

No. 67458-7-I
(Consolidated with No. 67457-9-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MERRILEE A. MACLEAN, CHAPTER 7 TRUSTEE, *et al.*,

Appellants,

vs.

STACEY DEFOOR,

Respondent.

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BRIEF OF APPELLANT MERRILEE A. MACLEAN, CHAPTER 7
TRUSTEE

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ORIGINAL

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I. INTRODUCTION

This is the second appeal of King County Cause No. 06-2-32531-1 SEA (consolidated with 06-2-33145-1 SEA), a dissolution proceeding between Stacey and Terry Defoor. This Court filed an unpublished decision on August 16, 2010, appeal no. 62519-5-I, captioned *Stacey J. Defoor, Respondent, v. Terry Mark Defoor, Appellant, Terry Defoor and G.W.C., Inc., Appellants, v. Stacey J. Defoor, Respondent* (hereinafter “*Defoor I*”). CP 58 *et seq.* There, this Court “reverse[d] the property distribution,” and “instruct[ed] the court to clarify the character and allocation of approximately \$1.6 million debt” on a line of credit.¹ “We reverse in part and remand for proceedings consistent with this opinion.”²

Appellant, Merrilee A. MacLean “MacLean,” is Chapter 7 Trustee of the Estate of Terry Defoor, having been appointed on June 7, 2011. Appendix A. MacLean appeared in this action on July 11, 2011, and filed her Notice of Appeal on July 27, 2011. CP 358-361. *See also* CP 393-94 (Ex Parte Order Authorizing Trustee to Employ General Counsel). MacLean was not involved in *Defoor I*.

Appellant MacLean assigns error to two actions taken by the trial court on remand from *Defoor I*. Those actions are embodied in the trial court’s “Amended Judgment” of March 7, 2011, and in its June 29, 2011

¹ *Defoor I* at *1.

Order Denying Plaintiff's Motion for Reconsideration of Order Amending Judgment. CP 341-343; CP 356-357.

II. MACLEAN'S ASSIGNMENTS OF ERROR

1. The trial court erroneously awarded post-judgment interest from November 20, 2008, the date of the original judgment, rather than from March 7, 2011, the date of the new judgment. CP 342.
2. The trial court erroneously dated its March 7, 2011 "Amended Judgment ... *nunc pro tunc* to November 20, 2008." CP 343.

III. ISSUES PERTAINING TO MACLEAN'S ASSIGNMENTS OF ERROR

1. Where the court of appeals reversed the property distribution contained within the original judgment, and instructed the trial court on remand to eliminate double counting of a promissory note, and to clarify the character and allocation of a \$1.6 million debt that also could affect the judgment amount, was it error for the trial court to award post-judgment interest back to the date of the original judgment?
2. Did the trial court err when it used the device of *nunc pro tunc* to backdate its judgment of March 7, 2011 to November 30, 2008?

IV. MACLEAN'S STATEMENT OF THE CASE

A. The First Appeal and Instructions For Remand

Many facts underlying this appeal are set forth in *Devoor I.*³ Only those facts especially relevant to the issues Appellant MacLean raises on appeal are discussed here, along with a description of pertinent proceedings following remand.

² *Id.*

After her relationship with Terry Defoor ended in 2006, respondent Stacy Defoor petitioned for an equitable distribution of property under the “committed, intimate relationship doctrine.”⁴ Following trial in March 2008, the court below characterized, valued, and distributed property as reflected in its Findings of Fact and Conclusions of Law, CP 26-56, and in its Judgment filed in November 20, 2008. CP 15-24. Both parties appealed: Terry Defoor appealed the trial court’s characterization, valuation and distribution of property. Stacey Defoor appealed the trial court’s refusal to award attorney fees.⁵

Two property interests addressed by this Court in *Defoor I*, and by the trial court on remand, are relevant to the current appeal. The first involves a Costa Rica condominium, regarding which this Court found “the trial court erred in crediting [Terry Defoor] with the promissory note in its property distribution. ... By crediting the same funds to Terry twice, the trial court did not achieve its stated intent of an equal division of community-like assets.”⁶ On remand, the trial court was “instructed to allocate the value of the Costa Rica condominium only once.”⁷ The trial

³ For the Court’s convenience, a copy of this decision is attached hereto as Appendix B.

⁴ *Defoor I* at *1.

⁵ *Id.*

⁶ *Id.* at *7.

⁷ *Id.*

followed this instruction. Its new “Principal Judgment Amount ... \$1,845,576.06,” reflects this recalculation.⁸ CP 342.

The second property interest, an approximately \$1.6 million dollar debt incurred on a line of credit with UBS bank,⁹ involved more than an arithmetic recalculation on remand. According to Terry Defoor, he incurred this debt “to acquire the Sea-Tac property”¹⁰—property the trial court awarded to Stacy Defoor. However, the trial court did not characterize or allocate the debt in its original Findings and Conclusions, at least not “clearly”.¹¹

In *Defoor I*, Terry Defoor challenged the award of the Sea-Tac property to Stacey Defoor, claiming this property was his separate property.¹² But, this Court found “it was not error for the trial court to treat the Sea-Tac property as a [community-like] asset, subject to division.”¹³ Terry Defoor also argued that if the Sea-Tac property was treated as community property, then “the debt he incurred to acquire it must be treated” as a community liability.¹⁴ Stacy argued in response that “the trial court expressly allocated this debt to Terry, citing the court’s

⁸ As respects the Costa Rica property, the trial court seems to have adopted the calculation proposed by Stacey Defoor in her Motion for Entry of Judgment at CP 8-9.

⁹ The actual amount of the UBS Line of Credit debt is \$1,568,997.82. CP 345.

¹⁰ *Defoor I* at *5.

¹¹ *Id.*

¹² *Id.* at *4-*5.

¹³ *Id.* at *5.

¹⁴ *Id.*

conclusion of law 6: ‘It is just and equitable to award to [Terry] all putative and real debts of GWC [the corporation Terry and Stacey owned], due to the fact that these debts are denied by, or largely controlled by [him.]’¹⁵

Addressing the Defoors’ competing positions on these issues in *Defoor I*, this Court upheld the Sea-Tac property’s characterization as a community-like asset and its distribution to Stacy Defoor. Yet, regarding the UBS line of credit debt, this Court said:¹⁶

The trial court did not include this specific debt in its list of debts or expressly address it in its factual findings. Because we cannot determine from the trial court’s findings and conclusions whether it allocated the debt to Terry as part of its fair and equitable property distribution, we remand for additional findings and conclusions to clarify the character and allocation of this debt.

As this Court’s ruling and instruction on remand is central to the legal analysis of the assigned errors, the ruling is quoted here in its entirety, along with this one of this Court’s explanatory footnotes (emphasis added).¹⁷

[B]ecause the trial court improperly counted proceeds from the sale of a community-like asset twice, we reverse the property distribution. We also instruct the court to clarify the character and allocation of an approximately \$1.6 million debt on a United Bank of Switzerland (UBS) line of

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at *1.

credit. [FN 1 omitted.] We reverse in part and remand for proceedings consistent with this opinion. FN 2.

