

No. 67817-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DORIS BERG

Respondent/Cross-Appellant,

vs.

LOUIS BERG

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE GREGORY P. CANOVA

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

The husband challenges the trial court's discretionary, fact-based decisions in valuing and dividing the parties' property and in awarding the wife maintenance. This court should affirm because, although it would have made no difference in the result given the husband's subsequent commingling of separate and community property, the trial court properly invalidated the parties' prenuptial agreement. The husband failed to meet his burden of proving that the agreement made a reasonable provision for the wife and that the wife, who was given the agreement for the first time less than two weeks before the wedding, entered the agreement freely and voluntarily with independent advice and counsel. The trial court also properly excluded certain witnesses who would have testified to the "economic climate" for "hard money" lenders. The husband failed to timely disclose their identities without good cause, to the wife's substantial prejudice, and in any event the witnesses' proffered testimony was largely duplicative of the husband's testimony.

The trial court properly valued certain commercial real estate based on the only tangible evidence presented at trial, and did not abuse its discretion in refusing to consider additional evidence offered by the husband after trial. There was no reason the same

or similar evidence could not have been presented earlier. The trial court also did not abuse its discretion in awarding the wife eight years of maintenance after a nearly 30-year marriage. The wife earns only a fraction of the income as the husband, who was awarded 62% of the marital estate. Because the husband's challenges on appeal are to wholly discretionary decisions that are supported by substantial evidence, this court should affirm and award fees to the wife for being required to respond to his appeal.

To the extent there was any error by the trial court, it was in its undervaluation of the husband's business, which impacted the overall division to the detriment of the wife. The trial court violated basic accounting principles in reducing the value of his business by over \$1 million in "shareholder loans" that were owed to the husband, yet failing to include these loans as an asset to the husband. The trial court should have either excluded the shareholder loans as a liability in valuing the business or included them as an asset to the husband. As a result of its error the husband received over \$1 million more than was intended, and resulting in him receiving 67% of the net marital estate. In the event this court remands on any basis, it should direct the trial court to reconsider its allocation of the shareholder loans and award the

wife additional property to accomplish a just and equitable distribution of the marital estate.

II. WIFE'S ASSIGNMENT OF ERROR

The trial court erred in either including a \$1 million "shareholder loan" as a liability in valuing the husband's business or in failing to account for the shareholder loan as an asset awarded to the husband in its property distribution. (Finding of Fact (FF) 2.8(5), 2.21.2, CP 1006, 1010)

III. STATEMENT OF ISSUE FOR WIFE'S APPEAL

The trial court reduced the value of the business awarded to the husband by over \$1 million because of a "shareholder loan" owed to the husband. Did the trial court err in failing to include the shareholder loan as an asset to the husband, since as a result the husband received over \$1 million more than was intended by the trial court's property distribution?

IV. RESTATEMENT OF FACTS

A. Background.

Respondent/Cross-Appellant Doris Berg, now age 65, and Appellant/Cross-Respondent Louis Berg, age 67, were married on March 14, 1982. (CP 1-2) Each had a son from a previous

marriage. (RP 27) The parties' one child from this marriage, a daughter, is now an adult. (RP 27)

The parties separated on June 29, 2009, when Doris filed a petition for legal separation after Louis became physically abusive. (CP 1, 18, RP 29-30) The legal separation was subsequently converted into a dissolution action. The decree dissolving the marriage was entered August 5, 2011, after a five-day trial before King County Superior Court Judge Greg Canova. (CP 1013-20)

B. Less Than A Week Before Their Wedding In 1982, The Parties Executed A Prenuptial Agreement That Protected The Husband's Separate Assets To The Detriment Of Any Community Estate And That Limited The Wife's Statutory Rights In The Event Of Divorce.

Doris, then age 37, and Louis, age 38, were engaged only two months before they married on March 14, 1982. (CP 1-2; RP 28, 604) The parties mailed invitations to their 100-150 guests a month before the wedding. (RP 28-29) Less than two weeks before the wedding date, Louis took Doris to the office of his attorney, Wolfgang Anderson, who presented to her for the first time a prenuptial agreement. (RP 40-41) Mr. Anderson instructed Doris to "look it over" the agreement. (See RP 40-41, Ex. 69) Louis and Doris had never discussed the terms of the proposed agreement before he brought her to Mr. Anderson's office. (RP 40)

After this meeting in Mr. Anderson's office, Doris contacted her parents' attorney, Howard Pruzan. (RP 47) Doris and Mr. Pruzan met once, for half an hour. (RP 47) Mr. Pruzan proposed no substantive changes to the prenuptial agreement. (RP 47, 113) Doris did not formally engage Mr. Pruzan to review the agreement, nor did she pay him for his services. (RP 217)

Doris had had no experience with prenuptial agreements. (RP 215) After her brief meeting with Mr. Pruzan, Doris still did not fully understand the agreement, or the consequence of the agreement if the parties divorced. (RP 48, 217) Doris did not ask, nor was she aware that she could ask, for documentation to confirm the value of Louis' assets listed in the prenuptial agreement, including the value of his business. (RP 46-47, 116, 215)

Despite her lack of understanding and any misgivings she might have had, Doris signed the agreement as presented to her by Mr. Anderson, because she was afraid that Louis would not marry her or would be angry if she did not sign it. (RP 216) Both Doris and Louis signed the agreement in Mr. Anderson's office on March 9, 1982, five days before their wedding. (RP 40)

In the event of divorce, the agreement eliminated all of the discretion the trial court statutorily has to make a just and equitable

division of assets, prohibiting the trial court from awarding the separate property of one to the other. (Ex. 69, § 6) Regardless of the parties' financial circumstances at the time of the dissolution, or the length of the marriage, the agreement required the trial court to divide any community property equally and award each party their separate property. (Ex. 69, § 6) With the exception of "major structural improvements," in the event the community contributed any funds towards separate property, the agreement provided that such contribution "shall be deemed a gift" to the party owning the separate property. (Ex. 69, §§ 4, 6) Conversely, if a party used separate property towards a jointly acquired asset, the agreement provided that the separate property contribution would retain its character. (Ex. 69, § 15A) The agreement provided that "the only commingling of their estates shall be by virtue of title documents." (Ex. 69, § 5) Although the agreement recognized that Louis would take a salary at his business Crown Finance, which would be community property, it did not address any compensation to the community for Louis' efforts in managing his real property investments. (Ex. 69, § 16)

Although Louis claims that the "parties' financial circumstances were roughly equal" when they executed the

prenuptial agreement (App. Br. 8), Louis in fact had more than twice the separate property of Doris. (Ex. 69)¹ Louis was self-employed and the sole shareholder of Crown Finance, which made high-interest “hard money” loans to high-risk individuals. (RP 226, 536) Doris was employed with the school district as a speech therapist for special needs children.² (RP 66)

