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COURT OF APPEALS  
DIVISION ONE

NOV 12 2010

COA No. 65328-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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DENISE BABCOCK,  
Respondent,

v.

ALLAN WAYNE BABCOCK,  
Appellant.

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COURT OF APPEALS  
DIVISION ONE

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ON APPEAL FROM SAN JUAN COUNTY SUPERIOR COURT  
IN THE STATE OF WASHINGTON

The Honorable Susan K. Cook

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APPELLANT'S OPENING BRIEF

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it characterized the proceeds from the sale of the Portage property as community property.
2. The trial court erred when it characterized the source of the funds to purchase the Orcas Island property as community property.
3. The trial court erred when it characterized the Orcas Island property as community property.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is the community entitled, in whole or in part, to an increase in the value of the husband's separately owned real property resulting from rezoning of the property? (Assignment of Error No. 1)
2. Does a brief comingling of substantial separate assets in a joint checking account in the process of the purchase of real property create a community property interest in the deposited assets and/or in the real property purchased with the same? (Assignment of Error No. 2)
3. Does real property purchased with separate assets of the husband become community property when title is taken in the name of the

husband and wife as tenants in common with right of survivorship when the husband's intention was to avoid probate in the event of his death and not to create a community interest in the property? (Assignment of Error No. 3)

**C. STATEMENT OF THE CASE**

The parties, Denise and Allan Wayne Babcock (Wayne) were married on June 21, 1995, and separated on September 28, 2007. RP (Vol. I) 34. At the time of the marriage, Denise was 19 and Wayne 43. Wayne was concerned with the impact that the marriage would have on the ownership of his property and began discussing the terms of and preparing a prenuptial agreement as soon as marriage was contemplated in August of 1994. RP (Vol. V) 83. Denise contends that she signed only at the last minute and under duress. RP (Vol. I) 27-28.

Wayne's holdings included substantial investments including real property in Portage, Michigan. CP 60. He had ongoing income from a prior divorce settlement. RP (Vol IV) 102-103. Neither party worked while married and residing in Michigan. RP (Vol. I) 30, 41, 43. The primary sources of

support were Wayne's payments from the divorce settlement, transfers from Wayne's investments, and gifts from Wayne's parents. RP (Vol. I) 43.

Denise and Wayne lived on the Portage property, and Wayne constructed an addition to the home on the property. RP (Vol. I) 37. Shortly after a rezoning of the property to commercial use, Wayne sold the property at a substantial profit. RP (Vol. I) 51-52. Wayne contends that the Portage property and the proceeds from its sale were his separate property. Denise argues that she had a right to an interest based upon improvements thereto during the marriage. The trial court determined that the Portage property was community property.

Immediately after the sale of the Portage property, the parties moved to Washington and purchased a home on Orcas Island. RP (Vol. I) 52-53. Wayne contends that the separate property proceeds from the sale of the Portage property, along with a substantial amount of Wayne's remaining investments, were used to purchase the home. RP (Vol. V) 14-15. On that basis, he argues that the Orcas Island property is his separate property.

Denise alleges that all or a substantial portion of the monies used to purchase the property was community in nature and/or that the monies were commingled and thus became community property before the purchase of the Orcas Island property was completed.

The deed conveying the Orcas property named the grantees as Wayne and Denise as joint tenants with right of survivorship. Denise alleges

that Wayne's intention was to create a community property interest. RP (Vol. I) 55. Wayne alleges that he did so solely for estate planning purposes. RP (Vol. IV) 108. The trial court determined that the Orcas property was community property.

**D. ARGUMENT**

1. Standard of Review

A trial court's characterization of property as community or separate is reviewed de novo. *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000).

2. The Portage property and any increase in its value or proceeds from its sale were the separate property of Wayne Babcock.

a. Property purchased prior to marriage is separate property.

Wayne Babcock owned real property in Portage, Michigan, subject to no lien or encumbrance, prior to the parties' marriage. RP (Vol I) 36, CP 60. It is presumptively his separate property. RCW 26.16.010, .020; *Brown v. Brown*, 100 Wn.2d 729, 737, 675 P.2d 1207 (1984).

b... A separate property presumption can only be overcome by agreement or operation of law established with clear and direct evidence.

Once established as separate property, that presumption remains unless and until “changed by agreement of the parties or operation of law.” *Strand v. Pekola*, 18 Wn.2d 164, k 166-167 (1943).

c. The other party is required to establish such a change with “direct and positive evidence.”

