

FILED
April 20, 2016
Court of Appeals
Division I
State of Washington

73468-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

AMBER HANSEN,

Respondent/Cross-Appellant,

and

TROY EDWARD HANSEN,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

On appeal, the husband seeks to reduce both the only liquid asset awarded to the wife – a money judgment necessary to equalize the property division because the husband’s pre-divorce planning placed nearly all of the marital estate in nonfungible business assets – and his child support obligation that the trial court ordered he pay so that the parties’ daughters can maintain some semblance of their lifestyle during the marriage. The husband’s challenges to these wholly discretionary decisions, which are supported by substantial evidence, are meritless.

The husband complains of the trial court’s decision to charge him with taxes and penalties the community incurred as a result of his unilateral decision to liquidate the parties’ only substantive retirement account in contemplation of divorce. The trial court properly found that it was a “waste of community assets” to spend \$242,214 of community assets to net \$122,075 to acquire an asset that the husband was ultimately awarded.

The husband also complains of the trial court’s discretionary decision to include the value of the husband’s purportedly separate real property as part of its equal property division – the difference being that the wife was awarded 50.7% of the community property,

rather than 50%. But the trial court was fully aware that its award to the wife included the value of the husband's separate real property and properly found its property distribution was nevertheless "still [] fair, just and equitable."

Finally, the husband complains about the trial court's discretionary decision awarding child support above the standard calculation. In doing so, the husband ignores the extensive testimony regarding the children's expenses and the family's high standard of living, the trial court's decision to order the parents to each pay half the cost of the children's extraordinary expenses, and the mother's monthly expenses of \$24,000, which the trial court in an unchallenged finding found reasonable.

The only error the trial court committed was in failing to order the parties to share the cost of the children's postsecondary support in proportion to their incomes. Unlike the discretionary decisions challenged by the husband, the trial court's decision apportioning the postsecondary support obligation was a legal error that conflicts with RCW 26.19.001 and RCW 26.19.080.

This Court should affirm the trial court's discretionary decisions, reverse the trial court's legal error in requiring the parties

to equally share the cost of postsecondary support, and award attorney fees to the wife.

II. CROSS-APPEAL ASSIGNMENT OF ERRORS

1. The trial court erred in ordering the parents to each pay half the cost of postsecondary support, and not in proportion to their incomes. (CP 451-52)

2. If this Court holds that the trial court abused its discretion in awarding child support above the standard calculation, the trial court erred in ordering the parents to each pay half the cost of “expenses not included in the transfer payment,” and not in proportion to their incomes. (CP 452, *conditional assignment of error*)

III. CROSS-APPEAL STATEMENT OF ISSUE

“The legislature [] intends that the child support obligation should be equitably apportioned between the parents.” RCW 26.19.001. RCW 26.19.080 further requires that parents share in the cost of “special child rearing expenses” in proportion to their shares of combined monthly net income. In this case, the father has twice as much income as the mother. Did the trial court err in ordering the parties to each pay half the cost of their daughters’ extraordinary expenses, including postsecondary education?

IV. RESTATEMENT OF FACTS

A. The parties were in a 19-year relationship and have two daughters.

Respondent/Cross-Appellant Amber Hansen, age 40, and appellant/cross-respondent Troy Hansen, age 45, married on May 12, 2001. (RP 132, 133; CP 449) They have two daughters, ages 13 (DOB 2/04/03) and 8 (DOB 7/19/07). (RP 133) The parties separated on October 11, 2013 when Amber filed for dissolution in King County Superior Court. (CP 1; Finding of Fact (FF) 2.4, CP 35, *unchallenged*) The parties physically separated a week later when Troy moved out of the family residence on October 18, 2013. (RP 748)

Amber met Troy when she was 16 and he was 21 years old. (RP 384) Amber moved in with Troy the following year, 1992, when she was 17 and a junior in high school. (RP 384) During the first two years they often fought, and Troy kicked Amber out of the house on a number of occasions. (RP 385) Amber would stay with a friend for a few days until the parties reconciled and Amber returned to Troy's home. (RP 385) After the first two troubled years, the parties consistently cohabited. (*See* RP 385) In an unchallenged finding of

fact the trial court found that the parties had lived in a committed intimate relationship since 1994. (FF 2.3, CP 34)

