

COURT OF APPEALS NO. 73415-6-I

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

In re the Marriage of

BARBARA TEMPLIN
(f/k/a KLAVANO),

Appellant/Cross-Respondent,

and

JAMES KLAVANO,

Respondent/Cross-Appellant.

REPLY BRIEF OF CROSS-APPELLANT

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I. REPLY ARGUMENT

A. Barbara's Appeal Is Frivolous.

Before commencing this appeal, Barbara and her attorneys knew they bore “the heavy burden of showing a manifest abuse of discretion on the part of the trial court” and that the trial court’s decisions would be “affirmed unless no reasonable judge would have reached the same conclusion.” *In re Marriage of Landry*, 103 Wash.2d 807, 809–810, 699 P.2d 214 (1985).

When the record is examined as a whole, and doubts are resolved in her favor, Barbara raises no debatable issues upon which reasonable minds could differ. The trial court properly exercised its discretion by applying the statutory factors to the evidence presented with respect to each of the issues Barbara raises on appeal. Her appeal is so totally devoid of merit that there is no reasonable possibility of reversal, *Mahoney v. Shinpoch*, 107 Wash.2d 679, 691-692, 732 P.2d 510 (1987), particularly in view of the heavy burden she bears on this appeal.

Jim should be awarded his reasonable attorney fees and costs in being compelled to respond to Barbara’s frivolous appeal, pursuant to RAP 18.9(a).

1. The Trial Court Properly Exercised Its Discretion By Dividing The Marital Estate and Denying Maintenance Based On The Statutory Factors, And Not On “Fault” Or Marital Misconduct.

The whole thrust of Barbara’s appeal is her unfounded accusation that the trial judge “indisputably relied on what it perceived was the wife’s ‘fault’ in making its decisions”¹ because it “could not otherwise have awarded the wife, at age 55 and with income that is only a fraction of the husband’s, less than 10% of the marital estate, no maintenance, and no attorney fees.”

Lacking either evidentiary or legal support to support her accusations, she resorts to hyperbolic *ad hominem* attacks against Jim and the trial judge. She accuses Jim of having “an almost unbelievable desire to punish her”, and thereby

poisoning the proceedings and causing the trial court to abandon any pretense of applying the RCW ch. 26.09 statutory factors and instead permissibly rely on what it perceived to be the wife’s marital misconduct in dividing the marital estate and denying her maintenance or a fee award.

Barbara provides no evidence to support these accusations.

¹ The “marital misconduct” at issue in RCW 26.09.080 “refers to immoral or physically abusive conduct within the marital relationship, [not] gross fiscal improvidence, the squandering of marital assets or ... the deliberate and unnecessary incurring of tax liabilities”. *Marriage of Muhammed*, 153 Wash. 2nd 795, 804, 108 P.3d 779 (2005).

Jim did argue that the March 8, 2008 journal entry, Ex. 301, showed that Barbara had devised a methodical plan for leaving the marriage, which she then carried out, culminating with her theft of \$90,000 from the separate property business account of Nothinz, LLC, acting upon the advice of her attorney.² CP 4572-4573. Ex. 301 also showed her motivation to fabricate claims of domestic abuse to “explain away” and/or to “rationalize” her plan.³

While the court did find that Ex. 301 showed that Barbara “had been planning to leave the marriage at least as early as March 8, 2008”, FF 2.8(3), CP 2332, there is no evidence that it thought her plan, or her theft from the Nothinz’ bank account, constituted “marital misconduct” or “fault”---or even considered her plan or her theft in making its rulings regarding the disposition of the parties’ property and liabilities, and maintenance. See, RP 62-64, 258-259.

Indeed the court expressly found no fault. 1/21/15 RP 197.

² Contrary to Barbara’s repeated assertions, the mere fact that Jim made her a signatory on this account did not transform this third party separate property account into a “joint” account. Her unauthorized withdrawal from this account constituted theft, pursuant to RCW 9A.56.020. *State v. Mora*, 110 Wash. App. 850, 856-857, 43 P.3d 38, *review denied*, 147 Wash.2d 1021, 60 P.3d 92(2002). Her attorney’s advice to take this money from the Nothinz account was unethical, RPC 1.2(d). This Court should say so.

³ Her March 8, 2008 journal entry was no “fantasy”. She methodically carried out the plan she had outlined in Ex. 301. Barbara’s repeated assertions that it was “fantasy”, was one of many reasons why the court found her testimony not credible. FF 2, CP 2384.