“[T]he right of the spouses in their separate property is as sacred as is the right in their community property, and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.”

*In re Dewey's Estate*, 13 Wn.2d 220, 226-27, 124 P.2d 805 (1942) (quoting *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911)).

Wayne’s separate property ownership of the Portage property is presumed and remains in effect unless and until Denise provides direct and positive evidence of a change by agreement or operation of law.

d. Increase in the value of separate real property solely attributable to recent rezoning does not create any community interest in the same.

The sale of the Portage property took place shortly after the property was rezoned to allow for commercial use. RP (Vol. I) 51-52. Denise testified at trial as follows:

“(S)ometime the year before we sold it it was rezoned commercial. And so the value had gone up and people – some potential buyers approached and made an offer. And I think

there were actually two offers. And eventually we accepted an offer. I think it was \$150,000.” Id.

It is clear that the increase in value was due to the rezoning of the property and not due to the construction done while the parties resided there.

Under such circumstances, the increase in the value of the property retained the nature of the property itself and was Wayne’s separate property.

Accordingly, we hold that any increase in the value of separate property is presumed to be separate property. This presumption may be rebutted by direct and positive evidence that the increase is attributable to community funds or labors. This rule entitles each spouse to the increase in value during the marriage of his or her separately owned property, except to the extent to which the other spouse can show that the increase was attributable to community contributions. (Citation omitted.)

*Marriage of Elam* 97 Wn.2d 811, 650 P.2d 213 (1982).

The increase in value of the Portage property was Wayne’s separate property unless Denise was able to establish otherwise. Instead, she testified clearly and directly that the increase in value was due to an external event, the rezoning of the property. The increase in the value of the property was Wayne’s separate property.

- e. Proceeds from the sale of separate property retain the separate property character of the property sold.

Separate property continues to be separate property through all of its changes and transitions so long as it can be clearly traced and identified, and its rents, issues, and profits likewise are and continue to be separate property. (Citations omitted.)

*In Re Witte's Estate* 21 Wn.2d 112, 125 (1944). Upon the sale of the Portage property, the proceeds of the sale became the separate property of Wayne Babcock.

3. The Orcas Property was the separate property of Wayne Babcock and continued to be his separate property until the time of trial.
  - a. Property purchased with separate funds remains the separate property of the purchaser.

Property acquired during marriage has the same character as the funds used to purchase it. *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999). The question of the characterization of the Orcas property begins with an analysis of the source of the funds used to purchase the same.

This can be established in two ways. First, it can be shown that no other source of funds for the purchase existed. Denise had no significant assets at the time of marriage. CP 60. Neither party had earned income between the date of marriage and the date of the purchase of the Orcas property. RP (Vol. IV) 129-130, RP (Vol. I) 41-42. There is no evidence of any community property resource for the purchase of the Orcas property.

Second, Wayne can establish that he had sufficient separate property assets for the purchase and that he used them for that purpose. The Portage property was sold for \$150,000 in August of 1997. CP 2, RP (Vol. I) 36. The parties moved to Washington at or about the same time. RP (Vol. I) 52. The Orcas property was purchased in September. CP 2. The time between the sale of one and the purchase of the other was less than sixty days.

At the same time, Wayne liquidated nearly all of his other separate property assets for purposes of purchasing the Orcas property. RP (Vol. VI) 14-15. There was no evidence presented contrary to the position that Wayne's investments as identified in the Agreement in Contemplation of Marriage (CP 60) were owned at the time of the marriage and thus clearly his separate property. The total value of the liquid assets available to Wayne at the time (1995) approached \$200,000. There is no evidence of any action on his part to change that characterization prior to the transfer for use to purchase the Orcas property. Those monies were Wayne's separate property.

Wayne testified that his separate property investments and the proceeds from the sale of the Portage property were transferred into the joint checking account solely for purposes of purchasing the Orcas property. RP (Vol. VI) 13-14. The total available to him was approximately \$350,000. The purchase price of the Orcas property was only \$290,000. RP (Vol. IV)

113. Clearly, Wayne had sufficient separate property to purchase the Orcas property.

Finally, given the authority set forth above, the burden was on Denise to establish (1) that the monies from Wayne's investments were community property, (2) that the monies from the sale of the Portage property were community property, and/or (3) that the monies used to purchase the Orcas property were from a different source. None of these were established.