After trial, the trial court found that the prenuptial agreement was unenforceable as “it was both substantively and procedurally deficient at the time it was executed.” (Finding of Fact (FF) 2.7, CP 1005) The trial court found that “the agreement was substantively unfair as it did not properly provide for the growth of community property during the marriage. Specifically, paragraphs 4-6 and paragraph 16 of the prenuptial agreement (petitioner’s Exhibit 69) were unfair to the petitioner.” (FF 2.7, CP 1005-06) The trial court

¹ Louis’ assets at the time of marriage included his business, Crown Finance, which he valued (without documentation) at \$15,000, cash/savings of \$18,354, cash value of life insurance of \$5,400, and three income-producing real properties worth over \$310,000. (Ex. 69) Doris’ separate property assets included her home, valued at \$47,625, a retirement account worth \$4,000, savings of approximately \$92,000, and personal property. (Ex. 69)

² Although there was no evidence of the parties’ incomes when they signed the prenuptial agreement, both were still in similar employment when they separated. In the years leading up to their separation Doris earned less than a third of Louis’ income from Crown Finance. (See CP 1070, 1119)

found “that the amount of time to evaluate the prenuptial agreement (30 minutes), the inadequacy of the review by petitioner’s then-counsel, and the short duration between the draft prepared by respondent’s counsel and the date of signing (within five days of the wedding) provide substantial evidence that the petitioner was not adequately protected nor properly informed of her rights under Washington Law.” (FF 2.7, CP 1006; *see also* 7/8 RP 5-6)

C. The Husband Controlled All Of The Finances During The Marriage. He Made No Effort To Segregate His Premarital And Community Property.

1. The Husband Was Secretive About Finances. The Parties Had No Joint Accounts And The Husband Paid Most Community Expenses Directly, While The Wife Paid Other Expenses From Her Earnings And Premarital Savings.

Although Doris worked throughout the marriage, Louis managed the parties’ finances and unilaterally made all financial decisions. Louis refused Doris’ request to have a joint account to pay community expenses. (RP 55) Instead, Louis directly paid utilities, maintenance, and upkeep on the home. (RP 115) While Louis claims that Doris “tried to put as much as possible on credit cards” (App. Br. 12), Doris used credit cards because the parties had no joint account, forcing Doris to use credit cards and her earnings to pay for the parties’ travel, meals, sporting equipment for

the children, furnishings, clothing for the family, and other household expenses that Louis did not directly pay. (RP 50-55)

For nearly a quarter of a century, Louis then paid these credit card bills at the end of each month. (RP 53) Starting in 2005 or 2006, however, Louis stopped paying the credit card bills and instead gave Doris \$600 a month for the family's expenses. (RP 53-54) Even with Doris' paycheck, this was not enough for the family to live on, forcing her to continue to use credit cards to meet their expenses. (RP 54) Because Louis refused to pay the credit card bills, Doris made minimum balance payments, in part from her premarital savings. When the parties separated in 2009, their credit card balances had ballooned to \$118,000 and Doris' premarital savings were depleted. (RP 43-44, 57-58, 183-84)

Despite Louis' attempt to paint Doris as a "spendthrift" (App. Br. 39), the fact was that until a few years before they separated, Louis never challenged Doris' spending. The parties had a comfortable lifestyle, including vacations, nice clothes, and meals out. (See RP 50-56) Louis was secretive about the parties' finances, going to great lengths to avoid keeping financial records in the home and storing tax returns and cash in the trunk of his car. Doris had no real understanding how much money the parties had

until after they separated. (RP 30-33, 340) But the parties' tax returns supported the lifestyle they were leading. In the two years before separation, the parties had total income of \$648,068 in 2007, and \$347,987 in 2008. (CP 1031, 1075) Their marital estate was worth more than \$6 million. (See CP 1006-08)

2. The Husband Commingled His Community Earnings With Income From His Premarital Investments. From The Commingled Accounts, The Parties Acquired Additional Properties.

Louis made no clear demarcation between community and separate property in depositing his community paychecks and the income from his premarital assets. Louis testified that he often cashed a portion of his paycheck instead of depositing it in any particular account, and that he frequently stored cash in the trunk of his car along with the financial records that he kept out of the house there. (RP 340) Louis deposited the portion of his paycheck he did not take in cash into a variety of accounts that also included income from his "outside investments," and admitted that he could not provide any documentation tracing how much community or separate property went into these accounts. (RP 340-48, 349) Louis paid community expenses from these accounts. Likewise, the

parties acquired additional assets/investments that were also paid from these commingled accounts. (RP 340-48, 408)

When the parties married, Louis and his sister owned a leasehold interest in a commercial building at Broadway and Harrison. (RP 348) After the parties married, Louis and his sister purchased the fee interest in Broadway and Harrison for \$75,000. (RP 349-50) Louis testified that he paid for the fee interest with accumulated rental income from the building, but he provided no other evidence to prove his claim. (RP 350) Louis conceded at trial that the Morgan Stanly account that held the rental income could be considered community property, because he was unable to entirely trace the source of all of the funds held in the account. (RP 409-10, CP 653) Doris had signed a quit claim deed when the fee interest was acquired, because Louis told her to "just sign it," but she was never told the effect of the document. (RP 93)

In November 2004, Louis sold his interest in Harrison and Broadway to Panos Properties for \$1.2 million. (RP 350-54) Louis received \$462,000 at closing, and a promissory note for the balance that paid \$8,400 per month, with a balloon payment of \$778,000 due November 2014. (RP 352-55) Louis deposited the monthly note payments in various accounts commingled with

community income. (RP 359-60, 409-10) The trial court found the note had a present value of \$964,000. (FF 2.8, CP 1006-07) The trial court also found that “given the lack of tracing of almost all of the assets acquired during the marriage,” the note, among other assets, was community property. (7/8 RP 6; *see also* 7/8 RP 20: “The reality, based upon the evidence, is that given the inability – actually I should say, given the complete lack of tracing of any of these investment accounts []. But the rest of those accounts fall under the presumption that they are community property, absent any tracking of separate property into these accounts.”)

From the original payment on closing, Louis claimed to have acquired several additional properties, including an interest in a commercial building, Redmond Ridge, purchased for \$340,000 in late 2004. (RP 319-20, 355-60) Redmond Ridge was “quite profitable,” and provided additional income for the parties. (RP 211) However, Redmond Ridge was less profitable by the time of trial. Although Louis testified that it was “completely tenanted/rented,” he anticipated losing two tenants by the end of the year. (RP 531) At trial, the court valued Redmond Ridge at \$340,000, the original acquisition price in November 2004 and the amount at which Louis

had valued his interest in a 2010 financial statement. (FF 2.8, CP 1006; Ex. 105)

D. After Separation, The Husband Unilaterally Liquidated Community Property, Generating A Significant Tax Liability, To Pay Off His Business Line Of Credit.

