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NO. 63304-0-1

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

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In re the Marriage of:

DALLENE N. BRACKEN,

Respondent,

and

JOHN L. BRACKEN,

Appellant.

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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REPLY BRIEF

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## **INTRODUCTION**

The trial court's award makes Dalleen an heir of the Bracken family, a status she did not enjoy during the marriage. The award utterly disregards the separate character of the majority of the parties' assets. Neither party has identified a single appellate decision, published or unpublished, in which the trial court so extensively invaded one spouse's separate property and John's counsel do not believe any such case exists. This Court should reverse.

## **REPLY TO RESTATEMENT OF THE CASE**

Dallene repeats her trial testimony that John "'sprung' [the prenuptial agreement] on her at the last minute," carrying on about how she was upset, scared, and overwhelmed. BR 8. The trial court rejected her testimony on this point. CP 209.

Dallene also falsely claims that there is "considerable evidence" that John purposefully spent less than 10% of the workweek on Blistex Bracken to avoid creating community property. BR 12. The testimony cited simply states that John worked 8-10 hours per week at Blistex Bracken. RP 520-21, 599. The trial court found that although this was more than 10% of John's workweek, he did not increase the value of his separate property. CP 208.

## ARGUMENT

### **A. Reply to summary of the argument. (BR 20-21).**

Although Dallene received the equivalent of 48.1% of John's separate property, she repeats her baseless assertion that John left the marriage with his "separate property relatively intact." BR 15-18, 20. She claims John has twice her income, but John has far less than Dallene after expenses, the bulk of which are obligations to Dallene and the children. BA 24; *infra* Argument § B 1.

Dallene's "silver spoon" comment betrays her bias. BA 21. Dallene reaped the benefits of John's family inheritance during their marriage, during which the parties spent \$2 million of John's separate property, in addition to all of the income produced by John's Blistex Bracken interests. BA 6-10. And despite her criticism, Dallene fought to continue getting a piece of John's family inheritance even in divorce, convincing the trial court to redistribute John's family inheritance. This Court should reverse.

### **B. It is inequitable to award Dallene 60% of the assets, where 83% of the assets are John's separate property.**

#### **1. The trial court effectively disregarded the amount of community property. (BA 27-28, BR 22-24).**

The trial court is required to consider the "nature and extent of the community property" (RCW 26.09.080), but estimated that

the parties' community assets were less than \$2 million net, when in fact they were worth far less – \$1,186,000. BA 27-28; CP 156, 200-02. The trial court awarded Dallene almost twice the value of the community property and burdened John with 98% of the community debt, without realizing that she was doing so. CP 209. Nor did the court realize that maintenance brings Dallene's award to over 60% of the total assets, community and separate, even though only 17% of the parties' total assets were community property. BA 28.

Dallene incorrectly claims that she received only 34% of the marital estate, leaving John with "twice the assets of" Dallene.<sup>1</sup> BR 21-22, 24. Dallene disingenuously omits the maintenance award, which is really a distribution of marital assets – John's GST.

The maintenance obligation must be included in the computation of John's share of the property division because it will be paid out of John's share. The value of John's interest in the GST is simply a calculation of the present value of a predicted future stream of income to John. RP 277-78; Ex 20. Thus, every

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<sup>1</sup> Dallene later repeats a similar refrain, arguing that the trial court awarded her "half the assets" it awarded John to "honor" John's separate property. BR 32. This argument again ignores that the mortgage and maintenance payments result in a 60/40 distribution in Dallene's favor. BA 21-23.

dollar paid in maintenance effectively reduces the value of John's separate estate by one dollar and transfers a dollar from John's side of the property ledger to Dallene's side. To ignore this is to ignore reality.

Future maintenance is normally not part of the property division because it equalizes the expected future earnings of the parties – the earnings are future, they are not part of the property division. But here the GST is not John's future earnings, it is an asset awarded to John and the maintenance must be netted against the rest of the award.