Although Ex. 301 was the basis for the court's erroneous finding that the parties' "marriage was a short-term marriage of four years", FF 1, CP 2384, this finding was made in the context of denying Barbara's improper second motion for reconsideration of the trial court's denial of her request for attorney fees.⁴ The error was harmless because the length of the marriage is not a factor which is considered regarding an award of attorney fees, pursuant to RCW 26.09.140. And when the court made its rulings regarding the disposition of property, maintenance, and even its original ruling regarding attorney fees, it found that this was a ten year marriage. FF 2.8(3), CP 2332; FF 2.12.3(a), CP 2338; FF 2.14, CP 2340.

2. The Trial Court Properly Exercised Its Discretion By Awarding Each Party Their Respective Separate Property And One Half Of The Community Property.

Without repeating all of the reasons which guided the trial court's discretion in making its rulings,⁵ and contrary to Barbara's patently false contention, the trial court did consider the "economic

⁴ CR 59(j) ("If a motion for reconsideration, ... is made and heard before the entry of the judgment, no further motion may be made, without leave of court first obtained for good cause shown."). Leave of court was not obtained prior to bringing this second motion.

⁵ These reasons are set forth in the Findings of Fact and Conclusions of Law, CP 2323-2343, which are reincorporated herein by reference.

circumstances of each spouse at the time the division of property is to become effective”, FF2.8(4), CP 2333-2334.

Barbara entered the marriage with little property and debt she was unable to re-pay, CP 2327, 2329, and left it ten years later with property worth \$945,074 (\$444,793 + \$215,933 + \$284,348) and no community debt, CP 2350. The trial court’s award is hardly the “miniscule property award”, she now claims.

While the court did find that Jim’s separate property did not increase in value due to community labor or money, it was not because Barbara had not “personally contributed any ‘significant income’ to the community”, as she contends, but rather because Jim’s separate property was worth less when the parties separated than when the parties married. FF 2.8(2), CP 2330-2331.

No community funds were ever co-mingled with any of Jim’s separate property or businesses. FF 2.8(2); CP 2330.⁶

Contrary to what Barbara contends is “an undisputed fact”, the court did **not** find that the husband’s separate businesses had

⁶ Barbara’s reliance upon *Koher v. Morgan*, 93 Wn.App. 398, 402-404, *review denied*, 177 Wash.2nd 1035 (1999), is misplaced because Koher had commingled his earned income with the profits from his businesses and had used the commingled funds to acquire property during the relationship. The court concluded that Koher could not establish his separate property interest in his accounts and real property investments.

undercompensated the marital community for his efforts.⁷ Rather, the court correctly recognized that under *Hamlin v. Merlino*, 44 Wash.2d 851, 860, 272 P.2d 125 (1954), there was no evidence that Jim's W-2 wages unfairly compensated the marital community based "upon the earnings of the corporation during the time such a salary was paid." FF 2.8(1), CP 2328.

Indeed, the trial court found that even if Jim's W-2 wages alone had undercompensated the marital community, "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." Significantly, "[t]he Petitioner offered no evidence to refute this opinion." FF 2.8(1), CP 2328-2329.

Nor did the court err in reducing Barbara's reconciliation payment by treating the temporary maintenance she had received as a pre-decree distribution. As the Court held in *Glorfield v. Glorfield*, 27 Wn.App. 358, 362, 617 P.2d 1051, *review denied*, 94 Wash.2d 1025 (1980):

⁷ The "lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof". *In re Welfare of A.B.*, 168 Wash.2d 908, 927, 232 P.3d 1104 (2010).

In making a division of the parties' property, the court may consider, and deduct, maintenance paid to a spouse who is capable of working, but who chooses not to do so.⁸

Barbara was capable of working, but chose not to do so.

FF 2.12(1)-(3), CP 2336-2338.

Contrary to Barbara's contention, the trial court did not "award" the Audi automobile rebate and the Lexus warranty refund to Jim, as "assets". Rather, the court properly offset those funds from Barbara's reconciliation payment for the reasons set forth in FF 2.8(2), CP 2331-2332, 2350.

