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State of Washington

73415-6

No. 73415-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

BARBARA TEMPLIN
(f/k/a Klavano),

Appellant,

and

JAMES KLAVANO,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JULIE SPECTOR

BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Appellant

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I. INTRODUCTION

The trial court distributed less than 10% of the marital estate and awarded no maintenance or fees to the wife after a 10-year marriage. Its decision was not guided by RCW ch. 26.09's statutory factors, but intended to punish the wife for what the trial court saw as "marital misconduct," based in part on a private note the wife had written herself more than five years before the parties separated detailing a "fantasy" escape plan from a marriage she perceived as abusive. The trial court also refused to consider the wife's need and the husband's ability to pay fees on the grounds that the wife's withdrawal of funds from a joint account just prior to separation "was questionable and started this dissolution on an unnecessarily contentious path." (CP 2384; *see also* CP 2341)

The Dissolution Act prohibits the consideration of marital misconduct in property distribution and maintenance, and requires consideration of the parties' economic circumstances in these decisions and in need-based fee determinations. Because the trial court improperly based its decision on the wife's purported "fault," this Court should reverse, remand to a new judge for a proper consideration of the factors governing property division, maintenance, and attorney fees, and award fees to the wife on appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Findings underlined in Appendix A. (CP 2323-2343)

2. The trial court erred in dividing the marital estate and denying the wife's request for maintenance and fees in the Decree of Dissolution, attached as Appendix B. (CP 2344-50)

3. The trial court erred in denying the wife's motion for reconsideration, and in entering the Findings underlined in Appendix C. (CP 2384-2385)

4. The trial court erred in denying the wife's motion to exclude evidence of marital misconduct and in admitting as Exhibit 301 the wife's private note attached as Appendix D. (RP 258)

III. STATEMENT OF ISSUES

1. RCW ch. 26.09 prohibits consideration of "marital misconduct" in deciding financial matters attendant to a marriage dissolution. Did the trial court err in basing its decisions on the wife's "fantasy" escape plan from the marriage, written in a private note to herself five years before the parties separated?

2. Did the trial court err in basing its property distribution and maintenance on a finding that this was a "short-

term marriage of four years" (CP 2384) when both parties acknowledged that the marriage lasted ten years?

3. Did the trial court err by not properly considering the RCW 26.09.080 factors in making an award of less than 10% of the marital estate to the wife, the more financially vulnerable spouse?

4. Did the trial court err by not properly considering the RCW 26.09.090 factors in denying maintenance to the wife, whose property award and income are wholly inadequate to maintain even a semblance of the parties' prior standard of living, while leaving the husband with more than 90% of the marital estate, including all income-producing and liquid assets?

5. Did the trial court err in refusing to consider the parties' financial resources in denying an RCW 26.09.140 award of fees to the wife because she withdrew funds from a joint account at the commencement of the dissolution action and because the trial court rejected her claims of abuse?

IV. STATEMENT OF FACTS

A. The parties married in May 2003 and separated in July 2013.

Appellant Barbara Templin (DOB 10/22/59), and Jim Klavano (DOB 6/24/49), met in 1982. (RP 145; CP 1) They dated briefly before eventually marrying other people. (RP 145) Barbara

and Jim reconnected in 2000. (RP 145) By then Barbara was divorced and Jim was going through a divorce with the mother of his two daughters. (RP 145-46, 150-51) The parties dated three years before marrying on May 4, 2003. (RP 148-49) They have no children from this marriage. (*See* CP 151)

The parties separated on July 22, 2013, when Barbara moved out of the family home after filing a petition for dissolution three days earlier, on July 19, 2013. (CP 1-2, 23) Their marriage was dissolved on March 24, 2015 after a 9-day trial before King County Superior Court Judge Julie Spector. (CP 2323, 2344)

B. Barbara was financially dependent on Jim throughout the marriage.

1. Barbara, age 55, is a senior flight attendant with Alaska Airlines. Her future ability to work long hours as a flight attendant is questionable.

Barbara started college but never graduated. (RP 139-40) In 1982, at age 23, Barbara began working for Alaska Airlines as a flight attendant. (RP 140) When the parties resumed dating in 2000, Barbara was 40, divorced, and still working as a flight attendant. (RP 146-47) She owned a townhome and had consumer debt of approximately $8,000. (RP 446) Although working full-time, Barbara was still somewhat financially dependent on her parents, who regularly gave her money to help defray expenses. (RP 382)

While they were dating, Jim encouraged Barbara to work less so that she could travel with him to China for business trips; once loaning Barbara money to pay her mortgage so she could travel with him. (RP 147-48) After they married, Barbara continued to occasionally travel with Jim for business. (RP 173) When Barbara did not travel with Jim, it was often so that she could "hold down the home front" with his school-age daughters, who lived with Barbara and Jim alternate weekends and two Wednesdays per month. (RP 151, 173, 399)

Jim and Barbara agreed that Barbara should continue to work after their marriage because Alaska Airlines provided medical insurance for both of them. (RP 181) They agreed that Barbara would use her Alaska Airlines earnings to pay off her premarital debt, and that Jim would pay for the community's expenses. (Finding of Fact (FF) 2.8(1)(c), CP 2327; RP 181) Approximately two years after they married, Jim paid off Barbara's premarital debt as a "Christmas gift." (FF 2.8(1)(c), CP 2327; RP 148, 383) Barbara believed her debt at the time was $5,000 to $7,000; Jim testified it was $10,000 to $12,000. (RP 147, 1022)

Eventually, at Jim's "suggestion" and with his "blessing," Barbara worked fewer hours to spend more time with Jim and his

daughters. (RP 185, 186, 1431) However, she always worked enough hours to maintain their health insurance, earning on average $25,000 annually. (RP 181, 187; *See* Ex. 520) Barbara earned her highest income, $36,795, in 2003, the first year of their marriage. (*See* Ex. 520) Prior to that, her highest income had been $46,890 in 1999, when she was 40 years old and working far more hours than she could work at age 55 and beyond. (*See* RP 254; Ex. 520)

Barbara had always been interested in making and marketing jewelry. (RP 254) In 2010 she took an 18-month leave from Alaska Airlines to go to gemology school. (RP 141-42, 442) Barbara also took leave in part because she was suffering back pain from an injury sustained in an auto accident 20 years earlier; the pain was exacerbated by her age and work as a flight attendant. (RP 141-45) Jim encouraged Barbara's decision to return to school, and helped pay for the course. (RP 442, 443)

Barbara hoped to eventually transition from working at Alaska Airlines to a career in jewelry design and sales. (RP 254, 444) Barbara testified that it was not "practical" for her to increase her flying hours at her age. (RP 188-89, 253-54) Barbara, age 55, described cramped quarters, assisting passengers with placing their carry-on bags in the overhead bins, lifting heavy soda drawers, and

pushing food and drink carts that weigh up to 280 pounds – and the physical toll the job took due to her age and back issues. (RP 141) Describing Barbara's lumbar and cervical spine as "significantly compromised," her physician had recommended that she work 2 to 3 days a week, and if possible that there be a weight limitation of 25 pounds for anything she is required to lift. (Ex. 533) Barbara testified that she wanted to maintain her benefits through Alaska Airlines by continuing to work limited hours while also pursuing a career in jewelry design and sales. (RP 254; *see also* Ex. 25) [1]

The trial court, however, found that Barbara's claims regarding her back injury were "unsupported" (FF 2.12(2), CP 2337), that Barbara could "continue to work full-time as a Senior Flight Attendant for many years" (FF 2.8(4), CP 2334), and that "the evidence does not support a late in life career change to go back to school as a gemologist." (FF 2.12(3)(b), CP 2339)

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[1] William Skilling, a vocational rehabilitation counselor, testified that a career transition was warranted for Barbara, because flight attendants' pay is low relative to the amount of effort, time, and stress involved in the job and it is unlikely that Barbara can continue to work as a flight attendant into her 60's. (RP 548-49) Although Barbara has been working as a flight attendant for over 30 years, her skills were not transferrable to another career; Skilling recommended that Barbara obtain additional skills and training for employment "into her later years, up through age 65 and beyond." (RP 548-49)

2. The community was undercompensated for Jim's efforts in his businesses, foreclosing the accumulation of any significant community property.

After Jim graduated from Washington State University and moved to Australia for two years, he returned to Seattle and formed Australia Unlimited, Inc. ("AUI") in 1981 to import sheepskin products and "massage sandals." (RP 1004-06) Less than a week before the parties married, Jim formed Jalau Klavano Properties, LLC, which owns a warehouse, and Borrego Management, LLC, which manages the Jalau warehouse and makes "hard money" loans. (RP 816-17, 847; Ex. 5) Borrego also holds limited partnership interests in apartment buildings. (RP 818, 914)

Jim managed, operated, ran, and entirely controlled all of these businesses as one enterprise. (RP 810-11, 816-17, 927) Ben Hawes, Barbara's forensic accountant, opined that over the course of the parties' marriage, these businesses evolved and increased in value, primarily due to Jim's efforts. (RP 810-12, 816-17; Ex. 5) Hawes testified that the enterprise increased in value from approximately $2 million at the beginning of the marriage to over $11 million today. (RP 818-19, 826; Ex. 549) There was significant growth between 2003 and 2006, but then growth stalled in 2007 when Crocs, Inc. sued AUI for patent infringement. (RP 811, 924)

Jim was very involved in the Crocs litigation, which eventually settled in 2009. (RP 850-51, 1248-49; Ex. 5 at 9) Jim then sued his insurance company for its failure to defend AUI in the Crocs lawsuit. (RP 811) The insurance litigation resulted in a judgment of approximately $2.8 million in favor of AUI, after legal fees and costs. (RP 936; Ex. 5 at 3)

In 2011, AUI sold all of its assets relating to its sheepskin slipper business to JAB. (RP 744, 770; Ex. 11) JAB immediately paid $250,000 to AUI, and executed three promissory notes for the balance. (RP 904-05, 986-89; *see also* Ex. 101) The first note of $500,000 was paid on December 31, 2011. (RP 986-88) The other two notes, for $1 million and $650,000, are to be paid over time. (RP 988-89)

During the parties' marriage, on September 26, 2012, Jim formed a third LLC, Nothinz. (RP 725-26; Exs. 95, 184) AUI assigned the promissory notes from JAB to Nothinz, LLC. (RP 771; Ex. 100) According to Jim, Nothinz, LLC was formed solely to protect the payments from JAB on the promissory notes, in the event of a future lawsuit by Crocs. (RP 723, 738, 770-71) Jim testified that other than to collect money from JAB, Nothinz, LLC has no independent business operations. (RP 770-71) However, there is a

separate Nothinz product – a line of shoes owned by AUI that was not purchased by JAB, and that were still being sold to consumers. (RP 725, 773) According to Jim, the Nothinz product and Nothinz, LLC are unrelated. (RP 723, 738, 770-71)

Throughout the marriage, Jim worked for his businesses and their associated lawsuits. Barbara testified that Jim worked "obsessively" during the marriage. (RP 172-73; *see also* RP 905-06) Jim claimed he worked only 20 hours per week. (RP 1195) Regardless, Jim was awarded four patents, for products Jim testified he developed as an AUI "employee" during the marriage. (RP 746-47; Ex. 168) Three of the patents he conveyed to AUI; one Jim retained. (RP 746-47, 774-75, 995) Hawes testified these patents were of "considerable value" and "crucial" to AUI's growth. (RP 849-51, 1/21 RP 8, 11, 21, 22-23) The trial court nevertheless disregarded the patents for products developed during the marriage in its distribution and characterization of the marital estate. (CP 2349-50)

On average, Jim took home less than $50,000 annually as W-2 wages from his businesses. (*See* Ex. 5 at 9) There was no dispute that the wages Jim paid himself were inadequate to compensate the community for Jim's efforts. Jim's forensic accountant, Steven Kessler, acknowledged that Jim was undercompensated, paying

himself only a third of what he should have earned, and that Jim used non-wage distributions from the businesses to fund the community's "above average lifestyle." (RP 1169-74, 1202) According to Kessler, Jim's reasonable annual compensation would have been approximately $150,000. (RP 1170; *see also* Ex. 567) Based on Kessler's opinion and Jim's W-2s, the community was undercompensated by more than $1 million over the course of the 10-year marriage. (Ex. 567; RP 1170)

Even though the experts agreed the community was undercompensated, the trial court found "no community funds were co-mingled with [Jim]'s separate property or businesses," and that there was "no intent on the part of [Jim] to transmute his separate property to community property." (FF 2.8(2), CP 2330) Instead, the trial court found that Jim "made substantial contributions of his separate property and income to meet the expenses of the marital community and to create community property." (FF 2.8(2), CP 2331) The trial court found that the businesses and their assets, including Nothinz, LLC, which was formed during the marriage were worth $4.9 million, and awarded the businesses entirely to Jim as wholly separate property. (CP 2349-50)

3. The trial court characterized Jim's down payment on the family residence consistent with a postnuptial agreement that the trial court found was unfair.