FN2: We cannot determine from this record whether the trial court would have made the same property distribution between the parties absent these errors.

B. Proceedings on Remand.

Following remand, Stacey Defoor moved for “Entry of Amended Judgment.” CP 1-12. She agreed the promissory note for the Costa Rica condominium had been counted twice, and she re-calculated the final money judgment. The trial court adopted her recalculation, and the Principal Judgment Amount in Stacey Defoor’s favor dropped from \$2,223,368.60 on November 20, 2008, to \$1,860,868.60 on March 7, 2011. *Compare* CP 108 with CP 342.

The trial court also made “Additional Findings of Fact,” pertaining to the UBS line of credit. CP 344-346. The court substituted new language in Paragraph 66 of its previous Findings and Conclusions, to wit: “With the exception of the Heritage Bank Loan **and the UBS Lines of Credit**, none of them are sustained[,]” meaning none of the “potential debts or liabilities of GWC, Inc.,” are sustained. CP 345; CP 7. The trial court also added new subpart (g) to Paragraph 66: “GWCA and/or GWC borrowed a total of \$1,568,997.82 against United Bank of Switzerland (‘UBS’) business lines of credit.” CP 345.

In addition, the trial court made five other new findings, each pertaining to the “UBS debt” or “Lines of Credit.” These additional findings are generally to the effect that the UBS debt was to be allocated to Terry Defoor as his separate liability. The Court further finds as follows:

4. Allocating to Terry all obligations for the UBS Lines of Credit is fair and equitable.

5. The approximately \$1.6 million obligation incurred by Terry in connection with the UBS Lines of Credit is substantially less than the value of joint assets that were retained by Terry but that the Court did *not* include in its awards to the parties of enumerated valued assets or in the calculation of the money judgment.¹⁸

The trial court also found at Additional Finding 2 that “Terry did not incur the UBS debt for the purpose of acquiring the Sea-Tac property.” CP 345. This new finding appears to contradict this Court’s statement in *Defoor I* that Terry Defoor did use this credit line to buy the Sea-Tac land. “GWCA [a new corporation Terry formed after the relationship ended] paid cash for the Sea-Tac property, using \$1,568,997.82 from the UBS loan account”¹⁹

Despite this discrepancy, however, Appellant MacLean does not in this brief challenge Additional Finding 2, though it seems clearly erroneous, nor does this appellant challenge any of the trial court’s other

¹⁸ CP 345.

new findings and conclusions. Instead, Appellant MacLean reserves the right to join any challenge its co-appellant may make, and here focuses upon the two Assignments of Error and the issues pertaining thereto that she identifies above.

Although Stacey Defoor argued otherwise in *Defoor I*, this Court said the character and allocation of the UBS line of credit debt required clarification:

But it is not clear from this conclusion and the factual findings whether the trial court meant to allocate to Terry the UBS line of credit Terry claims he incurred to acquire the Sea-Tac property. The trial court did not include this specific debt in its list of debts or expressly address it in its factual findings. Because we cannot determine from the trial court's finding and conclusions whether it allocated the debt to Terry as part of its fair and equitable property distribution, we remand for additional findings and conclusions to clarify the character and allocation of this debt.

The trial court did not account for the nearly \$1.6 million UBS line of credit in its original Findings and Conclusions, CP 26-56, and in its 2008 Judgment, CP 15-24. Circumstances suggest this was inadvertent, and that on remand, the trial court consciously considered the debt for the first time.

Finding 66 (originally and as amended) identifies two types of “potential debts or liabilities of GWC, Inc.”—“substantiated” and “not

¹⁹ *Defoor I* at *2.

real.” CP 47; CP 345. The UBS line of credit has always been “substantiated,²⁰ but only one substantiated debt—“the Heritage Bank Loan”—was listed in original Finding 66. CP 47. The six other Finding 66 liabilities fall into the trial court’s category of “not real.” CP 47; CP 345.

On remand, the trial court was instructed to, and did consider, the character and its allocation of the UBS line of credit debt. Although that court’s consideration ultimately did not affect the judgment amount, it could have done so. In *Defoor I*, this Court said: “it was not error for the trial court to treat the Sea-Tac property as a GWC asset, subject to division.”²¹ If the Sea-Tac property was a community-like asset subject to division, then the associated debt was potentially subject to division. Although the trial court eventually characterized the debt as Terry Defoor’s separate property and allocated the entire debt to him, leaving no effect on the judgment, the trial court’s action could have changed the judgment amount that Stacey Defoor was to recover—which possibility this Court has noted already.

On September 13, 2009, acting through its Commissioner, this Court entered a Notation Ruling on Terry Defoor’s cost bill. CP 147-148.

²⁰ The parties presented evidence about this debt at trial, as revealed in this Court’s discussion of the subject in *Defoor I* at *2, *4-*5.

²¹ *Defoor I* at *5.

Stacey Defoor had objected to Terry Defoor's cost bill, claiming he "did not prevail on several issues [he] raised in this appeal and ... there was no substantially prevailing party." CP 147. Explaining why Terry Defoor substantially prevailed, and therefore was entitled to costs, Commissioner James Verellen said, at CP 148 (emphasis added):

Terry Defoor prevailed on his argument that the trial court credited the same funds (one half of the \$725,000 proceeds of the Costa Rica condominium) to him twice in valuing funds deposited in a bank account used in the court's allocation of community cash. The panel also remanded for additional findings and conclusions to clarify the character and allocation of the USB line of credit debt (\$1.6 million) regarding the SeaTac property. ... One half of \$725,000 is significant, and **there is the potential for a large adjustment resulting from the clarification and allocation of the USB line of credit debt on remand.**²²

The trial court was to exercise its discretion on remand, and it did so.

Following this Court's instruction to "clarify the character and allocation of an approximately \$1.6 million debt on a United Bank of Switzerland (UBS) line of credit," *Defoor I* at *1, the trial court made new findings. In doing so, the court evaluated the evidence it had earlier received at trial. The trial court could have made "a large adjustment resulting from the clarification and allocation of the USB line of credit debt." CP 148. Unlike the situation with the promissory note, evaluating and allocating the UBS line of credit debt involved more than arithmetic.

Collectively and individually, these facts explain why the trial court erred when it awarded post-judgment interest from November 20, 2008, rather than from March 7, 2011, and when it ordered the Amended Judgment be entered *nunc pro tunc*. CP 15; CP 341-343; CP 356-357.

V. ARGUMENT

A. The Trial Court Erred When It Awarded Post Judgment Interest From November 20, 2008 on Its “Amended Judgment” That Was Rendered on March 7, 2011.

Trial courts must award post-judgment interest. RCW 4.56.110

“Interest on Judgments,” subsection (4), provides:

Except as provided under subsections (1), (2), and (3) of this section, [not applicable here], **judgments shall** bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partially affirmed on review, interest on the judgment or on that part of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. ...