B. Amber has a GED and stayed home to care for the parties' daughters.

Amber, who has Attention Deficit Disorder, dropped out of high school after the 11th grade. (RP 61, 442) She eventually earned her GED in 1994, when she was 19 years old. (RP 61, 382-83) Due in part to her limited education, Amber's work history is also limited. (See RP 61-62, 387; *see also* Ex. 107) Before the parties married in 2001, Amber worked briefly as a barista, a waitress, and a hair salon receptionist. (RP 61-62, 387; FF 2.11(1), CP 39) Amber did not work outside of the home during the marriage. (See RP 60-62, 387; *see also* Ex. 107) The trial court found that Amber "is not currently employable except possibly in unskilled service positions." (FF 2.11(2), CP 39, *unchallenged*) While the trial court recognized that Amber had expressed interest in obtaining her degree to become a registered nurse, "due to [her] ADD and family responsibilities, it is anticipated that she could only attend school part time." (FF 2.11(3), CP 39, *unchallenged*) It would take "at least six years" for Amber to complete her education. (FF 2.11(3), CP 39, *unchallenged*)

C. Troy owned and worked for All City Bail Bond throughout the entire relationship.

Troy began working as a bail bondsman when he was 16 years old. (RP 746) Troy's father, aunt, and brother also worked in the bail bond business. (RP 705-06, 746, 767) Troy started All City Bail Bond Company ("ACBB") in December 1989; he is the sole owner. (RP 185, 747) ACBB has an excellent reputation and is considered one of the top bail bond companies in Washington. (RP 185, 188, 1307) ACBB serves 11 cities throughout Washington (Ex. 130; RP 928-29, 975-76), and has 6 physical branches in Seattle, Kent, Tacoma, Everett, Mount Vernon, and Bellingham. (RP 765)

ACBB posts bail bonds for individuals who have been arrested. (RP 183) If the individual fails to appear, the bond is forfeited and ACBB must pay the amount of the bond to the court. (RP 183) ACBB is insured by Seneca Insurance ("Seneca"), the "payer of last resort" in the event that ACBB cannot pay the forfeiture on a bond. (RP 186) Part of the arrangement between ACBB and Seneca is that for each bond ACBB posts, it pays 1% of the bond value to Seneca directly and .9% into an account that "builds up" over time

(the “BUF”).¹ (RP 186-88) If a forfeiture requires payment, ACBB pays the forfeiture from its cash on hand or collateral posted by defendant, and if that is insufficient, from the BUF. (RP 188, 841) Seneca would have to pay any forfeiture only if there were insufficient funds in the BUF. (See RP 1316-17) Seneca has never had to pay on a forfeiture for ACBB. (RP 187, 1316-17)

Troy personally owns the BUF; all funds in the BUF are post-tax dollars that the community already paid income tax on. (RP 190, 1296) The BUF is “controlled” by Seneca (RP 188, 190), which allows Troy to liberally “borrow” from the BUF. (See RP 699, 857, 1299-1300) For instance, in 2012, Troy withdrew approximately \$750,000 from the BUF, interest-free, to purchase a vacation home on Whidbey Island. (See RP 856-57, 1302; Ex. 42) In exchange, Seneca accepted a first deed of trust on the property. (RP 857, 1302, 1319) Once the BUF is replenished by the amount removed, Seneca will release the deed of trust. (RP 857, 1325-26) By the time of trial, approximately \$409,000 was still owed to the BUF for the Whidbey

¹ For most bail bond companies, the rate is 1%. Because of Seneca’s confidence in ACBB, ACBB is only required to deposit .9% of the bond in the BUF. (RP 188) In addition, because ACBB has substantial BUF, Seneca does not require that ACBB’s bond be 100% collateralized. (RP 1330) Seneca only requires ACBB to collateralize the bonds by 50-75%. (RP 1330)

Island acquisition, and there was more than \$878,000 in cash in the BUF. (CP 45; Exs. 42, 43) The total value of the BUF, including amounts owed on the deed of trust, was nearly \$1.29 million.

In 2014, ACBB generated more than \$3.17 million in income. (RP 11-12) Troy is paid over \$155,000 in salary annually, and receives business income of \$682,000. (RP 261; Exs. 58, 116) Steve Kessler valued and the trial court found the value of ACBB is \$2.89 million. (Ex. 1; RP 192) Troy does not challenge this valuation on appeal. (FF 2.7(9), CP 36-37, *unchallenged*)

ACBB owns real property at 607 Central Avenue North in Kent from which ACBB operates. (RP 193, 222, 361) This property was purchased in 1994 during the parties' committed intimate relationship; its value is \$170,000.² (RP 766, CP 44; FF 2.8(2)(a), CP 38, *unchallenged*) Before they married in 2001, Amber and Troy executed a prenuptial agreement that made all the income of ACBB, including income from its investments, community property, but

