69747-1

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NO. 69747-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ANH-THU THI VU,

Appellant

v.

VINH QUOC DANG

Respondent

APPEAL FROM THE
KING COUNTY SUPERIOR COURT
(The Honorable Judge John Erlick)

VINH QUOC DANG RESPONSE BRIEF

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I. INTRODUCTION

This case involves a short term marriage of few issues. The parties stipulated during trial to the entry of mutual restraining orders. (RP 473). The parties stipulated during trial to enforcement of a prenuptial agreement to govern the division of assets and liabilities. (RP 390-391)

The only issues decided by the trial court were 1) the date of the parties separation, 2) whether there was a need and ability to pay spousal maintenance, 3) whether there was a need and ability to pay attorney's fees, 4) reimbursements to the wife for various costs she incurred personally during her occupation of husband's house and 5) whether the wife was intransigent in making various misrepresentations to the court regarding her available assets before and during trial.

Of the eleven assignments of error, the court made decisions regarding only five issues presented by the appellant. The balance of issues were decided on the open record by stipulation (whether there should be a restraining order, whether the prenuptial should be enforced as to division of assets and liabilities) or were not raised by the appellant below (adequacy of service, 90 day wait between service and decree, judicial bias). The appellant has made multiple allegations in her briefing which are not contained anywhere in the record or in the court proceeding. The court should impose sanctions against the appellant for improperly asserting allegations which are not contained in the record.

II. RESTATEMENT OF ISSUES

1) Whether service was proper when the wife was personally served at home and she failed to ever contest the issue at or before trial?

2) Whether the date of separation was properly at the time the respondent stopped sleeping in the home, and told appellant he wanted a divorce even though he returned to the home at times during the day to care for the house and yard?

3) Whether the wife cites any basis to set aside her stipulation to enforce the prenuptial agreement as to the division of assets and liabilities, made knowingly with the advice of counsel and the assistance of an interpreter in open court, on the record?

4) Whether the wife demonstrated any need for spousal maintenance given the short duration of the marriage and that she was able to still save money and meet reasonable living expenses as established during the marriage with the same job she held before she was married?

5) Whether the wife was properly denied personal living expenses when she was denied spousal maintenance?

6) Whether it was proper for the court to award husband attorney's fees for wife's intransigence where she misrepresented significant savings she accumulated during marriage which required husband to spend two court days documenting the monies she removed from bank accounts and reduced to cashier's checks at separation?

7) Whether fees are proper on appeal pursuant to RAP 18.9?

III. RESTATEMENT OF THE CASE

This is a dissolution of marriage case. The parties married in September, 2006, and separated in April, 2011 when Mr. Dang began sleeping away from the home. (RP 85:3, RP 284:19-20). The husband, Mr. Dang [hereafter Dang] filed for divorce November 10, 2011. (CP 1). Dang is a traffic engineer working for the Washington State Department of Transportation. (RP 252:12-14) The wife, Ms. Vu [hereafter Vu] works in customer service for the Social Security Administration. (RP 48) Although Vietnamese is her first language, she does not use a Vietnamese interpreter at work for use with her customers. (RP 154: 1-25; 211-212). Both parties are originally from Vietnam. (RP 43) Both parties obtained college degrees from American Universities. (RP 112:3-13, 212:17-19). Both parties came to the United States through a refugee program in 1975. (RP 43, 122-123) They met through a common friend who scheduled a reunion of the students who had previously attended Paris College in Dallas, Texas. (RP44:7-8). The husband was 55 years old at the time of trial. (RP 42:15) He has an adult son from a previous relationship who attends medical school in Australia. (RP 110)

The husband proposed that the parties enter a prenuptial agreement prior to marriage. (RP 47:20-21) At that time, the husband was still assisting his son through college and he didn't want to worry about

accounting to his wife for money he was paying to help his son through college. (RP 47: 22 – RP48:1-3).

The parties lived in different states at the time they became affianced. (RP 44) They did not reside together prior to marriage. Dang lived in Washington State. (RP 44:14) Vu lived in the state of California. (RP 44:11) Dang engaged a California attorney to assist him in preparing the prenuptial agreement. (RP 48:21-25). When faced with the option of a Washington or California prenuptial agreement, he sought to make access to counsel easier for Vu, who resided in California. (RP 49:9-11) Vu hired a second attorney to represent her (RP 50: 1-14, Exhibit 1.) The parties discussed between themselves some of the provisions of the prenuptial agreement prior to execution. (RP 56:7-25, RP 57: 1-11, Ex. 14). Both parties signed the prenuptial agreement and both their respective counsel signed the prenuptial agreement indicating that they had reviewed the agreement with their respective clients. (RP 61: 10).

Within the agreement, both parties listed their respective separate assets, including real estate, bank accounts, investment accounts and retirement as exhibit attachments. (RP 51, Ex 1: Exhibits A & B) The agreement provided that each party would keep their paychecks as separate property, but that they would create a combined community account into which they would deposit money for community spending. (RP 51, Ex 1: 4, paragraph 4.1) During the marriage, the parties created a joint account where they deposited monthly an equal sum of money for

community savings and spending. (RP 100-103). Because the parties were residing in Dang's home, he paid all the regular home maintenance expenses, including any debts against the home, repair of the home or upkeep from his personal savings. (RP 150, EX 49, 199, 420:15-17). The parties used the joint account where they were both depositing a portion of their income for utilities and for food. (RP 97: 6-10, RP 276: 17-21, Ex. 34, 35, 36, 37) They saved jointly approximately $18,000.00 in that account during the marriage, which the court divided evenly on divorce. (CP 21).

Because the prenuptial agreement allowed each party to keep their own pay check, Vu was able to accumulate roughly $90,000.00 in savings during the marriage, in addition to putting money into a deferred compensation account, as well as into FERS, a defined benefit account. (RP 379-382, 384-385). Her consolidated accounts just after filing without retirement totaled more than $160,000.00 which she reduced to cashier's checks. (RP 379-382, Ex 39: 79-81). For the temporary orders hearing, she failed to disclose these cashier's checks as "cash on hand" or other liquid asset. (EX 48: 3) When this was later brought to the court's attention, she remained vague about how much money she had actually put into cashier's checks. (RP 314-315).

The husband had a defined benefit account through his employment with the State of Washington. (RP 115-116, Ex 10) He accumulated no additional savings during marriage, and in fact depleted

some of his previous separate savings between the date of marriage and the date of separation, as well as incurring debt against his separate property home (RP 91-93). Additionally, he did reduce some previously owed family debt.

