, 2009 RP 9 L10-12) They were to replace anything that was broken or worn out during their residence there. (CP30, 1; Feb 3, 2009 RP 9 L10-12)

The couple separated and reconciled at least twice during their 12 year marriage. (Feb 2, 2009 RP 27 L 19-22; Feb 2, 2009 RP 173, L 6) During these periods of separation, the couple each continued to treat their property as their own, secure in the agreement that they had verbalized to one another.

Petitioner left the marriage for the last time on December 16, 2007. (CP1,2) In her Petition for Dissolution, Petitioner requested the court to divide the property, order maintenance for her and award attorney fees and costs. (CP1, 3). The dissolution went to trial on February 2 and 3, 2009.

This appeal follows from the judgment entered after considerable dialogue over whether or not Mr. Foster could legally

sign a Deed of Trust on property which he did not own and in which he did not have an interest. Judge Richard Brosey in Lewis County Superior Court, Department 3 ordered Mr. Foster to sign “ a mortgage’ to secure the obligation due and owing to the Petitioner. (Feb 3, 2009 RP 114 L 20-22) He finally did so, under protest.

## **5. ARGUMENT**

**ISSUE ONE: Did the trial court error in not finding the parties had an unwritten agreement to keep their property separate?**

In *Re Marriage of Dew Berry* 62 P.3d 525, 115 Wn. App. 351 stands for the premise an oral prenuptial agreement is valid when the parties perform as they had agreed. Here, at issue is whether an oral prenuptial agreement to treat income earned by the parties and property purchased by each during marriage separate and whether that oral agreement is enforceable. The trial court in *Dew Berry* said such an agreement is valid and can be binding upon the parties. However, the court in this case did not address this issue in its findings, in spite of the fact it was argued by counsel. Testimony showed the parties fully performed their separate property agreement during their marriage.

According to testimony from Petitioner, there was no discussion regarding any sort of arrangement about separate property and that they would keep everything separate while married (Feb 3, 2009 RP36 2-6). However, testimony from these parties revealed they did not share checking, savings, or other accounts (Feb. 2, 2009 RP106 L3-16). Respondent testified there was an unwritten agreement (Feb 3, 2009 RP 25, L15-17, 22-25). It was such that any mistake in ownership that was made was corrected (Feb 3, 2009 RP 26 L 1-5) He deeded over any interest he had as a spouse of the Petitioner when she purchased the River Run Ranch (Feb 3, 2009 RP 25 L 14-17) to her as he had no interest in it, per their agreement. (Feb 3, 2009, RP 25 L22-25 ) Respondent testified before they were married, they agreed they were joining two families and that they would keep everything separate. (Feb 2, 2009 RP169 L12-17)(Feb 2, 2009 RP 186L 20-25 ; 187 L1-4) Lastly, Petitioner testified it was common for Respondent to transfer properties during the marriage, without her involvement. (Feb 2, 2009 RP 51 L 25; RP 52 L1-2)

Each party purchased their own vehicles ( Feb 2, 2009 RP 180 L 4-9; 181 L 2-3; 181 L 8-11; 181 L 22-25; 182 L 1-7; 184 L 19-25 and 185 L4-12) Testimony of both parties was that

Respondent was retired (Feb 2, 2009, page 23 L11-18; Feb 3, 2009 RP 31 L 23-25; RP 32 L 1-3 and 21-25 and Feb. 2, 2009 RP 108 20-22). Respondent testified he had no income other than social security and his investment income (Feb 3, 2009 RP 37 L 11-13). Respondent contributed approximately \$4,000 a month to the community during the marriage (Feb 2, 2009 RP187 L5-9). Petitioner did not work much of the time, but stated she 'contributed to the community (Feb 2, 2009 RP123 L3-7; RP124 L1- 11; RP124 L19-21).

An argument can be made that the statute of frauds requires certain agreements, including agreements made in consideration of marriage, to be in writing. RCW 19.36.010. Failure to put such agreements into writing renders them void. *Koontz v. Koontz*, 83 Wash. 180, 184-85, 145 P. 201 (1915), *reversed on other grounds*, *In re Estate of Burmeister*, 124 Wn.2d 282, 877 P.2d 195 (1994). In *Koontz*, the husband's heirs alleged that his surviving spouse had orally agreed prior to marriage that she would not claim any interest in her husband's estate. *Koontz*, 83 Wash. at 184-85. The Washington Supreme Court held that any such agreement, if made orally, would violate the statute of frauds and declined to enforce the agreement. *Koontz*, 83 Wash. at 184-85. The alleged

agreement took effect only upon the husband's death; thus, there was no performance during the parties' marriage.