After they married, Barbara sold her townhouse, using what little proceeds she received to pay down her debt, and moved into Jim's apartment on Queen Anne. (RP 149-50) A few months later, Jim decided he wanted to move to Sammamish to live closer to his daughters, then 9 and 13. (RP 150) Jim charged Barbara with the task of finding a suitable home for the family. (RP 160) Barbara located a 5,000 square foot home in Sammamish on the 16th hole of a golf course, which the parties purchased in October 2003. (RP 153, 160)

On the Settlement Statement for the home's purchase, Barbara is listed as a "borrower." (Ex. 306) Barbara is also on the home's title. (Ex. 65 at 48) Barbara had no funds of her own to put towards the down payment (RP 386); Jim made the $207,000 down payment, telling Barbara that the home was a "gift to us for our wedding." (RP 156) Barbara understood that the home was an "investment for their future." (RP 388)

Around the time they purchased the home, the parties had a fight when Barbara confronted Jim on how he treated her in front of his friends. (RP 162) The following day, Jim angrily presented

Barbara with a "postnuptial agreement." (RP 163)[2] Despite his earlier promise that the down payment on their home was a "gift" to the community, the agreement purported to establish the down payment as Jim's separate property. (Ex. 213) The agreement further provided that if either party filed for dissolution within 18 months of the purchase, Barbara would immediately vacate, quit claim her interest in the home, and agree that any mortgage payments or expenses associated with the property be deemed gifts by the community to Jim's separate estate. (Ex. 213) If the marriage were to survive 18 months, the agreement provided that they would share equally in any increase in the equity of the property, not including the "down payment, closing costs, taxes, insurance," which were to be treated as Jim's separate property. (Ex. 213)

Barbara signed the agreement on October 3, 2003, having had no opportunity to consult a lawyer, because she was "afraid not to sign it." (RP 164-67)

The parties paid down the principal and refinanced the residence in April 2013, reducing the monthly mortgage payment

[2] Prior to their wedding, Jim had asked Barbara to sign a prenuptial agreement. Barbara refused and Jim never brought it up again. (RP 165)

from $5,000 to $2,000. (RP 156-57) Once again, Barbara was listed on title. (*See* RP 159)

The trial court found the postnuptial agreement "questionable" and "unfair, and therefore invalid." (FF 2.7, CP 2325, 2326) Nevertheless, the trial court gave Jim "credit for the down payment he made on the Sammamish home as his separate property" (FF 2.7, CP 2326) consistent with the agreement. Other than retirement funds accrued by each party during marriage, the Sammamish home, with equity of $586,774,[3] was the only community property found by the trial court. (*See* CP 2349-50)

4. Jim was controlling. Barbara was unhappy in the marriage.

There is no dispute that the parties were in financially disparate situations when they married. As Jim's companion on business trips and "sounding board," Barbara had hoped that they could be financial partners after they married. (RP 173-77) However, Jim refused to disclose any information any time Barbara asked for details regarding their finances. (RP 193, 687) One time, Jim became so angry about Barbara's inquiries that he "yelled" that it was

[3] The total equity in the home was $793,783, but the trial court gave Jim credit of $207,009 for the down payment. (CP 2349)

"none of [her] business," claimed she was trying to "kill him," and curled into the fetal position. (RP 687)

Initially, Jim would not even make Barbara a beneficiary of his will. (RP 193) Barbara was concerned she would not be provided for if Jim died, since she had very little retirement savings and he had kept her in the dark about their finances. (RP 193) When Barbara's parents suggested that she take out a life insurance policy out on Jim, Barbara paid the premiums herself until Jim took over the payments. (RP 194, 1039) Jim finally made Barbara a beneficiary of his will in 2007, four years after they were married. (RP 281-82; Ex. 394)

Jim's efforts to impose an "unfair" postnuptial agreement on Barbara was not the only way in which he was controlling. He opened a "family credit card" for Barbara to use and funded a joint checking account from which Barbara was to pay household bills, but required her to provide a monthly "accounting" of her credit card charges. (RP 182-85) If he disagreed with a charge, Jim refused to pay for it. (RP 182) To meet some of the expenses that Jim refused to pay, Barbara began increasing her tax exemptions to reduce the withholding from her paycheck, so that she could have enough money to pay the "unapproved" charges herself. (RP 203) The trial court charged Barbara $4,363 for income taxes Jim paid on her pre-

separation 2012 income as part of its property distribution. (CP 2350)

Jim threatened that if Barbara tried to divorce him, he would "devastate her in every way" and leave her "penniless." (RP 677) Jim told Barbara that "it was our money as long as you're in the marriage. It's my money if you leave." (RP 677)

Barbara was often unhappy in the marriage, describing it as one of "abuse, humiliation, control, and manipulation." (RP 360) During one particularly bad time in March 2008, Barbara wrote a "fantasy" note describing how she could escape the marriage.[4] (Ex. 301) In the note, Barbara writes of the "emotional abuse [she] put [up] with over the past 5 years," and of being upset by Jim's "lies about all our finances." (Ex. 301) Barbara described "hating" Jim, wanting to help the other side in the Crocs litigation, faking affection for Jim until he pays off the house, and waiting until the life insurance policy was in full effect before leaving Jim, just in case he committed suicide. (Ex. 301)

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[4] Jim and the trial court describe the note as a "journal entry." But it was not written in a journal. Instead, it was two handwritten pages that Barbara wrote to herself on hotel stationary while on a trip with Jim. (RP 262) Jim's attorney had this private note transcribed and admitted as Exhibit 301. (RP 258-59, 667) The transcription and original is Appendix D to this brief.

After Exhibit 301 was admitted, over objection, Barbara testified that she would never actually do any of the things that she had written in this note, and that she had written it out of "despair and desperation" and as a way to express her feelings, since she felt "powerless" in the marriage. (RP 262-71, 586) Vicki Boyd, a clinical psychologist, testified that victims of abuse will "write sometimes what they wish, they write sometimes what they hope for, they write sometimes out of anger, fear, frustration, and they write things they know can't be true, but they do write them." (RP 613)

That Barbara did not mean what she wrote in her private note to herself is also evidenced by Barbara's actions in July 2008, when Jim transferred half a million dollars from a Washington Mutual account in his name only into a Wells Fargo account in Barbara's name, because he believed Washington Mutual was about to fail. (RP 669-74; Ex. 538) Even though her name was on the account and she could have withdrawn the funds at will, Barbara made no attempt to take any money from her Wells Fargo account, where Jim "parked" these funds for at least five months. (RP 669-74; Ex. 538)

Jim discovered Barbara's private note in November 2008.[5] (RP 1042-43) He was (understandably) "furious," and "screamed and yelled" at Barbara. (RP 586-87) Jim testified that Barbara told him that "she was off her medication" when she wrote the note, that she wanted to work on the marriage, and that he accepted that explanation. (RP 1045) Although Jim often used the note against Barbara by threatening to show it to others, which he knew would embarrass her (RP 1440), the parties remained married until Barbara moved out in July 2013 – their agreed date of separation. (*See* CP 2, 23)

The trial court initially ruled it would not consider Exhibit 301 for purposes of property division and maintenance (CP 1546), but at trial overruled Barbara's objection to its admission, ruling that it goes to "Credibility. Motive. . . . It goes to, it puts every issue at question before the Court." (RP 258-59) The trial court then found that "the evidence established that [Barbara] had been planning to leave the marriage at least as early as March 8, 2008 (FF 2.8(3), CP 2332), and that as a consequence, this was a "short-term marriage of four years." (CP 2384)

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[5] Jim claimed he found the note in some papers in his office. (RP 1042) According to Barbara, after writing the note she tucked it into her flight bag, and Jim could have discovered it only if he was searching her bag. (RP 586)

C. Barbara moved out of the family home and filed for divorce in July 2013. The ensuing litigation was contentious and expensive.

In 2013, Barbara expressed her concern that if there were ever an emergency and Jim was unavailable, she would not have access to any funds, since her name was on only the one household account that Jim funded for monthly expenses. (RP 222) Jim resisted at first, but finally agreed to put Barbara's name on an account that held approximately $90,000. (RP 225, 1273) She did not realize it at the time, but this joint account was a business account for Nothinz, LLC, the business Jim had formed during the marriage, which was presumptively community property. (RP 227, 318)

Jim refused to allow Barbara to enter the bank with him to sign a signature card, because he did not want her to speak to anyone at the bank. (RP 225-26, 1274) Jim eventually relented and allowed Barbara to enter the bank so long as she "did not speak." (RP 225, 1274) But after this humiliation, Barbara decided that she wanted to separate. She moved out of the family residence while Jim was in Hawaii with his daughters. (RP 1275-76)

Barbara only had $10,000 available to her, including a $1,000 rebate check for her recently purchased Audi and a $3,000 refund check for the warranty that she had purchased for her previous car,

which was traded in for the Audi. (RP 298-99) To provide herself with a "safety net," Barbara withdrew the $90,000 in funds from the joint account. (RP 227-28, 230-31, 346)[6]

On her initial motion for temporary orders, Barbara asked for a restraining order and monthly temporary maintenance of $8,500. (CP 6, 17) Barbara also asked the court to order Jim to pay attorney fees of $15,000 per month. (CP 6) The court awarded Barbara monthly temporary maintenance of $6,751 and a one-time $20,000 award of fees, without prejudice to "petitioner making further motions for temporary fees and costs." (CP 88-90) Barbara was ordered to return $76,000 of the $90,000 to Nothinz, LLC; she had spent the other $14,000 and the court considered it as her first two months of temporary maintenance. (CP 90; FF 2.12, CP 2335) The court also granted a mutual restraining order. (CP 88)

Despite having the Nothinz funds returned to him, Jim sued Barbara, purportedly on behalf of Nothinz, LLC, for conversion. (Ex. 542) Jim later amended his civil complaint to include Barbara's

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[6] At trial, Barbara could not recall whether her attorney advised her to remove the funds from this account. (RP 334) In an earlier deposition and in a hearsay statement she made to a police officer she stated that she had spoken to her attorney before withdrawing the funds and that she was given the advice to do so. (RP 334-35, 344-45) The trial court in denying Barbara's fee request made a finding that she had acted on advice of counsel. (CP 2385)

divorce lawyer, Camden Hall, as a defendant. (Ex. 543)[7] Based on the lawsuit he had commenced, Jim sought to disqualify Mr. Hall as Barbara's lawyer in the dissolution. (*See* CP 110) The motion was denied. (CP 110) Jim then filed an (unsuccessful) Bar complaint against Mr. Hall. (CP 2137) Jim also sought a copy of the fee agreement between Barbara and Mr. Hall, forcing her to move for a protection order. (*See* CP 190, 472-73) The court granted the motion, finding that "absent good reason, production is contrary to good policy. It could lead to the chilling of the attorney/client relationship, could affect settlement negotiations unfairly, and require counsel to disclose his business practice unrelated to this case." (CP 190)

The divorce continued to be hotly contested; the parties even disputed custody of their black standard poodle Sophie. (RP 212-15) A year after the dissolution action had been commenced, Barbara had made at least 10 motions, and had been forced to respond to over 14 motions filed by Jim. (CP 164. 204-05) Barbara was largely successful in these pre-trial motions. (CP 204-05)

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[7] Mr. Hall was subsequently dismissed as a defendant in the civil action (Ex. 56), but Jim's civil action against Barbara was still pending at the time of the dissolution trial. It has since been dismissed.