The application of a statute to a given set of facts is reviewed *de novo*.²³

In *Defoor I* this Court did not affirm any verdict in whole or in part. Rather, this Court said: “We reverse in part and remand for proceedings consistent with this opinion.” *Defoor I* at *1, *9. After complying with this Court’s instructions to “allocate the value of the Costa

²² RAP 17.7 provides for review of a ruling of the Commissioner, but no such motion to modify was made. Thus, the ruling became final.

Rica condominium only once,” and make “additional findings and conclusions to clarify the character and allocation” of the UBS line of credit debt,²⁴ the trial court did not have authority to award interest on the new judgment from the date of the original judgment.

The case of *Fisher Properties, Inc., v. Arden-Mayfair, Inc.*, is dispositive.²⁵ *Fisher Properties* held: “Awards reversed on review do not bear interest. ... The mandate necessitated new findings and a new judgment, not a simple mathematical computation. ... The trial court could not merely recalculate; The exercise of discretion involved here removes it from the modification situation.”²⁶

In *Fisher Properties*, the trial court had, on remand from the first appeal, awarded interest from the date of the original judgment. The Washington Supreme Court said that action was error. “The court’s reversal wiped out the original judgment and required new findings and a new judgment. Thus, interest on the damages ... and the award of attorney fees must run from the date of the new judgment”²⁷ See also *Hadley v. Maxwell*, 120 Wn. App. 137, 146, 84 P.3d 286 (2004) (Division III) (“Awards reversed on review do not bear interest. ...”); and *Coulter*

²³ *Coulter v. Asten Group, Inc.*, 155 Wn. App. 1, 7 and n. 2, 230 P.3d 169 (2010) (Division I)

²⁴ *Defoor I* at *7.

²⁵ 115 Wn.2d 364, 798 P.2d 799 (1990).

²⁶ 115 Wn.2d at 373-374.

²⁷ *Id.* at 375.

v. Asten Group, Inc., supra, 155 Wn. App. at 15-16 (post judgment interest available only from date of new judgment where instructions on remand required trial court to exercise discretion).

Terry Defoor brought the *Fisher Properties* case to the trial court's attention in his Response in Opposition to Motion to Amend Judgment, CP 177, and in his Motion for Reconsideration of Order Amending Judgment. CP 350-352. In its Order Denying Plaintiff's Motion for Reconsideration of Order Amending Judgment, the trial court said without elaboration: "*Fisher Properties, Inc. v. Arden Mayfair, Inc.*, [citation omitted], is factually distinguishable." CP 356-357. Nearly all cases have factual distinctions from one another, but that does not permit a trial court to disregard relevant appellate precedent when there is a governing statute and the factual distinctions lack legal significance.

Fisher Properties involved a real property lease dispute. After a long trial, the trial court concluded the lease had been breached, and awarded damages for repair and restoration, building code violations, lost rent, treble damages for waste, and attorney fees. On direct appeal, the Washington Supreme Court affirmed damages for repair costs, lost rental and commissive waste, but reversed the awards for restoration costs, violation of codes, and attorney fees. The court said:

the trial court awarded Fisher almost all of its claimed attorney fees, but the statute authorized attorney fees only

for the commissive waste claim. [Citation to first appeal omitted.] The court ordered the trial court to award fees for only that time spent on the waste claim. [Citation to first appeal omitted.] ... The decision [also] clarified the appropriate measure of damages for breach of lease. While the general measure of damages is the cost of returning the premises to the condition required by the lease, the diminution in market value of the premises ... is to be used if less than the cost of restoration. ... The court remanded to the trial court for a reassessment of restoration damages and attorney fees.²⁸

On remand, the trial court declined additional evidence on diminution in value, and made its new findings based on evidence previously presented at trial. The trial judge awarded restoration cost damages (as he had before), though he excluded certain items consistent with the supreme court's admonition, and reduced the attorney fee award. Then "[h]e directed interest on the modified judgment to run from the date of the original judgment ..."²⁹

The judgment-debtor appealed, arguing in part the trial erred in refusing new evidence on diminution in value. The Washington Supreme Court found this "was not an abuse of ... discretion Since substantial evidence supports the value the trial judge chose ... we will not second-guess his choice."³⁰

²⁸ *Id.* at 367.

²⁹ *Fisher Properties*, 115 Wn. 2d at 368.

³⁰ *Id.* at 369.

The supreme court then addressed the trial court's decision to award interest on the new judgment from the date of the original judgment. The supreme court quoted RCW 4.56.110(3) and said: "Awards reversed on review do not bear interest."³¹

The supreme court in *Fisher Properties* did not end its discussion there, however, because "the parties rel[ied] on a Court of Appeals decision that adds a gloss to situations where an appellate court reverses the award by distinguishing between modification and vacation," citing *Fulle v. Boulevard Excavating, Inc.*, 25 Wn.App. 520, 522, 610 P.2d 387, *rev. denied*, 93 Wn.2d 1030 (1980). Before ultimately deciding the trial court erred by awarding interest on the new judgment from the original judgment date, the *Fisher Properties* court examined *Fulle's* "gloss."

Fulle's "gloss" is a judicial exception to the rule that permits post judgment interest to accrue only from the date of a new judgment entered after a prior judgment is reversed on appeal. "Where the appellate court merely modifies the trial court award and the only action necessary in the trial court is compliance with the mandate, interest runs from the date of the original judgment." *Fulle*, 25 Wn. App. at 522. But, "[o]n the other hand, where an appellate court has reversed the trial court judgment and directed that a new money judgment be entered, interest runs from the

³¹ *Id.* at 373.

entry of such new judgment.” *Id.* The latter situation is like the present case. The former situation is not.

In the first *Fulle* appeal, the appellate court’s judgment was: “Affirmed in part, reversed insofar as [claimant] was denied recovery under” one of his claims. The underlying legal issue, which the first appellate court addressed, was whether the defendant met its burden to prove what portion of the claimant’s damages claim was barred by the statute of limitations. Finding the defendant had not met its burden, the first court of appeals remanded the case so the trial court could increase the award by the amount it had excluded before as barred by the statute.

When the trial court made the adjustment that flowed from the first appellate court’s ruling on the statute of limitations question, the trial court awarded post judgment interest on the full amount from the original judgment date. In the second appeal, the defendant appealed the interest award, contending that “since the court reversed the trial court [in the first appeal], interest can only be awarded from the date of entry of the amended judgment.”

Responding to the defendant’s challenge to the interest award in the second appeal, the court said:

Each case must be examined on its own facts to determine the intent of the appellate court decision. ... It is clear that the matter was not sent back for a new trial but merely for an amendment of the original judgment. Under

such circumstances, interest on that claim shall date back to and shall accrue from the date the original judgment was entered. This result is consistent with RCW 4.56.110(2), which provides that if the appellate court directs a trial court to enter judgment on a verdict, interest shall run from the date of the original verdict.