The statute of frauds also barred enforcement of an alleged separate property agreement in *Graves v. Graves*, 48 Wash. 664, 94 P. 481 (1908). In *Graves*, several years after a husband and wife had divorced, the wife claimed that she was a co-owner of a parcel of real property that was acquired during marriage, but which was not disposed of in the parties' dissolution decree. The ex-husband contended that he and his ex-wife had entered into an oral agreement to treat each spouse's property as separate property; thus, he was the sole owner of the parcel in question because he purchased it in his name. The husband conceded, however, that community funds were used to purchase the property, and the court found that the wife had continuously asserted that the property was jointly owned. Thus, the alleged oral prenuptial agreement was void under the statute requiring agreements in consideration of marriage, as well as agreements transferring an interest in real property, to be in writing. *Graves*, 48 Wash at 667. Here, Respondent contends the statute of frauds does not apply to the agreement in question in this case because each party performed as they had agreed. (See RP generally). No community funds were

used for the purchase of anything. Each had their own accounts and Petitioner testified Respondent paid the household bills from his account as there was no joint account for household matters. (RP generally) This is yet another sign of an unwritten agreement.

*In re Marriage of Fox*, 58 Wn. App. 935, 939, 795 P.2d 1170 (1990), which stated in dicta that "antenuptial agreements made upon mutual promises to marry" do not require a writing. See *Koontz*, 83 Wash. at 184-86. Although there are mutual promises involved here as there are in any contract, Petitioner and Respondent's agreement is an agreement made in consideration of marriage. (Feb 2, 2009 RP 169 L14)

Although the statute of frauds would apply to the agreement in question, it should be noted that it is enforceable under the part performance exception to the statute of frauds. (*Miller v. McCamish* 78 Wash.2d 821, 479 P.2d 919 (1971) The doctrine of part performance is an equitable doctrine which provides the remedies of damages or specific performance for agreements that would otherwise be barred by the statute of frauds. See *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 465, 457 P.2d 603 (1969); *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971).

The first requirement of the doctrine of part performance of oral contracts is that the contract must be proven by clear, cogent, and convincing evidence. *Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623 (1947). Here, both parties testified as to the separation of their accounts and properties. (Feb 2, 2009 RP106 L 9-16 RP 169 L 12-17) It is clear from their actions there was an agreement to keep things separate.

The second requirement of the doctrine of part performance of oral contracts is that: the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. *Granquist*, 29 Wn.2d at 445 If they point to some other relationship, such as that of landlord and tenant, or may be accounted for on some other hypothesis, they are not sufficient. *Id.* Here, the acts of the parties are clear, as is their testimony. They kept separate bank accounts, separate investment accounts, they purchased their own property and that property was held in the name of the party making the purchase.(Feb 3, 2009 RP 169 L 21-22; Feb 2, 2009 RP 106 L 9-16;)

Where the evidentiary standard is clear, cogent, and convincing, the appellate court must determine whether the

substantial evidence in support of the findings of fact is "highly probable." *In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). Petitioner may contend that the trial court's findings are supported by clear, cogent, and convincing evidence, but her argument falls flat as the court made no objective finding as to whether or not any sort of oral agreement was made by the parties. (CP 61 & 62) However, the terms of the agreement were clear and simple. Each party testified that they kept separate accounts and purchasing things separately. (Feb 2, 2009 RP Feb 3, 2009 RP 169 L 21-22; RP 106 L 9-16; Feb 2, 2009 RP 93 L 3-25; RP 95 L 12-25)

Furthermore, despite Petitioner's denial of any conversation relating to any agreement, (Feb 3, 2009 RP 59 L 2-8) the steps taken by the parties to avoid commingling of their assets are strong evidence of a separate property agreement. (See RP in general ) It was undisputed that the parties meticulously accounted for and handled their individual incomes as separate property and created no joint accounts to handle certain family-related expenses and requirements. (RP in general) The husband and wife relationship cannot account for such painstaking efforts to establish and maintain separate property. It should be concluded by the Appellate

court that the trial court's lack of a determination that an oral agreement was made in spite of substantial evidence that is "highly probable", and was in error.

In looking at whether or not under Washington law the oral contract can be enforced, one should look then at the exceptions that will allow for an enforcement for such a contract. Performance is certainly one of them. It should be found that there was complete performance at least up to the present. It is clear; these parties kept their property separate.

The oral prenuptial agreement in this case was based upon the recognized exception to the statute of frauds of part performance and is supported by the testimony of both parties in this case. (RP in general )

Although Washington had previously never enforced an oral prenuptial agreement, several other jurisdictions have. *O'Shea v. O'Shea*, 221 So. 2d 223, 226 (Fla. Dist. Ct. App. 1969); *In re Marriage of Lemoine-Hofmann*, 827 P.2d 587 (Colo. Ct. App. 1992); *Hall v. Hall*, 222 Cal. App. 3d 578, 586, 271 Cal. Rptr. 773 (1990). These cases all involved partial or full performance of an oral prenuptial agreement. The case at bar is similar to the ones

cited herein. It involves complete performance of an oral prenuptial agreement during the parties' marriages. *Koontz* and *Graves* are distinguishable because there was no performance of the alleged oral agreement.