Among the motions that Barbara was forced to file were for orders compelling discovery. These were heard by King County Superior Court Judge Laura Inveen, to whom the case was originally assigned. In one order, Judge Inveen found that "this is a disputatious case involving, among other things, questions about the character of significant property. Respondent's discovery abuse seems to be a tactical attempt to prejudice petitioner in her preparation of her case and protection of her legitimate interests." (CP 103) In another order, which reserved sanctions for trial, Judge Inveen noted that Jim had provided "2272 pages of documents electronically w/o any semblance of organization to the production request the document is responsive to." (CP 352, 353) This "bulk production [ ] appears to have been purposefully designed to obscure the significance of produced documents, undermine the usefulness of production and prevent petitioner from determining which documents are responsive to her requests." (CP 352-53) At trial, Barbara's expert witness Hawes testified to the difficulty in getting organized useful information from Jim. (RP 798-804)

Judge Inveen also found Jim in contempt in December 2013 for violating the mutual restraining order and failing to timely pay the maintenance, and awarded Barbara attorney fees of $8,169.99.

(CP 93-100) When Jim sought to reduce temporary maintenance six months before trial, the motion was denied, and fees to Barbara for having to respond to the motion were reserved for trial. (CP 112, 161, 344-45)

By July 2014, Barbara had incurred over $88,000 in attorney fees. (CP 315) She sought another award of temporary fees and costs for her expert witnesses. (CP 163) Barbara was awarded only $15,000. (CP 340, 346) At trial, Barbara testified that she had no resources to pay attorney fees (RP 248), and that she had already liquidated one of her investment accounts to pay experts, taken a loan against her 401(k) to pay her attorney, and incurred additional credit card debt to fund the litigation. (RP 1445)

D. After a 9-day trial, the trial court awarded Barbara less than ten percent of the marital estate, no maintenance, and no attorney fees.

The case was reassigned and the parties appeared for a nine-day trial before King County Superior Court Judge Julie Spector beginning November 17, 2014 and ultimately concluding on January 21, 2015. At issue was the character and distribution of property and Barbara's requests for maintenance and an award of fees – fees that by the conclusion of trial exceeded over $240,000 in amounts still owed, as well as over $36,000 owed to expert witnesses. (CP 2116)

As "disputatious" as the matter had been pre-trial, things only got worse during the trial. For instance, late in the trial, Jim for the first time tried to present Kessler, who had not been previously disclosed, as an expert witness. Barbara objected, noting Judge Inveen's earlier discovery orders, as well as the trial court's earlier order that "respondent's experts may only express opinions in their testimony that were demonstrably fully disclosed by noon, November 10, 2014." (CP 1547) Seeming to blame both parties for Jim's discovery violations, Judge Spector allowed Kessler to testify, whose opinion was never disclosed prior to him testifying on December 15, 2014. (RP 1132-33)

Judge Spector "was not happy with the way discovery has gone in this case. It is not lost on the Court that this has been a very difficult, litigious, protracted piece of litigation. Both sides have essentially worked the system, to use the word. [ ] It is really become a gin of lawyers just going back and forth at each other for – you know to what end, I don't know. But it's just not the best of our profession, I will say that. And in 15 years of sitting on the bench, this is going to rate right up there with one of the most litigious divorce cases I've ever done." (RP 1128-29)

At the conclusion of trial, two months after it had begun, the trial court awarded each party what it found was their separate property, including an award to Jim all of his business interests, and the down payment on the family residence. (CP 2349-50) In total, the trial court awarded Jim $6.8 million in separate property, and Barbara $215,933 in separate property, consisting of her pre-marriage retirement and jewelry.[8] (CP 2349-50)

The trial court also purported to divide the community property 50/50. The trial court awarded each spouse $729,141, but offset Barbara's award by treating the temporary maintenance of $128,767 that she had received for the 16 months before trial as a "pre-distribution." (CP 2350) The trial court also offset Barbara's community property award with the $1,000 Audi rebate and $3,192 warranty refund that she had retained prior to the parties' separation, and by $4,363 in taxes Jim had paid on her community income. (CP 2350) The trial court awarded Barbara her nearly two-year old Audi at its full purchase price even though she would never be able to realize that amount in either a trade or sale. (CP 2350)

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[8] Most of pieces listed on the insurance schedule on which the trial court based its value of $142,320 was in fact jewelry belonging to Barbara's mother. (RP 1444; CP 2350; Ex. 413)

The trial court failed to separately address any of the patents that were developed during the marriage.

Even with these inflated values and "pre-distributions," the trial court awarded the wife less than 10% of the marital estate:

Assets	Wife	Husband
Family residence		$ 793,783
Post-separation mortgage, insurance, and taxes		($ 49,895)
Retirement Accounts	$390,088	$1,053,933
Bank Accounts	$ 10,476	$ 19,049
Investment Accounts		$1,026,232
Nothinz, LLC assets		$ 133,227
Australia Unlimited		($ 267,283)
Borrego Assets		$2,919,137
JaLau Klavano Assets		$1,332,281
Pyatt/ Broadmark Management, LLC		$ 777,185
Trend Family Trust		$ 48,000
Automobiles	$ 62,954	$ 14,468
Personal Property	$ 19,305	$ 26,215
Wife's Jewelry	$ 142,320	
Income taxes paid after separation	$ 4,363	
Wife's Horizon Benefit	$ 31,220	
Sub-total	$660,726	$7,826,332
Temporary maintenance	($128,767)	$ 128,767
Audi/Lexus refund	($ 4,192)	$ 4,192
"Equalizing" payment	$151,389	($ 151,389)
Total	$812,115	$7,674,943
	9.6%	**90.4%**

The trial court acknowledged the parties' "upper middle class lifestyle," but found that Barbara's claimed monthly expenses of $9,218 were unsupported even though Jim had testified that Barbara spent upwards of $10,000 per month during the marriage. (FF 2.12, CP 2337-38; *See* RP 756) The trial court also rejected Barbara's claims that her ongoing back issues and Jim's abuse limited her ability to work full-time, and as a consequence denied Barbara's request for maintenance. (FF 2.12, CP 2336-37)

Leaving Barbara with no maintenance, and no liquid assets except the $151,389 "equalizing judgment," the trial court also denied her request for fees. (CP 2347) Without any consideration of their relative resources, the trial court found that both parties "needlessly increased the costs of litigation." (FF 2.15, CP 2340) The trial court then in effect blamed Barbara for the "contentious" litigation, finding that the "secret withdrawal of $90,000 from the Nothinz bank account just prior to her separation from the respondent was questionable and started this dissolution on an unnecessarily contentious path." (FF 2.15, CP 2341)

The trial court denied Barbara's motion for reconsideration in an order that made additional findings that she had not been credible at trial, that "it was upon the advice of counsel that this litigation

began on its troubled path and ended with over $220,000 in attorney fees," and that her claims "for daily living needs were inflated and there was insufficient evidence to support her stated claims." (CP 2384-85) Although the trial court had found the marriage lasted 10 years in its initial finding of facts, on reconsideration it *sua sponte* concluded that this was a short-term, four-year marriage. (CP 2384)

Barbara appealed. (CP 2320, 2381) Jim filed a notice of cross-appeal and sought to stay enforcement of the equalizing judgment. (CP 2351; Sub no. 367, Supp. CP __) After Barbara was awarded suit money pending appeal if Jim stayed enforcement, he finally paid the judgment. (Sub no. 375, 378, Supp. CP __)

V. ARGUMENT

A. The trial court's decision was not guided by RCW ch. 26.09's statutory factors, but by its determination that the wife had committed "marital misconduct."

While a trial court has broad discretion in dividing property in a marriage dissolution, it will be reversed on appeal if the trial court bases its property division on inappropriate considerations. *Marriage of Muhammad*, 153 Wn.2d 795, 803-04, ¶ 12, 108 P.3d 779 (2005). In dividing the marital estate, the trial court must follow the strictures of RCW 26.09.080, which mandates that "the court shall, *without regard to marital misconduct*, make such disposition of the

property and liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

> (1) The nature and extent of the community property;
>
> (2) The nature and extent of the separate property;
>
> (3) The duration of the marriage; and
>
> (4) The economic circumstances of each spouse [ ] at the time the division of property is to become effective..."

RCW 26.09.080 (emphasis added).

Likewise, the trial court is directed to award maintenance "in such amounts and for such periods of time as the court deems just, *without regard to misconduct*, after considering all relevant factors including but not limited to:

> (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently [ ];
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
>
> (c) The standard of living established during the marriage [ ];
>
> (d) The duration of the marriage [ ];
>
> (e) The age, physical and emotional condition, and financial obligations of the spouse [ ] seeking maintenance; and

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

RCW 26.09.090 (emphasis added).

A trial court's property distribution or maintenance decision based on an improper consideration of marital misconduct is "manifestly unreasonable or based on untenable grounds or untenable reasons" and an abuse of discretion. *Muhammad*, 153 Wn.2d at 806, ¶ 16. Because "marital misconduct" is expressly excluded as a factor to be considered under RCW 26.09.080 or RCW 26.09.090, the private note Barbara wrote to herself five years before the parties separated should not have even been admitted, because it was presented solely to assess fault to her.[9]

This is not a case, such as *Marriage of Clarke,* 13 Wn. App. 805, 808, 538 P.2d 145, *rev. denied*, 86 Wn.2d 1001 (1975), where evidence of the husband's "profligate lifestyle" was properly considered because it was relevant to the question whether he

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[9] Even though the trial court purportedly admitted Exhibit 301 to assess Barbara's credibility, Jim used the Exhibit to argue Barbara's fault. (*See, e.g.,* RP 127: "All these claims of abuse and how she's afraid of Mr. Klavano, none of this came up until after separation and I submit that it was all there to just be a pushback against this March 8, 2008 journal entry, to try to make my client the bad guy, *when we know who the bad person was in this case.*") (emphasis added)

dissipated marital assets. Here, Barbara's private note, written more than five years before the parties separated, serves at best only to show that at one point in time Barbara was so frustrated in the marriage that she contemplated doing anything to get out of it in a manner that best suited her. Her musings were wholly irrelevant to how the property should be divided and whether she should be awarded maintenance given the parties' economic circumstances five years later. The trial court erred in admitting Exhibit 301, and then in relying on it in its property distribution and in denying the wife maintenance and fees.

The trial court's punitive attitude toward the wife permeated all of its decisions. As a result of the trial court's improper consideration of "fault," it awarded the wife less than 10% of the marital estate, no spousal maintenance, and refused to award fees even though the trial court found she acted upon the advice of counsel by (temporarily) removing funds from a joint account at separation. (CP 2385) These decisions were not based on a proper consideration of the statutory factors and must be reversed. Remand should be to a different judge because the current trial judge has clearly determined that the wife is at fault, and cannot be impartial on remand. *See Muhammad,* 153 Wn.2d at 807, ¶ 19 (instructing

that on remand the case be reassigned to different judge); *Custody of R.*, 88 Wn. App. 746, 763, 947 P.2d 745 (1997) (remanding to different judge "to promote the appearance of fairness" when trial court judge told appellant it "[didn't] like what [she] did").