Dallene also asserts that the appellate courts "regularly" affirm asset distributions awarding the "disadvantaged spouse" the majority of the community property, "and in some circumstances some of the other spouse's significant separate property." BR 23. In what "circumstances"? The only circumstance here is that John had far more separate property than Dallene. This is a midterm marriage, Dallene is young, healthy, and employed, her earning potential is comparable to John's, and John pays her mortgage, maintenance, and all of the children's expenses. BA 24, 32, 37. None of the cases Dallene cites have similar "circumstances" (BR 23):

- ◆ In ***Marriage of Dewberry/George***, the wife received 82% of the total assets, although she earned 21 times more than the husband. The wife paid no maintenance, and the husband paid child support. Had the trial court treated John anywhere near like the wife was treated in ***Dewberry***, the asset distribution would be completely different. 115 Wn. App. 351, 357-58, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003).
  - ◆ In ***Marriage of Fiorito***, the court awarded the wife most of the community property and the car she drove, which was characterized as the husband's separate property. Unlike this case, the court awarded the husband the remainder of his "significant separate property." BR 23; 112 Wn. App. 657, 659-60, 668-69, 50 P.3d 298 (2002).
  - ◆ In ***Rehak v. Rehak***, the trial court awarded the wife 75% of the community property, awarding the husband the remaining 25% of the community property and all of his significant separate property. This is not comparable to awarding John so much debt that the result is a negative community property award, and still taking 48% of the his separate property. 1 Wn. App. 963, 465 P.2d 687 (1970), *overruled on other grounds*, ***Coggle v. Snow***, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).
2. **The trial court effectively disregarded the amount of John's separate property. (BA 29-30, BR 22-24, 26-27).**

Dallene ignores that separate property is as "sacred" as community property. ***Estate of Borghi***, 167 Wn.2d 480, 484, 219 P.3d 932 (2009); ***Marriage of Shui***, 132 Wn. App. 568, 584, 125 P.3d 180 (2005), *rev. denied*, 158 Wn.2d 1017 (2006); (quoted at

BA 29). Dallene relies on out-of-context quotations about separate property and misapplies them.

Dallene argues that the Court cannot “single out . . . the character of the property,” and give it “greater weight than other relevant factors . . . .” BR 22, citing *Marriage of Konzen*, 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). But the *Konzen* trial court substituted separate property for community property, awarding the wife a portion of the husband’s separate military retirement pay because it was a more liquid asset than the community property. *Konzen*, 103 Wn.2d at 472. *Konzen* is nothing like this case – the wife’s award was less than the value of the community property. Other cases citing *Konzen* are similar. *E.g.*, *Marriage of Griswold*, 112 Wn. App. 333, 348, 48 P.3d 1018 (2002), *rev. denied*, 148 Wn.2d 1023 (2003); *Marriage of Parks*, 58 Wn. App. 511, 514-15, 794 P.2d 59 (1990), *rev. denied*, 116 Wn.2d 1009 (1991).

Dallene leaps from *Konzen*’s substitution of a liquid separate asset for an illiquid community asset to the illogical conclusion that it is permissible to award her the entire community estate and 48% of John’s separate property. But separate property

is fundamentally different from community property – the Legislature has clearly distinguished between community and separate property in a number of ways:

- ◆ The spouse owning separate property can manage and sell it without the joinder or consent of the other spouse “to the same extent or in the same manner as though he or she were unmarried.” RCW 26.16.010.
- ◆ A spouse is free to devise separate property without regard to the wishes or interests of the other spouse, but may only devise half of the community property. RCW 11.02.070.
- ◆ Under intestate succession, a surviving spouse inherits all community property, but only inherits half of the separate property of the deceased spouse if there are living issue. RCW 11.04.015.

Dallene's argument would tear down these statutory walls.

Washington would be in a very small minority of states if it ignored or minimized the differences between community and separate property. The American Law Institute's *Principles of the Law of Family Dissolution* (2002) (“*ALI Principles*”) plainly distinguish between community and separate property “follow[ing] both the majority of American states and the predominant view of commentators.” *Id.* at § 4.03 comment a. The ALI concludes that a dissolution court should award a party his or her separate property unless misconduct requires otherwise:

The general rule is that separate property is assigned at divorce to its owner. This is true in both community-property

states, e.g., Ariz. Rev. Stat. Ann. § 25-318(A) (2000) ("the court shall assign each spouse's sole and separate property to such spouse") and in the common-law states (see the authorities collected in Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 27 FAM. L.Q. 515, 695 (1994)).

