63523-9

63523-9

NO. 63523-9-I

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

In re the Marriage of :

KATHLEEN JEAN JANES

Appellant,

v.

STEVEN CRAIG JANES

Respondent.

REVIEW FROM THE SUPERIOR COURT
FOR ISLAND COUNTY
The Honorable Vickie Churchill

RESPONDENT'S BRIEF

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I. INTRODUCTION.

Following a six-day trial, the trial court granted the wife's request for a disproportionate property division instead of continuing spousal maintenance. In reaching its decision, the trial court adopted the stipulated value of the parties' business, the appraised values for the parties' commercial property based on the testimony from the only appraiser offered at trial, and the value for the family home based on the testimony from the Wife's appraiser. After considering the entire marital estate, community and separate, the trial court awarded the wife $2,197,328.00 or 57% of the marital estate, leaving the husband with $1,689,223.00 or 43% of the estate.

The wife's award included the parties' three commercial income-producing properties and a $560,000.00 cash equalizing payment from the husband. During its oral decision, the trial court gave the wife the option of declining to accept the income producing properties which would necessitate a larger equalizing payment from the husband but would give the husband more flexibility in obtaining the financing for an equalizing payment. However, at the time of presentation of the final orders, the wife accepted the trial court's award of the income-producing

properties. Based on the property division, the trial court awarded the wife continuing spousal maintenance only until the equalizing payment was made. Given that the husband had already paid almost $100,000.00 in attorney fees to the wife, the trial court further declined to award the wife any further attorney fees finding the wife was awarded sufficient assets to pay her remaining fees.

This Court should reject the wife's challenges to the trial court's fact based discretionary decision. The wife has failed to preserve these issues for appeal by not timely pursuing her motion for reconsideration and by inviting the errors alleged. This Court should affirm the trial court's thoughtful division of the parties' marital estate and award the husband his attorney fees for having to respond to this appeal.

II. RESTATEMENT OF ISSUES.

A. The wife failed to note her motion for reconsideration of the trial court's final orders (Decree of Dissolution and Findings of Fact and Conclusions of Law) within thirty days of entry of the final orders as required by CR 59(b). The wife finally noted her motion and scheduled a hearing date over 90 days after entry of the trial court's final orders. Did the trial court abuse its discretion by striking the wife's motion for reconsideration as untimely?

B. If the trial court properly struck the wife's motion for reconsideration, should this Court consider the wife's appeal of the trial court's final orders when her notice of appeal was untimely under RAP 5.2?

C. The wife requested a disproportionate property division instead of continuing spousal maintenance. Should this Court consider the wife's appeal of the trial court's decision to award a disproportionate property division instead of continuing spousal maintenance when the wife requested this relief from the trial court?

D. The trial court gave the wife the opportunity to decline to accept the parties' commercial income-producing properties prior to the entry of final orders. The wife chose to accept the income-producing properties. Did the trial court abuse its discretion by entering final orders giving the wife those income-producing properties?

E. There was substantial evidence at trial that the trial court's property division would leave the wife with sufficient funds to provide for herself in the future. Did the trial court abuse its discretion by adopting a property division that provided the wife with 55% of the community assets in the form of commercial

income-producing properties valued at $1,721,768.00 and $560,000.00 cash equalizing award?

F. Prior to trial, the husband paid almost $100,000.00 to the wife for her attorney fees and costs. Did the trial court abuse its discretion by declining to order the husband to pay any further amounts towards the wife's attorney fees?

III. RESTATMENT OF THE CASE.

A. Steve and Kathy Janes' Marital Estate.

Steve and Kathy Janes married in Coeur d'Alene Idaho on March 25, 1969. RP 236. They moved to Washington in 1972, and purchased a home on Whidbey Island in 1977. RP 34, 239, 711. Steve started The Janes Company in 1993. The business installs radiant heat flooring in new construction homes. RP 33-35, 240-41. The business had been very successful over the years and was the sole source of income for the couple. RP 35, 46, 241; See also CP 38 (Unchallenged Finding of Fact 37 and 38 regarding income available). The Janes Company was valued at $1,145,000.00 by James Palmer[1]. CP 131 (Unchallenged Finding of Fact 3).

[1] The trial court increased the value of the business by an additional $30,037.00 resulting from an increase in notes receivable during the parties' separation. CP 131 (Unchallenged Finding of Fact 4).

The Janes Company was not the only significant asset the parties' owned. The parties' Whidbey Island home was valued "as-is" at $1,750,000.00 by Joseph Elia. CP 131 (Unchallenged Finding of Fact 5). The parties also owned three commercial properties in Langley. They originally purchased the properties for retirement income. RP 379-80, 700, 776. The properties were valued as follows by Jeffrey Sherwood:

220 First Street	$ 900,000.00
112 Anthes Street	$ 700,000.00
221 Second Street (Building 11)	$ 750,000.00

CP 132 (Unchallenged Finding of Facts 9, 10, and 11). Mr. Sherwood testified the properties were generating rental income of approximately $5,500.00 per month. RP 458-460. Steve purchased the lot for Building 11 in 2002 and finished construction in early 2004. RP 707-09. Steve was very proud of the building and felt it was one of the finest structures in Langley. As such, it rarely had vacancies. RP 709-10.

Kathy was aware of the rental value of the commercial properties because she managed them prior to the parties' separation in late 2003. RP 249, 370-71. At trial, both parties agreed Kathy was unable to work because of her health conditions. RP 492; CP 134 (Finding of Fact 40). In fact, Kathy's health

conditions, which began in her early 30's and plagued her before the parties' separation, made it very difficult for her to lead an active life. RP 251-54, RP 484-495. Steve enjoyed better health than Kathy, although he suffered from high blood pressure and a recent angiogram showed some blockages in his arteries. RP 778.

At the time of trial, Steve testified he hoped to slow down working, retire, and allow his son to take the business over or wind it down. RP 737, 776-78. Steve's general manager and business colleague had recently died following a massive heart attack and another of his key employees left the business for health reasons. RP 728-29, 778. Kathy believed Steve did not have a retirement age and would never stop working. RP 572. Nonetheless, the parties had amassed a total marital estate just over four million dollars by trial in September 2008. CP 134 (Unchallenged Finding of Fact 29); see also RP 777-78 (Steve testifies the parties do not have cash but have significant property that can be disposed of so each have plenty of money).