B. An award of less than 10% of the marital estate to the wife who has far fewer resources after a 10-year second marriage is an abuse of discretion.

The trial court's property division was clearly guided by its belief that the wife committed marital misconduct in her private musings about a plan to "escape" the marriage five years before separation. The trial court's improper intent to punish the wife for her "thought crime" is apparent in its consideration of each of RCW 26.09.080's statutory factors:

1. The wife's entitlement to a share in community property is not satisfied by "predistributions," and does not depend on her contributions of income to the community. (RCW 26.09.080(1))

While the trial court found that "all of the community property in this marriage was created by gifts of the Respondent's separate property," it failed to acknowledge that relatively little community property had in fact been accumulated during the marriage. The only significant community property was the family home, which the trial court awarded to the husband after granting

him a credit for his purported separate property down payment, and the parties' accumulated retirement, which was not liquid.

The trial court then reduced the "equalizing" judgment by nearly half by treating the wife's temporary maintenance and the automobile rebate and warranty as a "pre-decree distribution." There was no evidence that these funds still existed; they had been exhausted by the wife's living expenses and litigation costs prior to trial. By "awarding" these illusory "assets" and the husband's payment of $4,636 in taxes to the wife, the trial court violated the well-settled principle that "if one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial." *Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).

In *White*, the trial court erred in awarding the wife $30,511 that had been her separate property but was spent before trial; these funds, which no longer existed, could not be distributed to the wife as assets. 105 Wn. App. at 553; *see also Marriage of Kaseburg*, 126 Wn. App. 546, 559, ¶ 36, 108 P.3d 1278 (2005) (value of real property lost to foreclosure before trial was not before the court for valuation or distribution). In this case, the wife was awarded less than 40% of the community property when the court reduced the equalizing judgment by including these illusory funds in its award – significantly

less, in fact, because the "community" retirement awarded to her included the growth on investment of the premarital portion of her Alaska Airlines retirement account. (*Compare* Ex. 581 with CP 2349)

The trial court also "left off the table" valuable community property in the form of patents developed by the husband during the marriage. Even if the patents were owned by AUI at the time of the dissolution, they were originally owned by the husband (and, thus, the community) before he unilaterally transferred them to AUI. The trial court should have acknowledged the community interest in the patents as part of its property division.

Finally, the trial court's property division was also improperly guided by its belief that there was "little evidence that the [wife] contributed any significant income to meet the expenses of the marital community." (FF 2.8, CP 2327) Leaving aside that the wife did not have any "significant income" to contribute, a property distribution based on which spouse contributed more income to the marriage is improper. *See Marriage of DeHollander,* 53 Wn. App. 695, 701, 770 P.2d 638 (1989) ("the fact one spouse, be it husband or wife, may be the major income producer will not justify giving him a larger share of the community property"); *see also Marriage of Lindemann,* 92 Wn. App. 64, 72, 960 P.2d 966 (1998), *rev. denied,*

137 Wn.2d 1016 (1999) (marital community is entitled to the fruits of all labor performed by either party, because each spouse is a servant of the community).

2. The husband's separate property was enhanced by the admitted undercompensation of the community for his services. (RCW 26.09.080(2))

The trial court also failed to properly consider the nature and extent of the parties' separate property, particularly the husband's separate property, which even by the accounting of his forensic expert increased in value during the marriage. (Ex. 568) The trial court's property distribution leaves the husband's purported separate property estate of $6.8 million intact, while awarding him more than half of the community property. Further, much of the husband's property award was cash accounts, while the wife's separate property consisted of her premarital retirement of $73,613 and $142,320 in jewelry, which was largely owned by her mother.

The trial court also failed to give any real consideration to the undisputed fact that the husband's businesses had not adequately compensated the community for the husband's efforts during the marriage – according to the husband's own expert, to the tune of over $1 million. (Ex. 567; RP 1170) Even if his undercompensation did not transform the businesses into community property, the trial

court should have considered the community's contributions to the husband's separate property in dividing the marital estate. *Estate of Borghi,* 167 Wn.2d 480, 491, n.7, 219 P.3d 932 (2009) (contributions to a spouse's separate property may give rise to a community right of reimbursement); *Byerley v. Cail,* 183 Wn. App. 677, 688, n. 1, 334 P.3d 108 (2014) (contributions to separate property may entitle the community to reimbursement).

Instead, the trial court relied on the husband's purported "separate property contributions" to the community to make a disproportionate award to him. While the husband may have partially funded the parties' lifestyle with his separate property, very little community property was actually created because he was not paid a proper salary for his services during the marriage. Had the community been properly compensated, the parties could have acquired more assets, which would then have been available for distribution as community property.

Because of the husband's substantial separate property, the trial court should have at least awarded the wife a disproportionate share of the community property, a portion of the husband's separate property, or both. *See e.g. Marriage of Davison,* 112 Wn. App. 251, 258-59, 48 P.3d 358 (2002) (awarding wife 75% of the community

property when husband owned substantial separate property); *Marriage of Fiortio,* 112 Wn. App. 657, 660, 50 P.3d 298 (2002) (awarding wife "most of the community property" when husband owned substantial separate property); *DewBerry v. George,* 115 Wn. App. 351, 358, 62 P.3d 525 (awarding husband the "bulk of the community property" and $300,000 from wife's substantial separate property estate), *rev.* denied, 150 Wn.2d 1006 (2003).

3. The wife's private note to herself did not shorten the duration of the marriage. (RCW 26.09.080(3))

The trial court wrongly concluded that the parties were in "a short-term marriage of four years" (CP 2384) and not the 10 years that both parties acknowledged the marriage lasted. (CP 2, 23) Even if the parties had disputed the date of separation, the evidence does not support the trial court's gratuitous finding on reconsideration that its punitive decision was justified because the marriage had been defunct six years before the parties separated.

Whether a husband and wife are living "separate and apart" turns on the peculiar facts of each case. *Marriage of Nuss,* 65 Wn. App. 334, 344, 828 P.2d 627 (1992). The conduct of both parties must be assessed in determining when the "will to continue the marital relationship" is lost. *Seizer v. Sessions,* 132 Wn.2d 642, 658-

59, 940 P.2d 261 (1997). A marriage is "for all practical purposes 'defunct,' " only when the parties have ceased to have a "community" relationship, and retain only a skeletal "marital" relationship. *Aetna Life Ins. Co. v. Bunt,* 110 Wn.2d 368, 372, 754 P.2d 993 (1988). The test is whether "the parties by their conduct have exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship." *Nuss,* 65 Wn. App. at 344.

Here, the parties did not "renounce the community" after Barbara wrote Exhibit 301 in 2008 – or after Jim discovered it. To the contrary, Jim testified that he accepted Barbara's explanation why she wrote it, because he "loved her." (RP 1045) Barbara testified that she had not actually intended to leave the marriage at that time, and was merely "venting" after feeling abused by Jim. (RP 584, 673) The parties continued to live together, sleep together, and vacation together for five more years. They refinanced the family home together two years after Jim discovered Barbara's private note to herself. The trial court finding that the marriage was a "short-term marriage of four years" (CP 2384), when it was undisputed that the marriage was not defunct until the wife moved out of the family home on July 22, 2013, is further proof that its decision was based on its belief that the wife was guilty of marital misconduct.

The trial court as a consequence of its punitive view of the wife's "thought crime" based its property division on the erroneous conclusion that the marriage was short-term. Where, as here, the trial court does not have the proper duration of the marriage in mind, its division of property must be remanded for reconsideration. *Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995) (remanding for reconsideration of property, maintenance, and attorney fees when the trial court based its decision on its erroneous conclusion that the parties' marriage was short, not long).

4. The trial court utterly failed to consider the economic circumstances of each spouse when the division of property became effective at the end of this midrange marriage. (RCW 26.09.080(4))

In a short-term marriage, the court "attempts to return the parties to their premarital relative financial conditions." *Terry*, 79 Wn. App. at 871. In a long marriage, the court attempts the place the parties in "roughly equal financial positions for the rest of their lives." *Marriage of Kim,* 179 Wn. App. 232, 253, ¶ 56, 317 P.3d 555, *rev. denied*, 180 Wn.2d 1012 (2014). In a midrange marriage (which is what the parties indisputably had here), the court must "blend the considerations underlying the analyses of both long and short

marriages." WSBA Family Law Deskbook (2nd ed. 2012), §32.3(3), at 32-17 (midrange marriage is one that lasts between 5 and 25 years).

In midrange marriages, the "the standard of living of the parties during the marriage and the parties' postdissolution economic condition are paramount concerns." *Marriage of Estes,* 84 Wn. App. 586, 593-94, 929 P.2d 500 (1997) (reversing an award of maintenance of only 16 months after a 10-year marriage in view of the disparate earning capacities of the parties); *Lynn v. Lynn,* 4 Wn. App. 171, 480 P.2d 789 (1971) (affirming an award of a disparate portion of the parties' community and a portion of husband's separate property to wife, whose earning capacity was far less than the husband, after an 11-year marriage); *Marriage of Donovan,* 25 Wn. App. 691, 696, 612 P.2d 387 (1980) (awarding wife twice the assets of husband after a 14-year marriage where wife was homemaker and husband was airline pilot).

Here, the wife's "economic condition" is that she is left with her retirement, a little more than $150,000 in cash, an over-valued car, and litigation costs still owed that are almost double her cash award. Meanwhile, the husband has nearly $7.7 million in assets that are either liquid or income producing. The wife is far worse off than she was before the marriage. She will have nowhere near the

standard of living that she had during the marriage, is 10 years older (and closer to retirement), and due to litigation costs now has six-figure debt of more than $280,000, rather than the modest four-figure consumer debt with which she entered the marriage.

A property division that "results in a patent disparity in the parties' economic circumstances will be reversed because the trial court will have committed a manifest abuse of discretion." *Urbana v. Urbana*, 147 Wn. App. 1, 10, ¶ 15, 195 P.3d 959 (2008). The trial court's findings here contain no valid reason to leave the wife with so little property compared to the husband. Instead, the trial court's unjustified findings of the wife's alleged marital misconduct, based on an irrelevant private note that should never have been admitted, make it abundantly clear that the property award was based on an improper consideration of the wife's "fault," and a consequent mischaracterization of the length of the marriage and reliance on the wife's contribution of less income to the community. *See Muhammad*, 153 Wn.2d at 805, ¶ 14 ("Beyond the highly questionable division of the parties' assets and liabilities, the language used by the trial court in the oral ruling and written findings of fact, also suggests an improper consideration of [ ] fault"); *Urbana*, 147 Wn. App. at 15, ¶ 30 (findings describing misconduct

during the marriage, considered in conjunction with an unexplained 20/80 percent split of community property, suggests that the trial court considered marital misconduct in dividing the property).