The husband's "hard money" loan business Crown Finance was successful throughout the marriage. Louis paid himself a salary of nearly \$200,000 on average during the two years before the parties separated. (CP 1070, 1119) Louis substantially reduced his income from Crown Finance after the parties separated, claiming at trial that he would soon take no salary because the business could no longer afford to pay him. (RP 556)

1. The Accounts Receivables.

The assets of Crown Finance include accounts receivables for the loans made by the business. (See Ex. 205, 227) The loan terms are usually for one to five years with interest rates of 17 to 25 percent. (RP 233) More than 50% of the loans are secured by real property, with the remainder secured by cars, boats, and motor homes. (RP 234) Crown Finance earns money from the interest payments, late fees, and origination fees. (RP 234-35)

At the time of trial, Crown Finance had \$2.8 million in accounts receivables, with an allowance of \$250,000 for "doubtful

accounts.” (RP 132, Ex. 205, 227) However, Louis claimed at trial that \$1.8 million of the receivables were uncollectible because of the economy and because the properties securing the receivables were now worth less than what was owed.³ (See RP 133, 135, 139, Ex. 205) Louis also testified that although he believed \$500,000 of the accounts receivable remained collectible, there would be costs associated with collecting. (RP 400) Louis admitted, however, that on occasion accounts receivables that are written off as “bad debt” do in fact result in payment. (RP 339)

Two weeks before trial, Louis disclosed for the first time two additional witnesses, Gary Ryno and Matthew Green, who he represented would bolster his claims regarding the “trend for real estate lenders and hard lenders in Washington” and the collectability of accounts receivables. (See CP 585-56) Neither Mr. Ryno nor Mr. Green had ever worked for Crown Finance, and neither had personal knowledge regarding the collectability of the loans made by Crown Finance. (CP 715) Their proffered

³ Although in his brief Louis claims that his expert accounting witness, Steven Kessler, testified to the collectability of these receivables (App. Br. 17), in fact Mr. Kessler admitted that his figures were based entirely on what he was told by Louis. (RP 131, 135, 140) Mr. Kessler testified that he did not personally assess the loan portfolio, the collateral securing those loans, or the collectability of the loans. (RP 140)

testimony was their general “expert opinion” about the nature of the “hard money” lending business. The trial court excluded these witnesses due to their late disclosure and the substantial prejudice to Doris if they were allowed to testify. (RP 14-15)

The trial court was skeptical of Louis’ claims, and had “serious questions about the write-offs of uncollectible loans, how that conclusion was reached.”⁴ (7/8 RP 21) Rejecting Louis’ claim that \$1.8 million of the accounts receivable were uncollectible, the trial court found assets of \$2.8 million based on the company’s most recent balance sheet, which included an allowance for “doubtful accounts” of \$250,000. (FF 2.8, 2.21.2, CP 1006, 1010, Ex. 227)

2. Outside Investor Loans.

Crown Finance receives financing from “outside investors” who loan money to Crown Finance. (RP 235, 246-47) The outside investors are Louis’ family and friends. (RP 236) Louis executes promissory notes in favor of these investors, using Crown Finance

⁴ In context, and contrary to appellant’s argument (App. Br. 23), this statement was more directed to the fact that Louis was claiming that nearly 80% of his accounts receivables were uncollectible, and the lack of financial documentation to support the value of the company, than to the impact of the economy on the collectability of receivables (See FF 2.21.2, CP 1010) – a topic that the husband claimed his late disclosed witnesses would have testified to.

assets and community assets as collateral. (RP 238) At the time of trial, Louis claimed that Crown Finance owed \$1,566,475 to “outside investors.” (Ex. 47)

As with Louis’ claims regarding the business’ accounts receivables, the trial court expressed “serious concerns” with the validity of this claim, and about Crown Finance’s “curious accounting.” (7/8 RP 9, 15) First, the trial court pointed out that the amount of the promissory notes when added together was \$285,000 less than the amount claimed. (7/8 RP 10: “Where is the other \$285,000 in notes payable to others? The Court doesn’t know. No one testified about it.”) Second, the trial court noted that many of the promissory notes purport to replace other notes, but “nowhere in the evidence, documentary evidence or testimonial evidence, is there any information about when any of these notes were originally executed.” (7/8 RP 10) Third, the trial court noted that the promissory notes are only signed by Louis – not by the lender – and that “promissory notes in their original form generally reflect the signature of both the borrower and lender.” (7/8 RP 12) The trial court reflected that “the fact that there are no signatures on any of these notes leads the Court to ponder whether these notes reflect actual obligations of the business or not.” (7/8 RP 12)

Despite its concerns, the trial court found \$1.2 million in outstanding "outside investor loans." (FF 2.21.2, CP 1010)

3. Bank Of America Line Of Credit/Shareholder Loans.

In addition to these "outside investor loans," Crown Finance also historically had a line of credit with Bank of America. In September/October 2010, while the dissolution was pending, the Bank of America line of credit apparently matured, and the Bank sought payment in full of over \$1.1 million. (RP 247) Louis did not make any effort to try to negotiate with the Bank to extend the line of credit. (RP 248, 250-51) Instead, Louis used \$210,000 from an accounts receivable that was paid to Crown Finance in January 2011 to pay down the line of credit. (RP 251-52)

Louis then unilaterally pulled \$1.2 million out of the community's Crown Finance profit sharing plan, deposited those funds into an IRA, and then transferred \$990,000 from the IRA into a Chase Bank account, from which he used \$917,000 to pay off the line of credit. (RP 253-55, 260-61) From the funds remaining after these manipulations, Louis repaid an "outside investor loan" from his friend Stephen Varon in the amount of \$63,000 (RP 239, 245, 265-66), and put an additional \$70,000 back into Crown Finance.

(RP 337-38) Louis took all of these actions without Doris' consent, and without consulting an accountant regarding the potential tax consequences. (RP 261-62, 269) As a result of Louis' actions, the community incurred a tax liability of \$465,000. (RP 269-70, 315)

The trial court found it "highly suspicious that Mr. Berg, an experienced businessman, a successful businessman up to that point, would choose to take the approach he took in paying off the Bank of America [line of credit], incurring the huge losses that the community assets incurred." (7/8 RP 19) The trial court also found it "curious" that Louis would use the rest of the funds that he liquidated from the community profit-sharing plan to pay off his friend, instead of any other investors, and that the rest of the money went back into Crown Finance. (7/8 RP 19)

In determining the business liabilities, the trial court found that the outside investor loans were \$1.2 million, and it replaced the Bank of America line of credit with a "shareholder loan" of \$1.017 million, ostensibly owed to Louis because he had paid off the Bank of America line of credit and contributed additional funds to the company. (FF 2.21.2, CP 1010, Ex. 227) In total, the trial court found Crown Finance's liabilities were \$2.3 million.

Louis' expert witness, Steve Kessler, testified that book value was an appropriate means to assess the business' value. (See RP 139-40) Therefore, after the trial court concluded that the "most reliable" value of the Crown Finance was book value (assets minus liabilities), the trial court found the value of Crown Finance was \$500,672. (FF 2.8, CP 1006)

E. After The Parties Separated, The Husband Left The Wife In Dire Financial Straits, Refusing To Provide Any Substantive Financial Support Or To Assist In The Payment Of Their Massive Credit Card Debt.