² There appears to be a conflict in the trial court's findings of fact. In Finding of Fact 2.7(9)(q) (CP 37), the trial court valued the ACBB real property at \$170,000. In another section of the findings, the trial court valued the same property at \$140,000. (FF 2.8(2)(a), CP 38) Because the trial court adopted the value of ACBB presented by Steve Kessler, who described the real property's "fair value" at \$170,000 (Ex. 1 at 52), the finding that the value of the real property is \$140,000 appears to be a typographical error.

preserved the Kent property and other property as Troy's separate property. (Ex. 100) The trial court upheld the prenuptial agreement as valid because it was substantively fair. (FF 2.6, CP 35, *unchallenged*) The trial court further found that even though there were certain ACBB accounts that had been reserved as Troy's separate property under the agreement, community funds had been deposited into the accounts, and those accounts and funds were now entirely community property because Troy "failed to meet his burden of proving the separate character of any interest in ACBB." (FF 2.20(1), CP 41-42, *unchallenged*; FF 2.6(3), CP 35, *unchallenged*)

D. The income from All City Bail Bond afforded the family a high standard of living.

The substantial income from ACBB afforded the family a high standard of living. Troy controlled all of the parties' finances before and during the parties' marriage, and Amber was "totally financially dependent" on him. (*See* RP 386-92; *see also* FF 2.6(4), CP 35, *unchallenged*; FF 2.11(4), CP 39, *unchallenged*) Troy lavishly spent money on himself, including expensive cars, trips with his friends, and clothes. (RP 392-93) While Troy was generous in allowing Amber to spend money on the parties' daughters, she often had to "repeatedly" ask for money to spend on herself. (RP 392, 438)

Nevertheless, as a whole, the family lived a “very luxurious lifestyle.” (RP 396; *see also* FF 2.11(6), CP 39: “The standard of living during the marriage was high.” *unchallenged*)

The daughters in particular always wore brand name clothes, such as North Face, UGG, and ivivva. (RP 437) Amber reasoned that because both parties had grown up “poor,” Troy wanted the daughters to have nice clothes. (RP 437-38) For instance, even though the daughters quickly grew out of their shoes, Troy told Amber, “I don’t want you to buy shoes that are going to last six months. I want you to buy the kids shoes that fit them now. If we have to buy another pair in a month, I don’t care. You know, I want them to be in nice clothes.” (RP 437) The parties also purchased clothes, shoes, and equipment for the daughters’ various activities, including ballet, tap, soccer, and basketball. (RP 439) The family took expensive vacations, typically flying first class to Disneyland once a year and Hawaii twice a year, and threw the girls “extravagant” \$2,000 birthday parties. (RP 396, 446-47)

In light of the parties’ “high” standard of living and the “family’s historical child-related expenses,” the trial court found that Amber’s anticipated monthly expenses of \$24,000 and Troy’s

anticipated monthly expenses of \$33,000 were “reasonable.”³ These findings also are unchallenged on appeal. (FF 2.11 (6), (7), (10), CP 39-40; CP 450)

E. Troy asked Amber for a divorce in 2013. During the parties’ short reconciliation, Troy purchased a new bail bond business by liquidating the parties’ only substantial retirement account, incurring heavy penalties and taxes.

An April 29, 2013, Troy signed a Contract of Sale to acquire CJ Johnson Bail Bonds (“CJ Johnson”) in Tacoma. (Ex. 34; *see also* Ex. 33) Troy had been interested in acquiring CJ Johnson for many years, and the opportunity to buy it finally arose when the owner became ill and was no longer able to run the daily operations. (RP 418-19, 702, 850) Troy was particularly interested in CJ Johnson because ACBB did not have a presence in Pierce County and he was told the owners were entertaining another offer from one of ACBB’s competitors. (RP 677, 702, 704-05)

Around the same time Troy was pursuing the acquisition of CJ Johnson, he accused Amber of an affair and demanded a divorce.

³ The trial court found that Troy’s monthly expenses of \$33,000 were reasonable based on a financial declaration he submitted approximately 4 months before trial. (*See* Ex. 56) By the time of trial, he claimed his monthly expenses were only \$16,599. (*See* Ex. 215) The most significant difference between the declarations was the inclusion of approximately \$15,000 in “professional fees” in Troy’s earlier declaration. (*See* Ex. 56)

(RP 417-18, 419) Although not physically separated, the parties retained divorce counsel. (See RP 418, 423) Amber's attorney expressed concern to Troy's then attorney, Ed Skone, about the parties purchasing CJ Johnson for what was projected to be over \$1 million in light of the upcoming divorce. (See RP 419; Ex. 35) On May 21, 2013, Mr. Skone assured Amber's attorney that Troy would put the purchase "in abeyance [] and take no action or enter into the transaction without the prior approval" of Amber. (Ex. 35; RP 912-13, 958) That statement in fact was untrue - on the same day Mr. Skone sent his letter, Troy signed an Addendum to the contract setting the closing date for the CJ Johnson purchase "on or before June 14, 2013" - less than a month away. (Ex. 247; RP 984)