Mr. Dang attempted to engage in a collaborative dissolution of marriage. (RP 170). Roughly four months after broaching the subject of divorce, he sought to file the dissolution action pro se. (CP 1)

He arranged to have his brother and sister give the divorce paperwork to his wife while she was at the residence. (RP 170, CP 61-62). After Vu was served with the paperwork, she went out to hire an attorney and made accusations against him and obtained, without notice to him, or to the attorney who had written a letter regarding collaborative divorce, an ex parte restraining order preventing him from returning home. (RP 170, CP 63-66) He was shocked by her accusations which he asserted were false and made to retaliate against him for filing for divorce. (RP 170)

The parties agreed to mutual restraining orders during the dissolution of marriage and post dissolution. (RP 173) The parties agreed to enforce the prenuptial agreement as to division of assets and liabilities. (RP 390-391)

IV. RESPONSIVE ARGUMENT

A. The appellant bears the burden of proving that findings are not supported by substantial evidence, and that the court abused its discretion in applying the law.

The appellant bears the burden of proving any error in an action to overturn trial court decisions made pursuant to a dissolution of marriage. The court is to view the evidence in the light most favorable to the prevailing party on matters of witness credibility and conflicting testimony. *Hegwine v. Longview Fibre Co.,* 132 Wn. App. 546, 556 (2007). Findings made by the court to which error is assigned are reviewed only to determine if the findings are supported by substantial evidence. *Id.* at 555-556. Arguments that are not supported by pertinent authority, references to the record, or meaningful analysis should not be considered. RAP 10.3(a); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801 (1992) (arguments not supported by authority); *State v. Elliott*, 114 Wn. 2d 6, 15 (1990) (insufficient argument); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345 (1989) (issues unsupported by adequate argument or authority); *State v. Camarillo*, 54 Wn.App. 821, 829 (1989) (no references to the record).

Distributions of property are seldom changed on appeal, and the appellant bears the heavy burden of proving an abuse of discretion by the trial court. *In re Marriage of Landry*, 105 Wash.2d 807, 809-810 (1985);. The trial court is in the best position to determine what is fair and equitable and has broad discretion in distributing property in dissolution proceedings. *In re Marriage of Brewer,* 137 Wn.2d 756, 769 (1999). The trial court may consider the property division when determining maintenance, and may consider maintenance in making an equitable

division of the property. *In re Marriage of Estes*, 84 Wn.App. 586, 593 (1997). The spouse alleging error bears the burden of showing an abuse of discretion on the part of the trial court. *In re Marriage of Sheffer*, 60 Wn. App. 51, 56 (1990).

1) Service of process was proper when Ms. Vu was handed copies of the Summons and Petition at her residence by a person of suitable age, not a party- the affirmative defense of insufficient service was waived when it was not challenged below.

Service of process in this case was made to Ms. Vu personally at her residence. (CP 61-62) She never disputed service of process and in fact, responded to the petition. (CP 5-7) RCW 4.28.080 states:

> § 4.28.080. Summons, how served
>
> Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:
>
> ***
>
> (15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

In this matter Ms. Vu was handed summons and petition for dissolution of marriage personally where she then resided. (CP 61-62) She admits this in her argument and cites to a case wherein the issue was that the defendant was not served at her residence, which is defined by case law as the "center of domestic activity." *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 236 P.3d 986, 2010 Wash. App. LEXIS 1792 (Wash. Ct. App. 2010). Ms. Vu never alleges a different residence or

different center of domestic activity. Ms. Vu makes numerous other allegations that are not supported by the record, nor relevant to the issue of service of process. It is difficult to glean from what Ms. Vu does assert, her specific objection to service.

In certain circumstances, the affirmative defense of insufficient service of process may be waived as a matter of law. The waiver can occur in two ways: (1) "the defendant's assertion of the defense is inconsistent with the defendant's previous behavior" or (2) "the defendant's counsel has been dilatory in asserting the defense." *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). *Blankenship v. Kaldor*, 114 Wn. App. 312, 319 (2002). Although in this case, service was proper, and Vu fails to outline or articulate in what way she was deprived of sufficiency of process, she has most certainly waived the defense by her conduct.

After being served, Vu immediately secured an attorney, and filed a motion for a temporary restraining order. (CP 48) Vu then filed a response to the petition. (CP 5-7) She never pursued the affirmative defense of lack of process during the course of the case, she engaged in discovery during the case, responded to a motion for summary judgment and additionally went through trial without ever asserting lack of process as an affirmative defense. Her assertion of such a defense here is frivolous and completely lacks merit.

2. <u>There was no evidence of bias by the Court against Ms. Vu, there was never any motion asking Judge Erlick to recuse himself due to bias, and moreover, the Court conducted a fair and impartial trial.</u>

At no time prior to, or during the trial, did Ms. Vu ever assert that the Court was in any way biased against her. Having failed to raise the issue below, she should be held to have waived it on appeal. *Marriage of Wallace*, 111 Wn.App. 697 (2002). A party may not speculate upon what rulings the court will make on propositions involved in the case and, if the rulings do not happen to be in the party's favor, then for the first time raise the issue on appeal. *In re Welfare of Carpenter*, 21 Wn. App. 814, 820, 587 P.2d 588 (1978).

Additionally, there is no evidence in the record that Judge Erlick's conduct was biased or appeared unfair towards Ms. Vu. "To prevail under the appearance of fairness doctrine, the claimant must provide some evidence of the judge's . . . actual or potential bias[,]" *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999); prejudice is not presumed, *State v. Dominguez*, 81 Wn. App. 325, 328-30, 914 P.2d 141 (1996). "The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial." *Dominguez*, 81 Wn. App. at 330. In addition, the court is to consider allegedly improper or biased comments in context. *See Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 158, 19 P.3d 453 (2001); *In re Dependency of O.J.*, 88 Wn. App. 690, 697, 947 P.2d 252 (1997), *review denied,* 135 Wn.2d 1002, 959 P.2d 126 (1998).

Throughout the several days of trial, Judge Erlick made multiple accommodations to Ms. Vu regarding her poor health, which was actually

rooted in anxiety. This anxiety seemed to have developed after the divorce was filed. (CP 339-343) The court adjourned on the third day of trial completely, even though the court's trial calendar was busy, giving Ms. Vu a continuance for several weeks to allow her to seek treatment for having panicked during direct examination. (RP 235). The court allowed Ms. Vu to take frequent breaks based upon her counsel's representation that this would assist Ms. Vu in tolerating the trial days. (RP 249) The court allowed Ms. Vu to testify from counsel table during cross examination, rather than sitting in the witness stand. (RP 269). Although the court did want the case to progress, Judge Erlick encouraged both sides equally to move their cases along, not just Ms. Vu. (RP 158, RP 291). It should be noted that the case had already been pending for ten months by the time the actual day of trial arrived.