C. In light of the paltry property award to the wife, the trial court erred in refusing to award her any maintenance.

As in its unjust property distribution, the trial court also erred in denying maintenance without a proper consideration of RCW 26.09.080's factors. Instead, the trial court's denial of maintenance was based on its determination that the wife was "not credible" regarding the abuse that she testified she suffered during the marriage or her back pain that she testified limits her ability to work full time as a flight attendant. (FF 2.12(1), (2), CP 2336-37)

The trial court also denied maintenance based on its finding that the wife "inflated her monthly expenses." (FF 2.12(3), CP 2337-38) But even if the wife's expenses were inflated, there was no dispute that the parties had lived an "upper middleclass" lifestyle, as the trial court found (FF 2.12(3), CP 2339), and an "above average lifestyle," as the husband's expert described. (RP 1202)[10] And even

[10] The husband testified that the wife spent upwards of $10,000 per month during the marriage (RP 764), which is close to the amount that the wife estimated as her monthly expenses at trial. (*See* Ex. 521) Her expenses were nearly the same as the husband's after excluding costs associated with his adult daughters. (*Compare* Ex. 474 and Ex. 521)

if the trial court declined to award the wife sufficient maintenance to allow her to *maintain* the lifestyle the parties had enjoyed, it should have awarded some maintenance in light of the fact that she was awarded so little property compared to the husband and the standard of living during the marriage. Had the trial court properly considered the statutory factors under RCW 26.09.090, it would have awarded the wife some maintenance:

1. **The court ignored the wife's limited financial resources and her inability to meet her needs independently.** (RCW 26.09.090(1)(a))

While the trial court found that the wife has "separate and community property apportioned to her," it failed to make any finding to warrant making the wife use what little property awarded to her (mostly her retirement accounts) to meet her monthly expenses before retirement. The trial court cannot isolate the determination of maintenance from its property distribution. *See Marriage of Rink,* 18 Wn. App. 549, 552-553, 571 P.2d 210 (1977). Where, as here, the property awarded to the wife is largely illiquid and the earning capacities of the parties are so disparate, the trial court should have used maintenance as "a flexible tool to equalize the parties' standard of living for an appropriate time." *See Marriage of Estes,* 84 Wn. App. 586, 594, 929 P.2d 500 (1997) (reversing for a

determination whether 16 month is an appropriate length of time for maintenance after a 10-year marriage in view of the disparate earning capacities of the parties); *Marriage of Sheffer,* 60 Wn. App. 51, 57-58, 802 P.2d 817 (1990) (reversing maintenance award where it failed to balance the parties' post-dissolution standard of living).

2. The court ignored the practical realities of continued work as a flight attendant. (RCW 26.09.090(1)(b))

Regardless of the wife's disputed back pain, her ability to work full-time as a flight attendant is also limited by her age. It cannot be expected that the wife will be able to continue the physically demanding work of a flight attendant for the long-term. [11] Her proposed vocational plan would have allowed her to continue at Alaska Airlines to maintain her benefits while also working towards a career change that would not be limiting to her as she ages.

3. The court ignored the standard of living during the marriage. (RCW 26.09.090(1)(c))

The paramount concerns when determining maintenance are the parties' standard of living during the marriage and their

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[11] Further, although the trial court found that the wife's wages were recently increased, the exhibit it relies upon was a "summary of a tentative agreement" between Alaska Airlines and its flight attendants. (Ex. 573) It does not support the trial court's finding that the wife's wages would have increased to $55.50 per hour; the wife testified, and it was unrefuted, that if the (hearsay) agreement the trial court relied on were ratified, her hourly rate would be less than that. (*See* RP 1280, 1474)

postdissolution economic circumstances. *Sheffer,* 60 Wn. App. at 57. Where, as here, there is a great disparity in the parties' earning power and potential, this Court "must closely examine the maintenance award to see whether it is equitable in light of the postdissolution economic situation of the parties." *Sheffer,* 60 Wn. App. at 56. Here, the husband was awarded business interests that will provide him with an income that will allow him to enjoy the same indisputably "high" and "above average" standard of living that the parties had during the marriage. Meanwhile, the wife's substantially lower income as a flight attendant will provide her nowhere near the parties' standard of living during the marriage.

4. **The court ignored the duration of the marriage as punishment for the wife's misconduct.** (RCW 26.09.090(1)(d))

As argued above, the trial court erroneously based its maintenance award on its determination that the parties' 10-year marriage was a "short-term marriage of four years." (CP 2384)

5. **The court ignored the wife's age, physical and emotional condition, and financial obligations.** (RCW 26.09.090(1)(e))

The trial court failed to acknowledge that its denial of attorney fees leaves the wife with a financial obligation of over $280,000, in addition to the loans and other credit card debt that she incurred to

fund the litigation. These obligations increase her monthly expenses by nearly $1,500. (CP 2291) Because she was denied maintenance, the wife must not only pay her fees but fund her monthly expenses with what little property she was awarded.

6. The court ignored the husband's robust financial circumstances. (RCW 26.09.090(1)(f))

There can be no serious dispute that, despite the fact the trial court found the husband was "semi-retired" and using his "separate capital to meet his living expenses" (FF 2.12(3)(e), CP 2339-40) he could pay maintenance wife from the more than $7.6 million awarded to him. [12]

The trial court failed to properly consider the statutory factors under RCW 26.09.090 in denying the wife maintenance, and showed no concern that the wife would be unable to maintain the standard of living during the marriage, or that she would be forced to consume what few assets she was awarded to meet her monthly expenses. Instead, the trial court focused almost entirely on its determination that the wife's expenses were not as high as she claimed and that her back injury and claims of abuse did not impact her ability to work.

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[12] The husband receives "unearned income" from various sources, and he represented in a loan application three months before separation that he receives monthly income of $30,000. (Exs. 5, 577)

The trial court's decision was unjust. This Court should reverse and remand for reconsideration by a different judge of the maintenance award based on the parties' 10-year marriage, without consideration of fault, and with a proper consideration of the statutory factors.

D. The trial court erred in refusing to award the wife fees without any consideration of her need and the husband's ability to pay.

The wife sought attorney fees under RCW 26.09.140 based on her need and the husband's ability to pay. At the end of the parties' marriage, the wife was left with less than 10% of the marital estate (consisting mostly of her own retirement accounts), no maintenance, and fees still owed of more than $246,000, as well as expert witness fees owed of more than $36,000. Meanwhile, the husband was awarded $7.6 million in property, a significant portion of which was liquid assets. Nevertheless, without any consideration of the parties' economic circumstances, the trial court denied the wife's request for attorney fees by blaming both parties for increasing the cost of litigation. This was error. *See Marriage of Nelson,* 62 Wn. App. 515, 521, 814 P.2d 1208 (1991) (reversing when the record does not reflect any consideration of appellant's request for fees under RCW 26.09.140); *Marriage of Scanlon & Witrack,* 109 Wn. App. 167, 181,

34 P.3d 877 (2001) (lack of findings as to either need or ability to pay requires reversal), *rev. denied*, 147 Wn.2d 1026 (2002).

The trial court denied fees based on the wife's withdrawal of funds from a joint account prior to the parties' separation and her failed claim that she could not work full-time in part due to abuse by the husband during the marriage. As for the withdrawal, the wife cannot be punished for withdrawing funds from an account on which she was a signor, for a business that was presumptively community. Further, $90,000 was only a small fraction of even the trial court's underestimated valuation of the community estate. The withdrawal did not increase fees for the dissolution because the wife was almost immediately ordered to (and did) return those funds. While it may have caused fees because the husband chose to file a separate civil lawsuit for conversion, that was a separate matter and does not absolve the husband from having to pay attorney fees in the dissolution matter. As for the wife's rejected claims of domestic abuse, the fact that she did not prevail on one of the claims that she raised in the dissolution is irrelevant in considering an award under RCW 26.09.140. *Marriage of Rideout,* 150 Wn.2d 337, 357, 77 P.3d 1174 (2003) (an award of attorney fees under RCW 26.09.140 is not dependent on which party prevails).

Instead, the relevant issue under the statute is the financial resources of the parties. Here, the only cash available to the wife to pay her fees and costs of over $280,000 is the $151,000 equalizing judgment awarded to her. Short of borrowing further against her retirement, which she had already encumbered to pay litigation costs, or worse, liquidating her retirement, the wife has no other assets available to pay fees. Meanwhile, the husband indisputably has the ability to pay the wife's attorney fees. "A wife need not pauperize herself by selling her assets to make the cash outlay necessary for the litigation." *Stibbs v. Stibbs,* 38 Wn.2d 565, 231 P.2d 310 (1951). The trial court erred in refusing to award fees without any consideration of the wife's need and the husband's ability to pay.

E. This Court should award fees to the wife on appeal.

This Court should award attorney fees to the wife on appeal. RAP 18.1(a). The wife has the need for her attorney fees to be paid, and the husband has the ability to pay. 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, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). Regardless whether this Court reverses or affirms, the wife's need relative to the husband's ability to pay

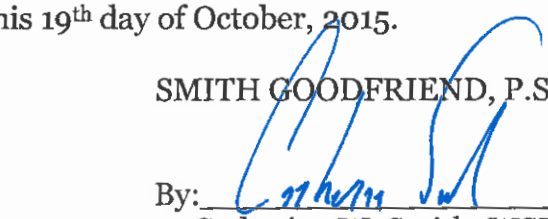
warrants an award of fees on appeal under RCW 26.09.140. The wife will comply with RAP 18.1(c).

VI. CONCLUSION

After a ten-year marriage, the trial court was required to do justice to both spouses, and not leave one in a significantly worse financial situation than the other. Based on what it perceived as her "fault," the trial court's award leaves the wife, the more economically vulnerable spouse, with only a fraction of the property awarded to the husband, no maintenance, and an obligation to pay fees that far exceed the assets awarded to her. The trial court's grossly disproportionate award of property and its denial of maintenance and fees, is not just, and does not reflect a proper consideration of the statutory factors. This Court should reverse and remand to a new judge for a redistribution of property and an award of maintenance and fees, and award the wife fees on appeal.

Dated this 19th day of October, 2015.

SMITH GOODFRIEND, P.S.



By:_____
Catherine W. Smith, WSBA No. 9542
Valerie Villacin, WSBA No. 34515
Attorneys for Appellants

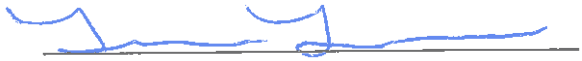
DECLARATION OF SERVICE

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

That on October 19, 2015, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Camden M. Hall Camden Hall, PLLC c/o Corr Cronin Michelson Baumgardner Foog & Moore, LLP 1001 Fourth Avenue, Suite 3900 Seattle, WA 98154	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
C. Nelson Berry Berry & Beckett PLLP 1708 Bellevue Ave Seattle, WA 98122-2017	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 19th day of October, 2015.



Tara D. Friesen

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CAMDEN HALL, PLLC

SUPERIOR COURT OF WASHINGTON FOR COUNTY OF KING

In re the marriage of: BARBARA L. KLAVANO, n/k/a TEMPLIN, Petitioner, and JAMES K. KLAVANO, Respondent.	NO. 13-3-09952-1 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Basis for Findings

The findings are based on the trial, which occurred over a 8-day period in December, 2014 and January, 2015. Petitioner was represented by Camden M. Hall and Respondent was represented by C. Nelson Berry III. The following witnesses attended and testified:

Petitioner: Barbara L. Klavano n/k/a Templin

Respondent: James K. Klavano

COPY TO CLIENT
Email/Mail/Fax
2/27/15

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Ben Hawes, the Petitioner's financial expert

William Skilling, the Petitioner's vocational expert

Vicki Boyd, Ph.D, the Petitioner's psychological expert

Jamie Klavano, the Respondent's daughter

Michael Hamblin, the parties' CPA

Steven Kessler, the Respondent's financial expert

II. Findings of Fact

Upon the basis of the court records, the court *Finds*:

2.1 Residency of Petitioner

The Petitioner is a resident of the State of Washington.

2.2 Notice to the Respondent

The respondent was served in the following manner:

Personal Service.

2.3 Basis of Personal Jurisdiction Over the Respondent

The facts below establish personal jurisdiction over the respondent. The respondent is currently residing in Washington. The parties lived in Washington during their marriage and the petitioner continues to reside,or be a member of the armed forces stationed, in this State.