Any argument that the oral prenuptial agreement is void because it is against public policy favoring creation of community property should be rejected by the Appellate Court. Under Washington law, there is a presumption that all income earned during marriage will be community property. RCW 26.16.030. This presumption may be rebutted by entering into a separate property agreement, but proof of such an agreement is held to a higher evidentiary standard than a community property agreement. *In re Diafos*, 110 Wn. App. 758, 37 P.3d 304 (2001); *Kolmorgan v. Schaller*, 51 Wn.2d 94, 99, 316 P.2d 111 (1957). Here, that standard is met by and through the actions of the parties in keeping all things separate, not comingling any funds and making purchases in their individual names. What better proof is there than the actions of the one making the claim there was an agreement and the actions of the one denying any agreement existed. It becomes a matter of looking at what was done and not what was said. One's actions speak louder than words.

Petitioner may argue that Washington law prohibits parties from entering into an agreement to repudiate the community property system and that such an agreement is void because it conflicts with public policy favoring creation of community property. This is not an accurate statement of Washington law. Washington courts have long held that a husband and wife may contractually modify the status of their property. See *Hamlin v. Merlino*, 44 Wn.2d 851, 864, 272 P.2d 125 (1954); *State v. Miller*, 32 Wn.2d 149, 158, 201 P.2d 136 (1948). Public policy favors prenuptial agreements because they are "generally regarded as conducive to marital tranquility and the avoidance of disputes about property in the future." *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972). Prenuptial agreements are contracts subject to the principles of contract law. *In re Marriage of Burke*, 96 Wn. App. 474, 477, 980 P.2d 265 (1999).

Washington courts evaluated prenuptial agreements under the *Matson* two-prong test to determine whether the contract is substantively and procedurally fair. *In re Marriage of Matson*, 107 Wn.2d 479, 730 P.2d 668 (1986). "If fair and fairly made, we have held prenuptial agreements between competent parties to be valid and binding." *Matson*, 107 Wn.2d at 482. The first prong of *Matson*

asks whether the agreement made a fair and reasonable provision for the spouse not seeking enforcement. If the answer is yes, the agreement is valid. If the answer is no, the second prong asks whether there was full disclosure of the value and nature of the property involved and whether there was full knowledge and independent advice about each spouse's rights. *Matson*, 107 Wn.2d at 482

The enforceability of separate property agreements or prenuptial agreements is also determined by the two-pronged test, now known as the *Foran* test. If the agreement is fair on its face, the agreement is valid. If not, the agreement may still be valid if (1) full disclosure has been made of the amount, character, and value of the property involved and (2) the agreement was entered into fully and voluntarily on independent advice and with full knowledge by both spouses of their rights. *In re Marriage of Burke*, 96 Wn. App. 474, 980 P.2d 265 (1999); *In re Estate of Hansen*, 77 Wn. App. 526, 531, 892 P.2d 764 (1995); *In re Marriage of Foran*, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992)

Here, the terms of the parties' agreement were clear and straightforward. Nevertheless, even if you were to evaluate the

agreement for fairness, the court should agree that the prenuptial agreement satisfies the *Matson and the Foran* tests. Under the agreement in the case at bar, each party was able to and did accumulate substantial separate property. (CP 61 & 62) There is nothing unfair about two well-educated working professionals agreeing to preserve the fruits of their labor for their individual benefit. Both parties were aware of each other's education, assets, and income potential and had ample time to consider the agreement during their pre-marital friendship and dating period. The agreement in this case was both procedurally and substantively fair to both parties.

The trial court in this case, made an error when it did not recognize the oral prenuptial the parties followed throughout the marriage.

**ISSUE TWO: Did the trial court error in recognizing a community interest in separate property or in property belonging to another?**

*In re Marriage of Johnson* 625 P.2d 720 (1981) was a case in which one spouse claimed a community interest arose from improvements on separate property made during the marriage. Such is the same in this case.

*Johnson*, citing *McCoy v. Ware*, 25 Wn. App. 648, 608 P.2d 1268 (1980), stated Division One of the Court of Appeals employed the presumption favoring community property to place the burden on the spouse owning separate property to prove that an increase in value during the marriage did not result from an investment of 'community labor'. Here, the record is replete with testimony from both parties that the Petitioner did not invest any money in the improvements to any of the Respondent's separate property. (Feb 2, 2009 RP 123, 124; 167 L 20-21; 186, L23-25) Petitioner stated, numerous times she contributed to the community, but not to the improvements. (Feb 2, 2009 RP 123 3-7; Feb 2, 2009 RP124 1- 11; RP 124 19-21). Further, petitioner's contributions to the community were never explained or extrapolated upon so as the court was clear as to those contributions were.