Barbara's reliance upon *In re Marriage of Pea*, 17 Wn.App. 728, 730-731, 566 P.2d 212 (1977) is misplaced. Unlike *Pea*, and contrary to Barbara's unsupported assertions, no evidence was presented as to whether these funds still existed or had been "depleted by the time of trial." See eg. FF 2.8(2); CP 2332; Exs. 320 and 321. Even so, in *In re Marriage of Griswold*, 112 Wn.App. 333, 349, 48 P.3d 1018(2002), Division Three found no abuse of discretion when the court characterized the proceeds from the wife's sale of her wedding ring before trial as community property

⁸ The Court in *Glorfield v. Glorfield*, *supra*, did not base its ruling on whether the temporary maintenance paid still existed at the time of trial, or what "impact" it might have on the wife's overall property award, as Barbara argues.

and assigned the value to the wife.

There was also ample “evidence to support a conclusion that the monies taken by appellant were used for other than *necessary* living expenses.” FF 2.12(1)-(3), CP 2336-2338; FF 3, CP 2384.

The patents retained by Australia Unlimited, about which Barbara repeatedly complains, have no value. 1/21/15 RP 92-93.

The trial court, “is in the best position to assess the assets and liabilities of the parties and determine what is ‘fair, just and equitable under all the circumstances,’” *In re Marriage of Brewer*, 137 Wash.2d 756, 769, 976 P.2d 102 (1999). In this case, the court properly exercised its discretion based on all the statutory factors set forth in RCW 26.09.080 and the particular facts in this case, by awarding each party fifty (50%) percent of the community property, and their respective separate property. FF 2.8, 2.9, CP 2326-2334; 2348-2350. There is neither a patent disparity in the award, nor in the economic circumstances in which the parties were left by the decree. Its decision should be affirmed, *except* for its ruling that the \$142,173 Jim used to pay down the mortgage when he refinanced the parties’ home prior to separation became community property.

3. The Trial Court Properly Exercised Its Discretion By Not Awarding Barbara Maintenance.

The court carefully considered each of the statutory factors set forth in RCW 26.09.090, to properly guide its discretion to deny Barbara's request for maintenance. FF 2.12, CP 2335-2340.

Barbara never submitted a credible Financial Declaration--- or otherwise established a "need" for maintenance, pursuant to RCW 26.09.090. FF 2.12(3), CP 2335-2340.

As previously argued, Barbara's decision to not contest the court's ruling that the temporary maintenance she was awarded be treated as a pre-decree distribution (apart from her complaint that she had already spent that money), when her "need" would have been greater⁹, shows that her complaint that the court did not award her *future* maintenance is without merit.

Once again contrary to Barbara's patently false allegation, the court did consider the parties' standard of living during their 10 year marriage. FF 2.12(3), CP 2338. But, it was not required to maintain it. *Friedlander v. Friedlander*, 80 Wash.2d 293, 297, 494 P.2d 208 (1972).

⁹ Her salary was lower. She had not yet been awarded property worth \$945,074 (community property: \$444,793 + separate property: \$215,933 + reconciliation payment: \$284,348). CP 2350.

4. The Trial Court Did Not Abuse Its Discretion By Refusing To Award Barbara Attorney Fees.

A party relying on RCW 26.09.140 “must make a showing of need and of the other's ability to pay fees in order to prevail.” *In re Marriage of Hoseth*, 115 Wn.App. 563, 63 P.3d 164 (2003).

The court did not “refuse” to consider these factors. It did.

Rather, Barbara never submitted a credible Financial Declaration---or otherwise established her “need” for reasonable attorney fees, pursuant to RCW 26.09.140. FF 3, CP 2384.

Contrary to Barbara’s incessant, but rather ironic, self-portrayal as a “victim”, the trial court did not find that her “claims of costs for daily living needs were inflated and there was insufficient evidence to support her stated claims”, FF 3, CP 2384,¹⁰ “to punish” her “simply for exercising her right to seek reconsideration and appeal”, but rather to show why she had failed to establish that she had the “financial need” required for an award of attorney fees. *Id.*, *Konzen v. Konzen*, 103 Wash.2d 470,478, 693 P.2d 97 (1985) (“RCW 26.09.140 allows a court to award attorney's fees if a party

¹⁰ This finding also supported the court’s finding that her testimony was not credible. FF 2, CP 2384.

demonstrates financial need. Respondent has made no present showing of financial need....”).