***ALI Principles*** at § 4.11, Reporter's Notes. Our Legislature has not prohibited an award of part of one spouse's separate property to the other spouse, but neither has it authorized the wholesale invasion of John's inherited separate property just to preserve Dallene's pre-dissolution lifestyle.

John's separate property flows from the Bracken family's careful stewardship of the Blistex Bracken interests, resulting from his grandfather's invention. John intends to preserve his legacy for his children and future Bracken generations. Yet the trial court's decision, awarding Dallene the equivalent of 48% of John's separate property, makes Dallene an heir even though she is no longer in the family. This is an improper redistribution of the Bracken family's wealth.

Dallene argues that the trial court can award one spouse's separate property to the other spouse, to ensure a just and equitable property distribution. BR 26-27. But this property distribution is neither just nor equitable in light of the amount and

character of the parties' total assets. BA 29-30. Again, the cases

Dallene cites are inapposite<sup>2</sup>:

- ◆ In ***Marriage of Irwin***, the court divided all assets, community and separate, approximately 50/50, following a 27-year marriage. The separate property at issue was worth \$250,000 and the parties' community assets were valued at \$10,695,650. Dividing the total assets 50/50, where 98% of the assets are community property, is not comparable to dividing the total assets 60/40 in Dallene's favor, where 83% of the assets are John's separate property. 64 Wn. App. 38, 42-43, 45, 822 P.2d 797, *rev. denied*, 19 Wn.2d 1009 (1992)).
  - ◆ In ***Ramsdell v. Ramsdell***, the court awarded the wife the husband's separate property "for the support and maintenance of herself and child." It appears that the separate property was the only asset, and there was no discussion of child support or maintenance. ***Ramsdell*** is inapposite – the parties have significant community property and John pays maintenance (from his separate property), child support, and nearly all of the children's expenses. 47 Wash. 444, 445-46, 92 P. 278 (1907).
3. **The trial court overvalued John's separate property. (BA 30-32, BR 24-25).**

The trial court grossly overvalued the GST, which accounts for 74% of John's separate property. BA 30-31. The trial court's valuation fails to account for the fact that John does not own the

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<sup>2</sup> Dallene also cites ***Marriage of Zahm*** for the basic proposition that the court may divide separate property to reach a just and equitable distribution. BR 27 (citing 91 Wn. App. 78, 86, 955 P.2d 412 (1998), *aff'd by* 138 Wn.2d 213 (1999)). Again, John does not disagree.

GST and is not its sole beneficiary, and does not have exclusive control over the GST. BA 31. The GST's value is based entirely on royalty income, but with decreasing royalties before trial, future income certainly is not guaranteed. BA 31. Further, John will have to pay the \$1.8 million maintenance award and the \$950,000 mortgage debt from his Blistex Bracken income, seriously reducing the potential net amount he might receive. BA 31-32.

Dallene's claim that substantial evidence support's the trial court's award misses the point. BR 24-25. John agrees that the court adopted Kevin Grambush's valuation. Grambush's valuation is flawed, so is not substantial evidence. BA 30-31.

**4. The trial court incorrectly distributed assets as if this were a long-term marriage. (BA 32, BR 29-30).**

Dallene does not disagree that the parties' marriage was a mid-range marriage under the categories developed by Judge Winsor in 1982 and restated by this Court as recently in 2008. BA 32 (citing *Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008)); Robert W. Winsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, WASHINGTON STATE BAR NEWS, 14-19 (Jan. 1982); RCW 26.09.090(1)(b). She instead asks this Court to

shorten its definition of a long-term marriage because marriages are shorter than they used to be. BR 29. That does not make it equitable to treat parties dissolving a shorter marriage as if they were dissolving a 25-plus-year marriage.

Just as she ignored the Court's logic in *Konzen*, Dallene ignores Judge Winsor's logic (Winsor, *id.* at 16):

In the traditional marriage relationship where one spouse devotes prime energies outside of the home earning money for the family and the other devotes prime energies raising children and maintaining a nurturing household, there is in a sense a contractual relationship entered into at the time of the marriage where the parties understand their respective primary obligations and undertake them willingly in the understanding that they both expect that the marriage is a long term (presumably life-time) commitment and that each will be protected and provided for by the other. When a traditional long marriage fails, however, one of the spouses usually is stranded in a situation where she (sometimes he) is very much behind the other in earning capacity. The judge should redress the balance.