Unlike *Defoor I's* instruction that the trial court make “additional findings and conclusions to clarify the character and allocation of the UBS debt,” *id.* at *5, the remand in *Fulle* did not require the trial court to do anything other than arithmetically increase the judgment by a sum that was fixed, but not awarded, in the first proceeding. *Fulle* required no new testimony and no new findings. Discretionary review of the record was not required. There was no re-weighting of the evidence. The narrow exception to the general rule that awards reversed on review do not bear interest, which the *Fisher Properties* court noted but rejected and the *Fulle* court employed, does not apply here because the circumstances supporting the exception do not exist here. In that way, this case is just like *Fisher Properties*.

When this Court reversed in part and remanded for further proceedings in *Defoor I*, it gave two instructions. The trial court was to eliminate double counting of the promissory note for the Costa Rica condominium sale, and it was to consider the character and allocation of a debt that it had not expressly addressed in its original findings and conclusions. When asked to “consider” an issue on remand, “the superior court may exercise discretion.” *In the Matter of the Marriage of*

McCausland, 129 Wn. App. 390, 399, 118 P.3d 944 (2005), *rev'd on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007). In the present case, discretion was to be exercised on remand. “A large adjustment”³² to the judgment amount was possible. CP 148. In this regard, this case is also like *Coulter*, *supra*, where this division of the court of appeals said that because its remand instructions “required an exercise of discretion, rather than mere computation, on the part of the trial court ... [t]here was no judgment on which interest could have run. RCW 4.56.110 (3).”

In *Coulter*, post judgment interest was available only from the new judgment date. Likewise here, post judgment interest should be available only from the date of the new judgment. The trial court erred by concluding otherwise.

B. The Trial Court Erred When It Used The Device of *Nunc Pro Tunc* to Backdate Its Judgment of March 7, 2011 to November 30, 2008.

A court’s power to enter an order *nunc pro tunc* is limited. *State v. Ryan*, 146 Wash. 114, 261 P. 775 (1927), quoted in *In the Matter of the Marriage of Pratt*, 99 Wn.2d 905, 911, 655 P.2d 400 (1983). When the trial court in the present case entered its “Amended Judgment,” dated “this 7 day of March, 2011, *nunc pro tunc* to November 20, 2008,” CP 343, the

³² These are this Court’s Commissioner’s own words when it determined Terry Defoor was the prevailing party on appeal. Respondent Stacey Defoor did not challenge Commissioner Verellen’s Notation Ruling. *See, supra*, note 22 and accompanying text. *See also* RAP 17.7.

limited circumstances under which a court may exercise its *nunc pro tunc* power did not exist. This Court should reverse.

The trial court here did not explain why it entered its Amended Judgment *nunc pro tunc*. CP 341-343. Perhaps the court employed this device because it had reservations about its authority under RCW 4.56.110(4) to award interest on the new judgment from the date of the original judgment. But *nunc pro tunc* has limited application, and no Washington case supports its use under the present circumstances.

State v. Ryan, supra, contains a detailed discussion of *nunc pro tunc*, which is quoted here. Emphasis is added to highlight the passages directly applicable to the instant case.

[T]he inherent power of a court of record to correct its records is stated as follows: “This power to correct clerical errors and misprisions extends to criminal as well as civil cases, and it would seem that no lapse of time will divest the court of its power, or absolve it from its duty, to supply deficiencies in the records of its own proceedings, where justice and truth of a case require it. A court may amend its record in the matter of clerical misprisions so as to make it conform to the truth even after the term has expired, and error brought, and where a court has amended omissions in its records which occurred in a previous term, the record thus amended stands as if it had never been defective, or as if all the entries had been made and completed at the previous term. **In the exercise of this power of amendment, the court is not, however, authorized to do more than to make its records correspond to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given. ...**

The office of a judgment *nunc pro tunc* is to **record some act of the court done at a former time** which was not then carried into the record, and **the power of the court to make such entries is restricted to placing upon the record evidence of judicial action which has been actually taken.** It may be used to speak the truth, but not to make it speak what it did not speak but ought to have spoken. **If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy these errors or omissions by ordering the entry *nunc pro tunc* of a proper judgment.** [Citation omitted.]³³

Although decided almost 100 years ago, *State v. Ryan* remains good law. See generally *In the Matter of the Marriage of Pratt, supra*; *State v. Melhorn*, 195 Wash. 690, 692-93, 82 P.2d 158 (1935) (“The office of a *nunc pro tunc* order or judgment is to record some act of the court done at a former time and not then carried into the record,” citing *State v. Ryan*); *Carter v. Tabery*, 14 Wn. App. 271, 275, 540 P.2d 474 (1975) (Division One), quoting *Osborne v. Osborne*, 60 Wn.2d 163, 167, 372 P.2d 538 (1962), which in turn cites *State v. Ryan*, (“The office of an order or decree *nunc pro tunc* is to record judicial action taken and not to remedy inaction. ... It may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken”).

In *Defoor I* this Court reversed the trial court’s property distribution and remanded for further proceedings. *Defoor I* at *1. This

Court instructed the trial court to value a promissory note only once, and asked the trial court to clarify and allocate a debt. The trial court was instructed to make additional findings and conclusions. *Id.* at *5. The trial court complied. CP 344-346.

In 2011, the trial court corrected the judicial errors it made in 2008. The trial court recalculated the amount of the equalization payment to Stacey Defoor by eliminating the double counting of the note; and it clarified the character and allocation of a debt for purposes of a “fair and equitable property distribution” by making additional findings. *Id.*

The trial court’s actions on remand were not the sort of actions *nunc pro tunc* can address. *Nunc pro tunc* allows a court to put “upon the record evidence of judicial action which has actually been taken.” *Ryan, supra*. The trial court did not, in 2008, allocate the Costa Rica promissory note only once. It did not, in 2008, account for the line of credit debt in its list of debts, rendering this Court unable to discern, in the first appeal, whether the trial court considered this debt when it set the amount of Terry Defoor’s equalization payment to Stacey Defoor. The trial court’s actions in March 2011 were new actions. They were not actions previously taken, for which a present record had to be made. *Nunc pro tunc* does not apply.

³³ *Ryan*, 146 Wash. 116-117.

Nunc pro tunc cannot be used to make the record “speak what it did not speak but ought to have spoken.” *Ryan, supra*. In *Defoor I*, this Court concluded the trial court’s Findings, Conclusions, and Judgment should have spoken about the line of credit debt, but they were silent, instead. This Court said the trial court should have counted the promissory note only once. It did not.

As reflected in this Court’s decision and instructions for remand, in 2008 the trial court “rendered an imperfect or improper judgment,”³⁴ for which *nunc pro tunc* is unavailable. The trial court’s errors were not clerical nor misprisions. The trial court’s entry of judgment *nunc pro tunc* to 2008 was error as a matter of law.