By the time the parties separated in June 2009, Doris' pre-marital assets were largely dissipated. (RP 42-46, 49) The home that Doris had owned when the parties married was sold early in the marriage and the proceeds of \$30,000, plus an additional \$5,000 from one of her savings accounts, used towards the purchase of the parties' Clyde Hill home, where they lived during the marriage. (RP 43) Doris used her savings for the post-secondary education of her son from an earlier marriage and for community expenses when Louis refused to pay off credit card bills, using her savings to make the minimum payments. (RP 44, 55) The only separate property that Doris owned prior to marriage that still existed at the time of separation was her retirement, which the

parties agreed had a separate component of \$48,000 and a community component of \$266,000. (RP 165)

Louis resisted paying support to Doris after the parties separated, but was ultimately ordered to pay temporary monthly support of \$4,500. (CP 176-77) Louis also refused to assist Doris in paying off the parties' massive credit card debt. As a result, Doris' credit score plummeted during the dissolution proceeding. (RP 479, *see also* CP 290-99) Louis, who was living in the parties' \$800,000 Clyde Hill home mortgage-free, refused Doris' efforts to pay off the credit card debt even though the interest was rapidly mounting, and he rejected her suggestion that that the parties take a loan against their home. (RP 477-88) When Doris sought to take a loan against her mother's home, which she had inherited and where she was residing after the parties separated, the bank denied her request because Louis had filed a \$117,000 lien against

the home.⁵ (RP 461) Despite several requests, Louis refused to subordinate the lien.⁶ (RP 307)

While Louis now claims that Doris' efforts to take a loan against her mother's home was to support her "spending," (App. Br. 27), in fact Doris was trying to pay off the community's credit card obligation and stop the mounting interest. (See CP 290-99) Doris' best friend and her husband eventually used their own line of credit as collateral for the bank's loan to Doris of \$226,000. (RP 307) Doris used that money to finally pay off the credit card debt and to assist her in paying attorney fees. (RP 63-64)

F. After A Five-Day Trial, The Trial Court Awarded The Husband 62% Of The Overall Net Estate And The Wife Eight Years Of Maintenance.

The parties appeared for a five-day trial before King County Superior Court Judge Greg Canova, starting on May 9, 2011. The parties disputed nearly everything, including the validity of the

⁵ The parties loaned money to Doris' mother so that she could continue to reside in her home with 24-hour care. (RP 193) At Louis' request, Doris' mother signed a deed of trust against her home when she was age 93 or 94, purportedly to secure this loan. (RP 374)

⁶ At trial, Louis claimed that this lien was his separate property because he had loaned the money to Doris' mother from his separate estate. (RP 374) The loan was paid to the mother in the form of cashier's checks, and Louis admitted that he had no evidence to prove that the loan was made from his separate property. (RP 374-75) The trial court found that the lien was a community asset. (FF 2.8, CP 1006)

prenuptial agreement, the character of property, the value of property, and whether the wife should be awarded spousal maintenance. (See CP 605-36, 638-73)

After considering the testimony of the parties' witnesses and the evidence presented, the trial court invalidated the prenuptial agreement because it was both substantively and procedurally unfair at the time it was executed. (FF 2.7, CP 1005-06) The trial court also found that Louis had failed to clearly and convincingly prove that certain assets were his separate property, in large part due to the commingling of investment accounts and his failure to trace his purported separate assets. (7/8 RP 7-9, 20) However, the trial court found that Louis was able to prove the nature of some separate assets of \$844,900, including two real properties and Berg Family Investment accounts. (FF 2.9, CP 1007) The trial court also found that Doris had separate assets of \$631,521, including her mother's home, which she had inherited during the marriage, and the separate property portion of her retirement account. (FF 2.9, CP 1007) The trial court found that the remainder of the

parties' \$6.3 million estate was community property. The husband does not substantively challenge this determination on appeal.⁷

After resolving the parties' disputes regarding the character and value of the property, the trial court awarded nearly 60% of the entire gross marital estate to Louis, as set forth below.

Property	Husband	Wife
Clyde Hill	\$ 812,500	
Whistler (50%)	\$ 58,500	
1432 Ocean	\$ 298,000	
1436 Ocean	\$ 241,000	
Alderbrook (98%)	\$ 161,700	
Berg, LLC (49%)	\$ 259,501	
Berg II, LLC (98%)	\$ 23,828	
Crown Finance	\$ 500,672	
Panos Note	\$ 964,012	
Redmond Ridge	\$ 340,000	
CF Profit Sharing	X	
Morgan Stanley IRA	X	

⁷ While Louis appears to complain about the trial court's characterization of the Panos Note and the lien on Doris' mother's home, he does not dedicate any portion of his Argument to these issues and has waived any claims of alleged error. If a party raises an issue but fails to provide argument relating to the issue in his or her brief, the party waives any challenge to the alleged issue. ***Yakima County v. Eastern Washington Growth Mgmt. Hearings Bd.***, 146 Wn. App. 679, 698, ¶ 24, 192 P.3d 12 (2008). In any event, in light of Louis' concession that he was unable to adequately trace his separate property to the accounts from which these assets were acquired (RP 359-60, 374-75, 409-10), the trial court properly found that the Panos Note and the lien on Doris' mother's home was separate property. "Where there is any uncertainty in tracing an asset to a separate property source, the law resolves the uncertainty in favor of a finding of community character." ***Marriage of Gillespie***, 89 Wn. App. 390, 400, 948 P.2d 1338 (1997).

Property	Husband	Wife
Bank Accounts	\$ 137,245	\$ 28,547
Vehicles	\$ 7,400	\$ 25,370
Phoenix Life	\$ 9,771	
2009 Tax overpayment	\$ 13,390	
Fink lien		\$ 117,833
Lake Wash. Blvd. S.,		\$ 510,000
AXA Equitable		\$ 1,884
DRS-TRS Plan I		\$ 314,000
TD Ameritrade		\$ 413,857
Morgan Stanley		\$ 443,541
Morgan Stanley		\$ 511,403
Wells Fargo		\$ 304,139
Jewelry/fur		\$ 25,000
Total: \$6,523,093	\$3,827,519	\$2,695,574
Percentage	59%	41%

The assets listed do not include the \$1,017,000 in shareholder loans that Louis is owed from Crown Finance, which was included as a liability to Crown Finance for purposes of valuation. (See Ex. 227) If the shareholder loans were included, either as an asset to Louis or added back into the value of Crown Finance, Louis in fact received approximately 64% of the overall assets.