*Accord, Marriage of Sheffer*, 60 Wn. App. 51, 57, 802 P.2d 817 (1990) (“ . . . Alfred's career . . . was facilitated by Beverly's caring for the home and family while forfeiting her own economic opportunities. . . . That trade-off, clearly agreed to by Alfred, now leaves Beverly economically disadvantaged as compared to Alfred”). Thus arises the expectation that when two parties “have toiled on together for upwards of a quarter of a century,” the

dissolution court will leave them in roughly equal financial positions. **Rockwell**, 141 Wn. App. at 243 (quoting **Sullivan v. Sullivan**, 52 Wash. 160, 164, 100 P. 321 (1909)).

This case is not the “traditional” situation giving rise to the notion that the parties should be placed in roughly equal financial circumstances. The parties did not toil together for 25-years to build the assets available for distribution. Dallene did not sacrifice so that John could build a career – Dallene developed her own career and her earning potential parallels John’s. John contributed to the community in large part with his family inheritance and by accruing debt. These facts do not warrant equalizing the parties’ financial circumstances.

Finally, Dallene incredibly suggests that the trial court did not treat the parties’ marriage as long-term. BR 30. The trial court stated “This is a long-term marriage.” CP 211. Although this Court acknowledged in **Rockwell** that in a long-term marriage the court generally places the parties in “roughly equal financial positions,” the Court also stated that the longer the marriage, the more likely it is that the court will make a disproportionate award of *community property*. 141 Wn. App. at 243. Dallene has not provided a single case (long-term marriage or otherwise) where the court has

awarded one spouse twice the value of the community property and a nearly half of the other spouse's separate property.

**5. The trial court misapplied the parties' post-dissolution standard of living. (BA 32-33, BR 27-29).**

Regardless of the trial court's rationale, Dallene cannot and does not deny that she cannot afford the family home the trial court awarded her. *Compare* BA 32-33 *with* BR 28. Dallene attempts to justify the award, arguing that it would be difficult for her son to move again and that she runs her business out of the home. BR 28-29. But when the parties purchased Dallene's home during their separation, they stipulated that the home would not be used as evidence of the "appropriate post marital standard of living." Ex 133. That is exactly what has happened. Neither party can afford Dallene's home, but John carries the entire burden.

**B. The maintenance is excessive.**

**1. The trial court grossly miscalculated John's ability to pay. (BA 33-35, BR 33-36).**

The trial court grossly overestimated John's ability to pay maintenance (RCW 26.09.090(1)(f)), failing to account for the \$8,475.50 per month John's GST pays to fulfill his obligation to purchase part of the GST interest. BA 33-34. No evidence

supports the trial court's theory that John could simply elect not to make this payment. BA 21-25, 34-35.

Accounting for John's monthly GST payment, John has only \$1,483.10<sup>3</sup> each month after his obligations to Dallene and the children. *Id.* Dallene has \$11,029.48 per month, 7.4 times more than John. *Id.* This is "outside the range of acceptable choices." ***Marriage of Littlefield***, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997), *superseded by statute on other grounds as stated in Marriage of Pennamen*, 125 Wn. App. 790, 803, 146 P.3d 466 (2006).

Dallene argues that "[b]ased on the evidence presented, the trial court could reasonably infer that" John's GST will no longer pay \$8,475.50 per month to fulfill his obligation to purchase part of the GST interest. BR 34. But Dallene does not point to any such evidence, instead citing only the absence of testimony that John "would have no control over the debt." *Id.* The absence of testimony contradicting the trial court's finding is not substantial evidence supporting the trial court's finding.