VI. CONCLUSION

Following remand from *Defoor I*, the trial court committed two errors of law. The first was to award of post judgment interest on the new judgment from the date of the original judgment. Under RCW 4.56.110, only if the reviewing court directs the trial court to enter judgment on a verdict, or if a judgment is wholly or partially affirmed on review, can interest on the new judgment accrue from the original judgment date. Here, the court of appeals reversed the trial court and remanded the case with instructions to make additional findings and conclusions on one

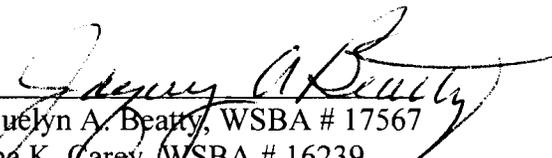
³⁴ *Ryan, supra*, 146 Wash. at 117.

matter—a discretionary undertaking—and to eliminate the double counting of another.

The trial court's second error was entering the March 7, 2011 judgment *nunc pro tunc* to November 20, 2008. *Nunc pro tunc* allows a court to presently record some act of the court that it actually completed previously, but which was not then put on the record. *Nunc pro tunc* does not permit a court to backdate new action undertaken at the appellate court's direction.

Appellant MacLean respectfully requests that this Court reverse the trial court, and hold that March 7, 2011, is the effective date of the only judgment in this case on which post judgment interest can accrue.

DATED December 19, 2011.

By: 
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Attorneys for Merrilee A. MacLean,
Chapter 7 Trustee

I declare that on December 19, 2011 I caused to be filed with the Clerk of the Court of Appeals, Division 1, and served via hand delivery by ABC Legal Messengers, the above and attached Brief of Appellant Merrilee A. MacLean, Chapter 7 Trustee.

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APPENDIX A

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UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re TERRY DEFOOR, Debtor.	No. 10-17470 NOTICE OF APPOINTMENT OF TRUSTEE
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This case was converted from a Chapter 11 to a Chapter 7 proceeding on June 6, 2011.
Pursuant to 11 U.S.C. §§ 701 and 322, and FRBP 2008, **Merrilee A. MacLean**, is appointed Chapter
7 trustee of the estate of the above-named debtor to serve under the trustee's blanket bond.

Unless the (interim) trustee notifies the United States Trustee and the court in writing of
rejection of the appointment within seven (7) days after receipt of this notice, the trustee shall be
deemed to have accepted the appointment.

Dated: June 7, 2011

Respectfully submitted,

ROBERT D. MILLER JR
United States Trustee

/s/ Mark H. Weber
MARK H. WEBER, MSBA# 012798X
Assistant United States Trustee

NOTICE OF APPOINTMENT
OF TRUSTEE

Office of the United States Trustee
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700 Stewart Street, Suite 5103
Seattle, WA 98101-1271
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APPENDIX B

Not Reported in P.3d, 157 Wash.App. 1033, 2010 WL 3220165 (Wash.App. Div. 1)
(Cite as: 2010 WL 3220165 (Wash.App. Div. 1))

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 1.
Stacey J. DEFOOR, Respondent,
v.
Terry Mark DEFOOR, Appellant.
Terry Defoor and G.W.C., Inc., Appellants,
v.
Stacey J. Defoor, Respondent.

No. 62519-5-I.
Aug. 16, 2010.

Appeal from King County Superior Court; Laura Inveen, J.
Howard Mark Goodfriend, Edwards Sieh Smith & Goodfriend PS, Seattle, WA, for Appellant.

Roger Ashley Leishman, Jeffrey L. Fisher, Davis Wright Tremaine LLP, Seattle, WA, Stacey Defoor (Appearing Pro Se), for Respondent.

UNPUBLISHED OPINION

LAU, J.

*1 Terry Defoor appeals the trial court's characterization, valuation, and property distribution following the end of his committed, intimate relationship with Stacey Defoor. She cross appeals the trial court's refusal to award her attorney fees. We find no error in the court's denial of attorney fees or characterization and valuation of the disputed property. But because the trial court improperly counted proceeds from the sale of a community-like asset twice, we reverse the property distribution. We also instruct the court to clarify the character and allocation of an approximately \$1.6 million debt on a United Bank of Switzerland (UBS) line of credit.^{FN1} We reverse in part and remand for proceedings consistent with this opinion.^{FN2}

^{FN1} The trial court labeled the bank "the United Bank of Sweden," but both parties refer to it as the United Bank of Switzerland.

^{FN2} We cannot determine from this record whether the trial court would have made the same property distribution between the parties absent these errors.

FACTS

Terry and Stacey married in 1987 and divorced in 1992.^{FN3} Though they soon reconciled, they never remarried. The couple lived together until their relationship ended on September 20, 2006. Stacey petitioned for an equitable property distribution under the committed, intimate relationship doctrine.^{FN4}

^{FN3} Because the parties have the same last name, we refer to them by their first names for clarity.

^{FN4} Our Supreme Court now uses the term "committed, intimate relationship" in lieu of "meretricious relationship" to refer to cohabitating couples in a stable, marital-like relationship. Olver v. Fowler, 161 Wn.2d 655, 657 n. 1, 168 P.3d 348 (2007).

During their cohabitation from 1992 to 2006, Terry and Stacey held themselves out as a happy, committed, married couple. Everyone who was close to them thought they were married, including close friends, neighbors, family members, and business colleagues. They wore wedding rings and pooled their resources. Terry's will named Stacey his personal representative and bequeathed his entire estate to her. Stacey gave Terry a power of attorney before she underwent a surgery in 2002. They also represented themselves as married to insurance companies, lawyers, courts, and, in some situations, the Internal Revenue Service. But because there were unresolved tax liens against Terry until 2005, the couple found it financially advantageous not to remarry. This allowed them to use Stacey's credit to purchase assets and grow their business.

Stacey and Terry were joint and equal owners of GWC, Inc., a Washington for-profit corporation. They used GWC to acquire interest in land that could later be subdivided for residential development. Be-

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cause Terry had poor credit and tax liens, Stacey enabled many of the corporation's deals to go forward prior to 2005 by solely obligating herself in financing arrangements. Ultimately, GWC's business model evolved to allow it to use option contracts with little or no money down. GWC sales agents would contact individual property owners to acquire options to purchase their property that was then aggregated with neighboring parcels and subdivided. GWC would assign its rights to a development partner like Camwest Development for a fee. The business was lucrative, and they acquired substantial assets over time.

After 1999, Terry and Stacey did not maintain individual or joint bank accounts. Instead, they paid all their expenses through GWC. They regularly disregarded the corporate entity and used GWC as their personal bank account. They treated GWC income as their own.

*2 During trial, Terry asserted that he was the sole owner of GWC and denied he had a committed, intimate relationship with Stacey. But the trial court found Terry's "assertions of a lack of intimacy and lack of committed relationship are not credible," and that "[i]t was the intent of the parties to be in a permanent, long-term relationship, with the expectation of marriage or all of the benefits and obligations of marriage." The trial court also found "[o]verwhelming evidence" that the parties were joint and equal owners of GWC. It noted that Stacey was routinely listed on corporate documents as a high ranking officer, she was the corporation's registered agent, and federal income tax returns showed her as owning fifty percent of the shares. While the only stock certificate presented at trial showed Terry as the sole owner of the corporation, the trial court found that he created this document in April 2006, which "was consistent with [his] consistent practice of creating false documentation to support his financial affairs."