From the assets awarded to Doris, she was ordered to pay \$275,500 in liabilities, including \$15,500 for one-half of a debt to Louis' mother and \$260,000 that she borrowed during the separation to pay the community credit card bills and her attorney

fees, reducing her net assets to \$2,420,074. From the assets awarded to Louis, he was ordered to pay \$15,500 for one-half of a debt to Louis' mother, reducing his net assets to \$3,812,019. Although Louis was also ordered to pay back the \$1.2 million in loans from the outside investors to Crown Finance, that liability was already included in valuing Crown Finance. After liabilities are deducted, Louis received 62% of the overall net estate. Had the trial court also included the shareholder loan of \$1.017 million as an asset to Louis, his award of the net overall estate increases to 67%.

V. ARGUMENT

A. The Trial Court Properly Found That The Prenuptial Agreement Was Unenforceable Because It Was Both Procedurally And Substantively Unfair, But In Any Event Its Determination Is Irrelevant.

1. The Husband Received More Property Under The Trial Court's Decree Than He Would Had The Agreement Been Enforced.

As an initial matter, the husband fails to explain any prejudice to him from the trial court's invalidation of the prenuptial agreement. Under the agreement, which would have obligated the court to divide the community property equally and gave each party their separate property, the husband would have received

approximately \$3.35 million.⁸ The husband received more than that – \$3.8 million – under the trial court’s property division (CP 1007). Thus, even if there were any error in invalidating the agreement (and there is not), reversal is not warranted because the husband was not prejudiced, and any error was harmless. See ***State ex. rel. Carriger v. Campbell Food Markets, Inc.***, 65 Wn.2d 600, 606–07, 398 P.2d 1016 (1965).

2. The Agreement Was Substantively Unfair Because It Failed To Make A Fair And Reasonable Provision For The Wife And Limited The Community’s Ability To Grow To The Benefit Of The Husband’s Separate Property.

The trial court properly invalidated the prenuptial agreement in any event. In determining whether a marital agreement is enforceable, the court must first determine “whether the agreement is substantively fair, specifically whether it makes reasonable provision for the spouse not seeking to enforce it.” ***Marriage of Bernard***, 165 Wn.2d 895, 902, ¶ 14, 204 P.3d 907 (2009); ***Marriage of Matson***, 107 Wn.2d 479, 482, 730 P.2d 668 (1986). “[A]n agreement disproportionate to the respective means of each spouse, which also limits the accumulation of one spouse’s

⁸ One-half the value of the community property was \$2.5 million, plus the husband’s separate property of \$844,900. (CP 1007)

separate property while precluding any claim to the other spouse's separate property is substantively unfair." **Bernard**, 165 Wn.2d at 905, ¶ 22.

The prenuptial agreement was substantively unfair because it served largely to protect the husband's separate estate, which was significantly greater than the wife's when the parties married, to the detriment of the community. The agreement allowed the husband to devote his efforts to the growth of his premarital assets, which included his business and rental properties, without any compensation to the community save his salary from the business, which he controlled as the sole shareholder. The agreement also provided that with the exception of "structural improvements," any community contributions to separate property would be considered "gifts" to the spouse who owned the separate property. (Ex. 69, §§ 4, 6) Meanwhile, any separate property contributed to the acquisition of a community asset would retain its character. (Ex. 69, § 15A) The prenuptial agreement also deprived the wife, the economically disadvantaged spouse, of her common law and statutory rights for a just and equitable distribution of property, precluding the award of any of the husband's separate property to

the wife and mandating an equal, not equitable, division of community property. RCW 26.09.080.

The agreement went far beyond “merely restat[ing] Washington law” (App. Br. 35), instead eliminating the trial court’s discretion to make a just and equitable division of property in light of the “economic circumstances of each spouse [] at the time the division of property is to become effective,” and the duration of the marriage. RCW 26.09.080; **Bernard**, 165 Wn.2d at 905, ¶ 23 (prenuptial agreement was substantively unfair because it “overall made provisions for [the wife] disproportionate to the means of [the husband], and limited [the wife]’s ability to accumulate her separate property while precluding her common law or statutory claims on [the husband]’s property.”); **Matson**, 107 Wn.2d at 486 (prenuptial agreement was substantively unfair because it “acted to bar [the wife] from making any claim against or seeking any rights in [the husband’s] separate property” while allowing the husband to devote substantial time to the management and reinvestment of his separate property.) **Marriage of Foran**, 67 Wn. App. 242, 249-50, 834 P.2d 1081 (1992) (agreement was economically unfair to the wife because it required her to waive any claim against the husband’s separate estate in the event of divorce, and all of her

statutory rights as a surviving spouse if the husband predeceased her). The trial court therefore properly found that the prenuptial agreement was substantively unfair. (FF 2.7, CP 1005)

3. The Agreement Was Procedurally Unfair Because The Wife Was Not Given Adequate Opportunity To Seek Independent Advice And Counsel.

Because the prenuptial agreement failed the test of economic fairness, the trial court was required to “zealously and scrupulously’ examine the circumstances leading up to its execution, with an eye to procedural fairness.” *Foran*, 67 Wn. App. at 251; see also *Estate of Crawford*, 107 Wn.2d 493, 498, 730 P.2d 675 (1986) (“where an agreement attempts to eliminate or restrict property rights of a member of the marital community, it must be scrupulously examined for fairness”). The burden of proving procedural fairness is on the spouse seeking enforcement of the agreement. *Friedlander v. Friedlander*, 80 Wn.2d 293, 300, 494 P.2d 208 (1972).

The two-part test for procedural fairness requires the court to first examine whether full disclosure was made of the amount, character and value of the property involved, and second to determine whether the agreement “was entered into fully and voluntarily on independent advice and with full knowledge by [both

spouses of their] rights.” **Matson**, 107 Wn.2d at 483. When considering whether the circumstances surrounding execution were fair, the court must consider “the bargaining positions of the parties, the sophistication of the parties, presence of independent advice, understanding of the legal consequences and rights, and timing of the agreement juxtaposed with the wedding date.” **Matson**, 107 Wn.2d at 484.

This court invalidated a prenuptial agreement when there was insufficient evidence that the wife understood the legal consequences of the contract that she signed in **Foran**. 67 Wn. App. 242. The party entering the agreement must have a “full understanding of the legal consequences of the contract. One who does not have that understanding has not ‘voluntarily and intelligently’ entered into the contract.” **Foran**, 67 Wn. App. at 257. Similarly, here, other than the terms of the agreement itself, the husband presented no evidence that the wife understood the agreement and its consequences in the event the parties divorced. The husband claims that “both of these parties had recently been married and divorced, by which they likely acquired some understanding of their rights under Washington law” (App. Br. 40), but the wife was divorced in California (RP 42), which has markedly

different laws than those in Washington with regard to property distribution. Cal. Fam. Code § 2550.

Further, the wife presented unchallenged testimony that she only met with an “independent” attorney for thirty minutes, and that attorney, who was not formally retained, made no substantive changes to the agreement. (RP 47, 113, 217) The “primary purpose” of independent counsel is to “assist the subservient party to negotiate an economically fair contract.” *Foran*, 67 Wn. App. at 254. The husband failed to meet his burden that the wife’s brief meeting with her parents’ attorney fulfilled that “primary purpose.”