B. The Legal Proceedings.

In late 2003, Kathy moved from the parties' home on Whidbey Island to the parties' cabin in Cheney. RP 243-44, 246-47, 696. The parties formally separated on November 1, 2003,

when Kathy filed her petition for dissolution and served Steve. RP 46-47, CP 129. At the time of filing her petition, Kathy was 56 years old. RP 235. Steve was also 56. RP 34. By the time of trial five years later, the parties were both 61. RP 34, 235.

Shortly after their separation in November 2003, the parties entered an agreed temporary order providing Kathy with $4,200.00 in spousal maintenance. Steve also agreed to pay Kathy's health insurance, car lease payment, car insurance and registration/tabs, monthly gasoline charges on Kathy's Exxon card, and $5,000.00 towards Kathy's attorney fees. CP 896-900; RP 248-50. In June 2005, the court granted Kathy's request to increase her spousal maintenance, and Steve began paying Kathy $7,400.00 along with her additional expenses as listed in the first temporary order. CP 711-14. In September 2005, the court reduced Kathy's spousal maintenance to $5,800.00 plus an additional $225.00 for gasoline, but Steve remained obligated to pay Kathy's additional expenses. CP 584-86; RP 250. Kathy never moved the court for additional spousal maintenance again between September 2005 and trial three years later, although she did bring several motions for attorney and expert fees. CP 273-280, CP 508-515. In addition to her monthly spousal maintenance and payments made on her behalf, Kathy had

$3,000.00 that she removed from the parties' joint checking account and one-half of the proceeds from the sale of the parties' cabin in Cheney, $28,000.00. RP 258, 501-02. In 2007, Kathy also accessed the parties' joint Bank of America line of credit and paid off approximately $45,000.00 in personal credit card debt. RP 270-71, 551-52, 555-56.

By the time of trial in September 2008, Kathy was living in a home she was leasing to purchase in Nine Mile Falls, outside of Spokane. RP 234-35, 412. Kathy testified that she found the house in 2005 and really wanted it. It was a small house on a small lot, but it was on a lake with a "nice, pretty setting," and she "really liked the area." Kathy invested money remodeling the home, she "loved it" and felt "very comfortable there," and she had no intention of returning to Whidbey Island. RP 412-415, 612.

At the time of trial, Kathy testified her monthly living expenses were approximately $5,901.00. RP 267-68. Kathy also testified, using a March 2008 financial declaration, regarding her debt. RP 268-73. These debts corresponded to those she listed on her September 2008 pre-trial statement. CP 241. However, Kathy's pretrial statement was somewhat misleading because it showed both the $42,000.00 Bank of America line of credit debt

and the underlying debts that were paid in full with the credit line. CP 241; but see 425-27. Including the $42,000.00 line of credit debt, Kathy indicated she had total debts in excess of $70,000.00, but she also testified she was not making payments on the majority of the debt at that time. CP 241; RP 268-272; see also RP 367-68 (testimony that Kathy owed approximately $100,000.00 in attorney fees to Ms. Schultz). In fact, Kathy was relying on the court to have Steve pay her remaining attorney fees. RP 270.

Kathy testified she wanted to pay off her debt as quickly as possible. Therefore, she requested the trial court award Steve the business and all of the parties' properties and give her a "cash" award. RP 437. By paying off her debt, Kathy could resume a standard of living similar to that she enjoyed previously, i.e. traveling, dining out, and shopping. RP 409-412. She did not formally request any kind of monthly spousal maintenance, and testified about the IRS liabilities she incurred because of the taxable nature of maintenance payments. RP 435-36.

Steve, on the other hand, was juggling the business in a slowing economy. He was concerned about having to lay off employees because all of his current work was based on jobs that had been permitted in 2007. He had no new permitted work in

2008 because the new construction industry had essentially ground to a halt. RP 727-730, 733; see also RP 320-23 (housing market slowing as of 2007 when business valued). The business boom in 2006 and 2007 was coming to a close, affecting the income stream the business would generate in the future. Based upon Steve's tax returns, the trial court found he had a monthly net income between 2004 and 2007 as follows:

2004	$ 12,708.10
2005	$ 9,416.52
2006	$ 21,677.15
2007	$ 23,052.78

CP 166. Steve's average income over those years would be $16,713.64 per month. Compare CP 160, 166 (trial court notes correction in average income) with 11/5/08 RP 19 (court notes average income of $17,638.91). His financial declaration listed expenses of $15,749.00 exclusive of debt expenses. CP 182-84.

During closing arguments, Kathy's counsel focused at length on Steve's income. She acknowledged that the parties' had "more than enough money to share" and urged the trial court to "consider the equity-of-economic-circumstances aspect" when fashioning its final property division. RP 988. Kathy's counsel Steve's income was approximately one million dollars a year

considering his wages, retained earnings in the business, commercial property income, and the loans available to him. RP 985. Based on these arguments, Kathy's counsel requested 75% of the community property, although she opined the trial court could give her 100% of the assets because Steve "is going to make that value back over the next four years." RP 1014-15.

Steve's counsel argued that the value of the business represented the income it produced. Therefore, he argued the trial court could not award the business to Steve at its appraised value and also use the monthly income stream to justify a continuing maintenance award or a disproportionate property division. RP 1041-42. Steve's counsel argued there were plenty of assets to provide both parties with a comfortable future in their retirement years.

> ..[W]e have, for these people who are close to retirement age or at retirement age, we have three commercial buildings. We have a house. We have a business. And we have a lifetime of work to put that all together.
>
> ...
>
> And there is enough here, fortunately, for both of them – for both of them to be able to move on in this way. There is, according to the distribution we propose, which we believe is reasonable because it's based on real numbers of experts we have called to testify...
>
> And so based on our proposal and the real numbers that we propose, Ms. Janes would be able to live off of the interest of – of an investment amount of 1.3 to $1.7 million

> which would end up being approximately 85 – to $90,000 a year. And that would be her living on it and having, you know, no debt and not ever having to touch the principal.

RP 1038-39.

C. The Trial Court's Decision, Entry of the Decree and Findings, and Kathy's Motion for Reconsideration.

On November 5, 2008, the trial court gave its oral ruling. 11/5/08 RP 1-48. Overall, the trial court awarded 55% of the community property to Kathy and 45% of the property to Steve. 11/5/08 RP 22-23; CP 164. Of relevance to this appeal, the court's property division to Kathy consisted of the three commercial buildings and a $560,000.00 equalizing payment. The court awarded Steve the business and the family home. 11/5/08 RP 6-7, 9, 23; CP 162-64.