Shortly after Troy signed the Addendum, Troy withdrew his request for a divorce, and the parties reconciled. (See RP 420) While Amber had been consulting an attorney when it appeared that the parties were headed to divorce, she stopped consulting the attorney about the CJ Johnson purchase once the parties had reconciled. (See RP 422, 423, 555)

Newly reconciled with Amber, Troy continued with the acquisition of CJ Johnson unimpeded. Although Troy purportedly involved Amber in the acquisition because she "needed to sign on the

real estate” portion of the acquisition (RP 852), he gave her only limited information about the purchase. For instance, even though Troy told Amber he planned to cash out the parties’ IRA to partially fund the purchase, he did not explain to her the significant tax and financial consequences they would suffer as a result. (RP 421)

Although Troy had been consulting with ACBB’s accountant on other matters related to the acquisition of CJ Johnson, Troy had not sought his advice as to the impact of liquidating the parties’ IRA to fund the purchase. (RP 37-38; *see also* Ex. 90 at 122) The particular IRA that Troy sought to liquidate was the only significant asset of the parties that was not real property or business related, and the only retirement account that could be awarded to Amber if the parties divorced.⁴ (*See* CP 44-46; RP 875, 1334)

Troy cashed the parties’ \$242,000 IRA to fund the CJ Johnson acquisition. (RP 36, 722, 881-82) As a result, the parties incurred approximately \$95,000 in taxes and \$24,000 in penalties.

⁴ Troy had previously told Amber that the BUF was a retirement account. (RP 428, 698-99) Troy told Amber that so long as there were no claims against the BUF when he retires, he would regain full control of the funds and use it for their retirement. (RP 428, 698-99; *see also* RP 1333) However, a court could not distribute the BUF to Amber in a dissolution action so long as Troy was still in the bail bond business, because Seneca controlled the BUF. (RP 875, 1334)

(RP 36-37, 722; *see also* Ex. 50) In other words, to invest approximately \$123,000, Troy sacrificed \$119,000 in community assets. The community paid the tax and penalties associated with the liquidated IRA from ACBB shareholder distributions. (*See* Exs. 9, 10, 50)

On appeal, Troy argues that his actions were reasonable because the BUF was unavailable to help fund the purchase. (App. Br. 21) But it is undisputed that the parties had more than \$2.4 million in unencumbered real estate that Troy could have borrowed against. (*See* CP 44) Troy claimed he had not considered taking out a loan for the funds because he believed “borrowing the funds would have been more than the \$24,000 penalty.” (Ex. 90 at 124) This claim ignores the fact that in addition to the penalty, the parties had to pay \$95,000 in taxes.

While there was no dispute that the acquisition of CJ Johnson was a good idea, Amber challenged the manner in which the acquisition was funded. (*See* RP 525) Her expert Steve Kessler described the acquisition as a “brilliant transaction,” but found it “sort of shocking that you would incur a 45 percent tax to fund an acquisition.” (RP 342) In fact, the “tax” was closer to 49 percent.

The acquisition of CJ Johnson Bail Bonds closed in June 2013. (RP 851, 984; Ex. 247) Amber signed on the closing documents for the purchase of both the business and associated real property. (Ex. 247) The final purchase price for CJ Johnson was \$1.2 million, including the building where the business is run. (RP 224, 240) The actual breakdown was \$800,000 for the business and \$400,000 for the building. (RP 240, 853) Troy paid \$800,000 in cash from the liquidated IRA and personal and business cash accounts; the balance was secured by a note. (See RP 701, 841, 989-91; Ex. 247) At the time of trial, \$261,000 was still owed to the sellers. (RP 224)

As a result of Troy's liquidation of the parties' only significant retirement account, the parties' \$10 million marital estate was largely tied up in real property or business-related assets at the time of trial – \$5.2 million in real property; ACBB (including CJ Johnson), worth \$2.9 million; ACBB-related cash accounts of nearly \$900,000, including the BUF; a \$1.089 million investment in a commercial building (BH Properties, LLC); and less than \$38,000 in retirement accounts. (See CP 44-45) The trial court found that “due to husband's actions in contemplation of divorce, the parties' estate has minimal liquid assets.” (FF 2.11(11), CP 40) The trial court also found that Troy “wasted community assets by cashing out IRA

accounts totaling \$242,211 and incurring tax penalties (\$24,221) and additional federal income tax (\$95,915) and he should be charged with the penalty and additional tax in the total amount of \$120,136 as predistributions of property to him.” (FF 2.7(20), CP 38)

F. Amber filed for dissolution four months after the new business was purchased. The trial court divided the property nearly equally, awarded maintenance to Amber, and awarded child support above the standard calculation.