The principle is well established that one seeking a community interest in separate property must overcome the presumption to the contrary. *Hamlin v. Merlino* 44 Wn.2d 851, 272 P.2d 125 (1954); *Conley v. Moe* 7 Wn.2d 355, 110 P.2d 172, 133 A.L.R. 1089 (1941) ; *Federal Land Bank v. Schidleman* 193 Wash. 435, 75 P,2d 1010 (1938); *In re Estate of Woodburn* 190 Wash.

141, 66 P.2d 1138 (1937); *Guye v. Guye* 63 Wash. 340, 115 P. 731 (1911). The record in this case is clear; Petitioner did not contribute any money toward any improvements and her 'community contribution' was never extrapolated upon for clarity. (Feb 2, 2009 RP 123 L25; RP 124 L 5-11; RP 124 L 19-25; RP 125 L1) Petitioner did not produce any receipts, no attempt was made to say she did any physical labor relating to any improvements and, in fact, she stated merely "I contributed to the community", with nothing further. (Feb 2, 2009 RP 123 L 5-7; 124 L1-25, 125 L 1)

Further, Petitioner testified she wanted a community interest for the well placed on the property belonging to the grandchildren. (Feb 2, 2009 RP122 19-21). She, by her statements placed a community interest claim on property belonging to another. (Feb 2, 2009 RP 139, L 2-15) No case law could be found which would support such a claim.

The presumption in favor of the community cannot prevail here because there has been a segregation of the income of the parties and the property of the parties from before the marriage was entered into. (RP in general). Respondent had only retirement income and income from his investments, all earned prior to

marriage. (Feb 2, 2009 RP 37 L 11-13) It is clear, from the record; the improvements to the separate property or property belonging to another did not occur from 'community labor', be that physical labor or monetary contributions earned by the community. (Feb 2, 2009 RP 123, 124).

The *Johnson* court held there was no merit to the claim the wife's performance of the usual homemaker's chores helped produce the increase in value and justified the granting of a lien on the improvements. *In re Marriage of Johnson* 625 P.2d 720 at 579. Further, the *Johnson* court, citing *Merkel v. Merkel*, 39 Wn.2d 102, 116, 234 P.2d 857 stated the homemaker duties performed were done so with no expectation of return and would be more than offset by the marital community's use and enjoyment of the family home. This statement holds especially true for this case. No testimony can be found which indicates Petitioner did anything out of the ordinary in the way of her 'community contribution'. Petitioner's household chores, undefined and undesignated, do not constitute enough to meet the burden of showing her contribution was more than mere household chores. (Feb 2, 2009 RP 123, 124)

Here, the trial court erred when considering any community contribution to separate property or property belonging to another.

**ISSUE THREE: Did the trial court error in its characterization of the property when it made its ruling on the distribution of property at the trial?**

The trial court has broad discretion in awarding property in a dissolution action, and will be reversed only upon a showing of manifest abuse of discretion." *In re Marriage of Fiorito*, 112 Wn. App. 657, 667-68, 50 P.3d 298 (2002). Here, the court used that broad discretion to divide property not belonging to either party at the time of the trial, give all the property in the name of the Respondent to the Petitioner, allowed Petitioner to keep her bank accounts, IRA, stocks and other money and investment accounts, and remove income from Respondent in the form of the Deed of Trust on the Alaska property and giving it to Petitioner. ( Feb 3, 2009 RP 110 L 24-25; 111 L 5-6) Giving the income producing property to the Petitioner took that money from the hands of the Respondent, thus lowering his ability to sustain his day to day living as he was dependent upon that income and his social security to live. This trial court has abused its broad discretion.

It is well established that property is characterized as of the date of its acquisition and, if separate property at that time, it will remain separate through all of its changes and transitions as long as it can be traced and identified. *Baker v. Baker* 80 Wn.2d 736, 498 P.2d 315 (1972). Here, Petitioner characterized certain property as belonging to Respondent prior to their marriage. (Feb 2, 2009 109 L 19-25). She testified the Selah property was purchased before the marriage. (Feb 2, 2009 RP116 9-10) Her testimony was that the Skate Creek and Alder property had always been in Respondent's grandson's name. (Feb 2, 2009 RP122 L 16-19). Cannon Road and Skate Creek is still in Respondent's grandson's name (Feb 2, 2009 RP165 23-25) There was testimony that the Cannon Road property was transferred out of Respondent's name to his grandchildren in 1997, ( Feb 2, 2009 RP121 23-25; 122 1-4). Yet, Petitioner insisted these properties are Respondent's separate property, knowing they had been gifted or transferred to others. When they *were* Respondent's separate property he could do with them whatever he wished, (RCW26.16.010) and he did, with full knowledge of Petitioner. He either gifted or sold them before the marriage and during the marriage. It is unrefuted that Respondent did as he saw fit with the