2.4 Date and Place of Marriage

The parties were married on May 4, 2003 at Costa Mesa, California.

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2.5 Status of the Parties

Petitioner and respondent separated on July 22, 2013.

2.6 Status of Marriage

The marriage is irretrievably broken and at least 90 days have elapsed since the date the petition was filed and since the date the summons was served or the respondent joined.

2.7 Separation Contract or Prenuptial Agreement

There is no written separation contract or prenuptial agreement, but there is a Post-Nuptial Agreement which was executed on October 3, 2013,Trial Exhibit 213 and is incorporated herein.

The Post-Nuptial Agreement is invalid.The document appears to have been faxed on the same day it was executed by both Mr. Klavano and Ms. Templin. There was contradictory testimony as to its validity. Mr. Klavano claimed that Ms. Templin signed it with full knowledge of her legal rights and the ability to seek her own legal counsel. Ms. Templin testified that she felt forced to sign the document on the same day that respondent presented it to her. She felt compelled to sign the document due to Mr. Klavano's overbearing nature. The court finds that the document itself is questionable and although it characterizes the home as community property, Mr. Klavano is entitled to all of his contributions as separate property. Ms. Templin was never in a financial

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position to pay the monthly mortgage payment so on one hand it reads as if it is intended to be community property but in the long run, Mr. Klavano's intent was to insulate his investment in the family home as his separate property. This is unfair and therefore, invalid. However, Mr. Klavano will be given credit for the downpayment he made on the Sammamish home as his separate property. That amount was not in dispute; the characterization of the Sammamish home is found to be community property minus the downpayment Mr. Klavano made from his separate property. The court finds the appraised value of $1.275 million is the most reasonable. Trial Exhibit 216. Ms. Templin is entitled to 50% of the remaining value after subtracting Mr. Klavano's down payment. The family home and its contents are awarded to Mr. Klavano.

2.8 Community Property

The parties have real or personal community property as set forth in Exhibit 1, Trial Exhibit [628,629, or 630]. These exhibits are attached or filed and incorporated by reference as part of these findings and conclusions.

The character of property as separate or community property is determined at the date of acquisition. *In re Estate of Borghi*, 167 Wash.2d 480, 484, 219 P.3d 932 (2009); Harry M. Cross, *The Community Property Law*, 61 Wash. L.Rev.13, 39 (1986).

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Applying the factors set forth in RCW 26.09.080:

(1) The nature and extent of the community property:

Washington courts recognize that consideration of each party's responsibility for creating or dissipating marital assets is relevant to the just and equitable distribution of property. *In re Marriage of White,* 105 Wash.App. 545, 20 P.3d 481(2001). Apart from the parties' respective pension contributions, all of the community property in this marriage was created by gifts of the Respondent's separate property.

During the marriage, the Respondent received a salary from his separate business, Australia Unlimited, Inc., which was formed in 1981. The Petitioner was and is a Senior Flight Attendant with Alaska Airlines. The parties agreed that the Petitioner would use her salary to pay her separate debt. When Petitioner was unable to pay that debt after a few years into the marriage, the Respondentagreed to pay her remaining debts.

The parties agreed that the expenses of the marital community would be paid from the Respondent's community and separate income. There is little evidence that the Petitioner contributed any significant income to meet the expenses of the marital community (other than groceries, and other household expenses that Mr. Klavano reimbursed her for routinely).

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Where at the time of marriage, the Respondent owned all or substantially all of the stock of a corporation, and is paid a salary by that corporation, the marital community is thereby compensated for his services, and any dividends paid or any enhanced value of the stock resulting from profits reinvested in the corporation are separate property. *Hamlin v. Merlino*, 44 Wn.2d 851, 858, 272 P.2d 125 (1954).

In this case, the Petitioner claimed that the marital community was unfairly compensated by the Respondent's W-2 wages. Whether a particular salary "is fair must depend largely upon the earnings of the corporation during the time such a salary was paid." *Hamlin v. Merlino*,

Respondent's expert opined that, even if the Respondent's W-2 wages were compared to those of a CFO, who was working full-time (compared to the Respondent's claim of working approximately 20 hours per week), for a corporation with $25 million to $99 million in sales (which dwarfed those of Australia Unlimited, Inc.), any such resulting undercompensation to the marital community was more than adequately made up by the substantial contributions of the Respondent's separate property and income to the marital community. Trial Exhibits 567-571.

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The Petitioner proffered no evidence to refute this opinion.

Thus, even if this court were to find that the marital community was unfairly undercompensated by the Respondent's W-2 wages alone, the court finds that any such undercompensation was more than made up by the Respondent's substantial separate property contributions to the marital community. *Connell v. Francisco*, 127 Wash. 2nd 339, 351-352, 898 P.2d 831 (1995); *In re Marriage of Pearson-Maines*, 70 Wn.App. 860, 869-70, 855 P.2d 1210 (1993); *In re Marriage of Miracle*, 101 Wash.2d 137, 139, 675 P.2d 1229 (1984).

(2) The nature and extent of the separate property:

RCW 26.16.010 states: Property and pecuniary rights owned by a spouse before marriage and that acquired by him or her afterwards by gift, bequest, devise, descent, or inheritance, *with the rents, issues and profits thereof*, shall not be subject to the debts or contracts of his or her spouse, and *he or she may manage, lease, sell, convey, encumber or devise by will such property* without his or her spouse joining in such management, alienation or encumbrance, as fully, and to the same extent or in the same manner as though he or she were unmarried. [emphasis added]. When the parties married, the Respondent had substantial separate property. The Petitioner had some separate property, namely, her pension, Trial Exhibit 581, and some debt.

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The Respondent's primary business was Australia Unlimited, Inc., which was formed in 1981. He formed LLCs to house his other businesses and real estate holdings to make sure they remained separate. He had the right to manage his separate businesses, pursuant to RCW 26.16.010. No community funds were co-mingled with the Respondent's separate property or businesses.

Once the separate character of property is established, a presumption arises that it remains separate property in the absence of sufficient evidence to show *an intent* to transmute the property from separate to community property. *In re Estate of Borghi, supra*. Where real property is at issue, an acknowledged writing is generally required. *In re Estate of Borghi*, 167 Wash.2d 485.

This court finds that there was no intent on the part of the Respondent to transmute his separate property to community property. Contemporaneous segregation of the income between community and separate estates is required only where the separate property in question is *real estate* or an *unincorporated business*, and community labor is used to increase the value of that separate property. *Hamlin v. Merlino*, 44Wn.2d 851, 858-859, 272 P.2d 125 (1954); *Lindemann v. Lindemann*,92 Wash.App. 64, 74-76, 60 P.2d 966(1998).

In this case, the Respondent had no unincorporated businesses. There is no evidence that the increase in value of any separate real estate

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was due to community labor. Where the property in question was initially the separate property of one of the spouses and no contribution of community funds is made by either spouse, the increase in value due to inflation is the separate property of the owning spouse. *Elam v. Elam*, 97 Wn.2d 811, 813, 650 P.2d 213 (1982); See also, RCW 26.16.010. Nor is there any evidence that any of the Respondent's other separate property increased in value due to community labor. Even taking into account the proceeds from the sale of Australia Unlimited, Inc.'s major shoe divisions, Trial Exhibit 182, and the Hartford judgment, Australia Unlimited, Inc. was worth more when the parties married in 2003, Trial Exhibit 571, than when they separated in 2013,Trial Exhibits 567, 568, 613.

In the meantime, during the marriage, the Respondent made substantial contributions of his separate property and income to meet the expenses of the marital community and to create community property. All funds used to create community property were from gifts of the Respondent's separate property. The right of reimbursement may not arise if the court finds that the community realized a "reciprocal benefit" for "its use and enjoyment of the individually owned property." *Lindemann v. Lindemann*, 82 Wash.App. at 74. The Respondent used his separate property to purchase the warranty on

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the Lexus automobile used by the Petitioner. The Petitioner cancelled that warranty and kept the refund of $3,192 for herself. These facts are undisputed. Trial Exhibits 407-409. In addition, the Respondent used his separate property to purchase an Audi automobile for the marital community. The Petitioner kept the overpayment refund on the Audi of $1,000 for herself. Trial Exhibit 406. These monies were not returned to the Respondent or to the marital community, but put into the Petitioner's safety deposit box and then into a separate personal account at Banner Bank shortly before separation. Trial Exhibit 320 and 321. These monies were not gifts to the Petitioner. They are treated as pre-decree distributions to the Petitioner and used to offset the equalization payment to the Petitioner.

(3) The duration of the marriage or domestic partnership:

The parties were married on May 4, 2003. This was a second marriage for both. No children were born of this marriage. Mr. Klavano has two grown daughters, Jamie and Lauren, from his first marriage. The parties separated on July 22, 2013, almost ten years later. Even so, the evidence established that the Petitioner had been planning to leave the marriage at least as early as March 8, 2008. Trial Exhibit 301.

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(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time:

There are no children from this marriage. Each spouse will be awarded substantial property.

In weighing these factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080. But, these statutory factors are not limiting and the trial court may consider other factors such as "the health and ages of the parties, their prospects for future earnings, their education and employment histories, their necessities and financial abilities, their foreseeable future acquisitions and obligations, and whether the property to be divided should be attributed to the inheritance or efforts of one or both of the spouses." *In re Marriage of Urbane*, 147 Wash. App. 1, 11, 195 P.3d 959 (2008); *In re Marriage of Olivares*, 69 Wash. App. 324, 329, 848 P.2d 1281 (1993); *see also In re Marriage of Zahm*, 138 Wash.2d 213, 218, 978 P.2d 498 (1999).

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In this case, both parties are in relatively good health. The Petitioner is 55 years old, and can continue to work full-time as a Senior Flight Attendant for Alaska Airlines for many years. The Respondent is 65 years old and semi-retired, and living off the separate property he accumulated prior to the parties' marriage. Each is capable of meeting his/her own financial necessities. The Petitioner has no community debt, or financial obligations beyond her monthly living expenses and whatever debts she may have incurred since separation. All of the community property to be divided, with the exception of the Petitioner's contributions to her pension during the marriage, are a result of the efforts and separate property contributions of the Respondent.

2.9 Separate Property

The petitioner and the respondent has real or personal separate property as set forth in Trial Exhibits 628,629, or 630. These exhibits are attached or filed and incorporated by reference as part of these findings.

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2.10 Community Liabilities

The parties have incurred community liabilities as set forth in Trial Exhibits 628,629, or 630.

2.11 Separate Liabilities

The petitioner has no known separate liabilities.

The respondent has incurred separate liabilities as set forth in Trial Exhibits 628,629, or 630.

2.12 Maintenance

Based on the Petitioner's representations in her Revised Financial Declaration of September 3, 2013, Exhibit 442, that her monthly expenses were $9,218 and her net monthly income was $1,289, and that she could not work full time due to domestic abuse during the marriage and back injuries she had sustained in a 1993 automobile accident, Family Law Court Commissioner Jacqueline Jeske entered a Temporary Order, on September 10, 2013, Exhibit 38, ordering that the $14,000 she had spent to that point from the money she had taken from the Nothinz, LLC Union Bank account be treated as maintenance, subject to further characterization by the court, for the months of August and September, and that she receive temporary

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maintenance in the amount of $6,751 beginning October 1, 2013.

Commissioner Jacqueline Jeske also ruled:

> ...that if future discovery results in new evidence which could reasonably and substantially have influenced this Court's ruling on the issue of the temporary order regarding financial relief (more than a 'de minimus' amount), Counsel may move the Court to request the financial ruling here be reviewed without any further showing of a substantial change of circumstances and may seek an award of fees at any time prior to trial.