Finally, the timing of the agreement is critical. The Supreme Court in *Bernard* invalidated a prenuptial agreement when the wife received a draft for the first time 18 days before the wedding, a revised draft two days before the wedding, and signed the agreement within 24 hours of the wedding, because “there was not enough time for [the wife] or her attorney to adequately review the prenuptial agreement as evidenced by the late date at which a working draft was provided and the several distractions present for [the wife] in the few days before the wedding.” 165 Wn.2d at 906, ¶ 25. Here, there was even less time for the wife to review the agreement than in *Bernard*. The wife was presented with the

agreement for the first time in the husband's attorney's office less than two weeks before marriage, while she was preparing for the parties' wedding before over 100 guests. As in **Bernard**, she not have enough time to adequately review the prenuptial agreement.

Given these facts, the trial court properly found that the agreement was procedurally unfair (FF 2.7, CP 1005), and although it would have made no difference in the result, the trial court properly invalidated the agreement.

B. The Trial Court Properly Excluded The Husband's Witnesses When The Husband Provided No Credible Basis For Their Late Disclosure And The Wife Would Be Substantially Prejudiced.

1. Standard Of Review.

A trial court's decision to exclude a witness is reviewed by this court for an abuse of discretion. **Lancaster v. Perry**, 127 Wn. App. 826, 830, ¶ 5, 113 P.3d 1 (2005). "This determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." **Lancaster**, 127 Wn. App. at 830, ¶ 5 (*quotations omitted*). "In the context of sanctions, the abuse of discretion standard recognizes that deference is owed to the judicial actor who is better positioned than

another to decide the issue in question.” *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 564, ¶ 91, 166 P.3d 813 (2007) (*quotations omitted*), *rev. denied*, 163 Wn.2d 1055 (2008). Here, the trial court did not abuse its discretion in excluding the husband’s witnesses, whom he failed to timely disclose without good cause and whose testimony would have been largely duplicative of the husband’s. The wife would have been prejudiced had they been allowed to testify because she would not have had adequate time to prepare for the witness’ testimony in light of the pending trial.

2. The Husband’s Undisputed Failure To Timely Disclose These Witnesses Under The Local Rules Prohibited Their Inclusion At Trial Absent A Showing Of Good Cause.

The trial court did not abuse its discretion when it excluded two of the husband’s witnesses when he failed to timely disclose them under KCLR 26(k)(4). Under this rule, the parties must disclose possible primary and rebuttal witnesses according to the case management schedule. Failure to do so requires exclusion of the witnesses, “unless the Court orders otherwise for good cause and subject to such conditions as justice requires.” KCLR 26(k)(4). The purpose of this rule is “an orderly process by which a case can

proceed,” allowing the parties to prepare for trial and timely conduct discovery. **Lancaster**, 127 Wn. App. at 833, ¶ 10.

There is no dispute that the husband failed to timely disclose his “expert” “hard money” witnesses under the rule. The parties’ case management schedule provided for a discovery cutoff of March 21, 2011, and a deadline to exchange witness disclosures by April 4, 2011. (CP 586) The husband did not disclose that he intended to call these witnesses until April 25, 2011 – three weeks after the witness disclosures were due, more than one month after the discovery cutoff, and just two weeks before trial. (CP 586, 603) None of the husband’s previous witness disclosures identified either gentleman as a potential witness. (See CP 593-95, 597-98)

Our courts have regularly upheld decisions by the trial court excluding witnesses for failure to comply with local rules requiring timely disclosure without an adequate showing of good cause. See **Lancaster**, 127 Wn. App. 830; **Southwick v. Seattle Police Officer John Doe Nos. #s 1-5**, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008) (striking declaration of witness who was untimely disclosed); **Allied Financial Servs., Inc. v. Magnum**, 72 Wn. App. 164, 864 P.2d 1 (1993), *amended by*, 871 P.2d 1075 (1994). In this case, the husband presented no “good cause” for his failure to

disclose any earlier these witnesses, who would purportedly offer an opinion about the collectability of Crown Finance's accounts receivables.

Instead, as he claims here, "these witnesses were not earlier disclosed because it was not known earlier that Doris would take the position that the company had any value." (App. Br. 21, *citing* CP 676) But to the extent there was any "change" to Doris' opinion regarding the value of the business it was only because Louis unilaterally paid off the Bank of America line of credit with community assets, thus increasing the value of the business by decreasing its liabilities. (See CP 716-17) The trial court rejected Louis' excuse on the facts, and found "the value of the business [has] been hotly contested throughout these proceedings." (RP 15) The trial court found that there was no "good cause basis for allowing these witnesses to testify" when they were disclosed late by the husband (RP 14), and that the wife is "prejudiced substantially if the court were to allow the testimony as experts of Mr. Ryno and Mr. Green." (RP 15)

3. The Husband Failed To Preserve His Challenge Because He Never Asked The Trial Court To Make Express Written Findings Supporting Exclusion Of His Late-Disclosed Witnesses, Which Is The Sole Basis For His Challenge On Appeal.

The husband ignores the local rule on which the trial court based its decision and the cases interpreting that rule, and instead argues for reversal because the trial court did not make specific findings that “the violation was willful and prejudicial and the sanction was imposed only after explicitly considering less severe sanctions.” (App. Br. 31, *citing Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012); *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011)) But the husband never made this argument or cited these cases in the trial court. (See CP 675-83; RP 8-13)

The trial court would have made express findings had the husband raised this argument below. Absent any indication in the record that the husband advanced this particular claim in any substantive fashion at trial, it cannot be considered on appeal. *Marriage of Studebaker*, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); see also RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court). The purpose of this rule requiring preservation of error is to afford the

trial court an opportunity to correct alleged errors, thereby avoiding unnecessary appeals and retrials. **Demelash v. Ross Stores, Inc.**, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001). Therefore, this court should reject the husband's challenge to the exclusion of his witnesses as not preserved.

The claimed need for findings is based on the analysis for discovery sanctions set forth in **Burnet v. Spokane Ambulance**, 131 Wn.2d 484, 933 P.2d 1036 (1997) – another case never previously cited by the husband. In **Burnet**, the misconduct at issue was the party's failure to comply with CR 26(f) governing discovery conferences. The sanction initially imposed by the trial court was dismissal of a claim. The Court held in **Burnet** that “when the trial court chooses one of the harsher remedies allowable under CR 37(b), it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed, and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.” 131 Wn.2d at 494 (*citations omitted*).

This court has previously held that express findings under **Burnet** are not necessary when a trial court excludes a witness for

untimely disclosure under KCLR 26. *Lancaster*, 127 Wn. App. at 832, ¶ 9. In *Lancaster*, the plaintiff sued the defendant for injuries sustained in an automobile accident. The defendant initially failed to disclose any expert witnesses before finally naming three “possible” experts who would conduct an independent medical examination of plaintiff. The trial court granted the plaintiff’s motion to exclude the defendant’s witnesses for failure to timely disclose.