marriage. (Feb 2, 2009, RP 51 L 25; 52 L 1-2) The record does not reflect in any part how Petitioner protested the gifting of assets from the Respondent to his grandchildren or children. (RP generally). She did not protest because she knew there was an agreement in place and she had no say in what Respondent did with his property. Likewise, he did not protest when she did anything with her property, they had an agreement.

Petitioner testified she did not help Respondent purchase the tax sale property known as Sherwood Court. (Feb 2, 2009 RP124 L22-25; RP 125 L1) Separate funds have been shown throughout the testimony of both parties as each testified there were never any joint accounts. (Feb 3, 2009 RP 25, L15-17, 22-25; Feb. 2, 2009 RP106 L3-16) Petitioner testified the 'gold mine property' was in the name of Retsof Corporation, and not the name of either party at the time of this trial. (Feb 2, 2009 RP 135 17-20) Petitioner testified she had done things to help her children (Feb 2, 2009 RP134 L10-11) She also testified she has paid things for them. (Feb 2, 2009 RP134 L12-13).

Exhibit 5 shows a transfer of property from Respondent to a third party. This property was acknowledged by Petitioner to be

owned by Respondent prior to marriage. (Feb 2, 2009, RP138 L 2-7). This is property with which he had control and had the ability to gift, loan, or sell because it was his separate property. (RCW 26.16.010)

Petitioner admitted she never told Respondent she wanted to consult an attorney about signing quit claim deeds. (Feb 2, 2009 RP 155 L 7-8; Feb 3, 2009 RP 20 L8-10) She was in real estate and had passed the certification or licensing test and it is highly probable she had knowledge of how deeds worked and what signing a Quit Claim Deed meant. (Feb 2, 2009 RP 27 L22-24) Respondent testified Petitioner volunteered to sign the three deeds on the Alaska Property, the driving range and the lot on the Corner of Canon and Cottonwood (lot 13). (Feb 2, 2009 RP173 L7-10) She signed of her own free will. (Feb 2, 2009 RP173 L13). Respondent testified, and it is unrefuted, that she knew she had no money in the properties,(Feb 2, 2009 RP 123-124) no interest and that she had come back after almost a year and told him she wanted back into the marriage. (Feb 2, 2009 RP173 L13-18) For and in consideration of returning to the marriage and because she had not interest or money in the properties, Petitioner signed the quit claim deeds.

There was no community property to go before the court at the time of trial, as the couple had an agreement to keep property separate. Absent that, the only property which could have possibly been considered community was (High Valley 10) the Mary Lane property, Lot 2 Eagle Peak, Lot 13 Eagle Peak, Sherwood Court (High Valley 8). All else was separate property of Respondent, as defined by the laws of the State of Washington, Case law in this state, and testimony of the parties or had been gifted or sold prior to the dissolution. In addition, the Judge noted there was no denying the fact that the vast source of Mr. Foster's assets comes from his sale of his real estate business that he had in Packwood and that pre-dated his marriage. (Feb 3, 2009 RP 102 L 20-25).

The property gifted during a marriage was separate property. Under RCW 26.16.010 states that property and pecuniary rights owned by the husband before marriage and . . . he may manage, lease, sell, convey, encumber or devise by will such property without the wife joining in such management . . . and to the same effect as though he were unmarried. This is exactly what Respondent herein did, gifted and managed his property as though he were unmarried.

The 1950 Buick two-door sedan was purchased before the marriage. (Feb 2, 2009 RP128 L 21-25). The 1957 Apache was purchased before the marriage. (Feb 2, 2009 RP129 L 6-8). The 1949 Studebaker half-ton truck was purchased during the marriage. (Feb 2, 2009 RP129 L9-11) The 1949 Willy Overland was purchased during the marriage (Feb 2, 2009 RP129 L21-24). Petitioner testified she purchased property and paid for River Run Ranch (Ex. 18) (Feb 2, 2009, RP132 13-22) Respondent did not help pay for River Run Ranch, the Nissan Pathfinder, the Volkswagon (Feb 2, 2009 RP133 L 4-10) and that Respondent paid for his vehicle. (Feb 2, 2009 RP133 L11-12) However, the River Run Ranch property had Respondent's name on it, but in order to keep their property separate, which was the agreement, he quit claimed to her any interest he would have had. (Feb 3, 2009 RP 25 14-17) (Feb 3, 2009 RP25 22-25)