When the Respondent subsequently moved to reduce the maintenance award, the Court reserved this issue for trial. Trial Exhibit 55.

After considering the evidence presented at trial, this Court finds:

1. The Petitioner's allegations of domestic abuse did not, and do not affect her present employability and prospective earning capacity, according to her own psychological expert, Vicki Boyd, PhD. *Matter of Marriage of Foran*, 67 Wash. App. 242, 258, 834 P.2d 1081(1992).

2. Whatever back injuries the Petitioner may have sustained did not, and do not affect her present employability and prospective earning capacity. Her settlement of $15,000 settlement for her soft tissue

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injuries was modest even by 1993 standards. She sought no treatment for any alleged back injuries after 1993. Her earnings after 1993 were not negatively affected by any alleged back injuries. No medical testimony was presented at trial to support Petitioner's claims of ongoing back issues and that those claims negatively affected her ability to continue working at Alaska Airlines as a senior flight attendant. Her Social Security summaries dating back to 1993 through Petitioner's marriage in 2003 show a steady rise in her income productivity and a clear decrease in income productivity, after the marriage in 2003-2013. Whether Respondent asked Petitioner to decrease her hours or Petitioner chose to decrease her hours at Alaska Airlines does not lend credibility to an unsupported claim of physical infirmity that prevents her from working full-time as a Senior Flight attendant at Alaska Airlines. Trial Exhibit 520.

3. Trial Exhibits 429 and 442 contain the only documents provided by the Petitioner, which purport to establish her monthly expenses. The expenses are inflated and are not supported by utility bills, receipts for hair and nail expenses, gym/club dues and personal trainer expenses, etc. (See also Trial Exhibits 209 and 210.) Little to no evidence was provided to support the inflated monthly expenses she claimed in the

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Financial Declaration she presented at trial.

The Petitioner received $115,265 in maintenance from August, 2013 through January, 2015. She will have received an additional $6,751 by the time these final orders are entered, for a total of $122,016. These monies should be treated as pre-decree distribution to the Petitioner and used to offset the equalization payment to the Petitioner. *Glorfield v. Glorfield*, 27 Wash.App. 358, 362, 617 P.2d 1051(1980).

Maintenance in the future will not be ordered. Both Petitioner and Respondent enjoyed a upper middleclass lifestyle for the 10-year period of their marriage but it does not support Petitioner's excessive claims for an award of maintenance.

Applying the factors set forth in RCW 26.09.090(1):

a. The Petitioner has separate and community property apportioned to her. She has the ability to meet her needs independently to a certain extent but not on the level she previously enjoyed during the course of this 10-year marriage.

a. Her hourly wage was recently increased from $46.32/hour to $55.50/hour. Trial Exhibit 573.

b. The purpose of spousal maintenance is to support a spouse until he or she has become self-supporting. *In re Marriage of Luckey, supra*; *In re Marriage of Irwin*, 64 Wn.App. 38, 55, 822 P.2d 797 (1992). The Petitioner needs no

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additional time to acquire sufficient education or training to enable her to find employment appropriate to her skill, interests, style of life, and other attendant circumstances. Although the Respondent paid for her to become a gemologist and a private investigator during the marriage, the Petitioner testified that she had done nothing with that training. She continues to be a Senior Flight Attendant with Alaska Airlines, and has been employed by Alaska Airlines for nearly 35 years. She is fully capable of being self-supporting as she grows closer to retirement age with a higher hourly wage at Alaska Airlines and returning to full-time employment.

The evidence does not support a late in life career change to go back to school as a gemologist. The court considered the testimony of Petitioner's vocational expert, William Skilling. His opinion failed to account for her current status as a senior flight attendant and her unsupported claim of physical disability to continue on in this position.

c. The parties enjoyed an upper middle class standard of living during the marriage.

d. The Petitioner is 55 years old. She is in good physical and emotional condition. She has no financial obligations beyond her monthly living expenses and whatever debts she may have incurred since separation.

e. The Respondent is 65 years old, semi-retired and no longer receives W-2 wages. He is living off the income from his separate investments, and must

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use his separate capital to meet his living expenses and to meet his needs and separate financial obligations---as he did during the parties' marriage to meet the marital community's living expenses, needs and financial obligations However, Petitioner's monthly expenses that are reasonable require Respondent to provide 50% from his retirement accounts prorated during the 10 year period of their marriage to Petitioner.

2.13 Continuing Restraining Order

There is no basis for the entry of a continuing restraining order.

2.14 Protection Order

Does not apply.

2.15 Fees and Costs

Both parties needlessly increased the costs of this litigation and each is responsible for his/her attorney's fees.

There were multiple motions brought by Petitioner against Respondent for his failure to disclose financial documents pertaining to his companies' profit and losses during the 10-year marriage, and his failure to disclose expert opinions in a timely fashion. Both parties blamed the other for late disclosure of expert witness' opinions further delaying the proceedings and increasing the cost of

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litigation. There were two orders granting Petitioner's motions to compel discovery. However, Petitioner's own witness, Vicki Boyd, Ph.D. testified that the (failed claims) of domestic abuse did not affect Petitioner's ability to work full-time. Petitioner's secret withdrawal of $90,000 from the Nothinz bank account just prior to her separation from the Respondent was questionable and started this dissolution on an unnecessarily contentious path.

2.16 Pregnancy

Neither spouse is pregnant.

2.17 Dependent Children

The parties have no dependent children of this marriage.

2.18 Jurisdiction Over the Children

Does not apply because there are no dependent children.

2.19 Child Support

Does not apply.

2.20 Other

There was a dispute in the evidence as to whether the parties' dog, Sophie,

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was Purchased as a gift for the Petitioner. The court finds that Sophie was purchased as a gift for the Respondent and shall be awarded to her.

III. Conclusions of Law

The court makes the following conclusions of law from the foregoing findings of fact:

3.1 Jurisdiction

The court has jurisdiction to enter a decree in this matter.

3.2 Granting a Decree

The parties should be granted a decree.

3.3 Pregnancy

Does not apply.

3.4 Disposition

The court should determine the marital status of the parties, make provision for a parenting plan for any minor children of the marriage, make provision for the support of any minor child of the marriage entitled to support, consider or approve provision for maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the

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allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders, and make provision for the change of name of any party. The distribution of property and liabilities as set forth in the decree is fair and equitable.

3.5 Continuing Restraining Order

Does not apply.

3.6 Protection Order

Does not apply.

3.7 Attorney Fees and Costs

Each party is responsible for his/her own costs and attorney's fees.

DATED this 20TH day of February, 2015.

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CAMDEN HALL, PLLC

IN THE SUPERIOR COURT OF WASHINGON IN AND FOR
THE COUNTY OF KING

In re the Marriage of: BARBARA L. KLAVANO, n/k/a TEMPLIN, Petitioner, and JAMES K. KLAVANO, Respondent.	NO. 13-3-09952-1 SEA Decree of Dissolution (DCD) Clerk's action required

I. Judgment Summaries

1.1 Real Property Judgment Summary:

Real Property Judgment Summary is set forth below:

Name of Grantor: BARBARA L. KLAVANO, n/k/a TEMPLIN	Name of Grantee: JAMES K. KLAVANO
Assessor's property tax parcel or account number: 0629810010	
Or	
Legal description of the property awarded (including lot, block, plat, or section, township, range, county and state):	
1 BEAVERDAM DIV NO. 02 TGW UND INT IN TRACT E	

COPY TO CLIENT
Email/Mail/Fax

Berry & Beckett
1708 Bellevue Avenue
Seattle, WA 98122
Tel 206.441.5444
Fax 206.838.9246

King County, Washington	
	See Page _____ for full legal description

1.2 **Money Judgment Summary:**

Does not apply.

End of Summaries

II. Basis

Findings of Fact and Conclusions of Law have been entered in this case.

III. Decree

It Is Decreed that:

3.1 **Status of the Marriage**

The marriage of the parties is dissolved.

3.2 **Property to be Awarded the Petitioner**

The petitioner is awarded as separate property the property set forth in Exhibit 1. This exhibit is attached or filed and incorporated by reference as part of this decree. After considering the factors set forth in RCW 26.09.080, as well as the non-statutory factors set forth in case law, the Court concludes that this award is just and equitable.

3.3 **Property to be Awarded to the Respondent**

The respondent is awarded as separate property the property set forth in Exhibit 1. This exhibit is attached or filed and incorporated by reference as part of this decree. After considering the factors set forth in RCW 26.09.080, as well as the non-statutory factors set forth in case law, the Court concludes that this award is just and equitable.

3.4 **Liabilities to be Paid by the Petitioner**

Unless otherwise provided herein, the petitioner shall pay all liabilities incurred by the petitioner since the date of separation. After considering the factors set forth in RCW 26.09.080, as well as the non-statutory factors set forth in case law, the Court concludes that this award is just and equitable.

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3.5 Liabilities to be Paid by the Respondent

The respondent shall pay the community or separate liabilities set forth in Exhibit 1. This exhibit is attached or filed and incorporated by reference as part of this decree. After considering the factors set forth in RCW 26.09.080, as well as the non-statutory factors set forth in case law, the Court concludes that this award is just and equitable.

Unless otherwise provided herein, the respondent shall pay all liabilities incurred by the respondent since the date of separation.

3.6 Hold Harmless Provision

Each party shall hold the other party harmless from any collection action relating to separate or community liabilities set forth above, including reasonable attorney's fees and costs incurred in defending against any attempts to collect an obligation of the other party.

3.7 Maintenance

Does not apply.

3.8 Restraining Order

All temporary Restraining Order(s) signed by the court under this cause number are terminated. *Clerk's Action.* The clerk of the court shall forward a copy of this order, on or before the next judicial day to: King County Sheriff law enforcement agency where *the protected person* resides which shall enter this order into any computer-based criminal intelligence system available in this state used by law enforcement agencies to list outstanding warrants.

3.9 Protection Order

Does not apply.

3.10 Jurisdiction Over the Children

Does not apply because there are no dependent children.

3.11 Parenting Plan

Does not apply.

3.12 Child Support

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Does not apply.

3.13 Attorney Fees, Other Professional Fees and Costs

Attorney fees, other professional fees and costs shall be paid as follows:

Each party shall pay his/her own costs and attorney's fees

3.14 Name Changes

Does not apply.

3.15 Other

Sophie was purchased as a gift to the Petitioner and is awarded to her.

The West Coast life insurance policy, Policy No. ZT0005251, which the Petitioner is holding on the Respondent is awarded to the Respondent.

Each party shall cooperate with the other, and shall promptly execute and return any and all documents which may be necessary to effectuate the allocation and to convey the property and liabilities awarded herein.