It is uncontested that there was no earned income from either party during the first two years of their marriage while they lived in the Portage home. RP (Vol. I) 30-31, 41-42, RP (Vol. IV) 129-130. The parties' living expenses were paid from Wayne's income from his prior divorce, from contributions from Wayne's investments, and/or from gifts from Wayne's parents. RP (Vol. I) 42-43, RP (Vol. IV) 125. The gifts from Wayne's parents were approximately \$20,000 per year. RP (Vol. I) 43-44, RP (Vol. IV) 127-128.

The fact that the property was paid for in full is conceded. RP (Vol. I) 52. The sum of \$290,000 was required. There was no identified source of community property income sufficient to amass any significant savings prior to the purchase of the Orcas property nor was there any evidence of any such source.

In short, Wayne has shown that he had sufficient separate property resources and that he used them to buy the Orcas property. Denise failed to establish that the necessary community property assets existed.

- b. Substantial separate property does not lose its separate property character if it is briefly comingled with minimal community assets in anticipation of a purchase.

(W)hen the community property is inconsiderable in comparison with the separate property, the mass remains separate property. (Citation omitted.)

*In re Witte's Estate* 21 Wn.2d 112, 126 (1944) .

The moneys used for the purchase of the Orcas property were transferred from Wayne's accounts in Michigan to his separate accounts in Washington. RP (Vol. IV) 107-108. A portion of the same (\$50,000) was placed in the parties' joint checking account, and a check was then written for the down payment. CP 4. Note that the payment is written on a counter check. Id. The account had to be a new account.

The money could not have been in the account for a long period. Wayne and Denise had only been living on Orcas for a few weeks when the house was purchased. The purchase was finalized with a cashier's check from Wayne. RP (Vol. IV) 108. No evidence was submitted to suggest that any substantial sum of community money was in the joint account at the time.

The presumption is that if there are both separate and community funds and there are sufficient separate funds from which the payments can be made, then the payments will be presumed made from such separate funds.... (T)he principle also logically

applies when separate and community funds are deposited into the same account.

*Marriage of Person-Maines* 70 Wn. App. 860, 855 P.2d 1210 (1993).

Given the fact that \$240,000 of Wayne's separate property was paid to complete the purchase of the Orcas property, the processing of the down payment of \$50,000 through the parties joint checking account does not overcome the continuing separate property presumption. This is particularly true where that \$50,000 had only recently been amassed from the sale of the Portage property and the liquidation of the other separate assets and was only briefly in the joint account.

- c. Taking title to real property, purchased with separate property funds, as tenants in common did not transmute the property into community property where the intent of the donor was otherwise and where there is a reasonable alternative explanation for the decision.

The 2009 ruling in the *Estate of Borghi* case makes it abundantly clear that the fact that title to the Orcas property was transferred from the seller to both parties as joint tenants with right of survivorship has no impact whatsoever absent clear and convincing evidence of an intent to create a community property interest.

We have consistently refused to recognize any presumption arising from placing legal title in both spouses' names and instead adhered to the principle that the name on a deed or title does not

determine the separate or community character of the property, or even provide much evidence. (Citation omitted.)

*In re Estate of Borghi*, No. 80925-9 (2009)

Moreover, because the property at issue is real property, an acknowledged writing evidencing Jeanette Borghi's intent to transfer her property to the community was required, and no such writing is in evidence. *fn*

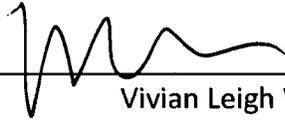
Id. Wayne Babcock testified that such was not his intention. RP (Vol. IV) 108-109. As the *Borghi* court stated, “(t)here are many reasons it may make good business sense for spouses to create joint title that have nothing to do with any intent to create community property.” (Citation omitted.) Such was the case here.

**E. CONCLUSION**

Wayne Babcock owned substantial assets when he met and married Denise Babcock. It was his intention at all times to retain the separate character of that property except insofar as his periodic, generous, and voluntary contributions to the living expenses of the community were concerned. The most significant of those assets, the one for which he liquidated most of what he owned at the time, was the Orcas property. The presumption that the property was and remained separate in nature has not been overcome by Denise Babcock. The lower court erred in finding that the Orcas property was community property.

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Respectfully submitted this 9<sup>th</sup> day of November 2010

A handwritten signature in black ink, consisting of a series of connected, wavy lines that form a stylized, somewhat abstract representation of the name.

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