The Appellate Court reviews division of property in a marriage dissolution action under the abuse of discretion standard. *Marriage of Irwin* 64 Wn. App. 38 822 P.2d 797 (1992). It is well settled that the trial court has broad discretion when distributing property in a dissolution case. RCW 26.09.080; *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976P.2d 102(1999); *In Re Marriage*

*of Kraft*, 119 Wn. 2d 438, 450, 832 P.2d 871(1992); *In Re Marriage of Kozen*, 103 Wn.2d 470m, 477-78, 693 P.2d 97, cert. denied, 473 U.S. 906 (1985); *In re Marriage of Stachofsky*, 90 Wn. App 135, 142, 951 P.2d 346, review denied, 136 Wn.2d 1010 (1998) *In re Marriage of Harrington*, 85 Wn. App. 613, 624, 935 P.2d 1357 (1997). Under appropriate circumstances, the Court need not divide community property equally. RCW 26.09.080. The court need not award separate property to its owner. RCW 26.09.080. According to the statute, the court need only 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. The case law in the State of Washington has added the word 'fair' to the language. *Baker v. Baker* 80 Wn. 2d 737, 498 P.2d 315. (1972), *Marriage of Olivares* 69 Wn. App. 324, 848 P.2d 1281 (1993). Fair, Just and Equitable are not words which Respondent believes describe the distribution of the assets of this marriage; given the fact the parties had an oral agreement regarding their property and assets which they followed throughout the marriage.

When exercising its broad discretion, a trial court focuses on the assets then before it, i.e. on the parties' assets at the time of

trial. RCW 26.09.080; *Brewer*, 137 Wn.2d at 766; *Freidlander v. Freidlander*, 80 Wn.2d at 305; *In Re Marriage of Olivares*, 69 Wn. App. 324, 328-29 , 848 P.2d 1281, review denied, 122 Wn.2d 1009 (1993). If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial. *Marriage of White* 105 Wn.App. 545 20 P.3d 481. Here, property had been gifted by Respondent to his grandchildren and his children as far back as 1994. (See Exhibits Generally). Except for her denial of knowledge of the recording of the Quit Claim Deed to the golf driving range, any gifting done during the marriage was with the knowledge of the Petitioner. (Feb 2, 2009, RP 51 L 25; 52 L 1-2) This is also shown by the fact there was no denial of her knowledge. Her silence speaks volumes and her protest of knowing of the recording of the Quit Claim Deed for the golf driving range falls flat.

When exercising its broad discretion, the trial court characterizes each asset as separate or community property. RCW 26.09.080; *Brewer v. Brewer*, 137 Wn. 2d at 766, *In re The Marriage of Hadley*, 88 Wn.2d at 656; *Baker v. Baker*, 80 Wn.2d at 745; *Blood v. Blood*, 69 Wn.2d at 682. The asset is separate property if acquired before marriage, acquired during marriage by

gift or inheritance; acquired during marriage with the traceable proceeds of separate property or in the case of earnings or accumulations, acquired during permanent separation. (RCW 26.16.010; RCW 26.16.020) The asset is community property if it is not separate property, which is characterized as of the date of its acquisition and its character does not change thereafter, subject to certain exceptions, regardless of whether the asset is improved, or its value enhanced, by property of a different character. (*Baker v. Baker* 80 Wn.2d 736, 745, 498 P.2d 315 (1972).

In re the *Marriage of Hurd* , 69 Wn. App. 38 holds that a spouse's use of his or her separate funds to purchase property in the names of both spouses, absent any other explanation, permits a presumption that the purchase or transaction was intended as a gift to the community. Here, Petitioner purchased a piece of land known and testified to be River Run Ranch. (Feb 2, 2009 RP132 L21-22) Respondent, because he had no interest in the property and because the parties had an agreement, signed a Quit Claim Deed to Petitioner, further showing the verbal agreement between them. (Feb 3, 2009 RP 25 L 14-25).

RCW 26.16.010 says that property and pecuniary rights owned by a spouse before marriage . . . and he or she may manage, lease, sell, convey, encumber or devise by will such property without his or her spouse joining in such management, alienation or encumbrance as fully and to the same extent or in the same manner as though he or she were unmarried. That is exactly what Respondent in this case has done. However, the trial court in this case, at the end of the trial, seemed to be punishing Respondent for the gifting of his separate property. Some of the property to which the court referred and distributed at the end of trial, had not been in the name of Respondent since 1994. (EX 3, QCD for Selah Property).