In fact, there is no evidence in the record or the file, nor in any post trial motions, as to any letters drafted by Ms. Vu to the Chief Civil Judge, or from the Chief Civil Judge to Judge Erlick commenting on this case. If such letters existed, they were not shared with Mr. Dang. There is simply no evidence in the record of any such letters. However, even if such correspondence did occur, Ms. Vu herself cannot create a basis for bias in a judge once she has accepted that judge and once he has made a decision in the case. In *Mayberry v. Pennsylvania*, 400 U.S. 455, 463, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971), the United States Supreme Court addressed the problem presented by the continued participation of a judge who feels

he has been attacked. The court observed, "[W]e do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case." 400 U.S. at 463-64. There was no evidence presented during the trial that the court had felt any personal sting or attack by Ms. Vu and no motions were brought by Ms. Vu to request that the court recuse itself. In fact, there is no evidence that the Judge received notice of any letters from another judge regarding Ms. Vu's complaint.

Ms. Vu complains that she was asked to vacate Mr. Dang's home before she wanted to. Ms. Vu requested that she be allowed sixty days before vacating the home. (RP 232-233) Mr. Dang requested that she vacate within thirty days. (RP 231-232) The court gave Ms. Vu forty-five days to vacate the home, allowing Ms. Vu to remain during Thanksgiving, but, giving Mr. Dang possession of his home for Christmas. (RP 231-233) There is no appearance of unfairness in such a ruling. Ms. Vu complains that when making its final ruling, the court made comments that she was residing in Mr. Dang's home without paying rent, but this was a true fact. (RP 228-229) Ms. Vu states that the prenuptial agreement did not provide that she should pay rent. But the prenuptial agreement states that neither would make a claim to the other's separate property- and she violated that agreement by making a possessory claim to Mr. Dang's separate property during the pendency of the case. (Ex. 1, Page 1, Recitals, Section G)

Additionally, Ms. Vu complains that Judge Erlich should not have had her attorney bring her to her the emergency room and should have called 911 on the day Ms. Vu had an anxiety attack. But the representation by Ms. Vu in court on that day was that *Ms. Vu's doctor directed Ms. Friedrich* to bring Ms. Vu to the emergency room. (RP 224) Judge Erlich was very responsive to this request, immediately adjourning court to accommodate Ms. Vu's request. (RP 224)

It is impossible for Judge Erlick to have had any personal bias against Ms. Vu in entering an order asking her to vacate Mr. Dang's separate property home given that her alleged complaint about the court occurred in response to this ruling.

Ms. Vu misstates the court's ruling regarding testimony about her health. Ms. Vu was allowed to testify about her health, but, she was not allowed of offer a professional or expert medical opinion about the cause of her health concerns, other than her own opinion. (RP 13-16). The court also made this decision prior to any written complaint by Ms. Vu, assuming such complaint was made after the order restoring possession of Mr. Dang's home to him was made. (RP 13-16) Ms. Vu offers no evidence in this appeal or below of personal bias by the Court.

3. There was no error committed by the court regarding the enforceability of the prenuptial agreement because Ms. Vu ultimately stipulated to the enforceability of the prenuptial agreement.

A. *The court did not rule on the enforceability of the prenuptial agreement- Vu and Dang stipulated that it was enforceable.*

The court did not make a reviewable decision regarding enforcement of the prenuptial agreement. (RP 389) Ms. Vu agreed to enforce the prenuptial agreement when she realized that the large sums of money she had received would be defined as community property and could be divided in the absence of the prenuptial agreement. (RP 389-391) CR 2A states:

> Rule 2A. Stipulations
>
> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

The purpose of allowing counsel to make stipulations in open court is to assist in narrowing and streamlining the issues in dispute. The function of a trial court is to ascertain that the parties and counsel understand the stipulation and to implement that agreement. *Baird v. Baird*, 6 Wn. App. 587, 494 P.2d 1387 (1972). The purpose of this rule is to avoid disputes and to give finality and certainty to settlements and compromises, if they are made. *Eddleman v. McGhan*, 45 Wn.2d 430, 275 P.2d 729 (1954). Oral stipulation made and assented to in open court and entered in the court minutes is binding upon the parties and the court. *Cook v. Vennigerholz*, 44 Wn.2d 612, 269 P.2d 824 (1954).

Ms. Vu was asked in open court whether she understood the requests she was making at trial as opposed to the property she had

already received into her possession to that point. (RP 389) The court questioned her and her attorney on the record in open court to outline her understanding regarding the terms of the prenuptial agreement and whether she was agreeable to implementing those terms. (RP 389-391 EX 39, EX 1). At no time has she ever presented evidence that she did not understand the nature of the agreement she made in open court. She had the benefit of both an attorney and a Vietnamese interpreter to assist her in court. (RP 387). She alleges in her appellate brief "At the same time [during trial] my attorney did not advocate for me very well. She also intimidated and threatened me. I just said yes to everything my attorney at the judge asked." (Appeal, p. 19).It is clear that even on appeal, Ms. Vu realizes that she in fact agreed to the terms of the prenuptial agreement in court. Mr. Dang was not responsible for Ms. Vu's decisions. The judge was not responsible for Ms. Vu's decisions. Neither the judge, Mr. Dang, nor Ms. Vu's attorney could possibly differentiate what Ms. Vu wanted to do from what she did if she was sitting there indicating her agreement.

Ms. Vu had engaged in several days of trial seeing the evidence available to her, before making her decision. (RP 307-313 Exhibit 39, page 81, RP 378-385,). At no time did she indicate that her attorney was abusing her or that she did not agree with the case she herself was presenting (RP 387-390). There is no evidence that she had conflict with her attorney during the trial nor does she cite any basis to vacate her stipulation, which was assented to by her in open court. (RP 391) There

is simply no decision made by the trial court regarding the prenuptial agreement that is before the court of appeals to review. The decisions made were by Ms. Vu and they were the most profitable decisions she could make under the state of the law and the circumstances.

B. *It would have been unfair and inequitable to divide Mr. Dang's lifetime accumulations with Ms. Vu after a four year marriage, where both parties worked.*

Ms. Vu and Mr. Dang both married late in life. Mr. Dang was 51 years old on the date of marriage and 55 years old as of the date of divorce. Mr. Dang has an adult child from a previous relationship who was attending medical school. (RP 110) On the date of marriage, Mr. Dang owned two houses, two vacant lots, ½ of a personal airplane worth roughly $22,000.00, a 2004 Ford Ranger pickup truck, some savings and some retirement. (Ex. 1) He also owed his family debt of roughly $180,000. By divorce, all his property holdings were the same, except the real estate had significantly depreciated in value and his savings decreased. Additionally, he had accumulated some PERS 2 retirement and he reduced some of the debt to his family, but, he had increased debt on one of the houses. (CP175-176)