The court continued Kathy's monthly spousal maintenance in the amount of $6,025.00 until the parties could come back for a review hearing regarding how Steve would pay the equalizing payment. 11/5/8 RP 35-36, 44. The trial court also declined to award additional attorney fees to Kathy based on the court's property division in her favor and her prior receipt of fees pre-trial. 11/5/08 RP 15-16, 42. Following its oral decision, the trial court

sent both parties a letter outlining its decision with the court's own asset/debt worksheet. CP 160-66.

The trial court finally entered its Findings of Fact and Conclusions of Law along with a Decree of Dissolution on January 13, 2009. CP 116-127 (Decree); CP 128-136 (Findings). The trial court's extensive findings of fact are largely unchallenged on appeal. On the same day, Steve paid the equalizing lien by refinancing the family home and taking out a new mortgage in excess of $1,000,000.00. See CP 966 (loan for equalizing lien closed January 13, 2009).

On January 23, 2009, Kathy filed a Motion for Reconsideration and Motion to Assign Delinquent and Undisclosed Debt. CP 272-274. Specifically, Kathy moved the trial court to reconsider:

> 1) The court's failure to award attorney fee assistance to the wife other than as sanctions against Mr. Janes. ...
> 2) The Court's finding that the substantial funds running through Mr. Janes' checking account over the years are from "loans." ...

Kathy did not cite to any of the grounds contained in CR 59(a) in her motion. CP 272. Kathy did not note her motion for hearing as

required by CR 59(b)[2]. In her declaration in support of her motion, Kathy focused exclusively on the extensive attorney fees ($166,151.17) she was required to pay out of the $560,000.00 equalizing payment she received from Steve. CP 93. Kathy provided no additional information regarding her request the trial court reconsider its finding about Steve's income. See CP 92-112. She does not assign error to the trial court's findings regarding Steve's income on appeal. See Appellant's Opening Brief, pages 15-16.

On February 23, 2009, Kathy filed a supplemental motion for reconsideration requesting the trial court reconsider its decision not to award spousal maintenance. Again, Kathy did not note her motion for hearing as required by CR 59(b). Again, her motion did not contain any citation to the grounds for reconsideration found in CR 59(a). CP 89-91. It wasn't until March 18, 2009, that Kathy finally noted her motion for reconsideration for hearing on April 27, 2009, 94 days after entry of the final orders. CP 975; see also CP 976 (letter from court manager to Ms. Schultz regarding requirement to note motion for hearing).

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[2] Kathy's failure to note her motion for reconsideration at the time of filing was not new behavior. In August 2008, she filed a motion for reconsideration of the

Steve filed a Motion to Strike Kathy's motion for reconsideration on April 8, 2009 and noted it for hearing on April 20, 2009 (one week before the motion for reconsideration). CP 970-974 (Motion); CP 965-69 (Steve's declaration in support of motion); CP 964 (note for calendar). Steve argued the trial court should strike Kathy's motion because she failed to timely note her motion for hearing within 30 days as required by CR 59(b). CP 973-74. Kathy responded that her failure to note the motion at the time it was filed was not fatal and that Steve had waived any objection to her error by not objecting sooner. CP 956-963.

On April 20, 2009, the parties appeared for hearing on Steve's motion to strike. CP 42. The trial court granted the motion. On May 11, 2009, the trial court entered its formal order. CP 42-44. In the order, the trial court made specific factual findings, *none* of which are challenged on appeal. CP 42-43. Those findings state:

> 1. The Petitioner's Motion for Reconsideration under CR 59 was timely filed don January 23, 2009, within 10 days after entry of the Decree of Dissolution on January 13, 2009. The Motion for Reconsideration was not noted for hearing at the time it was filed as required by CR 59(b). Therefore, the Court took no action on the Motion for Reconsideration.

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trial court's award of terms against her for a trial continuance. She did not note the motion for hearing, and the motion was never heard. CP 230-32.

2. Under CR 59(b), the Motion for Reconsideration was required to be heard by February 12, 2009 (within 30 days of entry of the Decree of Dissolution), unless otherwise directed by the Court.

3. On February 10, 2009, Petitioner's counsel filed a "Declaration of Counsel Requesting Additional Time on Reconsideration." Petitioner did not file or note a Motion requesting additional time for hearing her Motion for Reconsideration as allowed by CR 59(b). Therefore, the Court took no action on the "Declaration of Counsel."

4. On February 27, 2009, Petitioner filed a Supplemental Motion for Reconsideration. Again, at the time of filing her supplemental motion, Petition did not note the motion for hearing. Again, the Court took no action on the Motion for Reconsideration.

5. On March 18, 2009, the Petitioner finally noted the Motion for Reconsideration for hearing on April 27, 2009. The hearing date is outside the 30 day requirement of CR 59(b).

6. On April 8, 2009, Respondent filed the instant Motion to Strike Petitioner's Motion for Reconsideration. At the time he filed his Motion, the Respondent also filed a Note for Motion setting a hearing on April 20, 2009.

7. Respondent did not waive his right to object to the timeliness of the Petitioner's Motion for Reconsideration and/or his right to move to strike Petitioner's motion based on her failure to comply with CR 59(b). Until the Petitioner noted her Motion for Reconsideration, the issue was not properly before the Court. Until the Motion for Reconsideration was properly before the Court, Respondent had no obligation to respond.

8. The Court was under no obligation to consider Petitioner's Motion for Reconsideration until Petitioner noted it for hearing by filing the required Note for Motion. The "noting" requirement prompts the Court to consider the Motion because the Court cannot consider the Motion without a hearing date. It is the moving party's responsibility to place the Motion before the Court by filing the appropriate Note for Motion. In this case, Petitioner failed to place her Motion before the Court within the 30 day time requirement under CR 59(b). The Petitioner did

> not file or note any Motion to extend the 30 day hearing requirement under CR 59(b).

CP 42-43.

On May 18, 2009, Kathy filed the instant appeal of both the trial court's January 13, 2009 final orders and the trial court's order striking her motion for reconsideration. CP 1-47.