B. JIM SHOULD HAVE BEEN AWARDED HIS ATTORNEY FEES CAUSED BY BARBARA’S AND HER ATTORNEY’S INTRANSIGENCE.

When the Petitioner contends in her appeal, that Jim blames her attorney, as well as her, for unnecessarily increasing the costs of this litigation, she is correct. Mr. Hall led the way. Barbara followed his advice. While it is true that the trial court did not *expressly* find that Barbara and her attorney had been intransigent, it did find that they substantially increased the legal fees and costs in this proceeding through their own actions. Jim should be reimbursed for these additional fees and costs.

1. Barbara Stole \$90,000 From The Separate Property Business Account of Nothinz, LLC.

Shortly after retaining Mr. Hall, Barbara fraudulently induced Jim to make her a signatory on the business account of Nothinz, LLC¹¹, his separate property, by telling him she would need access to money to pay the bills of the marital community if Jim had a medical emergency. A week later, on July 17, 2013, when Klavano

¹¹ Making a Barbara a signatory on this account did not convert this account into a “joint” account. Barbara’s wrongful withdrawal of \$90,000 from the Nothinz, LLC Union Bank account, acting on the advice of her attorney, constituted theft. *State v. Mora, supra*.

was in Maui with his two daughters, and while acting on the advice of her attorney, CP 4572-4573, she transferred this money to her own personal bank account. Barbara and Mr. Hall both knew that Klavano did not have a medical emergency, and that she did not need these funds to meet the expenses of their marital community.

Her contention that she was just seeking a “safety net”, is belied by the fact that, at the same time Mr. Hall was advising Barbara to steal this money, he was preparing pleadings to ask the court to award her temporary maintenance and attorney fees, RP 1461-1476; Ex. 427; CP 5-16---which it did. CP 88. Thus, both knew there was the legal way to get a “safety net”. She did not have to steal it. But she did---acting on the advice of her attorney.¹²

The trial court recognized and found that this conduct substantially increased the attorney fees incurred in this case:

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.

¹² Hall’s advice to steal this money to pay his retainer was unethical, RPC 1.2(d). The only reason the WSBA dismissed Jim’s grievance against Hall on this issue, was because no court had said such conduct was unethical. This is why it so important that this Court call it out and say that it is. Acquiescence of this conduct sets a very bad precedent.

FF 2.15, CP 2341. The trial court also found, FF4, CP 2385:

It was upon the advice of counsel that this litigation began its troubled path and ended with over \$220,000 in attorney fees.

2. Barbara's Request For Maintenance.

What made Barbara's request for temporary maintenance intransigent, is that it was premised on her fabricated claim that she could not work a full schedule because of previous back injuries, CP 15, and her false accusations that Jim had emotionally and financially abused her during the marriage. CP 7-15, 59-66, 70-71, 2399-2340. Her Financial Declaration, CP 17-22, set forth inflated and non-existent expenses, CP 35-36, without the financial documents required by KCLFR 10, CP 3854-3859. See also, FF 2.12, CP 2335-2338. In spite of Jim's numerous discovery requests she refused to provide evidence to support her claims, or to admit they were untrue, thereby unnecessarily increasing the costs of this proceeding.

3. Barbara's Psychiatric Records.

Since Barbara claimed that Jim's alleged domestic abuse affected her present employability and prospective earning capacity

and/or the validity of the parties' Post-nuptial agreement, Ex. 213, evidence concerning her claim was discoverable and admissible. *Matter of Foran*, 67 Wn.App. 242, 258, 834 P.2d 1081 (1992). If Barbara had truly been abused, it is highly likely that Dr. Gentry would have known about it and documented it.

However, Barbara and her attorney "sandbagged" Judge Amini by denying that she was making such a claim, CP 2637:

But, more broadly, any request for healthcare information should be limited to just the healthcare issues that are relevant to this case: herpes and my back problems.

Judge Amini granted Barbara's Order Granting Motion for Protective Order, finding "that discovery should not be had from Dr. Rex Gentry for the reasons stated by petitioner in her Motion for this Protective Order...". CP 2708.

When Jim then brought a motion for leave to obtain Barbara's other daily journal entries, like Ex. 301, which he understood Barbara had given to Dr. Gentry, CP 2743-2763,¹³ the court entered an Order Denying Motion---Judgment, which not only

¹³ Barbara had failed and/or refused to produce any daily journal entries in response to Jim's Requests for Production, claiming they had been lost when her computer crashed, and that she did not have any daily journal entries after 2004 or 2005. CP 2761-2762, RP

denied Jim's motion for leave, but imposed sanctions against him of \$750 for even asking. CP 91-92. There was no legal or factual basis for these sanctions. Jim should not have been found intransigent simply for asking the court's leave. Moreover, the requested documents were probative of Barbara's claims of abuse.