On marriage, Ms. Vu had no real property, she held retirement accounts in a Thrift Savings Plan of $32,414.00, a FERS account, a 2000 Honda Acura, and she had additional saving of roughly $71,000.00. (Ex. 1, Ex 42) Ms. Vu claimed she was 45 years old at the time of divorce. By

the time of separation of the parties, she had increased her savings to $165,000.00, her Thrift Savings Plan had increased to$101,979.00, and she had increased FERS. She had the same Honda Acura. (Ex. 1, Ex 42). Ms Vu had no debt. Ms. Vu has no children. Ms. Vu held essentially the same job for the Social Security Administration that she had when she married. (RP 212) She did not forgo any career opportunities while married. She was embroiled in litigation against her previous supervisor at the Social Security Administration in California, so, her job prospects improved by moving to Washington. (RP 252)

Ms. Vu's proposal to the court of appeals that all of Mr. Dang's separate property be divided up with her based upon four years of marriage is neither a fair nor equitable proposal, even if the court had made a decision subject to review. In fact, she makes this argument for the first time on appeal, as she did not make this request in the court below. (RP 299-304)

RCW 26.09.080 sets forth relevant factors to be considered by the court in dividing assets and liabilities, including but not limited to:

> (1) The nature and extent of the community property;
>
> (2) The nature and extent of the separate property;
>
> (3) The duration of the marriage; and
>
> (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

In considering the factors set forth in RCW 26.09.080 the courts have established a series of principles. To begin, the trial court has the duty to characterize the property as either community or separate. *Blood v. Blood*, 69 Wn.2d 680, 682, 419 P.2d 1006 (1966);*Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972); *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977); *In re Marriage of DeHollander*, 53 Wn. App. 695, 700, 770 P.2d 638 (1989). To accomplish this characterization, the court may consider the source of the property and the date it was acquired. *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 408, 433 P.2d 209 (1967); *In re Marriage of Glorfield*, 27 Wn. App. 358, 361, 617 P.2d 1051, *review denied*, 94 Wn.2d 1025 (1980).

Although the status of property as community or separate is not controlling, the final division of property must be fair, just and equitable under all the circumstances. In a case where a marriage is for a very short duration, prior courts have held to not have abused discretion in finding that restoring each party their pre-marital separate property and awarding the financially disadvantaged spouse a larger portion of community property was fair and equitable. *Marriage of Fiorito*, 112 Wash. App. 657, 668 (2002).

Because Mr. Dang's income during marriage went primarily to supporting the parties' household (they lived in his home and he did not seek or obtain contribution from Ms. Vu to maintain the home), he did not accumulate any savings and in fact, depleted savings during the marriage.

(RP 298) In contrast, Ms. Vu accumulated nearly $90,000.00 in additional personal savings and more than $62,000.00 in personal retirement, exclusive of FERS, which was accumulated by her during marriage due to her labors and Mr. Dang's payment of the majority of living expenses. (RP 303, EX. 106, EX. 119.) Mr. Dang only received the increase in value of his defined contribution plan (PERS 2), with no deferred savings. (RP 369). Ms. Vu's existing bank accounts balances as of the date of marriage totaled roughly $71,000. (RP362-363, EX103, 104). As of the date of separation, Ms. Vu was holding $166,000.00 in ready cash in consolidated accounts, which she reduced to cashier's checks (Ex. 39, pages 79-81).

Mr. Dang held $61,968.71 in savings as of the date of marriage. (RP 92, Ex. 50) By the date of separation, Mr. Dang only had $22,196.03 in savings. (RP 91, Ex 11).

Insofar as separate property, Mr. Dang did not increase accumulations of separate property- all real property owned and maintained by him depreciated in value between the date of marriage and the date of separation. (RP 75-79) Thus, Ms. Vu's decision to agree to divide property according to the terms of the prenuptial agreement was also financially beneficial to her given the evidence at trial and was more than fair and equitable. Her current request is unfair and inequitable, and without merit. She continues to engage in intransigent behavior running up Mr. Dang's attorney's fees. Her arguments to set aside her own

agreements on appeal are completely without merit. She cites no legal authority for the court to avoid the stipulation she entered in open court, therefore, her request is wholly frivolous. She seeks to vilify Mr. Dang alleging that his conduct should essentially result in forfeiture of his property. Mr. Dang denies abusive conduct towards Ms. Vu and feels her allegations to be completely retaliatory for him wanting to be divorced from her. (RP 170) However, she has already received per her agreement the bulk of community property in the marriage and each party kept only their separate property.

C. *The prenuptial agreement was enforceable under California law, even if Ms. Vu hadn't ultimately agreed to enforceability.*[1]

Although we do not believe the issue of the validity of the prenuptial agreement is before the court because the parties stipulated to its enforceability, the prenuptial agreement was enforceable under California law.

Prenuptial agreements are enforceable and encouraged as a matter of public policy in California as a means of promoting predictability. The standards required to be met are codified in California's Family Code Sections. Such agreements are considered enforceable when signed by both parties and no consideration is necessary. California Family Code Section 1611. In addition, the burden of proving that a premarital

[1] The parties agreed that the prenuptial agreement should be interpreted under California law, and Ms. Vu also argues this position in her brief on appeal, so the issue of enforceability under Washington law is not addressed. (RP 295)

agreement should not be enforced rests with the party challenging the validity of the agreement. California Family Code Section 1615.

Under California law, a premarital agreement is not enforceable if the party against whom enforcement is sought proves either of the following:

> **(1)** That party did not execute the agreement voluntarily.
> **(2)** The agreement was unconscionable when it was executed and, before execution of the agreement, all of the following applied to that party:
> **(A)** That party was not provided a fair, reasonable, and full disclosure of the property or financial obligations of the other party.
> **(B)** That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.
> **(C)** That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.
> **(b)** An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
> **(c)** For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following:
> **(1)** The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.
> **(2)** The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.
> **(3)** The party against whom enforcement is sought, if unrepresented by legal counsel, was fully informed of the terms and basic effect of the agreement as well as the rights and obligations he or she was giving up by signing the agreement, and was proficient in the language in which the explanation of the party's rights was conducted and in

> which the agreement was written. The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement. The unrepresented party shall, on or before the signing of the premarital agreement, execute a document declaring that he or she received the information required by this paragraph and indicating who provided that information.
> **(4)** The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement.
> **(5)** Any other factors the court deems relevant.

California Fam. Code Section 1615

In re Marriage of Cadwell-Faso & Faso, 101 CalApp 4th 945, 119 Cal. Rptr 3d 813 (2011). *In re Marriage of Howell*, 195 Cal. App.4th 1062, 126 Ca. Rptr. 539, 552 (2011).

i) Ms. Vu executed the prenuptial agreement with the advice of independent counsel and execution of the agreement was voluntary.