After a failed attempt at counseling, Amber filed for dissolution on October 11, 2013. (CP 1; RP 423) The parties appeared before King County Superior Court Judge Monica Benton for a 9-day trial, beginning February 24, 2015. By that time, Troy had been found in contempt 21 times, and had gone through multiple divorce attorneys. (See RP 433; Ex. 121; FF 2.14, CP 40, *unchallenged*) Nearly every issue remained in dispute, including the characterization and distribution of property, spousal maintenance, child support, parenting, and attorney fees.

The trial court entered its findings, decree of dissolution, parenting plan, and order of child support on April 17, 2015. (CP 33, 37, 54, 470) The trial court designated Amber as the primary residential parent, and gave Troy 5 out of 14 overnights. (CP 471) Neither party challenges the parenting plan on appeal.

The trial court awarded monthly child support to Amber of \$4,000, an amount over the standard calculation of \$1,862.58 (CP 56) based on monthly gross income for Troy of \$78,772 and Amber's monthly maintenance award of \$20,000. (CP 55) The trial court found that child support above the standard calculation was warranted based on:

The parents' combined monthly income exceeds \$12,000 net per month. (CP 56)

The children's needs and the family's historical child-related expenses. (CP 56)

The standard of living during the marriage was high. (FF 2.11(6), CP 39; FF 2.19(2), CP 41)

Wife's reasonable monthly expenses are anticipated to be \$24,000. (FF 2.11(7), CP 39; FF 2.19(2), CP 41; Ex. 54)

Tax planning. (CP 56)

Wealth. (CP 56)

The trial court ordered each parent to pay half the cost of postsecondary support and other "expenses not included in the transfer payment" (CP 57-58), except uninsured medical expenses, which Troy was ordered to pay. (CP 62) Troy does not challenge the medical expenses order on appeal.

Although the trial court recognized that real property owned by ACBB in Kent was “preserved to [Troy] as his separate property by the prenuptial agreement” (FF 2.8(2)(a), CP 38), it awarded Troy the real property and ACBB, valued in total at \$2.89 million, as community property. (FF 2.7(9), CP 36-37; *See* CP 44) In an unchallenged finding the trial court found that “even if the husband had met his burden of proving the continued existence of a separate property interest in ACBB, the overall division of the separate and community property as set forth above would still be fair, just and equitable in light of the fledgling character of the business when the committed intimate relationship began, the tremendous growth of the business as a result of community efforts, the length of the relationship and marriage, the gross disparity in the parties’ earning capacities and their respective future economic prospects.” (FF 2.20(3), CP 42, *unchallenged*)

The trial court otherwise evenly divided the community property and awarded each party their separate property. The trial court found that “given the nature and extent of the community and separate property, the duration of the marriage and the parties’ relationship, and the parties’ economic circumstances and prospects, a 50/50 disproportionate [sic] division in favor of the wife is fair and

equitable.” (FF 2.20(2), CP 42, *unchallenged*) The trial court awarded Troy ACBB, the BUF, his residence, real properties owned by the parties that are ACBB locations, a rental property, and an investment account started with his friends. (CP 44-46) The trial court also treated the taxes and penalties associated with the liquidation of the IRA that were paid with community funds as a predistribution to Troy. (CP 45) The trial court found that Troy “wasted community assets” by cashing out the IRA and that he “should be charged with the penalty and additional tax in the amount of \$120,136 as a predistribution to him.” (FF 2.7(20), CP 38)

The trial court awarded Amber the family residence, the vacation home on Whidbey Island, two rental properties, the parties’ investment in commercial property, \$7,272 of the parties’ limited retirement accounts (CP 44-45) and an equalizing judgment of \$596,704. (CP 46) The trial court also awarded Amber \$75,000 in attorney fees for Troy’s intransigence based on an unchallenged finding that the “husband needlessly increased wife’s attorney fees and costs as a result of his behavior and litigation tactics throughout this proceeding. The husband refused to meet court ordered deadlines; defied court orders; and was held in contempt. The husband refused to timely and completely respond to discovery

requests. The husband strategically engaged multiple lawyers throughout the litigation, resulting in delay and increased work for wife's attorneys." (FF 2.14(1), CP 40, *unchallenged*; CP 52)