This was error and that judgment should be set aside.

4. Barbara's Refusal To Provide Discovery.

Barbara invariably blamed Jim for failing to provide discovery as her excuse for failing to provide discovery or to respond to Requests for Admission---even after she acknowledged that she had received all of discovery she had requested, CP 3251.

Barbara's "foot dragging and obstruction" by refusing to provide this discovery substantially increased the costs of this litigation by precluding summary disposition of Barbara's claims for maintenance, and what was community and separate property, thus requiring a trial to resolve these claims.

5. Barbara's Theft Of Jim's Privileged Records.

Hall's refusal to return Jim's privileged documents was unethical, *Richards v. Jain*, 168 F.Supp.2d 1195, 1200-1201

260, 584. Yet, she provided additional daily journal records subsequent to those dates to Vicki Boyd, Ph.D. RP 602, 635.

(2001); See also, RPC 4.4; ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94–382 (1994), and required Jim to file a motion to obtain their return. This constituted intransigence. CP 3211- 3233, 3303-3341, 3342-3346, 3359-3361.¹⁴

6. Barbara’s Untimely Disclosure of Experts.

a. **Vicki Boyd, Ph.D.** Contrary to their representations to Judge Amini, Barbara disclosed Vicki Boyd, Ph.D, as a possible witness in her Disclosure of Possible Primary Witnesses, who “may testify concerning petitioner’s subjection to domestic abuse by respondent and other related domestic abuse issues.” CP 4780.

Yet, Dr. Boyd’s “Psychological Evaluation of Mrs. Klavano” was not provided to Jim’s attorney until October 6, 2014, CP 4767, just a week before the discovery cut off of October 13, 2014. CP 4765. Dr. Boyd’s report was untimely. KCLR 37(g).¹⁵ She was not available to have her deposition taken until October 30, 2014. CP 4767. Her testimony was frivolous.

¹⁴ The WSBA did not even address this grievance. It should. This Court should indicate that it agrees with the Court’s holding in *Richards v. Jain, supra*.

¹⁵ “Discovery requests must be served early enough that responses will be due and depositions will have been taken by the discovery cutoff date.”

Dr. Boyd testified that none of the domestic abuse alleged by Barbara affected her present employability and prospective earning capacity. FF 2.12(1), CP 2336. Even so, Barbara admitted that Dr. Gentry had never diagnosed her with PTSD---much less, Battered Women's Syndrome--- RP 374, as Dr. Boyd had opined.

b. Ben Hawes. Producing Hawes' reports 11 days before the discovery cutoff and on the last day of discovery, October 14, 2014, was not timely. KCLR 37(g). His delay was not caused by Jim's "failure to provide discovery". As Hall himself attested, he had all of Jim's documents by April 21, 2014, nearly six months earlier. CP 3251.

While Hawes did opine in his report, Ex. 5 at 11, that Jim's purported "undercompensation" meant that "material amounts of both separate and community funds have been intermixed throughout the Klavano enterprise", he opined, RP 842, 848-854, 926, 951, and Hall argued, 1/21/15 RP 130-131, for the first time at trial, that this intermixing had transformed all of Jim's separate property, including his LLCs and corporation into community property. No legal authority supports this opinion.

c. William Skilling. Skillings' reports were

likewise untimely and frivolous for the reasons previously argued.

Mr. Hall's and Barbara's untimely disclosure of their experts' frivolous opinions was a deliberate effort to preclude Jim from being able to counter those opinions,¹⁶ and made "the trial more difficult and increased legal costs". *In re Marriage of Greenlee*, 65 Wn.App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wash.2d 1002, 838 P.2d 1143 (1992). Since their intransigence "permeates the entire proceeding, the court does not need to segregate which fees were incurred as a result of intransigence and which were not." *In re Marriage of Burrill*, 113 Wn.App. 863, 873, 56 P.3d 993 (2002), *review denied*, 149 Wash.2nd 1007(2003).