IV. ARGUMENT.

A. THE TRIAL COURT PROPERLY STRUCK KATHY'S MOTION FOR RECONSIDERATION OF THE TRIAL COURT'S FINAL ORDERS BECAUSE KATHY FAILED TO COMPLY WITH THE TIME REQUIREMENTS OF CR 59(b).

It is well settled that motions for reconsideration are addressed to the sound discretion of the trial court. "[A] reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. A trial court abuses its discretion when its decision is based on untenable grounds or reasons." Ducote v. Dep't of Soc. & Health Servs., 144 Wn. App. 531, 537, 186 P.3d 1081 (2008), affirmed, 167 Wn.2d 697, 222 P.3d 785 (2009) (citing Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729 (2005)).

Kathy's notice of appeal seeks review of the trial court's order striking her motion for reconsideration. CP 1. Her brief, however, consists solely of the following statement:

> [t]he wife assigns error to the trial court's refusal to grant reconsideration of its decree upon being advised of the financial reality in which that decree placed the wife.

Appellant's Opening Brief, Page 16. This bare statement provides neither meaningful analysis nor citation to legal authority as required by RAP 10.3(a)(6). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); State v. Wood, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977); see also Matheson v. Gregoire, 139 Wn. App. 624, 638, 161 P.3d 486 (2007), review denied, 163 Wn.2d 1020, 180 P.3d 1292, cert. denied, 129 S. Ct. 197, 172 L. Ed. 2d, 140, 2008 U.S. LEXIS 5552 (2008) (court refuses to consider alleged error regarding denial of motion for reconsideration where brief fails to comply with RAP 10.3(a)). As such, this Court should decline to reach this issue.

If this Court concludes Kathy's singular reference to her claimed error is sufficient to warrant appellate review, review is limited. Kathy fails to assign error to any of the trial court's findings. As such, they are verities on appeal. In re Marriage of

Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Based on its findings, the trial court did not abuse its discretion in striking Kathy's motion for reconsideration when it was both procedurally and substantively inadequate.

The relevant rules governing motions for reconsideration state:

> **(b) Time for motion; contents of motion.** A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

CR 59(b). The "grounds" upon which a CR 59 motion may be based are found in CR 59(a).[3]

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[3] CR 59(a) provides:

(a) Grounds for new trial or reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

In the instant case, Kathy does not dispute that she failed to note her motion for reconsideration so it was heard within 30 days of January 23, 2009, the day she filed the motion. See CP 957 (responsive argument that failure to note motion at time of filing is not jurisdictional). In fact, Kathy did not note her motion for reconsideration until March 18, 2009, and then she inexplicably chose a hearing date over a month later of April 27, 2009. CP 975. Kathy's motion for reconsideration, had the trial court not ordered it stricken, would have been heard in excess of 90 days following the trial court's final orders and well outside the thirty (30) day time limit required by CR 59(b).

In addition to this procedural deficiency, neither the motion for reconsideration nor the supplemental motion for reconsideration expressly set forth the specific grounds under CR

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(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application;

(9) That substantial justice has not been done.

59(a) upon which the motion was based[4]. Instead, the motions largely restate the arguments Kathy raised during and following the trial court's oral decision on November 5, 2008 regarding her need for additional money to pay attorney fees. See 11/5/08 RP 27-28 (argument from counsel Schultz regarding Kathy's outstanding attorney fees of $70,000 owed to Schultz); 11/5/08 RP 33-34, 43 (without fee award Kathy may be without counsel; attorneys are business people; discussion of attorney fee credit already extended to Kathy); 11/19/08 RP 28 (no ability to pay attorney fees or file reconsideration motion if equalizing payment is not paid promptly); CP 165 (trial court considered outstanding attorney fees owed to Jesse Valentine and friends). Given Kathy's complete failure to comply with any of the requirements of CR 59(a) or (b), the trial court did not manifestly abuse its discretion when it struck her motion for reconsideration. Although some cases have held that the failure to note a motion for reconsideration as required by CR 59(b) does not, in and of itself, render the

[4]To the extent Kathy's motion and declaration implies she did not obtain the evidence she needed until after trial, this is incorrect. Evidence regarding the income produced by the commercial properties was contained in Kathy's trial exhibits. See CP 939 (reply regarding motion to strike). Further, Kathy's trial counsel argued, during closing argument, the business appraisals identified as much as $5,520 net income per month from the commercial properties. RP 978-79; CP 202 (Petitioner's trial exhibit list).

motion untimely, those cases should not allow a party to completely ignore the rules altogether. See Buckner Inc. v. Berkey Irr. Supply, 98 Wn. App. 906, 951 P.2d 338 (1998) (motion was timely although not noted when filed because it was heard within 30 days); Singleton v. Naegeli Reporting Corp., 142 Wn. App. 598, 175 P.3d 94 (2008) (failure to note motion not defective because motion heard within limits of local rule). The trial court's decision to strike Kathy's motion for reconsideration was clearly reasonable.

Because the trial court properly struck Kathy's motion for reconsideration, the trial court did not consider the pleadings filed in support of that motion. As such, on appeal, this Court cannot consider any argument based on those stricken pleadings. See CP 113-15 (Initial Motion); CP 45-88 (Declaration in Support of Supplemental Motion); CP 89-91 (Supplemental Motion); CP 92-112 (Initial Declaration).

B. BECAUSE KATHY'S MOTION FOR RECONSIDERATION WAS UNTIMELY UNDER CR 59, HER APPEAL OF THE TRIAL COURT'S FINAL ORDERS IS UNTIMELY UNDER RAP 5.2.

At the commencement of this appeal, this Court set its own motion to dismiss Kathy's appeal of the trial court's final orders as

untimely under RAP 5.2. Commissioner William Ellis initially ruled Kathy's appeal would be limited to only the issue of whether or not the trial court abused its discretion in striking her motion for reconsideration. See June 26, 2009, Notation Ruling. Thereafter, Kathy filed a motion to modify Commissioner Ellis' ruling under RAP 17.7.

On September 8, 2009, this Court granted Kathy's motion to modify Commission Ellis' decision. In its order, this Court simply stated:

> ...the motion to modify is granted and the appeal shall proceed as to the decree of dissolution entered by the trial court on January 13, 2009 as well as the May 11, 2009 ruling striking the motion for reconsideration.