RCW 26.16.210 says in every case, where any question arises as to the good faith of any transaction between spouses, where a transaction between them directly . . . the burden of proof shall be upon the party asserting the good faith. Here, Respondent testified and the evidence shows each party kept separate bank accounts, separate checking and savings accounts and separate investment accounts. (See RP generally) Petitioner testified that she shared no bank account with Respondent, that she did not share in the purchase of any property with Respondent and she did

not monetarily assist in the improvements on any of the Respondent's separate property. (See RP generally). She testified that she 'contributed to the community', (Feb 2, 2009 RP 124 generally) an indistinguishable and vague statement put forth by Petitioner as a self-serving statement.

In a well-reasoned oral opinion, a trial court would fully set forth tenable grounds for dividing the parties' property in accordance with the parties' oral prenuptial agreement. Here, the court did not set forth the tenable grounds for its division of the parties' property, and did not address the issue of the oral prenuptial agreement. Instead, the court determined all property in the names of third parties belonged to Respondent and any property purchased during the marriage was given to Petitioner. (CP 61 & 62).

It is unclear what the court relied upon in its disposition of the property. It was clear from the record that the Respondent had been retired for a number of years. (Feb 2, 2009 RP 163 L 25) The court found the vast source of Respondent's assets came from his sale of his real estate business that he had in Packwood, and that predated his marriage, even predating his cohabitating with the

petitioner (Feb 3, 2009 RP102 20-23). There is no question there are in fact issues here of separate property. (Feb 3, 2009 RP102 23-25) Based upon the parties' agreement and expectations under that agreement, it is the Respondent's position the trial court's property distribution was an abuse of discretion.

Respondent argues the division of the property was prejudicial in that it constituted an imposition of a penalty against the Respondent for his transfers of separate property to his grandchildren, as gifts, or to other family members or to other corporations done during the marriage. The matter of fault is a proper one for inquiry when making a division of property, but this by itself does not require that a larger (or in this case, *all* the real estate) portion be awarded to the one not in fault, while nothing is given to the other party. *Baker v. Baker*, 80 Wn.2d at 745.

Finally, although no single factor must be given greater weight than any other factor as a matter of law, (*In re Kozen*, 103 Wn.2d 470, 478, 693 P.2d 97 cert. denied, 473 U.S. 906, 87 L. Ed. 2d 654. 105 S. Ct. 3530 (1985)) the economic circumstances of each spouse upon dissolution is of 'paramount concern'. *DeRuwe v. DeRuwe*, 72 Wn,2d at 408. Here, Respondent believes he was

being punished for transferring his separate property in the form of gifting to his children or to others. He has clearly been left with nothing while all the property purchased during the marriage was given to the Petitioner, along with an award for attorney fees and a judgment to compensate the Petitioner for her interest in the golf driving range.

**ISSUE FOUR: Did the trial court error in awarding reasonable attorney fees of \$7,500 to the wife.**

It is abuse of discretion for a court to award attorney fees under RCW 26.09.140 to a party who has the ability to pay. *In re Marriage of Foley*, 84 Wn. App. 839, 864, 930 P.2d 929 (1997); *Cleaver v. Cleaver*, 10 Wn. App. 14, 20, 516 P.2d 508 (1973). Here, the record reflects that Petitioner has worked continuously since 2003 (Feb 2, 2009 RP31, 7-8). She has been employed in the arena of real estate for 10 years. (Feb 2, 2009 RP35, 11-12). Petitioner has \$30,000 in stocks. (Feb 2, 2009 RP119, 3-4), a home worth \$115-125,000. (February 2, 2009 RP117, 12-21). A savings Account at Security State Bank with \$15,000 in it, an IRA worth the stated amount of \$2,000 (Feb 2, 2009 RP 101 L11) and a Savings account at Yakima Credit Union with \$3,000 in it (Feb 2, 2009 RP 101 L16) Further, Petitioner, in Exhibit C of the Findings of

Fact and Conclusions of Law stated she has a Security State Bank checking and Savings accounts, an IRA at Yakima Federal, and a Savings account at Yakima Credit union. (CP 61, Exhibit C). Even without knowing the amounts in each account, it can be said Petitioner has the ability to pay her own attorney fees and the costs associated with the dissolution action

The record shows the Respondent retired, having already made his money (Feb 3, 2009 RP 23, L 13-14). He testified that he sold his business, its building and retired. ( Feb 2, 2009 RP163, 3-4). He supports himself in his retirement by receiving funds from properties sold on Deeds of Trust. (Feb 2, 2009 RP163, 16-21). His only income is social security and \$250 a month for a rental, which was given to the Petitioner at the conclusion of the trial and of which she receives the monthly payment. (Feb 3, 2009 RP37, L 11-13).

Respondent does not have the ability to pay the fees and petitioner is not in need of assistance with her fees. It was error for the judge to order fees paid by Respondent to Petitioner.