Dated: March 23, 2015

The Honorable Julie Spector
Superior Court Judge

Presented by:

C. Nelson Berry III
Berry & Beckett, P.L.L.P.
WSBA #8851
Attorney for Respondent

Approved for entry:
Notice of presentation waived:

Camden M. Hall
Camden Hall, P.L.L.C.
WSBA #148
Attorney for Petitioner

Berry & Beckett PLLP
1708 Bellevue Avenue
Seattle, WA 98122
Tel 206.441.5444
Fax 206.839.0346

Exhibit 1

ASSETS / DEBTS	EXHIBIT	Date of Value	Gross Value	Loan Debt	NET VALUE	TO WIFE COMM	TO WIFE SEP	TO HUSBAND COMM	TO HUSBAND SEP
186 247th Ave SE, Sammamish Property	216	10/7/2014	1,275,000	-481,217	793,783			586,774	207,009*
*Husband's $207,009 payment towards home in 2003 Closing ($50,000 deposit+ $157,009)(included in H Sep property above)	306	10/13/2003							
Mortgage payments post separation-paid by Husband	311-312, 314,624,625	1/20/2015		-26,856	-26,856			-26,856	
Property Taxes post separation-paid by Husband	311,624,627	1/20/2015		-16,081	-16,081			-16,081	
Home insurance post separation-paid by Husband	311,313,624 & 626	1/20/2015		-6,956	-6,956			-6,956	
Wife's Alaska Airlines Retirement Account - Vanguard	581	7/1/2014	139,019		139,019	139,019			
Wife's Alaska Airline 401K Account - Vanguard	581	7/1/2014	251,069		251,069	177,456	73,613		
Wife's Banner Bank Acct. *5017	320 & 321	7/22/2013	9,616		9,616	9,616			
Wife's Wells Fargo Bank Acct. *7823	322	7/10/2013	860		860	860			
Husband's Pension Plan: Australia Unlimited, Inc. 401K Profit-Sharing Plan (by Steve Kessler)	570, 600 & 601	12/23/2014	1,053,933		1,053,933			442,189	611,744
Husband's Personal AMEX Bank Acct. *1302	603	11/23/2014	360		360				360
Husband's Union Bank Money Market Acct. *0553	603	12/22/2014	38		38				38
Husband's Union Bank Money Market Acct. *0307	604	11/24/2014	7,134		7,134				7,134
Husband's Union Bank Money Market Acct. *1700	605	12/22/2014	500		500				500
Husband's Union Bank Money Market Acct. *2361	606	12/22/2014	95		95				95
Husband's Union Bank Money Market Acct. *7942	607	12/22/2014	665		665				665
Husband's Chase Bank Personal Acct. *0900	608	12/6/2014	10,227		10,227				10,227
Charles Schwab Jim Klavano Individual Acct. *6722	372 & 609	11/30/2014	742,706		742,703				742,706**
Charles Schwab Jim Klavano Individual Acct. *0372	610	11/30/2014	106,586		106,586				106,586
Charles Schwab Jim Klavano Individual Acct. *7251	611	11/30/2014	176,940		176,940				176,940
Nothinz Union Bank Acct. *0710	612	11/28/2014	133,227		133,227				133,227
Australia Unlimited dba Nothinz Comfort Footwear	614	11/30/2014	-267,283		-267,283				-267,283
Borrego Union Bank Acct. *1697	615	11/28/2014	31,401		31,401				31,401
Borrego Chase Bank Acct. *5140	616	11/28/2014	67,703		67,703				67,703
Borrego Schwab Acct. *8575	617	11/30/2014	753,630		753,630				753,630***
Borrego Management, LLC - CEP III Morning Run 13, LLC	356	12/31/2013	354,659		354,659				354,659

ASSETS & DEBTS	EXHIBIT	Date of Val.	Gross Value	Debt Adj.	NET VALUE	TO WIFE COMM.	TO WIFE SEP.	TO HUSBAND COMM.	TO HUSBAND SEP.
Borrego Management, LLC - CEP III Brampton 12, LLC	358	12/31/2013	90,586		90,586				90,586
Borrego Management, LLC - Triplex	357	10/10/2014	712,000		712,000				712,000
Borrego Management, LLC - Juniper Loan Servicing	618	12/19/2014	450,817		450,817				450,817
Juniper: Martin Loan in default	619	12/19/2014	-56,768		-56,768				-56,768
Juniper: Legal cost for Martin Loan	620	12/19/2014	-3,239		-3,239				-3,239
Borrego Management, LLC - WADOT Capitol, Inc.	621	12/10/2014	472,592		472,592				472,592
Borrego Management, LLC - Valdovinos	362	10/1/2014	45,753		45,753				45,753
JaLau Klevano Union Bank Acct. *6171	622	11/28/2014	32,523		32,523				32,523
JaLau Properties, LLC-warehouse	363 & 632	10/10/2014	2,100,000	-800,242	1,299,758				1,299,758
Pyatt/Broadmark Management, LLC	623	10/31/2014	777,185		777,185				777,185
Treend Family Trust	395	6/20/2014	48,000		48,000				48,000
Wife's Audi - purchase price	405	5/31/2013	62,954		62,954	62,954			
Lexus trade-in for Audi - $25,000 (included in $62,954)	405	5/31/2013							
2009 Lexus ES 350	410	10/10/2014	14,466		14,466			14,466	
Personal Property removed from Home by Wife	411	2/28/2014	19,305		19,305	19,305			
Husband's Personal Property	412	10/7/2014	26,215		26,215			19,955	6,260
Wife's Jewelry	413	11/17/2009	142,320		142,320		142,320		
Dog Sophie		10/10/2014	0		0		x		
Wife's employment taxes paid by Husband after separation	422	9/30/2013	4,363		4,363	4,363			
Insurance Policy on Husband's Life taken out by Wife	73,74				0				x
Wife's Horizon Benefit	425	8/26/2014	31,220		31,220	31,220			
TOTALS - ALL COLUMNS			9,818,411	-1,331,352	8,487,067	444,793	215,933	1,013,489	8,812,842
TOTALS - COMMUNITY ONLY					1,468,283	444,793		1,013,489	
Husband's percentage (automatic)		50.00%				284,348		-284,348	
Wife's percentage (enter 0-100 by user)		50.0%		Pre-Decree Distributions:		-132,959		132,959	
				Transfer		151,389		-151,389	

**$141,072 held for Lauren, Ex 372
***funds gifted by James' mother
****not including penalties and interest

1) Audi Overpayment Check $1,000, Ex 406
2) Lexus Warranty Refund $3,192, Ex 407-409
3) Maintenance Pre-Decree Distribution $128,767

Total: $132,959

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CAMDEN HALL, PLLC

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

BARBARA L. KLAVANO, f/k/a TEMPLIN, Petitioner, and JAMES K. KLAVANO, Respondent.	No. 13-3-09952-1 SEA **ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION RE ATTORNEY FEES**

THIS MATTER, having come on for hearing without oral argument, before the undersigned Judge of the King County Superior Court and having reviewed the files and records herein.

The court finds many of the arguments made in this motion were previously raised in Petitioner's first motion for reconsideration. The court enters additional findings of fact.

1. The marriage between Barbara Klavano and James Klavano was a short-term marriage of four years. See Trial Exhibit 301.
2. Barbara Klavano's testimony was not credible.
3. Ms. Klavano's claims of costs for daily living needs were inflated and there was insufficient evidence to support her stated claims.

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4. It was upon the advice of counsel that this litigation began on its troubled path and ended with over $220,000.00 in attorney's fees.

NOW THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Reconsideration Regarding Attorney Fees is DENIED.

Dated: April 24, 2015

HONORABLE JULIE SPECTOR

JUDGE JULIE SPECTOR
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Other than the 1st day @ SEA-TAC where he tried to tell me when to go to the bathroom and told me you must be blind - Jim has actually been pretty decent on this trip. I'm guessing it's only for Jamies sake though. I have also done a good job of taking care of myself when I need to and not doing things when I don't want to and not feeling guilty about it. Today I am tired so I am staying in the hotel room and doing only what feels good to me! Besides, I have already seen the air and space museum. Jim keeps trying to kiss me occasionally I'm having a hard time responding. I know I need to because - he is definitely feeling the lack of affection and if I don't start faking it a little better - it may ruin my plan. It's hard tho' because I just don't feel anything for him anymore. I'm not really sure why I came on this trip. I think just to keep up appearances. I step back and look at him now as Margaret suggests and I see a very narcissistic and yet terribly insecure man. He will grow old alone. He has been talking lately about selling a part of the business for 2 million dollars and paying off the house! Wouldn't that be sweet? My plan is coming together much faster than I thought - now just the car. He has said if I trade in the Mercedes it should be on a 4 year old car! Yeah Right. No way I'm gonna let that happen! The car will be 1 year old /w/ low miles. It will be exactly what I want and something that I can afford when I leave him. Depending on where I decide to live, I may need 2 cars so that will have to be a consideration. I absolutely will not let him Bully me into getting a 4 year old car. That's ridiculous. He said that's what he did with the Lexus. Well, that's _____ . The Lexus was going to be for Lauren not him! Funny how he conveniently forgets that little fact!! Well I am not a teenager and I deserve a newer nicer car from my millionaire husband for all of the emotional abuse I put up with over the past 5 years. I hate him so much at this point. I have thought about going to Ron Snyder at Crocs and saying - if you pay for my divorce I will help you any way I can! I could so easily attach a flash drive onto his computer and download all of his emails between his lawyers and he would never know what hit him! And I would get some of "mone" back!!! Also, I have my own

life insurance policy which needs to be in force a full 2 years before I leave because Jim is unstable and such a drama-King that if I left and his company failed at the same time - he could suicide. If I did that the policy wouldn't pay off. So I will just keep working my plan - gathering all the things I will need in my new life on his dime – the insurance policy will be in full–force – it will be 6.5 year and I will be fine. I do think the new _____ will be – what can I say to Crocs tho! Jim marred our marriage /w/ all of this crap – I may as will get something out of it too! Also, I need to have Janice pull up all CLS transactions for me. That will save money in the long-run. I need to fake affection for him better tho' or he is going to catch on. The other thing that I will push for after much thought is for Lauren to stay in Cheney this summer. I really don't like having her around. It's stressful. It's been wonderful having her gone. Both parents want her back – but I know where she'll end up living – our house – cuz her own mother can't stand her either. So I am going to suggest to Jim that staying in Cheney might not be such a bad idea. He's so stressed out he'll probably go for it. So far – I've managed not to spend a dime of my own $ on this trip and that's the way it's going to be at home, too. From now on!!! He's just like my dad – he lies about his $. Tells me his company is failing. I know that's a lie because I read it in the divorce papers of Jim/Cheri – he said it then too and it wasn't true. He lies about all of our finances. Well 2 can play that game! From now on I work 70 hours and it all converts to cash for the S.D. Box. Meantime, he pays off the house- thinks everything is fine with us because I will be a better actress from now on. The only thing now is that I am going to start gathering info for Crocs! Which means I will need to get him to start talking to me about all of that crap again – what a pain in the ass....

DC 3-8-08. Other than the 1st Day @ SEA-TAC where he tho
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to Ron Snyder at Cross & saying - if you pay for my divorce I will help you in
any way I can! I could easily access a flashdrive onto his computer & down
load all of his emails between him & his mistress & he would never know wh. I did it! Not Him!

life ins. policy which needs to be in force a full 2 years before I receive benefits. Jim is so unstable & such a drama-king that if I left and his co. failed at the same time - he could suicide. If he did that the policy wouldn't pay off. So I will just keep working my plan - getting all the things I will need in my new life on his dime - the ins. policy will be in full-force - it will be 6.5 years & I will be gone. I do think the new dimension will be - what can I sell to cross this. Jim ruined our marriage w/ all of this crap - I may as well get something out of it, too! Also, I need to have Janice pull up all his transactions for me. That will save money in the long-run. I need to fake affection for him better tho' or he is going to catch on. The other thing Jim going to push for often much thought is for Laura to stay in Cheney this summer. I really don't like having her around but I know when she's not around leaving our house - city her own mom, can't stand her - it's a struggle. It's been wonderful having her gone. Both parents want her back - bad idea. He's so stressed out he's probably go for it. So far - I've managed to not spend a dime of my own $ on this trip and that's the way it's going to be at home, too. From now on!!! He's just like my dad - he lies about his $. Tells me his company is failing I knew that a lie because I read it in the divorce papers of Jim/Cheri - he said then too & it wasn't true. He lies about all our finances. Well I can play that game! From now on I work 70 hours & it all converts to cash for the S.D. Box. Meantime, he pays off the house - I know everything is fine with us because I will be a better actress from now on. The only thing left is that I am going to start gathering info for CASE which means I need to get him to start talking to me about all of that crap again - what a pain in the ass....