This court affirmed, holding that while it “would have been preferable for the trial court to analyze, on the record, the prejudice that would ensue if [defendant] were allowed to conduct an untimely CR 35 examination and present the examiner’s testimony and the suitability of lesser sanctions [under *Burnet*], the trial court was within its discretion in excluding Perry’s witness.” *Lancaster*, 127 Wn. App. at 833, fn. 2. This court held that in the absence of good cause, failure to timely disclose witnesses would frustrate the purpose of the scheduling rules, and that it was within the trial court’s discretion to exclude the witnesses. *Lancaster*, 127 Wn. App. at 833, ¶ 10.

Likewise here, while it may have been “preferable” for the trial court to have made written findings to support its exclusion of the husband’s witnesses, when no findings were sought by the

husband, and the trial court rejected the husband's claim that his late disclosure was for "good cause," the trial court did not abuse its discretion in excluding cumulative witnesses.

4. Regardless Of The Lack Of Written Findings, It Is Clear From This Record That The Trial Court Considered All Relevant Factors Before Excluding The Husband's Witnesses.

Even if express findings were necessary, it is apparent from this record that the trial court did indeed consider the factors under *Burnet* before excluding the husband's witnesses.⁹ See *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d at 348, ¶ 16 (in the absence of written findings the appellate court can consider colloquy between the bench and counsel to determine whether the requisite factors were considered before the trial court excluded a witness). On the issue of whether the husband's late disclosure was "willful," the trial court expressly rejected the husband's excuse that his late disclosure was not willful based on his claim that the value of the business was a new issue. The trial court noted correctly, that the

⁹ Contrary to the husband's claim, the trial court did not "declare it did not need to address the *Burnet* factors." (App. Br. 22, citing RP 13-16) Instead, it stated that it did not have to find "absolute prejudice to the other to party to exclude witnesses. The court doesn't have to find that there aren't any options if the court does allow the witness to testify." (RP 13-14) This is certainly true – no case requires a finding of "absolute prejudice," or that there are "no options" other than allowing the witnesses to testify.

value of the business was “in the court’s view, from the evidence presented, [] an issue throughout this proceeding.” (RP 14-15) See *Teter v. Deck*, 174 Wn.2d at 219 (trial court considered the willfulness of a discovery violation on the record when it “explicitly discredited [the] excuse based on the facts in the record”).

In granting the motion to exclude the witnesses, the trial court also considered on the record the prejudice to the wife if the witnesses were allowed to testify, and whether there were lesser sanctions available other than exclusion. In doing so, the trial court expressly adopted the reasoning of the wife’s counsel (RP 15), who argued that it was prejudicial to the wife because she would “have no time to depose these witnesses or to prepare for their cross-examination or prepare rebuttal witnesses. And its grossly prejudicial to her both financially and strategically in this case.” (RP 8; see also CP 589-90)¹⁰

Wife’s counsel also argued that a lesser sanction – such as continuance of the trial to allow her time to depose the witnesses – would not be appropriate because it would be “cost-prohibitive [], it

¹⁰ The trial court stated, “while the court doesn’t have to find extreme prejudice to the other party, the court certainly finds in this case the petitioner is prejudiced substantially if the court were to allow the testimony as experts of Mr. Ryno and Mr. Green. For the reasons outlined by Petitioner’s counsel, the prejudice is clear.” (RP 15)

would lose the momentum of all preparations that have been made for trial. And most importantly, it really does not give us the time to develop a whole new angle to a case that's been litigated for two years now." (RP 8) Although the trial court did not expressly consider any other lesser sanctions than trial continuance, which it rejected, that was because husband's counsel offered no other option. When the husband offered no less severe sanction, such as payment of the cost of delaying trial, the trial court cannot be faulted for not expressly considering other possible sanctions.

5. Because The Testimony Would Have Been Merely Duplicative Of The Husband's Testimony, Any Error In Excluding The Witnesses Was Harmless.

Even if the trial court erred in excluding these witnesses, any error was harmless because their testimony was not "critical" (App. Br. 33) to his claims – its only purpose was to buttress the husband's own testimony that Crown Finance's accounts receivables would be difficult to collect. The trial court's exclusion of evidence is harmless when the evidence is "in substance, the same as other evidence which is admitted." *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 170, 876 P.2d 435 (1994) (citing *Moore v. Smith*, 89 Wn.2d 932, 941-42, 578 P.2d 26 (1978) (no reversible error where "the substance" of the excluded evidence, an

exhibit, came out at trial in testimony); **Mason v. Bon Marche Corp.**, 64 Wn.2d 177, 179, 390 P.2d 997 (1964) (no reversible error where no offer of proof and no showing that excluded evidence differed “in any material respect” from that which was admitted); **Gaffney v. Scott Pub'g Co.**, 41 Wn.2d 191, 194, 248 P.2d 390 (1952) (no reversible error where other testimony was “in substance, the same as” the excluded evidence), *cert. denied*, 345 U.S. 992 (1953).

Here, the husband asserted that these witnesses would “testify regarding the accounts and the effect of the housing crisis on both residential and commercial lending.” (CP 679) But both the husband and his accounting witness, Steve Kessler, were allowed to testify to this issue during trial. (See RP 142-59; 300-25) The witnesses’ testimony would not have added to the trial court’s understanding of this issue, and the trial court did not abuse its discretion in excluding their cumulative testimony.

C. The Trial Court’s Valuation Of Redmond Ridge Was Supported By Substantial Evidence At Trial, And The Trial Court Did Not Abuse Its Discretion In Declining To Consider Additional Evidence Of Its Value After Trial.

The trial court did not abuse its discretion in rejecting the husband’s claim that the Redmond Ridge property had no value,

and basing its valuation on the amount he had paid for it only a few years before the parties separated. A trial court does not abuse its discretion by assigning values to property within the scope of the evidence. See **Marriage of Soriano**, 31 Wn. App. 432, 435, 643 P.2d 450 (1982). The role of the appellate court is not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses. **Marriage of Rich**, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030, 1031 (1996).

There is substantial evidence to support the trial court's valuation of Redmond Ridge at \$340,000. Approximately a year before trial and nine months after the parties separated, the husband submitted a financial statement, sworn under penalty of perjury, to Bank of America, that Redmond Ridge was worth \$340,000. (Ex. 105) On the other hand, there was no evidence that the value of this commercial real property was *zero*, as the husband claims on appeal. While there was testimony that the building might lose tenants and the husband was no longer receiving rental income from the property, this is not evidence that the building itself was worth *nothing*. (RP 530-31) The trial court did not abuse its discretion in valuing the interest in Redmond Ridge on

the only evidence available – the husband's testimony of the cost of the investment and his most recent financial statement.