In the execution and signing of the prenuptial agreement, Ms. Vu was represented by Mr. Mathew Shahon, an attorney in good standing in the state of California. (RP 260, Ex. 1) Mr. Dang was represented by a different attorney, Elaine Mendowitz. (Ex. 1) Ms. Vu has not alleged any facts that would demonstrate her execution of the agreement was involuntary. In fact, her testimony on this point in particular demonstrates that her actions were completely voluntary. In particular, Ms. Vu asserts that she did not read the prenuptial agreement before she signed it. (RP 259) Ms. Vu would not waive her attorney client privilege to allow Mr. Dang to discovery what advice she was given in execution of the agreement; therefore, it should be held that the advice she received was

competent and that she elected to sign the prenuptial agreement voluntarily. (RP 18-25).

Ms. Vu's personal decision not to read the agreement does not impact the legal determination of whether or not the agreement was signed voluntarily. In *Marriage of Hill and Dittmer*, the wife alleged that she did not receive the final draft of the prenuptial agreement she signed until the morning of the wedding, and that she was too busy with wedding preparations to read or understand the Agreement when she signed it. However, the court found that allegation unpersuasive. 202 Cal.App.4th 1046 (2011). The California court states: "ordinarily when a person with capacity of reading and understanding an instrument signs it, he may not, in the absence of fraud, imposition or excusable neglect, avoid its terms on the ground he failed to read it before signing it." *Bauer v. Jackson* (1971) 15 Cal.App.3d 358, 370 [93 Cal. Rptr. 43.] This policy is in accordance with contract interpretation under Washington law, where you are presumed to have read contracts which you sign. "[A] party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." *National Bank v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973); *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987). Ms. Vu is a college graduate of Paris Junior College and also holds a Bachelor's of Science Degree from Oklahoma. (RP 112) Her allegation that the agreement should have been translated into Vietnamese is also without merit in light of the fact that she

opted to not read the agreement. She is capable of reading English, she has a college degree from an American University and she has been in the United States since 1975. She works in customer service for the federal government assisting callers with questions about Social Security Benefits and filling out applications for benefits. She does not require an interpreter at work, and she does not interpret benefits for only Vietnamese customers. (RP 212). Moreover, at trial, when she stipulated to enforcement of the prenuptial agreement, she was aided by a Vietnamese interpreter and an attorney.

Under California law, Ms. Vu's actions cannot be said to be involuntary unless she can prove she was 1) unrepresented by independent legal counsel and 2) (if unrepresented by legal counsel) she had less than seven days between the date she received the agreement and the date she signed the agreement. Even though the evidence demonstrates that Mr. Dang sent her the prenuptial agreement more than seven days prior to her signing the agreement, even if she signed the agreement less than seven days after receiving it, the California court has held that this provision applies more particularly to those persons unrepresented by an attorney. (Ex. 14, Ex 1: page 14) *In re Marriage of Cadwell-Faso & Faso*, 101 CalApp 4th 945, 119 Cal. Rptr 3d 813 (2011). *In re Marriage of Howell*, 195 Cal. App.4th 1062, 126 Ca. Rptr. 539, 552 (2011). In cases where both parties are represented by counsel, the requirement that the party against whom enforcement is sought does not require more than seven

days between the time the agreement is first presented and being advised to seek independent counsel if counsel was in fact, obtained. (RP 55-56, Ex 14) *In re Marriage of Cadwell-Faso & Faso*, 101 CalApp 4th 945, 119 Cal. Rptr 3d 813 (2011). *In re Marriage of Howell*, 195 Cal. App.4th 1062, 126 Ca. Rptr. 539, 552 (2011).

Ms. Vu argues that because Mr. Dang or his attorney may have recommended her to Mr. Shahon that somehow he is not working for her. (RP 50, 256) She cites no authority for the proposition that an attorney referred to her by another person would owe her any less duty, especially where he has clearly signed on behalf of her as representing her. (RP 256)

ii) The agreement is not unconscionable.

If Ms. Vu cannot prove the agreement was executed involuntarily, then it is Ms. Vu's burden in challenging the agreement to prove the agreement is unconscionable *and* if unconscionable then she must also prove *all* of the following facts:

A) She was not represented by legal counsel;

B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided;

C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Thus, even if Ms. Vu were to demonstrate that the agreement were legally "unconscionable" she must still prove that she was not represented by legal counsel, that she did not waive in writing any right to disclosure of the property beyond the disclosure provided *and* that she did not have or could not have had adequate knowledge of the property or financial obligations of the other party. California Code Section 1615

Ms. Vu admits that she was represented by legal counsel, so, even if the court were to find the agreement were unconscionable as a matter of law, Ms. Vu cannot demonstrate the first required prong to invalidate the prenuptial agreement. (RP 254-256) In particular, she cannot demonstrate a failure of representation of her legal counsel, as she refused to waive her attorney-client privilege to disclose the advice given to her by her legal counsel. (RP 18-24) Without knowing the advice she received, the Court cannot consider her legal counsel inadequate. Her allegations that her attorney may have been recommended by Mr. Dang or Mr. Dang's attorney would not demonstrate on its face any loyalty to Mr. Dang or disloyalty to Ms. Vu, especially given that the agreement clearly identified that Mr. Shahon represented Ms. Vu in execution of the agreement, the evidence at trial demonstrated that Ms. Vu met with Mr. Shahon more than once, and that Mr. Shahon received his fee from Ms. Vu. (RP 256, Ex 1, last page). Therefore, she cannot meet her burden of proving she was unrepresented by legal counsel.

The petitioner did disclose all of his property and financial obligations as represented by the attached Exhibits A and B of the prenuptial agreement. (Ex 1, A & B). There is no evidence that Ms. Vu found these disclosures to be inadequate at the time the agreement was signed. Mr. Dang brought Ms. Vu to both houses before marriage, and pointed out the vacant lots he owned. (RP 46) It appeared at trial that Ms. Vu sought to offer public record values of these same assets at trial, so appraisal of these assets was not obtained even at trial, and in California, constructive knowledge of a party's assets are sufficient disclosure for the purposes of a prenuptial agreement. (RP 365-66) *Marriage of Facter*, 212 Cal App. 4th 967, 984-985 (2013). Citing from *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 15 [99 Cal.Rptr.2d 252, 5 P.3d 815] (*Bonds*); see former § 1615, subd. (a)(2).

Under these circumstances the agreement is not unconscionable. The agreement, when entered, was executed by two middle aged, employed individuals working for different sectors of government with retirement and assets of their own. Mr. Dang earns only slightly more annually than Ms. Vu. Although the agreement does convert each party's earnings into separate property, the parties maintained a joint account where they each deposited an equivalent sum of money to maintain fungible living expenses such as food and utilities, and were able to accumulate some savings. (RP 97: 6-10; RP 276: 17-21, Ex. 34, 35, 36, 37) Each party was then able to use the remaining income in any way they

pleased. In this case, Ms. Vu was able to save a significant sum of income outside the community account. Mr. Dang maintained a larger share of living expenses and was not able to save much and spent some separately owned assets down to maintain his existing assets. (RP105, 106, 107,150, Ex 49, RP 180)

By the date of separation, Ms. Vu was in possession of roughly $276,000.00 as well as a FERS entitlement. She was legally 45 years old, was employed full time by the government, and had a long working life ahead of her.