Under RCW 26.09.140, the trial court must indicate on the record the method used to calculate the award of attorney fees. *In re Foley*, 84 Wn. App 839, 930 P.2d 929 (1997). The trial court here did not indicate on the record any method of calculation the award of fees. (Feb 3, 2009 RP111 at 15-16) Here, the court merely set the amount without further discussion.

Further, proof of fees incurred is necessary to support an award. *In re Marriage of Estes*, 84 Wn. App. 536, 929 P.2d 500 (1997); *in re Marriage of Knight* 75 Wn. App. 721, 880 P.2d 71 (1994), *review denied* 126 Wn. 2d 1011 (1995); *In re Marriage of Sanborn*, 55 Wn. App. 124, 130, 777 P.2d 4 (1989); *Abel v. Abel*, 47 Wn. 2d 816, 819, 289 P.2d 724 (1955). There was no proof of fees incurred presented to the trial court. The trial court merely came up with the number and it was said on the record (Feb 3, 2009 RP111 L15).

#### **E. ATTORNEY FEES**

Respondent Appellant is entitled to recover “out of pocket litigation expenses as part of the attorneys’ fee.” *United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d at 407. *See also Davis v. City and County of San Francisco*, 976 F.2d at

1556 (“[A]ttorneys’ fees awards can include reimbursement for out-of-pocket expenses including the travel, courier and copying costs that appellees’ attorneys incurred here.”); *Chalmers*, 796 F.2d at 1216 n.7 (explaining that “out of pocket expenses incurred by an attorney which would normally be charged to a fee paying client are recoverable as attorney’s fees”). Here, Respondent has paid copy and mailing costs, transcript costs and filing fees in excess of \$2,100.00 and \$6,500 in attorney fees to date.

This award should be considered in its entirety and not reduced. These costs and fees were reasonable to defend Respondent’s position. See *Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir. 1994) (discussing whether the expenses “were necessary and reasonable in this case”).

Respondent has been placed in a position which mandated he file an appeal with this court. That appeal has cost him the filing fee, costs for copies and service of documents on the other party and the court, and the attorney fees relating to this appeal. To date, this appeal has cost Respondent \$6,500 in attorney fees, \$2,100.00 in reimbursable expenses such as transcript costs, filing

fees and in copy costs. Respondent requests fees under RAP 18.1.

## **F. CONCLUSION**

Respondent seeks a determination there was an enforceable and valid verbal agreement between the parties, which was supported by their actions, that they would keep their property and accounts separate.

Respondent seeks the return of the title to his property namely; High Valley 10 (Mary Lane), High Valley 8 (Sherwood court), his interest in Lot 13 Eagle Peak, all of which the trial court acknowledged was purchased with separate funds.

Respondent seeks the return of the contract on the Alaskan property and any money received by Petitioner since she obtained the contract after the dissolution trial.

Respondent seeks the denial of the award of attorney fees to Petitioner as she clearly has the ability to pay those fees.

Respondent seeks the court to set aside the award of \$35,000 as an equalization of the property as all property was agreed to be kept separate. Further, the court recognized property

was purchased using separate funds of the Respondent Appellant from the sale of his business which predated the marriage.

Order the release of the Deed of Trust against the Wenas Property which Respondent Appellant was ordered to sign to secure the monetary award of \$35,000.

Respondent seeks attorney fees and costs for having to file this appeal.

July 9<sup>th</sup>, 2009

Respectfully submitted,

  
MARLENE K. WENGER  
Attorney for Appellant  
WSBA number 35478

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

TINA SCALF-FOSTER,

Respondent,

Case No.: 08-3-00011-9

vs

Court of Appeals #

JACKIE C. FOSTER,

Appellant.

Certificate of Service by Mail

I, MARLENE K. WENGER, Attorney for Appellant, declares as follows:

That on July 9, 2009, I personally mailed a copy of the Brief of Appellant in this case to  
ROGER MADISON, counsel for Respondent TINA SCALF-FOSTER at  
the following address:

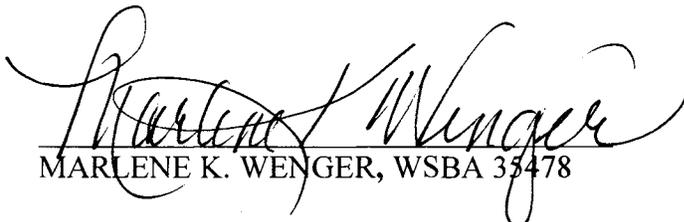
ROGER MADISON  
2401 Bristol court SW, Suite D-101  
Olympia, WA 98502

I also sent a copy via email on July 9, 2009, per a message left on Mr. Madison's voice mail.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this 9<sup>th</sup> day of July, 2009.

THE LAW OFFICE OF WENGER & ASSOCIATES, P.S.

  
MARLENE K. WENGER, WSBA 35478