The trial court also did not abuse its discretion in refusing to consider evidence presented after trial of the value of Redmond Ridge. A trial court is obligated to decide the case on the evidence submitted to it, and “must base its decision on the evidence it already heard at trial.” ***Jet Boats, Inc. v. Puget Sound Nat'l Bank***, 44 Wn. App. 32, 42, 721 P.2d 18, *rev. denied*, 106 Wn.2d 1017 (1986). Evidence presented for the first time in a motion for reconsideration, without a showing that the party could not have obtained the evidence earlier, does not qualify as “newly discovered evidence” for purposes of CR 59. ***Marriage of Tomsovic***, 118 Wn. App. 96, 109, 74 P.3d 692 (2003).

Here, the husband claims that the trial court should have considered this new evidence because it was “material, driving at the heart of the valuation question.” (App. Br. 46) But that is not the test – he must also show that this is evidence that was discovered since the trial; could not have been discovered before trial by the exercise of due diligence; *and* is not merely cumulative or impeaching. ***State v. Swan***, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990), *cert denied*, 498 U.S. 1046 (1991). The husband

cannot meet this test. That a “realtor thought the property could not be sold except at a loss,” (App. Br. 45) is not evidence that could not have been discovered before trial. The husband had the opportunity to present evidence of this kind before trial, but for his own reasons chose not to do so. That the property management company declared bankruptcy after trial (App. Br. 45) is cumulative, because a representative from the company had testified at trial that the company was in a receivership. (RP 580) Thus, the financial problems of the property management company were already known at trial.

Further, that the owners of the building had to contribute an additional \$180,000 to the bank (App. Br. 45) was evidence that could have been discovered before trial by the exercise of due diligence. The reason for the additional deposit was because the loan agreement mandated it when the largest tenant declined to renew its lease. But the husband already knew that this tenant was not going to renew its lease at trial. (RP 575) Thus he should have known that a reserve deposit would be required.

Finally, contrary to the husband’s claim on appeal, the trial court explained its reason for rejecting the evidence. The trial court expressly found that there was “no basis pursuant to CR 59(a)(4),

(8), and (9) to consider the proffered Declarations of Steve Varon and Trevor Scott, see **State v. Swan**, 114 Wn.2d 613 (1990), and the authorities and arguments outlined at pages 2-5 of Petitioner's Response to Respondent's Motion for Reconsideration." (CP 1025)

D. An Award Of Spousal Maintenance Was Proper In Light Of The Fact That The Husband Received More Property And The Wife Earns Less Income Than The Husband.

An award of spousal maintenance is a discretionary decision that will not be disturbed on appeal absent a showing that the trial court abused its discretion. **Marriage of Luckey**, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). The trial court's discretion in this area is "wide;" the only limitation on the amount and duration of maintenance is that, in light of the relevant factors, the award must be "just." **Luckey**, 73 Wn. App. at 209. "The standard of living of the parties during the marriage and the parties' post dissolution economic condition are paramount concerns when considering maintenance and property awards in dissolution actions." **Marriage of Estes**, 84 Wn. App. 586, 593, 929 P.2d 500 (1997) (*citations omitted*). Spousal maintenance is not based solely on the need of one party and the ability of the other party to pay (App. Br. 47), but is a "flexible tool by which the parties' standard of living may be

equalized for an appropriate period of time." ***Marriage of Washburn***, 101 Wn.2d 168, 178-79, 677 P.2d 152 (1984).

Here, the husband leaves the marriage with more assets and greater income than the wife. Despite the husband's pleas of poverty, he has historically earned at least \$165,000 annually from Crown Finance – an income that may resume again as the economy improves (or when this appeal is over). He also receives over \$100,000 per year from a promissory note that he was awarded until November 2014, when he will receive a lump sum payment of \$706,000. Meanwhile, the wife's only income is her salary from the school district of \$3,000 net per month. It was not an abuse of discretion for the trial court to award maintenance of 8 years under these circumstances when the parties have been married for nearly 30 years.

E. This Court Should Deny Attorney Fees To The Husband And Instead Award The Wife Attorney Fees.

There is no basis for an award of attorney fees to the husband. This court should instead award the wife her attorney fees. This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; ***Leslie v. Verhey***, 90 Wn. App. 796,

954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). The husband was awarded more assets than the wife and has greater income. The husband's complaint that he received "hardly any liquid assets" from which to pay his own attorney fees (App. Br. 49) is laughable. He received over \$400,000 in cash accounts *plus* a promissory note that pays him \$8,000 per month and \$762,000 cash when the balloon payment is due in less than two years. This court should award attorney fees to the wife because she has the need for her fees to be paid and the husband has the ability to pay. RAP 18.1; RCW 26.09.140 (court may award fees considering the financial resources of the parties on any appeal).

VI. WIFE'S APPEAL ARGUMENT

The trial court erred when it reduced the value of the business awarded to the husband by over \$1 million for a "shareholder loan" that was owed to the husband without also including this loan as an asset to the husband. As a result of this error, the husband was awarded even more assets than intended – 67% of the entire marital estate.

The husband admitted at trial that it was unlikely that the business, which he controlled, would repay the shareholder loan, which only he would receive. (RP 331) Thus it was a fictitious

liability that should not have been included in valuing the business. While the trial court has discretion in valuing property, "its discretion does not extend to completely overlooking factors material to the determination." **Marriage of Landauer**, 95 Wn. App. 579, 591, 975 P.2d 577, *rev. denied*, 139 Wn.2d 1002 (1999) (reversing valuation of Indian trust land by trial court when it failed to discount for restrictions on alienation of trust land). Conversely, to the extent that the trial court properly included the shareholder loan as a liability, which presumably will and must be paid, it should have been considered an asset to the husband and specifically awarded to him in the property distribution. **Byrne v. Ackerlund**, 108 Wn.2d 445, 451, 739 P.2d 1138 (1987) (trial court must make a specific disposition of all assets before it).

While the wife believes this is reversible error, for purposes of ending the litigation she only asks this court to reverse on this issue if this court remands on any of the issues raised in the husband's appeal. If this court remands, it should direct the court to reconsider its property distribution based on a proper consideration of this shareholder loan, which impacted the property distribution to the wife's detriment by over \$1 million.

VII. CONCLUSION

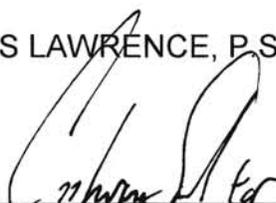
This court should affirm the trial court's fact-based discretionary decisions challenged by the husband on appeal, and award attorney fees to the wife for having to respond to his appeal. In the event this court remands on any of the issues raised in the husband's appeal, this court should also remand for the trial court to reconsider its inclusion of "shareholder loans" owed to the husband as a liability of the business.

Dated this 1st day of August, 2012.

SMITH GOODFRIEND, P.S.

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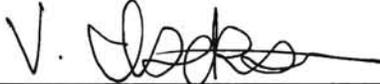
DECLARATION OF SERVICE

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

That on August 1, 2012, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 1st day of August, 2012.



Victoria K. Isaksen