C. THE COURT ERRED BY FINDING THAT THE \$142,173 JIM USED TO PAY DOWN THE MORTGAGE BECAME COMMUNITY PROPERTY.

For purposes of characterization as community or separate property, "[t]he ownership of real property becomes fixed when the obligation becomes binding, that is, at the time of execution of the contract of purchase." *Byerley v. Cail*, 183 Wn.App. 677, 688, 334 P.2d 108 (2014).

¹⁶ Steve Kessler was a rebuttal expert, who could not prepare his opinions until he learned what Ben Hawes was going to opine.

The evidence was undisputed that when Jim purchased the family home, he used \$207,000 of his separate property for the down payment, RP 156, 1030, and his separate credit, Ex. 198; FF 2.7, CP 2326, 2349. Barbara contributed no funds. RP 386, 1479-1480. Although Barbara was listed on the Settlement Statement as a “borrower”, Ex. 306, Jim was the only true borrower. RP 1410-1413, 1479-1480; Ex. 198. Barbara was not on the mortgage. Her liability was limited to her interest in the home. RP 1033-1036.

The court found that Jim did not intend to transmute his separate property to community property. FF 2.8(2), CP 2330.

Thus, in the absence of a valid Post-Nuptial Agreement, this home remained Jim’s separate property. *In re Estate of Borghi*, 167 Wash.2d 480, 483-484, 219 P.3d 32 (2009); *In Re Marriage of Zahm*, 138 Wash.2d 213, 224, 978 P.2d 498 (1999); *In re Marriage of White*, 105 Wn.App. 545, 550, 20 P.3d 48(2001).¹⁷

Contrary to Barbara’s contention, this result is not “invited error”. Jim sought to uphold the parties’ Post-Nuptial Agreement.

But if the parties’ Post-Nuptial Agreement is not valid and

¹⁷ The family residence, except for the original down payment, and the down payment at issue here, was shown as community property in the spreadsheet attached to Jim’s Trial Brief, CP 454, because the intent of the Post-Nuptial Agreement, which Jim considered valid and enforceable, was to make the appreciated equity community property.

enforceable, then it necessarily follows that this home remained Jim's separate property.

But, as previously discussed, after a rocky start to their marriage, RP 1018-1019, 1024-1025, Barbara started seeing Dr. Rex Gentry, a psychiatrist, RP 1026, who began treating her for depression and anxiety arising from a serotonin imbalance. RP 376, 378-379, 1027-1028. Jim wanted to incentivize Barbara to work on her problems, take her medication, and in so doing, to save their marriage. RP 1028-1032.

So, even though the home was purchased solely with Jim's separate property and credit, after he had signed the Purchase and Sale Agreement, but ten days before closing, he had them both execute a Post-Nuptial Agreement, Ex. 213, which provided that all of the funds he used to purchase the home would remain separate. If no dissolution proceeding was commenced within 18 months, Barbara would share equally in the home's appreciation.

The Post-Nuptial Agreement thus created community property solely from Jim's separate property and credit. But, it also preserved the separate property character of Jim's original down

payment, and the down payment he made when he refinanced the property three months before the parties separated.

The court erred in concluding that the Postnuptial Agreement was “unfair” because “Mr. Klavano’s intent was to insulate his investment in the family home as his separate property,” since preserving the separate character of one’s separate property is the primary purpose of all Pre-nuptial or Post-nuptial agreements.

In determining the validity of a pre-nuptial or post-nuptial agreement, the court first determines whether the agreement is substantively fair, ie. specifically whether it makes reasonable provision for the spouse not seeking to enforce it. If it does, the analysis is at an end, and the court will enforce the agreement. *In re Marriage of Bernard*, 165 Wn.2d 895, 902, 204 P.3d 907 (2009).

In the absence of factual disputes not present here, whether the agreement is substantively fair is a question of law reviewed *de novo*. *Matter of Foran*, 67 Wn.App. at 251 n. 7. In this case, the Post-Nuptial Agreement makes a fair and reasonable provision for Barbara because it created community property for her solely from Jim’s separate money and credit (as was all of the other community property, FF 2.8(1), CP 2327; FF 2.8(4), CP 2334.

As a result, the analysis is at an end. This Post-Nuptial Agreement should have been enforced, pursuant to RCW 26.09.070(3), even though the evidence about procedural fairness was disputed. *In re Marriage of Bernard, supra*.

And the court should have found that the down payment Jim made when he refinanced the family residence remained his separate property consistent with that Post-Nuptial Agreement.