But even setting aside the GST payment for the moment, Dallene's income comparison ignores John's child-related

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<sup>3</sup> This number does not account for \$206,900 in community debt assigned to John. BA 25.

expenses and mortgage. BR 33-34. Dallene argues that John has \$24,458.60 “available income” after paying her maintenance and mortgage, compared to her \$10,029.48. BR 33. This is a false comparison. John pays Dallene’s mortgage so it is false to ignore his – \$4,000 per month rent. BA 24. Dallene is also relieved of significant child-related expenses because John pays \$9,500 each month for the children’s tuition and \$1,000 each month for child support. BA 24. Even setting aside the GST payment, John has \$9,958.60 and Dallene has \$11,029.48. *Id.*

Dallene asks the Court to disregard John’s tuition payments for the parties’ three children, arguing that tuition can be paid from the children’s UGM accounts and trust funds. BR 35-36. Although there are no limitations preventing the use of the children’s accounts for educational purposes, Dallene grossly understates John’s testimony, stating that John would “prefer[.]” not to use the children’s accounts. BR 35 (citing RP 451). John actually said that it is his “obligation” to pay for his children’s education, just as his family had paid for his. RP 451. Paying tuition from the children’s accounts could completely exhaust the accounts. *Id.* John wants these funds to be preserved to help his kids “start their life,” such as by providing a down payment on a house. *Id.*

And John's GST does not provide him with "additional funds," nor did the trial court so indicate. BR 35. John's GST income is included in his income calculation. CP 185, 191.

**2. The 20-year, \$1.8 million maintenance award is unparalleled in Washington. (BA 35-39, BR 36-37).**

As discussed at length in the opening brief, when a maintenance award exceeds ten years, it is usually because the husband received the lion's share of the assets – usually community property – and the wife cannot work due to a disability. BA 35-39 (citing *Marriage of Hadley*, 88 Wn.2d 649, 651-52, 565 P.2d 790 (1977); *Marriage of Morrow*, 53 Wn. App. 579, 581, 586-88, 770 P.2d 197 (1989); *Marriage of Tower*, 55 Wn. App. 697, 698-99, 701, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990)). In *Hadley*, the wife was "totally disabled" from multiple sclerosis. 88 Wn.2d at 652. There, as here, the husband's separate property far outstripped the parties' community assets. *Id.* The Supreme Court affirmed a property and maintenance award of 11% of the parties' total assets of \$9.4 million. *Id.* at 652.

In *Morrow*, this Court affirmed the trial court's \$2,200 per month lifetime maintenance award in a 23-year marriage, where the wife could not work due to a disability and the husband had

converted large amounts of community property for his separate use. 53 Wn. App. at 580-81, 589. And in **Tower**, this Court affirmed a permanent maintenance award in a 19-year marriage, where the wife had multiple sclerosis that impaired her activities and the husband received 63% of the property, which was all community. **Tower**, 55 Wn. App. at 698-99, 701.

Dallene responds that there is no magic “formula” for maintenance, relying chiefly on **Hadley**, **Morrow**, and **Tower**, *supra*, entirely ignoring John’s discussion of these cases in his opening brief. BR 36-37. The only case Dallene relies on that John did not already distinguish is **Sheffer**, in which the appellate court reversed a three-year maintenance award after a 30-year marriage.<sup>4</sup> **Sheffer**, 60 Wn. App. at 57. **Sheffer** is inapposite.

Dallene fails to respond to John’s basic premise – a high maintenance award like this one is usually awarded only where the wife is disabled from working and the husband receives a disproportionate property award, usually from community assets. BR 36-37. Dallene cites no case with a maintenance award like the one here under facts like these. *Id.*

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<sup>4</sup> When maintenance terminated, the husband’s income would have been over \$4,000/month, while the wife would have had only \$844/month. **Sheffer**, 60 Wn. App. at 57.

Finally, Dallene notes that John compares this matter only to published cases, which of course is all John is allowed to do. BR 36. Dallene seems to suggest that there are comparable unpublished maintenance awards, but we cannot find one.

**3. Contrary to Dallene's assertion, it is erroneous to simply ignore that John will pay maintenance from his family inheritance. (BR 37-39).**

As discussed above, this is not the typical situation in which the wife has forgone economic opportunities while supporting the husband's career, leaving the wife economically disadvantaged in a dissolution. BR 37-38. The sole reason that Dallene claims to be the "disadvantaged spouse" (BR 23) is that John is the one with a substantial inheritance. The maintenance award will not balance disparate earning capacities created during the marriage – it will shift John's family inheritance to Dallene, making her an heir when she is no longer in the family.