Additionally, Ms. Vu asserts that there are outstanding issues surrounding the parties' mutual restraining orders. In fact, no such issues are outstanding. Both parties had respective fears concerning the conduct of the other party during marriage and after separation. As such, both parties agreed to mutual restraining orders, which were to remain in effect for a period of five years from the date they were issued. (CP 405-416, RP 473) Therefore, there are no outstanding issues surrounding the mutual restraints on the parties. This matter was also stipulated to in open court by the parties. (RP 473)

4. Ms. Vu was not in need of spousal maintenance to support her existing lifestyle or that established during the marriage.

RCW 26.09.090 allows the court to consider the following criteria in determining an award of spousal maintenance:

> (a) The financial resources of the party seeking maintenance, including separate or community property

apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

Washburn v. Washburn, 101 Wn.2d. 168, 179 (1984).

In considering the award of maintenance, the court made the following factual findings with regard to Ms. Vu:

> In considering the financial resources of Ms. Vu, she was awarded assets with a value of approximately $275,000.00 exclusive of her FERS. She is able to meet her needs independently, without an award of spousal maintenance. She presented evidence that her projected expenses exceed her income, however, the court finds Ms. Vu can easily increase her income and decrease her expenses without having to rely on existing savings. In presenting her income to the court, she outlined that she is currently voluntarily contributing $950.00 per month in savings. Although the court encourages wage earners to save for the future, Ms. Vu has a FERS pension plan with her job. In addition, Ms. Vu's projected future rental for an apartment of $1600.00 per month is greater than should be necessary for her housing and is greater than the housing in which she resided with Mr. Dang, who projected a fair rental value for his two story home in South Seattle at approximately $1200.00 per month. Additionally, Ms. Vu outlined $300.00 per month for cell phone usage and $800.00 per month for food and $200.00 per month for haircuts/personal expenses all of which seem inflated.

> In considering the time necessary for her to find appropriate self supporting employment, the court finds she is already gainfully employed and therefore no action is necessary.
>
> In considering the standard of living enjoyed during the marriage, the court notes that the spouses pooled their incomes in equal amounts to share common expenses and Mr. Dang paid primarily for the cost of housing, resulting in Ms. Vu being able to accumulate significant savings.
>
> In looking at the duration of the marriage, the court finds this is a short term marriage, of less than five years from the date of marriage to date of separation.
>
> The court considered Ms. Vu's age, physical condition. Ms. Vu asserted that her health interfered with her ability to earn a living; however, Ms Vu did not meet the burden of proof required for the court to make such a finding. Ms. Vu presented no medical evidence that her health affects her employability in any way, and in fact, she is employed full time. Ms. Vu has a substantial worklife in front of her.
>
> (CP 16-17)

The court's factual findings were supported by substantial evidence in the record. Ms. Vu admitted during her own testimony to having cash assets at separation of $166,000.00 exclusive of her Thrift Savings Plan and her FERS. (RP 313). Her TSP as of December, 2011 amounted to $94,466.55. (Ex. 119). She was also awarded one half of the community savings to that point, or $7,426.88, as well as one half of the community checking account, which was $2,417.63, and roughly $5,500.00 in reimbursements. (CP21-22) In addition to these liquid assets, she owned a vehicle [a 2000 Honda Acura], as well as being vested in FERS, a defined benefit plan through the federal government. Ms. Vu had no debts. (CP 21-22)

Ms. Vu's monthly expenses were grossly inflated, as was found by the court. She was withdrawing $950.00 per month from her pay to deposit into savings. (Ex. 120) During marriage, the pattern of the parties was to put $200.00 each per month into savings. (RP 278-279). To continue that pattern would have added $755.00 per month to her available net monthly resources to pay expenses, thereby increasing her monthly income to $3483.00. (Ex. 159) She acknowledged that she deliberately failed to find a better phone plan, where she as a single person claimed to pay $300.00 a month for 200 minutes. (RP 414, Ex. 159) She lived in South Seattle and worked in Burien, but alleged she spent $455.00 per month on gasoline and car repair, even though she drives a 2000 Honda Acura. (EX 159). To have one's hair cut and dyed twice a month is wholly unreasonable, thus to allocate $200.00 a month on haircuts is also inflated. (EX 159) . To spend $800.00 a month as a single person on food is also unreasonable. (EX. 159). Although Ms. Vu asserts a single meal can be as much as $30.00, it can also be as little as $2.00. Additionally, Mr. Dang testified that the reasonable rental for the two story home where the parties lived during marriage was closer to $1200.00 per month. But Ms. Vu listed $1600.00 per month to rent housing. Thus it was clear that for nearly every line of her financial declaration, her net income was artificially deflated by voluntary savings, and her projected monthly expenses were grossly inflated.

Ms. Vu similarly exaggerates the actual value of Mr. Dang's post marriage estate, as well as his annual income in her request for spousal maintenance. (Ex. 49) In fact, he did not earn $100,000.00 annually, and he did not have an estate over $1 million dollars. (Ex 30, CP 24-25) She ignores his debts of over $100,000.00. (Ex. 49)

Ms. Vu offered no medical evidence that her health impacted her income earning ability. (RP 355) In fact she had sufficient sick leave available to her such that her income was not impacted by whatever health issues she claimed to have suffered, and she suffered no reduction in income during the pendency of the case or at trial (CP 414-415, Exhibit 120). Ms. Vu's speculation that her health may in the future impact her current job and her current income were not relevant to a proceeding for current spousal support and the court properly excluded such testimony as speculative. (RP 335) RCW 26.09.090.

Ms. Vu's current allegations that Mr. Dang's treatment of her during marriage impacted her health are raised for the first time on appeal and should not be considered by the court. RAP 2.5(a) Moreover, these allegations are without merit given that her alleged health concerns did not exist during marriage, or separation, and did not arise until after the divorce was filed. (CP 339-353) Even more importantly, the evidence at trial demonstrated that her alleged health concerns didn't impact her ability to earn income and she still had available sick leave. (RP 414-415)

Her allegations at this stage appear to be attempts to prejudice the court against Mr. Dang for allegations of marital misconduct. It is inappropriate to seek financial retribution for allegations of marital misconduct. *Marriage of Muhammed*, 153 Wn. 2d 795, 806 (2004). Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). An appellate court should "not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility." *Greene*, 97 Wn. App. at 714. The trial court is in the best position to ascertain the credibility of the parties.