See Order on Motion to Modify. Because this order does not specifically indicate this Court addressed the merits of the argument that Kathy's appeal is untimely, Steve renews the arguments contained in his June 16, 2009 Response to Motion for Clarify Time for Filing Notice of Appeal and/or Extend Time for Filing Notice of Appeal and his August 3, 2009 Response to Motion to Modify.

For the reasons stated in these prior responsive pleadings, Kathy's appeal of the trial court's January 13, 2009 final orders is

untimely and should be dismissed. As argued above herein, the trial court did not abuse its discretion to strike Kathy's motion for reconsideration. As such, the trial court's decision to strike should be affirmed and this appeal concluded.

C. IF KATHY'S APPEAL IS TIMELY, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING KATHY A DISPROPORTIONATE SHARE OF THE PARTIES' ESTATE AND TERMINATING ANY FURTHER SPOUSAL MAINTENANCE ONCE STEVE PAID THE $560,000.00 EQUALIZING PAYMENT.

In exercising its discretion in a marital dissolution proceeding, a trial court is required to make a "just and equitable" property distribution. RCW 26.26.080. A just and equitable property distribution is guided by the following statutory factors: (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. In re Marriage of Harris, 107 Wn. App. 597, 601-02, 27 P.3d 656 (2001). "An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of the parties."

In re Marriage of Crosetto, 82 Wn. App. 545, 556, 918 P.2d 954 (1996).

Similarly, a trial court may grant spousal maintenance to either party in a dissolution proceeding "in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after considering all relevant factors...." RCW 26.09.090. These factors include:

> (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently...;
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her 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 or her needs and financial obligations while meeting those of the spouse...seeking maintenance.

RCW 26.09.090(1)(a)-(f).

Finally, appellate courts widely recognize the deference given to a trial court's discretionary decisions in dissolution actions.

> We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. In re Marriage of Kozen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985); Baker v. Baker, 80 Wn.2d 736, 747, 498 P.2d 315 (1972). The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

In re Marriage of Landry, 103 Wn.2d 807, 809-10, 699 P.2d 814 (1985).

In the instant case, Kathy's recurrent argument is that the trial court's "entire economic package" is unfair to her because she is unable to support herself on the two million dollar property division the trial court awarded to her. This argument ignores the fact that the trial court gave Kathy exactly what she requested – a disproportionate property division in lieu of continuing spousal maintenance consisting of a $560,000.00 cash equalizing payment and income-producing properties. Kathy fails to meet her burden of proving the trial court abused its discretion.

1. To The Extent The Trial Court Should Have Entered a Different Property Division Or Provided Kathy With Ongoing Spousal Maintenance, Kathy Invited The Error.

Kathy argues that the trial court's decision to award her 57% of the total marital estate is grossly inequitable. However, to the extent that Kathy argues the trial court should not have terminated her spousal maintenance following payment of a $560,000.00 equalizing award and/or should not have awarded her the commercial income-producing properties, Kathy invited by the error by requesting this very relief. "Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal." In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (citing State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995)).

(a) Kathy Requested A Disproportionate Property Division In Lieu Of Ongoing Spousal Maintenance.

It is clear from the commencement of the case that Kathy wanted a disproportionate division of property in lieu of continuing spousal maintenance. In her pre-trial submission, Kathy requested 75% of the marital estate. CP 242. In her opening statement, Kathy's counsel discussed the "property distribution [Kathy]

should receive in order to avoid having to continue taxable maintenance payments to her." RP 24. Throughout the trial, Kathy's theory of the case was devoted to demonstrating that Kathy had been treated unfairly over the course of the proceedings by Steve. Kathy's counsel's closing argument summed up this theory nicely:

> So if the Court awarded maintenance in this case, it does not have the ability to award non-modifiable maintenance. If the Court awarded maintenance, what you'd see is, you know, six months down the road Mr. Janes coming back to Court with a new litany of – of documents saying, "Oh my income's dropped off dramatically. I don't have any money." And Ms. Janes having to go through the rigmarole that she has gone through over the last year to try and get, you know, 15 different sources to figure out exactly what Mr. Janes is going through.
>
> So we are asking that the Court consider that in its decision as to whether its remedy should be in the form of maintenance or a set non-modifiable property division.

RP 987-88; see also RP 1015 (argument that trial court should give Kathy more property and minimize or do away with maintenance because maintenance is inherently modifiable).

The trial court clearly recognized this was Kathy's request. At the time of its oral decision, the following discussion occurred between the trial court and Kathy's counsel:

> The Court: My understanding that, Ms. Schultz, that you have made no proper request for spousal maintenance, but rather a request for a disproportionate award of the

> assets to the Wife. My notes sort of indicate that you did and then you kind of went a different way. So I just want to make sure of that.
> Ms. Schultz: Well, Your Honor, I left that up to the Court in terms of the packet that it felt would be effect the equity that it intends here. That I had – My recollection is that I had argued for a disproportionate property transfer to be paid out over a certain period of years –
> The Court: Right.
> Ms. Schultz: - but I hadn't discounted the idea of maintenance if the Court did not find that that was a reasonable solution.
> The Court: Okay. Thank you. I believed that the request was more for a property distribution rather than a spousal maintenance because of your fears that there would be a request for modification and that there would be a very difficult time trying to get information and that it would be more advantageous to your client if it continued as a property distribution. *So I am working under that assumption at least.*
> Ms. Schultz: I think that concept certainly was mentioned to the Court. I – I do recall that.

11/5/08 RP 4-5 (emphasis added). Thus, the trial court gave Kathy *exactly what she requested*, a property division in lieu of continuing maintenance in order to avoid both the tax consequences of continuing maintenance and the possibility of a future modification. By requesting the property division she actually received, Kathy has waived any error. See K.R., 128 Wn.2d at 147 (appellate court will deem an error is waived if the party asserting such error materially contributed thereto).

(b) Kathy *Agreed* To Receive The Commercial Income-Producing Properties Instead Of A Larger Equalizing Payment.

Similarly, Kathy has waived any error to the trial court's decision to award her the commercial income-producing properties. The trial court's finding that the commercial properties provide Kathy with the "ability to have stable rental income that keeps pace with the cost of living" is supported by Kathy's own testimony and arguments. Kathy's counsel specifically argued, during her closing argument, that the commercial properties yielded $5,520.00 net per month in rental income.