Troy moved for reconsideration on the issue of child support only (CP 69-72), challenging the trial court's award above the standard calculation and failure to impute income to Amber or include income from the rental and investment properties awarded to Amber. (CP 70) Amber moved for clarification of the decree because the court's asset list dividing the property did not conform with the language of the decree.⁵ (CP 382-84) Troy largely agreed with Amber's request for clarification but also claimed the need to address a "scrivener's error," asserting that because the trial court acknowledged ACBB-owned real property was preserved to Troy as his separate property, the trial court should have reduced the community value of ACBB by the value of the real property and awarded the real property to Troy as his separate property, thus reducing the equalizing payment to Amber. (CP 395-96)

⁵ For instance, although the asset list awarded the wife a rental property and commercial property investment, the decree did not reflect the award. (CP 382-83)

The trial court clarified the decree as requested by Amber. (See CP 374-75, 463) The trial court did not specifically address the relief Troy requested in answer to Amber's motion regarding the alleged "scrivener's error" relating to the real property owned by ACBB. The trial court granted Troy's motion for reconsideration in part, by including in Amber's income, rental income of \$3,386 and imputed monthly net income of \$1,641. (CP 374, 449) The change in the parties' incomes resulted in a decrease in the standard calculation from \$1,862 to \$1,709. (CP 450) The trial court declined Troy's request to award child support at the standard calculation instead of \$4,000 due to the change in the parties' incomes (CP 374-75), reasoning that the resulting change in the standard calculation was "not appreciable and the deviation is justified" based on its earlier written findings supporting child support above the standard calculation. (RP 1279; FF 2.11, CP 39; FF 2.19 (2), CP 41; CP 450)

Troy appeals. (CP 378)

V. RESPONSE ARGUMENT

A. Standard of review.

The trial court is given “broad discretion” to divide property in a dissolution action, “because it is in the best position to determine what is fair, just, and equitable.” *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). The trial court’s award will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Wallace*, 111 Wn. App. at 707. Here, the trial court’s decision to charge the husband with the penalties associated with his liquidation of the IRA and its decision to include business real property acquired during the parties’ committed intimate relationship as part of its approximately equal division of property were all within its discretion.

Likewise, the trial court’s decision to order child support above the standard calculation is also within its discretion. “Trial courts are afforded considerable discretion in setting [] child support orders,” and these orders are “seldom disturb[ed] on appeal.” *Marriage of Zacapu & Zacapu-Oliver*, ___ Wn. App. ___, ¶ 8, ___ P.3d ___ (Feb. 17, 2016). An appellant bears “the heavy burden” of showing that the child support order was a “manifest abuse of discretion.” *Zacapu*, ___ Wn. App. ___, ¶ 8. If this Court believes that

the trial court abused its discretion in awarding child support above the standard calculation, this Court should also remand for the trial court to order the parties to pay their proportionate share (rather than equally) the cost of the children's expenses that were not included in the transfer payment. (See Cross-Appeal Argument §VI.B)

B. The trial court properly charged the husband for the taxes and penalties associated with unilaterally liquidating a community IRA.

In “shaping a fair and equitable apportionment” of the parties’ property and liabilities, the trial court has discretion to consider “gross fiscal improvidence,” the “squandering of marital assets,” “the deliberate and unnecessary incurring of tax liabilities,” and otherwise “negatively productive conduct.” *Marriage of Steadman*, 63 Wn. App. 523, 528, 821 P.2d 59 (1991); see also *Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003) (“In making its property distribution, the trial court may properly consider a spouse's waste or concealment of assets”). Here, the trial court did not abuse its discretion in treating the taxes and penalties of \$120,136 that the community paid when the husband liquidated a \$242,211 retirement account as a “predistribution” to him. In making its decision, the trial court not

only recognized that the husband's actions "wasted community assets" by liquidating a retirement account that could have been awarded to the wife, but left the estate with "minimal liquid assets" by forcing it to pay the resulting taxes and penalties. (FF 2.7(20), CP 38; FF 2.11(11), CP 40)

It is irrelevant that Amber may have known "of the conduct, had access to relevant financial information, and did not object." (App. Br. 20) In *Steadman*, this Court affirmed the trial court's decision to charge the husband with business tax liabilities that he had not paid, which it deemed was "negatively productive conduct." 63 Wn. App. at 528-29. The fact that the wife in *Steadman* may have known "of the conduct, had access to relevant financial information, and did not object" was not a bar to the trial court considering the husband's wasteful conduct.