The 20-year maintenance term is in fact a disfavored perpetual lien on John's family inheritance. BA 37. Under the trial court's order, maintenance will terminate in August 2027, at which time John will be 69 and Dallene will be almost 65. CP 197. In other words, John will pay maintenance until Dallene reaches the

average retirement age of 65, even though he will be four years past the average retirement age.

Dallene attempts to justify her perpetual lien on John's family inheritance under ***Marriage of Bulicek***, 59 Wn. App. 630, 634, 800 P.2d 394 (1990). ***Bulicek*** is inapposite – maintenance terminated on retirement and was based on employment income, not future income from a separate property inheritance. *Id.* at 631-32.

Dallene quotes the trial court's observation that maintenance is always paid from separate property, *i.e.*, post-dissolution earnings. BR 38 (quoting CP 522). This again ignores the basic logic of Judge Winsor's guidelines – the court is trying to remedy inequalities arising during the marriage, not to make one ex-spouse a permanent heir of the other's family wealth. Invading John's family inheritance simply is not the same thing as requiring him to pay maintenance from post-dissolution employment income.<sup>5</sup>

Dallene fatuously claims that John could pay the maintenance award from "earned income." BR 38. The trial court found that John earns \$60,000 managing Blistex Bracken, and

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<sup>5</sup> This argument also misses the point made earlier in this brief that a proper maintenance award is based on post-dissolution earnings, while the GST is not earned income, but a stream of inherited income already counted in the property division.

John's expert estimated that he could earn \$50,000 working in real estate.<sup>6</sup> BA 38. His maximum after-tax earned income would be far less than John's \$120,000 annual maintenance obligation. Any maintenance award based on earning potential would be a fraction of the trial court's award.

**C. The prenuptial agreement is enforceable.**

**1. The prenuptial agreement made a fair provision for Dallene when the parties married. (BA 40-45, BR 39-45).**

The prenuptial agreement preserved the separate property character of separate funds contributed to a community asset, such as real property, in keeping with a long line of controlling authority holding that separate funds combined with community funds to purchase real property retain their separate character. BA 43-44 (citing *Marriage of Chumbley*, 150 Wn.2d 1, 8, 74 P.3d 129 (2003)). As such, the prenuptial agreement made a fair provision for Dallene when it was executed. *Marriage of Bernard*, 165 Wn.2d 895, 904, 204 P.3d 907 (2009); *Marriage of Matson*, 107 Wn.2d 479, 482-83, 730 P.2d 668 (1986).

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<sup>6</sup> Grambush's estimate that John could earn \$100,000 annually as a real estate broker is baseless – Grambush was unaware that John does not have a broker's license and has never worked as a broker. BA 38; RP 303.

Dallene argues that the agreement is substantively unfair because John limited his community labor “to prevent the creation of community property.” BR 43. Dallene does not cite to the “evidence” she refers to and there is none. *Id.* Rather, the evidence is that John earned community income for all but two years of the marriage. BA 11-12.

Dallene also argues that the prenuptial agreement is substantively unfair under the first prong of the *Matson* test, where the agreement dictates how separate and community property would be considered and distributed in the event of a dissolution.<sup>7</sup> BR 41-42. This Court rejected the very same argument in *Dewberry, supra*, in which the Court found an oral pre-nuptial agreement substantively fair even though the agreement completely repudiated the community property system by providing that each party’s earnings would be separate property and that in the event of dissolution, each party would receive their own separate property home. 115 Wn. App. at 355-56. Dallene’s present argument, made by the same trial and appellate counsel

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<sup>7</sup> Dallene also argues that the prenuptial agreement is substantively unfair because it prohibited an attorney fee award to either party. BR 42. This provision does not make the agreement unfair as a matter of law and could be severed in any event.

who prevailed in *Dewberry*, is hypocritical and inconsistent with *Dewberry*.

Finally, Dallene compares this case to a line of cases she categorizes as holding that the prenuptial agreements were unenforceable “because they allowed the husband to increase his disproportionately large separate estate at the expense of the community . . . .” BR 45. John exhausted the separate assets he brought into the marriage, along with the income from assets he inherited during the marriage. BA 13-17. And John’s community labor did not increase the value of his separate property. CP 208.