When they separated, Terry unilaterally removed Stacey as a GWC officer and registered agent and seized control of GWC and its assets. Because Stacey could no longer access GWC accounts, she had no means to pay various mortgages for which she was the sole obligor, including for their house in Duvall, their vacation house in Florida, and the Florida condominium where they had moved her parents. Stacey was able to begin satisfying her obligations only after

a superior court judge awarded her \$387,000 of interim relief. During this same period, Terry used GWC income and assets to acquire personal belongings. For example, he purchased a \$2,450,000 home in Kirkland and a new motor home for \$261,185.

Soon after the parties separated, GWC received \$1,275,000 in assignment fees from Camwest for property in Federal Way and the Renton Highlands. Although the fees were paid postseparation, they were based on Terry's preseparation efforts. Terry's preseparation efforts contributed to several other GWC/Camwest deals that remained pending at the time of trial. The trial court found that these deals would lead to compensation to GWC in the future with little or no postseparation effort.

Separate from his dealings with Camwest, Terry also used GWC funds to purchase property on Boren Street in Branson, Missouri (the Boren property). Branson is a nationally known recreation and vacation area. GWC had already acquired substantial properties in the Branson area before Terry and Stacey separated. For example, GWC purchased approximately 100 lots in the area from Stacey's parents for only \$40,000. They agreed to this sale because "they naively anticipated they would reap the ultimate benefits" of a project Terry was planning. GWC spent approximately \$700,000 buying neighboring lots for the project. The properties were more valuable as an assemblage than as individual lots.

After the relationship ended, Terry formed a new corporation, GWC & Associates, Inc. (GWCA), to separate assets and deals from GWC in an attempt to keep them from Stacey. GWCA purchased a two-acre parcel along International Boulevard in Sea-Tac (the Sea-Tac property) for \$1,620,000 pursuant to a joint venture agreement with GWC. Under the agreement, GWC contributed \$1,650,000 in cash and GWCA contributed contract rights to the property, which the agreement stated were worth \$2,650,000. GWC was to receive 25 percent of any profits from the project, while GWCA was to receive 75 percent. The trial court found this agreement to be a sham transaction and considered the Sea-Tac property to be entirely a GWC asset. GWCA paid cash for the Sea-Tac property, using \$1,568,997.82 from UBS loan account 5V 50979 BK.

*3 Terry also sold their Costa Rica condominium

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ium, which they had acquired pre-separation with GWC assets, shortly after his relationship with Stacey ended. Pursuant to a promissory note, he was to be paid \$725,000 one year after the sale. Terry claims he negotiated a reduction in the note in exchange for early payment. He presented documents showing that he received a wire transfer for \$699,990.00 on August 14, 2007, which he then transferred to GWCA's UBS account BK 0264235. He claims this account provided the collateral for the line of credit at UBS that GWCA borrowed against to purchase the Sea-Tac property.

The trial court entered written findings of fact and conclusions of law on September 18, 2008. It concluded that all of Terry and Stacey's assets as of September 20, 2006, were subject to a just and equitable distribution under the committed, intimate relationship doctrine. It attempted to divide these assets equally, but stated, "to the extent there is any uncertainty as to the value of the assets, the equities lay in support of making inferences in favor of [Stacey.]" In particular, it noted that Terry had engaged in a "continued practice of deception" and "pattern of misrepresentation and dishonesty as it relates to his financial dealings" that made it difficult to track their assets with certainty. (Finding of fact 37; conclusion of law 5(e).)

The trial court awarded both Terry and Stacey a list of specific assets that it valued at \$4,533,282 each, including an equalizing cash payment of \$723,652 to Stacey. The court valued the Sea-Tac property at \$1,625,000 based on its purchase price and awarded it to Stacey. It valued the Missouri properties at \$2,660,000 based on Stacey's expert's opinion and awarded the property to Terry. The trial court also credited Terry with the \$725,000 value of the promissory note for sale of the Costa Rica condominium. In addition to the \$4,533,282 in valued properties, the trial court awarded each party half the value in USB account BK 0264235 as of October 31, 2007 (\$992,194 each). And it awarded half of GWC's interest in pending assignment agreements with Camwest to Stacey through 2011, with decreasing amounts thereafter, through 2019. It explained that it was impossible to accurately determine the degree to which Terry's post-separation efforts, if any, would be necessary to realize the value from pending assignment agreements and that Stacey should retain an interest in the agreements over a long enough time

frame to prevent Terry from using delaying tactics to avoid paying Stacey her share.

The trial court allocated GWC's liabilities to Terry "to [the] extent they exist." It concluded that this allocation was equitable because GWC's debts were "denied by, or largely controlled by [Terry]. Furthermore, [Terry] is being awarded the corporation, and its goodwill." GWC's reported debts included \$425,000 in real estate commissions owed to Ed Flanigan and Shelly Hyatt. The trial court did not specifically refer to the \$1,568,997.82 that GWCA borrowed against its UBS credit line.

*4 After the court's decision, Stacey requested an award of attorney fees, which the trial court denied. Both sides appeal.

ANALYSIS

A committed, intimate relationship is a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." *Olver v. Fowler*, 161 Wn.2d 655, 657 n. 1, 168 P.3d 348 (2007); *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). When a committed, intimate relationship ends, a court has the equitable power to distribute property acquired during the relationship regardless of which party has title to the property. *Connell*, 127 Wn.2d at 351. A trial court disposes of property by (1) determining whether a committed, intimate relationship existed, (2) evaluating each parties' interest in the property acquired during the relationship, and (3) making a just and equitable distribution of their property. *In re Marriage of Pennington*, 142 Wn.2d 592, 602, 14 P.3d 764 (2000). Only property that would be characterized as community property if the couple were married is subject to division by the court when the relationship ends.^{FN5} *Soltero v. Wimer*, 159 Wn.2d 428, 435, 150 P.3d 552 (2007).

^{FN5}. The parties refer to this property as "quasi-community property," but this term has a different meaning under *RCW 26.16.220*, so we use the phrase "community-like property."

On appeal, Terry does not challenge the trial court's finding that he and Stacey were in a committed, intimate relationship. But, he raises several objections to the court's characterization, valuation, and

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distribution of property. The characterization of property as community or separate is a question of law, reviewed de novo. In re Marriage of Zier, 136 Wn.App. 40, 45, 147 P.3d 624 (2006). But we defer to the trial court's factual findings if they are supported by substantial evidence. Pennington, 142 Wn.2d at 602-03. We will affirm the trial court's valuation of property so long as the value is within the scope of the evidence. In re Marriage of Gillespie, 89 Wn.App. 390, 403, 948 P.2d 1338 (1997). And we review the trial court's distribution of property for abuse of discretion. In re Meretricious Relationship of Sutton & Widner, 85 Wn.App. 487, 491, 933 P.2d 1069 (1997).