> Well, one of the other things that came out here is the commercial properties. In the commercial properties there is a demonstration through the business appraiser of approximately $5,520 per month of income there. P-57 is Building 11. And the average income on the income approach through the business appraisal – This is actually at page – Where is it? I don't have it down here on Building 11 – but when you do to the index, it will say "Income Approach." You go to the Income Approach and the projected income, net income is $23,000. So that's $1,916 a month.
>
> Now the Court should remember that Building 11 is the building that Mr. Janes offered was the best building in Langley that people were lining up to lease and that he thought he could get 3,000 a month from it.
>
> So you have a business appraisal that says 1916. And that's the number I'm using, 1916.
>
> P-53 is the 112 Anthes building. Page 10 is the Income Approach. And that building will produce about $18,000 according to the appraisal. That's 1,500 per month.

> Then there's P-55, which is the 220 First Street building. And that building is projected to make about 25,250 a month (sic). That's Page 11, P-55. And that averages $2,104 a month.
>
> So according to the business appraisals there's about [$5,250] a month of net income coming off the [commercial properties].

RP 978-79.

Kathy clearly believed the properties were capable of producing a monthly income stream and were considerably more valuable than their appraised values. See RP 985 (commercial property income of $5,500 net per month should be added to Steve's monthly net income); RP 459-60 (commercial property appraiser testifies building produce net rental income of $5,500); RP 370-72 (Anthes property worth $800,000.000); RP 377-78 (220 First street property worth 1.4 million), RP 378-79 (Building 11 worth 1.1 million), and CP 135 (Finding of Fact 42 indicating wife's belief regarding value of properties); RP 1000-01 (closing argument regarding commercial property values and fact Steve didn't want to sell properties); RP 379 (Kathy's testimony that buildings are valuable because commercial property is scarce); CP 715 (declaration of Kathy Janes indicating rental income is "substantial"). This is clearly sufficient evidence to support the

trial court's finding that the commercial properties would give Kathy the ability to support herself.

More importantly, however, the trial court gave Kathy the opportunity to decline to accept the commercial income-producing properties. The trial court was clearly trying to accommodate Kathy's choice regarding the manner in which she would receive her property division. During its oral ruling, the trial court had the following colloquy with Kathy's counsel regarding the commercial properties:

> The Court: I don't have, because those exhibits were not admitted – I don't have the rental income; whether or not the rental income will cover the mortgage payments plus maintenance and vacancies. I don't know that. That was what I was thinking, however. I also thought that I could award these to the Husband. I know the Wife didn't want them. But I could have done that and just switched the figures here. But I thought it would be good for her to have some income –producing property.
> Ms. Schultz: Well, Your Honor, I'd – I'd have to talk to Ms. Janes about that. I know it was her original desire was (sic) to have the Husband run them and simply receive the cash in the form of the – of a payout. So I can certainly discuss that with her. I'm – I'm not prepared to answer that right now based on the values that have been attributed here.
> The Court: All right. Well, I will do this: Is if she chooses to keep those, then she must make the payments out of the income, the rental income.

11/5/08 RP 25. Thereafter, contrary to her position in her closing argument, Kathy's counsel later stated the income-producing

properties were not going to be producing much income. As such, Kathy and her counsel were clearly aware the income-producing properties might not produce the cash flow the court anticipated based on the evidence admitted during trial. 11/5/08 RP 28. In fact, Kathy's counsel used this fact to support her vehement request that the Court order Steve to pay the $560,000.00 equalizing payment as quickly as possible so Kathy could pay her outstanding attorney fees and purchase a home. 11/5/08 RP 26-30, 34-36.

The trial court was cognizant of the fact that swift payment of the equalizing award was of significant importance to Kathy, and it denied Steve's request to make monthly payments. 11/508 RP 30-33. Ultimately, the trial court was clearly trying to give Kathy the ability to control how she would receive her property division. The trial court scheduled a review hearing for November 19, 2008, to allow Steve to come up with a plan to finance the equalizing payment. In the interim, the trial court continued the temporary order of spousal maintenance from Steve to Kathy. 11/5/08 RP 32-36, 42-46. At the conclusion of the hearing, the trial court specifically asked Kathy's counsel:

> If your client would just as soon not have the hassle of the rental properties, then somebody needs to say something right away because that makes it more feasible for money for refinancing of separate properties so that money can come out for Ms. Janes.

11/5/08 RP 46.

At the review hearing two weeks later, Kathy's counsel gave absolutely no indication Kathy was not accepting the trial court's award of the commercial properties. 11/19/08 RP 1-61. Instead, Kathy's counsel focused her arguments on ensuring the trial court entered a judgment against Steve for the $560,000.00 equalizing payment (bearing interest at 12%) and making sure the payment was made through her trust account. 11/19/08 RP 24-30, 34-35.

Clearly, Kathy chose to accept the trial court's initial award consisting of the income-producing properties and the $560,000.00 equalizing payment rather than allowing the trial court to award those properties to Steve, and, consequently increase the amount of the equalizing payment. Kathy likely chose this option because she knew Steve was capable of financing $560,000.00 quickly whereas a larger equalizing payment may have taken more time. See CP 993-96 (11/14/08 declaration of Steve Janes regarding financing for equalizing lien); CP 986-92 (12/30/08 motion and

declaration regarding payoff of equalizing lien). In fact, the equalizing payment was made the same day as the final orders entered, two (2) months later on January 13, 2009. See CP 986-992 (motion and declaration regarding financing for equalizing payment); CP 122, 125 (decree allows for payment of third mortgage to allow for loan to close). Under these circumstances, Kathy cannot complain now that the trial court abused its discretion in awarding these properties to her.

2. If The Doctrine of Invited Error Does Not Preclude Review, The Trial Court Properly Exercised Its Discretion By Awarding Kathy A Disproportionate Share Of The Community Assets And Providing For Continuing Spousal Maintenance Until Such Time As Kathy Received The $560,000.00 Equalizing Payment.

In an effort to avoid the consequences of her choice to accept the trial court's award of the commercial properties and $560,000.00 in cash, Kathy argues that the trial court abused its discretion by not placing her in "economic parity" with Steve for the future. Essentially, she argues the trial court should have awarded her continuing spousal maintenance after payment of the equalizing award because Steve is left with "$23,000 a month of net business income" compared to Kathy's "$635 a month of social security income." Appellant's Opening Brief, page 21.

This argument invites this Court to separate the trial court's decision regarding spousal maintenance from its decision regarding the property division. A maintenance award alone, however, need not ensure that each party has an equal or comparable income after dissolution.