2. **Dallene now concedes that she knowingly signed the agreement under counsel’s advice – she should be held to her signed statements that she had full and fair disclosure. (BA 45-47, BR 45-47).**

The fiduciary duty that applies when parties enter a prenuptial agreement requires the parties to “exercise the highest degree of good faith, candor and sincerity in all matters bearing on the proposed agreement.” *Estate of Crawford*, 107 Wn.2d 493, 497, 730 P.2d 675 (1986). The trial court found that Dallene knowingly and intelligently signed the prenuptial agreement (CP 209), which provides that John had “fully disclosed the nature and extent of his . . . separate property,” and waives Dallene’s right to

challenge the prenuptial agreement on that ground. Ex 26 ¶ 11. Allowing Dallene to recant her statement that she had full and fair disclosure of John's separate property would be to allow her to breach her fiduciary duty. BA 46-47. Yet this is exactly what the trial court did. *Id.* This Court should reverse.

Dallene argues that the trial court did not believe John's testimony that he disclosed his assets and that the trial court found Dallene's testimony "more credible." BR 46. There is no finding and nothing in the trial court's memorandum decision indicating that the trial court doubted John's credibility in any regard. Rather the trial court's only comment on whom it believed is the court's statement that Dallene's testimony that the prenuptial agreement was sprung on her at the last minute was "not persuasive." CP 209. It is Dallene – not John – who should be doubted. Dallene signed the prenuptial agreement stating that she had full disclosure, yet blatantly denied disclosure at trial. *Compare* Ex 26 ¶ 11 with RP 215, 398. Both statements cannot be true.<sup>8</sup>

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<sup>8</sup> Dallene does not respond to John's argument that the trial court's award is improper under the prenuptial agreement. BA 47-48.

**D. The trial court erroneously required John to sign a Confession of Judgment for the mortgage obligation. (BA 48-49, BR 47-49).**

The Confession of Judgment is invalid on its face because John did not consent to it. BA 48 (citing *Pederson v. Potter*, 103 Wn. App. 62, 68, 11 P.3d 833 (2000), *rev. denied*, 143 Wn.2d 1006 (2001)). The Confession violated John's due process rights to notice and an opportunity to be heard.<sup>9</sup> *Id.*

Dallene's cut-and-paste quotation from the presentation hearing is misleading. BR 48. John's trial counsel opposed the Confession so long as John's obligation was owed to the mortgage company (RP 885 (underlined text omitted from BR 48)):

MS. WAHRENBARGER: I want it to be clear that he doesn't owe to both and I don't want it to show up on a credit report. What makes sense to me is if Ms. Bracken were to sell the residence so we are in the period of time where Mr. Bracken is, in fact, owing to Ms. Bracken and if he defaults on a payment to Ms. Bracken, then I think the confession of judgment would be a workable idea as a remedy.

On reconsideration, counsel opposed any confession of judgment. CP 442-45. The trial court nonetheless entered a Confession (drafted by Dallene's attorney) allowing entry of judgment against

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<sup>9</sup> John does not argue that due process was lacking at the trial court's hearing in which the parties discussed the Confession. BR 49. Rather, his point, which Dallene does not contest – is that he would be deprived of due process if Dallene enters the Confession in the future. BA 49.

John for any breach of his "mortgage obligations" (CP 430), which is contrary to the proposal by John's counsel.

**E. The Court should deny Dallene's fee request.**

Dallene does not argue that she has financial need – she simply argues that John should pay her attorney fees because he has more money than she does. BR 49-50. The trial court denied Dallene's fee request, concluding that she has the ability to pay and that John is in no better position to pay Dallene's fees than she is. CP 213. This Court should reject this frivolous argument.

**CONCLUSION**

This Court should reverse and remand (1) for an equitable distribution of assets and reduction or recalculation of maintenance; or (2) with instructions to enforce the prenuptial agreement. This Court should order the trial court to strike the Confession of Judgment. The Court should deny Dallene's fee request.

RESPECTFULLY SUBMITTED this 16 day of February, 2010.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 16 day of February, 2010, to the following counsel of record at the following addresses:

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