The wife in *Steadman* worked in the business, managed the bookkeeper and accountant, and knew of the husband's history of not paying taxes, but like the wife here, had no real control to prevent the conduct. 63 Wn. App. at 524-25, 526. Even when the wife here did object to the acquisition of CJ Johnson, the husband unilaterally moved forward with the acquisition. Although the husband claimed he put his efforts toward acquiring CJ Johnson in "abeyance" after

the wife's counsel expressed her objection, he in fact was moving forward with the purchase and agreed to close only a few weeks later. (See Exs. 35, 247; RP 984) He withdrew his demand for divorce, resulting in the parties' reconciliation, which allowed him to close the purchase on time without any further interference from the wife's counsel. (See RP 420-21) Even though the husband denied this was his reason for reconciling (RP 960), the trial court was free to not believe him⁶ and find that his decision to cash out the parties' only significant retirement account was in "contemplation of divorce," "wasted community assets," and should therefore be charged to him. (FF 2.7(20), CP 38; FF 2.11(11), CP 40)

The husband tries to distinguish *Steadman* by claiming that the husband there was charged with "delinquent" taxes and penalties, whereas here, he "did not fail to pay any taxes, nor did he incur delinquency penalties." (App. Br. 22) This is a distinction without a difference. In both cases, the husbands were charged with taxes and penalties that the trial courts found were the result of the husbands' negatively productive conduct. In *Steadman*, the

⁶ *Stringfellow v. Stringfellow*, 56 Wn.2d 957, 959, 350 P.2d 1003 (1960) (it is "solely the function of the trial court" to believe or disbelieve the testimony of the parties).

husband's share of the assets was reduced by the unpaid taxes and penalties that the trial court ordered him to pay post-dissolution. Here, the husband's share of the assets were reduced in the same way by treating the already paid taxes and penalties as a "predistribution."

It also is irrelevant that the husband's actions here facilitated the purchase of CJ Johnson, which the wife acknowledged was ultimately a good idea. (App. Br. 20) Presumably, the taxes incurred by the husband in *Steadman* was a result of income that the community business earned and benefitted from. Even if there were some benefit to the community, if it comes by way of unnecessary costs and negatively productive conduct, the party who incurs that cost should be charged with it. Thus, while the wife did not question the decision to purchase CJ Johnson, she did question the husband's means of funding the purchase – by liquidating one of the few community assets that could be awarded to the wife with attendant taxes and penalties.

The husband claims that he could not have "wasted community assets" because there was no evidence of an "alternate source" to obtain the funds. (App. Br. 21) But the parties owned \$2.46 million in unencumbered real property against which the

husband could have borrowed the \$122,075 ultimately netted from liquidating a \$242,211 asset. (CP 44) The husband's decision to do otherwise is the type of "gross fiscal improvidence" that this Court has acknowledged the trial court can consider in "the attainment of a just and equitable distribution of marital property." *Steadman*, 63 Wn. App. at 527-28 (citing *Marriage of Clark*, 13 Wn. App. 805, 808, 538 P.2d 145, *rev. denied*, 86 Wn.2d 1001 (1975)).

Finally, the husband misplaces his reliance on *Marriage of Williams*, 84 Wn. App. 263, 927 P.2d 679 (1996), *rev. denied*, 131 Wn.2d 1025 (1997) (App. Br. 20-21). In *Williams*, Division Three affirmed the trial court's finding that the wife's use of credit cards to gamble was not wasteful because the husband knew "approximately what was going on." 84 Wn. App. at 271. On appeal, the husband claimed that the credit card debts associated with the wife's gambling should not have been treated as a community liability. In affirming, Division Three deferred to the trial court's discretion "to consider whose negatively productive depleted the couple's assets and to apportion a higher debt load or fewer assets to the wasteful marital partner." *Williams*, 84 Wn. App. at 270. Under the particular circumstances of that case, the *Williams* court held that it was appropriate for the trial court to consider the fact that gambling was

“legal and even encouraged in Washington” and was “more in the nature of entertainment costs than dissipation of assets,” in denying the husband’s request to charge the wife with the credit card debts. *Williams*, 84 Wn. App. at 270.

Likewise here, this Court should defer to the trial court’s determination that the taxes and penalties incurred by the husband in liquidating the IRA was a “waste of community assets” done in “contemplation of divorce,” leaving the parties with “minimal liquid assets.” (FF 2.7(20), CP 38; FF 2.11(11), CP 40) But for the husband’s unilateral decision to liquidate the IRA, the community would have had over \$120,000 in liquid assets that were otherwise expended to pay taxes and penalties. The trial court properly took into account the husband’s textbook “divorce planning” in dividing an estate that was made less liquid by the untoward actions of the spouse who controlled the marital estate.

C. It was within the trial court’s discretion to include real property acquired during the parties’ committed intimate relationship as part of its equal division of community assets.

The husband complains that the trial court erred in including the value of certain real property that was acquired during the parties’ committed intimate relationship but purportedly

“preserved” as his separate property by the parties’ prenuptial agreement in the value of ACBB, which the trial court found was community property. Specifically, the husband argues that “the result was in effect to award [the wife] 50% of [the husband]’s separate property as if it were community property.” (App. Br. 23) But the trial court did not award the husband’s separate property to the wife. Instead, in making its division it considered the “nature and extent of the separate property” awarded to the husband, and divided the property before it in a manner it deemed fair and equitable, as required by RCW 26.09.080.