Award of Sea-Tac Property

Terry contends the trial court erred by awarding the Sea-Tac property to Stacey because it was his separate property and therefore not before the court for distribution. Property acquired during a committed, intimate relationship is characterized in a similar manner as property acquired during marriage. Connell, 127 Wn.2d at 350. Assets acquired during marriage are presumed to be community property. In re Marriage of Griswold, 112 Wn.App. 333, 339, 48 P.3d 1018 (2002). To overcome the presumption, a party must demonstrate the asset is separate property by clear and convincing evidence. In re Marriage of Chumbley, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Assets are separate property if acquired before marriage or during marriage by gift, inheritance, or with the traceable proceeds of separate property. In re Marriage of White, 105 Wn.App. 545, 550, 20 P.3d 481 (2001). In addition, earnings and accumulations acquired after a marriage becomes defunct are separate property. RCW 26.16.140; In re Marriage of Terry, 79 Wn.App. 866, 70, 905 P.2d 935 (1995). The separate or community character of property is established at the point of acquisition. In re Marriage of Skarbek, 100 Wn.App. 444, 447, 997 P.2d 447 (2000). But if separate property becomes so commingled with community property that it is impossible to distinguish or apportion it, the entire amount becomes community property by operation of law. Chumbley, 150 Wn.2d at 5.

*5 Terry argues the Sea-Tac property would not have been characterized as community property had he and Stacey been married because he acquired it after his relationship with Stacey ended. But Terry did not acquire the Sea-Tac property in his individual

capacity. Rather, the corporation he and Stacey co-owned acquired the property using community-like funds and credit. "[I]f assets are acquired with community funds they are community assets...." 19 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY & COMMUNITY PROPERTY LAW § 6.12, at 111 (1997). And because the Sea-Tac property was a GWC asset, it was properly before the court as part of its division of the couple's business assets.

Terry disputes this conclusion based on the joint venture agreement between GWC and GWCA. He argues that the Sea-Tac property was purchased in GWCA's name under this agreement. But the trial court found that the joint venture agreement was a sham transaction designed to remove GWC's assets beyond Stacey's reach. GWC provided all of GWCA's operating capital. GWCA had no money to purchase the property, but was entitled to 75 percent of any profits. Terry claims the transaction was an "arm's length agreement." Appellant's Opening Br. at 27. But he controlled both GWC and GWCA. GWCA had no assets (other than those transferred from GWC) to ensure repayment of the loan proceeds purportedly used to purchase the Sea-Tac property. And the joint venture agreement did not provide GWC with a security interest in the Sea-Tac property. Under these circumstances and given the undisputed finding that Terry had a "consistent practice of creating false documentation to support his financial affairs," the trial court's finding that the GWC/GWCA agreement was a "sham" is supported by substantial evidence. It was not error for the trial court to treat the Sea-Tac property as a GWC asset, subject to division.

Terry also argues that if the Sea-Tac property is a GWC asset, the debt he incurred to acquire it must be a GWC liability. Stacey responds that the trial court expressly allocated this debt to Terry, citing the court's conclusion of law 6. "It is just and equitable to award to [Terry] all putative and real debts of GWC, due to the fact these debts are denied by, or largely controlled by [him.]" (Emphasis added.) But it is not clear from this conclusion and the factual findings whether the trial court meant to allocate to Terry the UBS line of credit debt Terry claims he incurred to acquire the Sea-Tac property. The trial court did not include this specific debt in its list of debts or expressly address it in its factual findings. Because we

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cannot determine from the trial court's findings and conclusions whether it allocated the debt to Terry as part of its fair and equitable property distribution, we remand for additional findings and conclusions to clarify the character and allocation of this debt.

Valuation of Sea-Tac and Branson Properties

*6 Terry next argues that the trial court undervalued the Sea-Tac property it awarded to Stacey and overvalued the Branson properties it awarded to him. But the trial court has broad discretion in valuing property and this court will not disturb its decision so long as the valuation is within the scope of the evidence. Gillespie, 89 Wn.App. at 403. The trial court's discretion includes selecting different valuation dates, such as the date of separation or the date of trial, and different valuation dates for different properties. Koher v. Morgan, 93 Wn.App. 398, 404, 968 P.2d 920 (1998); 20 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY & COMMUNITY PROPERTY LAW § 32.7, at 167 (1997).

Here, the trial court valued the Sea-Tac property at \$1,625,000 based on its purchase price of \$1,620,000 approximately six months before trial. Terry argues it should have instead valued the property at \$2,650,000 based on his testimony about its fair market value. At trial, he testified that he purchased the property at a "firesale" price from a terminally ill seller. He claimed the property's true value was more like \$2,650,000 based on his own market research.^{FN6} But the trial court was not required to credit this testimony. Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003) ("credibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal.") And evidence of purchase price may be used to determine the value of land. State v. Reano, 67 Wn.2d 768, 772, 409 P.2d 853 (1966). The trial court did not abuse its discretion by selecting the lower value for the Sea-Tac property.

FN6. Terry incorporated this value into the GWC/GWCA joint venture agreement, signed on July 1, 2007.

Terry also claims the trial court overvalued the Branson properties at \$2,660,000 and that they are actually worth no more than their acquisition cost, approximately \$800,000. But the trial court found that the collection of properties GWC had acquired was worth far more than the individual parcels, and

Terry does not challenge this finding. The trial court also noted that Terry was able to acquire 100 lots from Stacey's parents for only \$40,000 by making representations that they would ultimately benefit, which her parents "naively" believed. Stacey testified that she would have accepted an award of Branson based on a \$2,600,000 valuation, and her expert estimated the value of the aggregate properties at \$2,660,000. Terry fails to show the trial court abused its discretion.^{FN7}

FN7. Terry also argues the court erred by including the Boren property in its distribution of community-like assets. He notes that unlike the other Branson-area properties, he acquired the property on Boren street post-separation. But it is undisputed that he used GWC funds to acquire the property and that it was an asset of the jointly owned corporation. Therefore, as with the Sea-Tac property, it was properly before the court for distribution.

Pending GWC/Camwest Projects

Terry contends the trial court erred in awarding Stacey proceeds from GWC/Camwest assignment agreements that were pending at the time of their separation. He argues the trial court "erred by giving no credit whatsoever" to his postseparation efforts that would be necessary to realize these proceeds. Appellant's Opening Br. at 34. But this is inaccurate. The trial court awarded him an increasing share of any future proceeds over time to acknowledge his postseparation efforts and the fact that these efforts would create a separate interest in the proceeds that would also increase over time. Terry challenges the court's finding that the assignment agreements would lead to compensation "without any post separation efforts of the parties," but he omits the remainder of the sentence that specifically acknowledges that Terry's continued efforts might be necessary to extend certain option contracts once expired.

*7 The trial court also found, "It is not possible to determine with precision the percentage of [Terry's] additional efforts, if any, which will be necessary to bring in future income from the current assignment agreements with Camwest." Based on this finding, which Terry does not challenge, the trial court determined that the most equitable distribution of future proceeds would be to initially award Stacey

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half the proceeds, followed by a declining percentage over time. It chose a multi-year time frame so that Terry would not have an incentive to delay seeking payment to avoid paying Stacey her share. Given Terry's undisputed hostile conduct towards Stacey following their separation, this was not an abuse of discretion.