This court will uphold a conclusion of law if the trial court's findings of fact support it. *In re Marriage of Burrill*, 113 Wn. App. 863, 870, 56 P.3d 993 (2002), *review denied*, 149 Wn.2d 1007 (2003). In the current case, the marriage was of short duration, 4 years. (RP 301) Both parties worked full time prior to marriage, during marriage and after marriage. They maintained the same jobs prior to marriage that they did at separation and at dissolution. Ms. Vu was able to save a significant sum of money during marriage because Mr. Dang used his income and resources to maintain the parties' living expenses. (RP 276) But even post dissolution, Ms. Vu was able to support herself and still save money. Maintenance in this matter was appropriately denied. Ms. Vu was able to

maintain her health care expense using her work sick leave, which she did not deplete prior to trial, or in the year previous. (Ex 120). The court should affirm the trial court's ruling on spousal maintenance.

5. The finding of intransigence by Ms. Vu in that she concealed her assets and made active misrepresentations to the court regarding her available assets was also supported by substantial evidence.

A court may award attorney fees for "intransigence" if one party's intransigent conduct caused the other party to incur additional legal fees. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Intransigence includes obstruction and foot-dragging, filing repeated unnecessary motions, or making a proceeding unduly difficult and costly. *Bobbitt*, 135 Wn. App. at 30. An award of fees for intransigence must be supported by findings. *Bobbitt*, 135 Wn. App. at 30; *see Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (trial courts must exercise their discretion to award fees on articulable grounds and make an adequate record to review the award).

When awarding fees for intransigence, the court should segregate the fees caused by the intransigence from those incurred for other reasons. *In re Marriage of Crosetto*, 82 Wn. App. 545, 565, 918 P.2d 954 (1996). Segregation is not required, however, if intransigence permeates the entire proceedings. *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). The absence of adequate findings requires a remand to the trial court for entry of proper findings. *Mahler*, 135 Wn.2d at 435. An

award of attorney fees is reviewed by this court for abuse of discretion. *In re Marriage of Mattson*, 95 Wn. App. 592, 604, 976 P.2d 157 (1999).

In this matter, the court specifically found that Ms. Vu increased the number of days of trial by at least two days. (CP 17-18). Ms. Vu filed spreadsheets with the court representing that she only had $14,023 available to her in her U.S. Bank account. (RP 377). In fact, she had $165,000.00 in cashier's checks that she had withdrawn from that very same bank account after the parties separated. (RP 377-379).

Mr. Dang had to subpoena Ms. Vu's bank records to discover that the large withdrawals she made, one for $140,000.00 and a second for $25,506.00, were reduced to cashier's checks. (Ex 39, page 79). By trial, looking at Ms. Vu's spreadsheets and listening to her testimony, it was as though that money never existed. (RP 378-379). Even when she was shown one bank statement showing a $140,000.00 withdrawal, leaving a remaining balance of $25,506.00 before the second withdrawal, she attempted to tell the court that she had only $140,000.00 "and that includes the $25,000.00." (RP378-379, Ex 39, pages 73-79) She made this representation with the full benefit of counsel, and a Vietnamese interpreter. (RP 378-382.) Ms. Vu now asserts that this was "her money" which was composed of $71,000.00 of separate funds and $94,000.00 of savings from her earnings, which would have been characterized as community had the prenuptial agreement been set aside. (RP 382) She is additionally now claiming she spent this money, between October, 2011

when it was withdrawn and reduced to cashier's check and trial (October, 2012), even though she was living in Mr. Dang's home rent free during that period of time, she was working full time earning $55,000.00 annually and had modest expenses.

It took two full court days to go through the accounts to show what Ms. Vu had actually done, as well as tracing the source of funds from which the monies she withdrew were comprised. (RP 464, CP 17-18) Even after the end of the first day of tracing, when it was apparent that Ms. Vu had taken all this money out of the bank, she still maintained that it was less than it clearly was. (RP 370) Even in the appeal, she misrepresents the fact that she reduced all available cash in her name, including separate and community based moneys, to various cashier's checks in her own name, one for $140,000.00 and a second one for $25,506.00. (Exhibit 39, pages 32,33,35,39,43, 79-81). Essentially, Ms. Vu did the same thing to her bank accounts as the trial date approached, that she had done when Mr. Dang told her he was filing for divorce- she withdrew all the monies she had available to her in cash, making it appear that she had nothing left in front of the court.

Earlier in the proceeding, she made a motion for temporary spousal maintenance where she filed a financial declaration stating that her available cash assets were $1,000.00. (Ex 48).

An additional intransigence occurred when Ms. Vu began to manufacture evidence after Mr. Dang had stopped sleeping at the

residence. The parties had traditionally, for all four years of their marriage, deposited the exact same amount of money into their joint checking account and into their joint savings account. (RP 276). This action had been contemplated by the prenuptial agreement. (Ex. 1, paragraph 4.1) However, after Mr. Dang started sleeping at his brother's house, Ms. Vu began writing large checks to Mr. Dang, which she then deposited into the parties joint account without his endorsement. (RP 117). She did this in a series of checks totaling $14,000.00. She then, withdrew all $14,000.00. (RP 117) Although she claimed she did this because his siblings accused her of being a freeloader, the reality is that she didn't give the money to Mr. Dang. She was commingling her previously separately held account with the parties' community account, she wrote the checks to Mr. Dang without giving the checks to him, and then, she took every penny of it back. (RP 119) She appeared to be trying to manufacture evidence of commingling. Mr. Dang had to request actual check copies and bank records to disprove Ms. Vu's deceptions. (RP 119) A portion of trial testimony also involved disproving these deceptions.

The trial court's findings of Ms. Vu's continued deceptions running up trial costs was supported by substantial evidence. The trial court properly differentiated the increase in fees caused by Ms. Vu's intransigence as against normal costs of trial and litigation. (RP 434, 467, CP 17-18).

6. Ms. Vu should not have been reimbursed her personal living expenses after the date of separation- the court's findings as to Ms. Vu's unreimbursable expenses should be affirmed.

RCW 26.16.140 provides that the respective earnings of a husband and wife who are living separate and apart "shall be the separate property of each." *See Beakley v. Bremerton*, 5 Wn.2d 670, 105 P.2d 40 (1940); *Hokenson v. Hokenson*, 23 Wn.2d 908, 162 P.2d 592 (1945). The law distinguishes between a "marital" and a "community" relationship, the latter concept encompassing more than mere satisfaction of the legal requirements of marriage. It is the fact of community that gives rise to the community property statute; when there is no "community", there can be no community property. *See* Cross, *The Community Property Law in Washington* (revised 1985), 61 Wash. L. Rev. 13, 33 (1986). In a similar vein"[A] debt incurred by one spouse during marriage is a community liability if the transaction was intended to confer a community benefit." *In re Marriage of Manry*, 60 Wn. App. 146, 150, 803 P.2d 8 (1991). However, RCW 26.16.140 and subsequent case law make it clear that debts incurred during separation should be determined to be the separate debt of the party incurring the debt.