> A careful reading of RCW 26.09.090 reveals that the trial court is not only permitted to consider the division of property when determining maintenance, but it is required to do so. Likewise, the trial court, when dividing the property, may take into account the amount of maintenance it intends to grant. RCW 26.09.080. There is no requirement in the statute or case law that the trial court isolate one determination from the other. To hold otherwise would frustrate the wide discretion which this statute gives to the trial courts. Wilder v. Wilder, 85 Wn.2d 364, 366, 534 P.2d 1355 (1975).

In re Marriage of Rink, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977). Thus, this Court must consider the trial court's overall award, not just an isolated component. If the assets of parties are sufficient to compensate a spouse entirely through a property division, supplemental maintenance is unnecessary. In re Marriage of Washburn, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). Maintenance is not a matter of right. In re Marriage of Irwin, 64 Wn. App. 38, 55, 822 P.2d 797 (1992). The relevant consideration in determining the propriety of an award of maintenance is whether

such an award is just. In re Marriage of Luckey, 73 Wn. App. 201, 209, 868 P.2d 189 (1994).

Although Kathy argues the trial court failed to make any findings regarding either the factors in RCW 26.09.090 as to how its property distribution achieved a just result, specific findings are not required. In re Marriage of Mansour, 126 Wn. App. 1, 16, 106 P.3d 768 (2004). Further, Kathy does not assign error to the vast majority of the trial court's forty-seven findings. CP 128-136. In particular, Kathy fails to assign error to the trial court's finding that "the 55/45 split of community assets" in her favor would be just and equitable considering the factors outlined in RCW 26.09.080. See CP 134 (Finding of Fact 34). More importantly, Kathy only partially assigns error to the trial court's finding regarding spousal maintenance in paragraph 2.12 of its Findings of Fact. The entirety of this finding states:

> Maintenance should be ordered until the equalizing payment is paid of $560,000.00 (which gives the wife 55% of the community property) because the wife will have the need and the husband will have the ability to pay. Any award of spousal maintenance after the equalizing payment is made would come out of the business asset already given to the husband in the property division. Since the trial court has already distributed the value of the business through the property award, any attempt to distribute the value of the business through monthly maintenance amounts would be in error. *Marriage of Barnett*, 63 Wn.

> App. 385 (1991)[5]. Additionally, after the equalization payment is made, the wife will leave the marriage with a substantial amount of assets, including commercial rental properties, and will have the ability to support herself.

CP 135 (Finding of Fact 2.12). Kathy only assigns error to the last part of this finding, namely "that the trial court's property division will allow [her] the ability to support herself." Appellant's Opening Brief, page 15. The remaining important parts of the trial court's finding remain unchallenged. Unchallenged findings of fact are verities on appeal and will not be reviewed. In re Brewer, 137 Wn.2d at 766; see also Chapman v. Perera, 41 Wn. App. 444, 452-54, 704 P.2d 1224, review denied, 104 Wn.2d 1020 (1985) (appellant assigns error only to a portion of trial court's findings)

In the instant case, there is substantial evidence to support the trial court's finding Kathy will be able to support herself. The trial court struck a balance by awarding both parties a combination of real property and cash/income. The trial court awarded Steve the family home (which he had to refinance to pay Kathy's equalizing payment) and the business. CP 131-32. The business value consisted mainly of its earnings and the income it provides.

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[5] In re Marriage of Barnett, 63 Wn. App. 385, 818 P.2d 1382 (1991).

RP 303 (argument that business value is the income it generates); RP 327-330 (business appraiser testifies regarding income approach to valuation); RP 1041-42 (closing argument). Thus, awarding Kathy continuing maintenance based on the income the business generated to Steve would give Kathy a duplicative award. CP 130 (Unchallenged Finding of Fact 2.12). The trial court correctly recognized this fact when reaching its decision[6].

On the other hand, the trial court awarded Kathy the commercial properties, which she could choose to keep for a monthly income stream, or she could sell them and invest the proceeds in an annuity which would generate a generous annual income stream from the interest alone. CP 135; RP 568-69. In fact, Kathy testified that she had already spoken to an investment advisor regarding her post-dissolution situation, acknowledged she would likely sell the commercial buildings, and indicated it would be like trying to determine what to do if you won the lottery. RP 568-570, 574.

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[6] Notably, although Kathy's motion for reconsideration was properly stricken, she makes no argument in that motion that the trial court erred by reaching this conclusion. Failure to properly bring this error to the attention of the trial court precludes appellate review. In re Marriage of Studebaker, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); see also RAP 2.5(a).

Now, however, Kathy argues her post-dissolution situation is inadequate. She relies on In re Marriage of Pea, 17 Wn. App. 728, 566 P.2d 212 (1977) and Edwards v. Edwards, 74 Wn.2d 286, 444 P.2d 703 (1968) to argue the trial court abused its discretion by leaving her without sufficient monthly income. These cases are significantly different from the instant case. In both Pea and Edwards, the parties had little to no community assets to divide between them, thus ongoing monthly support was critical to achieve a fair result. See In re Pea, 17 Wn. App at 729 (only assets available to divide at dissolution were modest furnishings and husband's military pension of approximately $123,000.00; trial court erred in taking into consideration depleted assets to offset wife's share of military pension); Edwards, 74 Wn.2d at 287 (total community assets of $12,000 were divided equally; trial court erred by awarding working wife one-half of retired husband's pension which left husband in desperate financial circumstance). Here, however, the trial court left Kathy with assets totaling $2,167,328.00 after paying the separate debt awarded to her. See CP 164-65 (total community award of $2,300,610.00 less separate debt of $133,282.00; trial court's division leaves Kathy with 56% of the total marital estate). Taking into consideration the entirety

of the trial court's award, the trial court did not abuse its discretion by discontinuing monthly maintenance once Steve paid the $560,000.00 equalizing payment. See In re Mansour, 126 Wn. App. at 16 (trial court did not abuse discretion by declining to award maintenance to wife after awarding wife 55 percent of marital assets including entirety of house sale proceeds).