But, even in the absence of a valid, enforceable Post-Nuptial Agreement, and even if this Court were to ignore the fact that without a valid, enforceable Post-Nuptial Agreement, the family residence remained Jim's separate property, the trial court should still have found that the \$142,173 Jim used of his separate money to pay down the mortgage when he refinanced the parties' home barely three months before the parties separated, Exs. 65, 307-310, RP 754-755, remained his separate property.

Jim did not intend to transmute his separate property to community property. FF 2.8(2), CP 2330.

The trial court thus erred in finding that the \$142,173 of his separate money Jim used to pay down the mortgage when he

refinanced the parties' home, somehow became community property. That finding is not supported by the law or any evidence--- much less, substantial evidence.

Jim had and has a right to be reimbursed for his separate property down payment of \$142,173 on the mortgage, *In re Marriage of DeHollander*, 53 Wn.App. 695, 700-701, 770 P.2d 638 (1989), and this Court should enforce that right.

CONCLUSION

This Court should affirm the trial court's rulings and deny Barbara's appeal. It should find that her appeal is frivolous.

When Barbara falsely accuses the trial court of basing its decisions regarding its allocation of the parties' property and liabilities, and maintenance, on "fault" or "marital misconduct" without providing any evidence to support those accusations--- particularly, where, as here, the court made it clear that it did not base those decisions on "fault" or "marital misconduct"--- her appeal is frivolous.

When Barbara complains that the court did not award her maintenance or attorney fees, but fails to even argue, must less show, that the trial court's findings that she never submitted a

credible Financial Declaration, and thus never established her “need” for such awards, as required by the relevant statutes, were not supported by substantial evidence, her appeal is frivolous.

For that matter, when Barbara contests nearly every finding made by the trial court, but fails to show that any of them are not supported by substantial evidence---and fails to even present argument for nearly all of the findings she challenged as to why they are not supported by the evidence, much less, cite to the record to support that argument---her appeal is frivolous.

And finally, when Barbara brazenly complains on appeal that the trial court did not apply the proper statutory factors to properly guide its discretion when it made its rulings, but even a cursory review of its Findings of Fact and Conclusions of Law plainly shows that the court did, then her appeal is frivolous.

When the record is examined as a whole, and even when doubts are resolved in her favor, Barbara has raised no debatable issues upon which reasonable minds could differ. Her appeal is so totally devoid of merit that there was no reasonable possibility of reversal, *Mahoney v. Shinpoch*, *supra*, particularly in view of the

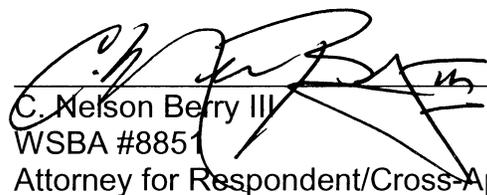
heavy burden she and her attorneys knew she had to bear before she even filed this appeal. *In re Marriage of Landry, supra*.

This Court should award Jim the reasonable attorney fees which he has been compelled to incur to respond to Barbara's perfidy, FF 2, CP 2384, and her unsupported false accusations, which rendered her appeal frivolous, pursuant to RAP 18.9(a).

It should also find that Barbara and her attorney engaged in intransigence, and remand this case to the trial judge to determine to what extent their intransigence unnecessarily increased the fees and costs Jim incurred, and to award those fees and costs to him.

If this Court concludes that the Post-Nuptial Agreement is unenforceable, then it must find that the family residence is Jim's separate property. In any event, it should find that the \$142,173 Jim used to refinance the family residence only three months before the parties separated remained Jim's separate property, and should be awarded to him.

Respectfully submitted this 18th day of April, 2016.


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Attorney for Respondent/Cross-Appellant

DECLARATION OF SERVICE

I certify that on the 18th day of April, 2016, I caused a copy of the foregoing Reply Brief of Cross-Appellant, to be hand-delivered by ABC Legal Messenger Service to the attorneys for the Appellant/Cross-Respondent, at the following address:

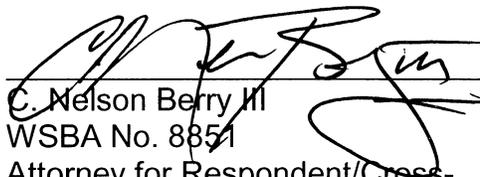
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 18th day of April, 2016 at Seattle, Washington.



C. Nelson Berry III
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