While mere physical separation does not dissolve the community, *Kerr v. Cochran*, 65 Wn.2d 211, 396 P.2d 642 (1964), it is not necessary for the operation of RCW 26.16.140 that a dissolution action be final or even pending. *Togliatti v. Robertson*, 29 Wn.2d 844, 190 P.2d 575 (1948).

Rather, this statute applies to those marriages that are for all practical purposes "defunct". *Rustad v. Rustad*, 61 Wn.2d 176, 180, 377 P.2d 414 (1963).

Mr. Dang had stopped sleeping in his own home to avoid Ms. Vu as of April, 2011. He attempted several times to negotiate with her an amicable dissolution of marriage. Ultimately, he filed and had her served with divorce proceedings. (CP 1-4, CP 61-62). Expenses she incurred personally after the date of separation were her separate obligation. (CP 18) The court set the date of separation at April, 2011. It was at this time that Mr. Dang requested a divorce from Ms. Vu and stopped staying nights in his own home to avoid her. (RP 118). Once again, Ms. Vu makes various assertions against Mr. Dang accusing him of abusive conduct, which are completely irrelevant to the character of the debts she was incurring while living separate and apart from Mr. Dang.

Mr. Dang should not be responsible for Ms. Vu's post separation hotel bills, or for her personal medical expenses post separation for her various anxiety attacks which occurred when he had no contact with her at all. Mr. Dang should not be responsible for Ms. Vu's decision to change the locks on Mr. Dang's home post separation, or the costs to install an alarm so she can feel personally more secure, especially given that the home was equipped with an alarm. Mr. Dang gained no benefit from either of these costs and in fact, incurred costs in having them removed. Ms. Vu presented no evidence that Mr. Dang or his family were harassing

her. Once again, Ms. Vu simply seeks to disparage Mr. Dang to prejudice him in the eyes of the court.

Ms. Vu presents no evidence that her health deteriorated before the divorce action was filed. In fact, the evidence at trial was that she began incurring medical expenses only after the divorce was filed. (RP 416). She additionally continually sought to reconcile with Mr. Dang for months after he moved away from her until the day she obtained a restraining order against him. He saw her actions in obtaining a restraining order as retaliatory because he filed for divorce. (RP 170)

There was never any issue raised in the trial court regarding the amount of reimbursement for the oil and a full accounting was done. All reimbursements were paid to Ms. Vu's prior counsel. None of Ms. Vu's prior attorneys since the end of the trial ever raised any issue about Mr. Dang's accounting for the power bills or the reimbursements which occurred more than a year ago. In the absence of such evidence, the court of appeals should decline to hear such matters. Ms. Vu does not assert any argument of substance that she disputed the reimbursement to her, or the accounting. She admits to receiving the money without complaint until now.

7. The date of separation was April 30, 2011 based upon substantial evidence presented at trial that this was the date the marriage became defunct.

The court identified the date of separation as April, 2011 because this was the date that Mr. Dang stopped sleeping at home and the time he asked her for a dissolution of their marriage. (RP 446). Additionally, it was clear that a significant event happened from Ms. Vu's perspective because this was the time she began attempting to commingle the joint account funds at BECU with funds she previously held in her name only. (EX. 43, RP 282).

8. Mr. Dang should be awarded further attorney's fees for intransigence as Ms. Vu does not identify any issues of merit on appeal

The findings of the court are all supported with substantial evidence. Ms. Vu fails to develop any argument or present any issue of that is not supported by substantial evidence. Additionally, Ms. Vu makes new factual assertions which were not raised below, as well as assertions which do not appear anywhere in the record all aimed at placing Mr. Dang in a poor light. Ms. Vu fails to support her arguments in many instances with any legal authority or follow proper legal procedure. RAP 18.9 authorizes the court to award sanctions and fees for violating procedural rules, or for frivolous appeal. Additionally, a party must request fees on appeal if such a basis exists pursuant to RAP 18.1. At this stage, the case Vu seeks to appeal is not the case she presented below and her appeal is so devoid of merit as to warrant sanctions on appeal. *Marriage of Healy*, 35 Wn.App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d. 1023 (1983). There are so many misrepresentations regarding the record (assertions that

her attorney was abusive, assertions that the judges were exchanging letters based upon her complaints, etc.) that most of the brief should be stricken, and the court should award sanctions.

For this reason, Mr. Dang should be awarded further attorney's fees for a frivolous appeal. RAP 18.9

V. CONCLUSION

This appeal is brought in bad faith. The entire basis of the appeal is punitive, not to cite to errors of fact or law but to punish Mr. Dang for wanting a divorce from Ms. Vu. There were never throughout the marriage allegations by Ms. Vu of abusiveness by Mr. Dang. These allegations arose only after Ms. Vu was served with divorce papers. Similarly, Ms. Vu now accuses the court who heard the case of bias, even though that same judge pointed out to her that she had received significant assets throughout the marriage, accumulated significant savings which she has walked away with and which she asks in her conclusion, for this court to ignore. Ms. Vu also accuses her former attorney of abusing her, even though that attorney represented her throughout five days of trial, drove her to the emergency room *at her own doctor's request,* in the middle of a trial day. There is no basis in the law to seek spousal maintenance or property division based upon marital misconduct, yet, that is exactly what Ms. Vu is doing. Ms. Vu knew Mr. Dang wanted to have an amicable dissolution of marriage. Mr. Dang first served Ms. Vu with a letter seeking to go through a collaborative divorce. Instead, Ms. Vu made the

process as contentious as possible, failing to show up for depositions, hiding bank records, and assets from the court and from Mr. Dang, and now seeking an appeal to set aside agreements she made and understood. Although the court made no decision regarding the enforceability of the prenuptial agreement, the fact remains that Ms. Vu was represented by independent counsel, who she met with and who she paid. She was not willing to waive her attorney client privilege to determine the advice he gave her, and as a result, there was simply no basis to believe that she did not receive sound advice regarding that prenuptial agreement. The advice she received may not have mattered, since she determined to sign the agreement without reading it, but she cites no legal basis to set it aside- she was not under duress.

Mr. Dang should be awarded his attorney's fees on appeal. The court should decline to remand this matter to the trial court as all findings are supported by substantial evidence and the court applied the law correctly.

Dated this 11th day of October, 2013.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on October 17, 2013, I arranged for service of the foregoing Vinh Quoc Dang Response Brief, an original and one copy to the court and one copy to the parties to this action as follows:

Office of Clerk Court of Appeals-Division I 600 University Street One Union Square Seattle, WA 98101	____Facsimile __ x _Messenger ____U.S. Mail ____Overnight Mail _ __Email/efile
Ms. Anh Thu Vu 126 SW 148th St C100-PMB #459 Seattle, WA 98166	____Facsimile __ _Messenger x ____U.S. Mail ____Overnight Mail

Dated at Seattle, Washington this 17TH day of October, 2013.

Melissa Perez

Melissa Perez