Upon close examination, Kathy's argument really centers on "nature of the property" awarded to her rather than on the property award itself. See Appellant's Opening Brief, page 22 (disproportionate distribution is form over substance as nature of property made a bad situation worse). Clearly Kathy she is now unhappy with the property division *she chose* because her equalizing payment was depleted by payment of her astonishingly high attorney fees. Id. at pages 28-29. During these proceedings, the trial court commented on the expensive nature of Kathy's choice of counsel and the resulting attorney fees. CP 262-67; CP 250-51; see also CP 276-79 (counsel's declaration regarding trial expenses, including $9,600 in travel expenses, $2,400 in lodging expenses). During the trial court's oral decision and the review hearing that followed, Kathy's counsel made it very clear to the trial court she was concerned about ensuring her fees were paid.

11/5/08 RP 27, 30-31; 11/19/08 34 (equalizing payment paid through counsel's trust account). In fact, counsel went so far as to argue that Kathy might not have continuing representation to finalize the dissolution if fees were not paid. 11/5/08 RP 33-35, 42-43.

The fact that Kathy's financial obligations to her trial counsel depleted her equalizing payment and made her daily living situation difficult immediately after trial is not a basis to find the trial court abused its discretion. The trial court's decision left Kathy with significant assets she could use to pursue the activities her health allowed her to pursue. In fact, Kathy had already begun to travel and was in Spain in November 2008 at the time of the trial court's review hearing. 11/19/2008 RP 58.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO AWARD KATHY ADDITIONAL ATTORNEY FEES WHEN KATHY HAD ALREADY BEEN AWARDED ALMOST $100,000.00 IN FEES PRIOR TO TRIAL AND RECEIVED SUFFICIENT PROPERTY WITH WHICH TO PAY HER FEES.

Pursuant to RCW 26.09.140 a trial court may, within its discretion, award attorney fees and costs in a dissolution proceeding after considering the financial resources of both parties. A party to a dissolution action is not entitled to attorney fees as a

matter of right. The court must determine whether one party has a need and the other party has the ability to pay. In re Marriage of Stenshoel, 72 Wn. App. 800, 812-13, 866 P.2d 635 (1993). Like its decisions regarding a property division and spousal maintenance, a trial court's decision regarding whether or not to award fees is reviewed for an abuse of discretion. In re Crosetto, 82 Wn. App. at 564.

Here, Kathy simply argues "it is obvious" she does not have the ability to pay her attorney fees without substantially depleting her equalizing payment. Appellant's Opening Brief, page 28. She assigns no error to the trial court's finding Steve already paid Kathy $92,000.00 for attorney fees and costs. CP 130 (Unchallenged Finding of Fact 2.15); see also CP 899 (November 2003 order); CP 448 (May 2007 order); CP 251-52 (November 2007 order). In its oral decision, the trial court made it clear it believed Kathy would not have the need for fees given the trial court's prior attorney fees awards and the disproportionate "award of assets and debts." 11/5/08 RP 41-42; see also CP 164 (trial court's asset/debt spreadsheet indicates Kathy will have sufficient property to pay remaining fees).

The trial court's denial to award additional fees was not an abuse of discretion. Notably, although Kathy was awarded a significant sum for appraisal costs, she presented no expert testimony at trial regarding the value of The Janes Company or the value of the parties' commercial buildings. CP 251, 447-48. In fact, Steve paid for the business appraisal, and Kathy stipulated to the business value based on that appraisal. CP 659; RP 301, 824-25. Early in the case, the trial court recognized that each party would have assets with which to pay their attorney fees upon the conclusion of the case. CP 447. The trial court certainly had sufficient testimony upon which to assume Kathy's fees following trial could be in excess of $100,000.00. RP 368-69. While the trial court did not make a specific finding Kathy's fees were unreasonable following trial, the trial court was certainly cognizant of the fact that Kathy's fees were extremely high given Kathy's choice of counsel and that her choice would affect "what she's going to be left with when this is all over." CP 263. Under the circumstances, trial court did not abuse its discretion in declining to award Kathy additional attorney fees.

E. THIS COURT SHOULD DECLINE TO AWARD KATHY FURTHER ATTORNEY FEES ON APPEAL AND SHOULD INSTEAD AWARD STEVE FEES FOR HAVING TO RESPOND TO THIS APPEAL.

This court should decline to award Kathy her attorney fees on appeal. Her claim that an award of fees is "proper given the gross economic disparity" between she and Steve ignores the reality of the trial court's decision. Between the property division awarded by the trial court, and the fees Steve paid on Kathy's behalf prior to trial, Kathy received $2,392,610.00 from the parties' marital estate. She has sufficient funds with which to pay her own fees on appeal.

In fact, Steve should be awarded his fees for having to continue to respond to Kathy's insatiable desire for more. Kathy's challenges are not properly preserved for appeal because she either fails to assign error to the trial court's findings or she invited the very error she now complains of. Her appeal truly has no merit, and it would be well within this Court's discretion to award Steve his attorney's fees on appeal. In Re Marriage of Healy, 35 Wn. App. 402, 406, 667 P.2d 114, review denied, 10 Wn.2d 1023 (1983).

V. CONCLUSION.

Kathy Janes received the disproportionate property division she requested. The trial court gave her the opportunity to structure the way she received the property she was awarded, and Kathy chose to accept an immediate equalizing payment of $560,000.00 and commercial income-producing properties valued at $1,721,768.00. She cannot avoid the consequences of her choices by complaining on appeal that the trial court treated her unfairly by awarding her what she requested, just not as much as she requested.

The decision of the trial court should be affirmed. Kathy's request for attorney fees on appeal should be denied. Steve should be awarded his attorney fees for having to defend against an appeal that clearly has no merit.

Respectfully submitted this 22 day of March, 2010.

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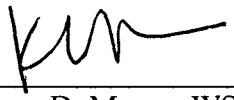
Attorneys at Law
A Professional Service Corporation

By 
Karen D. Moore, WSBA 21328
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 22nd day of March, 2010, I arranged for service of the original and one copy of the foregoing Respondent's Brief to be delivered to the following:

Office of Clerk, Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101
BY: ABC MESSENGER

Copies to:

Attorney for Appellant:
Mary E. Schultz
Attorney at Law
Davenport Tower, Penthouse 2250
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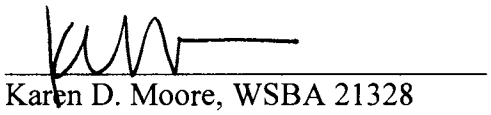
BY: US MAIL and email to mary@mschultz.com

Dated this 22 day of March, 2010 at Everett, Washington.



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