Promissory Note for Sale of Costa Rica Condominium

Terry argues the trial court erred in crediting him with the promissory note for the Costa Rica condominium in its property distribution. We agree. The trial court's stated intent was to make an equal distribution of community-like assets. It awarded both Terry and Stacey property that it valued at \$4,533,282. The award to Terry included \$725,000 for the Costa Rica condominium promissory note. The trial court also awarded half the funds in UBS account BK 0264235 to Terry and half to Stacey. But the record shows that Terry had already received payment on the promissory note (though for the reduced amount of \$699,990.00) and that these funds were deposited in the UBS account. Specifically, Terry presented evidence of wire transfers from a financial institution in Costa Rica to a bank in Panama to U.S. Bank to UBS account BK 0264235 between August 14 and 16, 2007. By crediting the same funds to Terry twice, the trial court did not achieve its stated intent of an equal division of community-like assets. On remand, the trial court is instructed to allocate the value of the Costa Rica condominium only once.

Sales Agent Debts

Terry argues the trial court erred by failing to include \$425,000 in GWC liabilities when it calculated the assets and liabilities to be divided between the parties. He cites testimony from GWC sales agents that they were owed \$425,000 in commissions and GWC tax returns corroborating this claim.^{FN8} But the trial court found that these debts were unsubstantiated: "It appears they may be carried on the GWC, Inc. books to avoid unfavorable tax implications, and are not in fact 'real.'"

^{FN8} Ed Flanigan testified that GWC owed him \$100,000, and Shelly Hyatt testified that GWC owed her \$400,000. But the 2006 GWC tax return indicated that Hyatt was only owed \$325,000.

While Terry challenges this finding, we conclude it is supported by substantial evidence in the record. Testimony showed that GWC carried hundreds of thousands in debt to "Olympic Equities" on its books for several years in violation of accepted accounting principles. Other evidence also showed that Terry had denied owing anything to Hyatt. And Flanigan had taken no action to pursue any claim against GWC. In any event, the trial court concluded these debts, to the extent they might be real, should be allocated to Terry as part of a just and equitable distribution because it also awarded him the corporation and its goodwill. Terry fails to show that the trial court abused its discretion.

Attorney Fees

*8 In her cross appeal, Stacey advances several equitable and statutory theories for why the trial court erred in denying her request for attorney fees. We review the denial of attorney fees for an abuse of discretion. *In re Marriage of Morrow*, 53 Wn.App. 579, 590, 770 P.2d 197 (1989). "Under the American rule, the parties are responsible for their own attorney fees unless an award of fees is authorized by a private agreement, statute, or a recognized ground of equity." *Benzen v. Demmons*, 68 Wn.App. 339, 349, 842 P.2d 1015 (1993).

Stacey first argues the trial court should have awarded her fees because Terry used their joint, community-like funds to pay for his fees, thereby reducing the funds available for distribution. She claims this resulted in her receiving less than she otherwise would have from the subsequent property distribution. The equitable solution, she contends, would have been for the trial court to order Terry to pay half of her fees. In essence, her argument is that the trial court's property distribution was inequitable because it failed to take into account Terry's post-separation expenditures of community-like funds. But the trial court specifically found that Stacey's receipt of over \$400,000 in community-like funds pretrial, along with Terry's mortgage payments towards their Duvall house "shall be considered a substantially equal off-set to [his] unilateral post-separation expenditure of the parties' assets." Stacey challenges this finding, asserting that Terry's post-separation expenditures exceeded hers. But she points to no significant expenditures not accounted for in the trial court's property distribution. And while she

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claims he must have accumulated over \$1 million in attorney fees (citing her own bill of almost \$1.4 million), she offers no evidence that he actually paid that amount from their community-like funds. Stacey fails to show that the trial court abused its discretion on this basis.

She next argues that she is entitled to mandatory indemnification under Washington's Business Corporation Act for successfully defending against Terry and GWC's lawsuit against her.^{FN9} Under RCW 23B.08.520, "a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the corporation." The justification for mandatory indemnification is that if a person is sued because the person is a director, the corporation should pay the resulting litigation expenses. But Stacey was not sued because of her status as a director of GWC. Indeed, Terry's complaint asserted that she was not a shareholder, director, or officer of the corporation. Instead, the complaint referred to her as "the former spouse of Terry Defoor," and it asserted claims against her based on her allegedly tortious personal actions toward Terry and GWC. Terry could have brought the same action against Stacey even if she had not been a corporate officer. Consequently, the trial court correctly determined that Stacey was not "a party because of being a director of GWC," and we reject her claim for attorney fees on this basis.

^{FN9}. After Stacey filed her petition for property distribution, Terry filed suit against her on his and GWC's behalf, claiming that she defamed him (by falsely accusing him of steroid abuse), trespassed on GWC property, and tortiously interfered with GWC's business affairs in Branson.

*9 Stacey also contends that under RCW 23B.16.040, she is entitled to attorney fees incurred to establish her shareholder status and obtain various corporate records. This statute provides,

(2) If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with RCW 23B.16.020 (2) and (3) may apply to the superior court of the county where the corporation's principal office, or, if none in this state, its regis-

tered office, is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(3) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs, including reasonable counsel fees, incurred to obtain the order....

RCW 23B.16.040(2), (3). Stacey contends that she requested corporate records from GWC and had to resort to a subpoena to obtain them. Cross Appellant's Opening Br. at 46. Thus, she argues, she was entitled to an attorney fee award and the trial court abused its discretion by denying her request.

But a trial court only abuses its discretion when its decision is based on untenable grounds or is made for untenable reasons. Nakata v. Blue Bird, Inc., 146 Wn.App. 267, 276, 191 P.3d 900 (2008). Here, the trial court denied the request after finding that Stacey failed to demonstrate she followed the statutory prerequisites for an attorney fee award under RCW 23B.16.040. The trial court noted that Stacey did not request an order permitting inspection and copying of corporate records as envisioned under this statute. Instead, it used the discovery process and the issue of "costs and expenses to obtain corporate documents was litigated in each individual discovery motion." Under these circumstances, Stacey fails to show that the trial court abused its discretion.

Finally, Stacey also seeks attorney fees on appeal pursuant to RAP 18.1. She argues that she was entitled to fees below, so she should receive fees on appeal. "[I]n general, where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal." Sharbono v. Universal Underwriters Ins. Co., 139 Wn.App. 383, 423, 161 P.3d 406 (2007). Because Stacey was not entitled to fees below, we decline to award her fees on appeal. Stacey also argues this court should recognize the availability of attorney fees in committed, intimate relationship cases as a matter of equity and award her fees on this basis. Without deciding whether this court has authority to make such an award, we decline to do so in this case.

We reverse in part and remand for further proceedings consistent with this opinion.

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WE CONCUR: DWYER, and APPELWICK, JJ.

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