Even if including the value of the real property as part of the value of ACBB resulted in a slightly disproportionate division of the community property (50.8% versus 50%), the trial court in an unchallenged finding found its property division, exactly as made, “fair and equitable:”

Given the nature and extent of the community and separate property, the duration of the marriage and the parties’ relationship, and the parties’ economic circumstances and prospects, a 50/50 disproportionate division in favor of the wife is fair and equitable. The property should be divided as set out in attached Exhibit A.

(FF 2.20(2), CP 42, *unchallenged*)

Based on the trial court's findings, it is clear that the trial court was not bound by a "decreed 50/50 division of community assets." (App. Br. 24) In fact, the trial court found that even if there had been any error in its characterization of assets, "the overall division of the separate and community property as set forth above would still be fair, just and equitable." (FF 2.20(3), CP 42, *unchallenged*) Further, when the husband brought the alleged "scrivener's error" of including a purported separate asset in the equal division of community assets to the trial court's attention, the trial court exercised its discretion by declining to make any change to its property distribution that it already found "fair and equitable." See *e.g. Marriage of Rockwell*, 141 Wn. App. 235, 246-47, 170 P.3d 572 (2007) (inferring from the trial court's denial of the husband's motion for reconsideration pointing out a "factual error" that the court nevertheless intended to divide the property exactly as it had regardless of any mistake), *rev. denied*, 163 Wn.2d 1055 (2008).

Absent any evidence that the trial court was significantly influenced by the character of property in dividing the assets, remand is not necessary. *Marriage of Langham/Kolde*, 153 Wn.2d 553, 563-64, fn. 7, 106 P.3d 212 (2005) ("Remand is necessary only when the characterization of the property is crucial to the

distribution) (*citing Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989)). The husband’s challenge to the trial court’s property distribution, which it found “fair and equitable,” and amounts to less than 1 percent of the marital estate, is meritless.

D. In light of the family’s standard of living during the marriage and historic child-related expenses, the trial court properly awarded child support above the standard calculation.

The legislative intent in establishing child support is “to insure that child support orders are adequate to meet a child’s basic needs and to provide additional child support commensurate with the parents’ income, resources, and standard of living.” RCW 26.19.001. The economic table is presumptive for combined monthly net incomes up to and including \$12,000. RCW 26.19.020; RCW 26.19.065(3). When combined monthly net income exceeds \$12,000, as it does here four times over,⁷ the court has discretion to exceed the presumptive amount of support (the “standard calculation”) upon written findings of fact. RCW 26.19.020; RCW 26.19.065(3); *Marriage of McCausland*, 159 Wn.2d 607, 620, ¶ 27, 152 P.3d 1013 (2007). The statute does not require that the primary

⁷ Appellant does not challenge the trial court’s calculation of the parties’ net monthly income as \$52,854.80. (CP 458)

residential parent prove “extraordinary needs” before the trial court may award child support above the advisory amount when the parents’ incomes exceed \$12,000. *See Marriage of Krieger/Walker*, 147 Wn. App. 952, 963, ¶ 19, 199 P.3d 450 (2008) (reversing order denying child support above the standard calculation because the trial court used the wrong legal standard by requiring a showing of “extraordinary needs”).

In establishing child support above the presumptive amount, the Supreme Court in *McCausland* held that the trial court should consider: (1) the parents’ standard of living, and (2) the children’s special medical, educational, or financial needs. 159 Wn.2d at 620, ¶ 28, citing *Marriage of Daubert*, 124 Wn. App. 483, 495-96, 99 P.3d 401 (2004); *Marriage of Rusch*, 124 Wn. App. 226, 233, 98 P.3d 1216 (2004). But the Court emphasized that the trial court is not limited to consideration of these factors alone. *McCausland*, 159 Wn.2d at 620, ¶ 28. Overall, the amount of child support must relate to the children’s needs, keeping in mind the intent of the legislature is to insure that support not only meets the children’s “basic needs” but also provides “additional child support commensurate with the parents’ income, resources, and standard of living” in light of the “totality of the financial circumstances.” *McCausland*, 159 Wn.2d at

617, ¶ 18; *Marriage of Leslie*, 90 Wn. App. 796, 804, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999); RCW 26.19.001.

The only limit to the trial court’s discretion in ordering child support above the standard calculation is that the trial court make written findings of fact that reflect its consideration of the appropriate factors. *McCausland*, 159 Wn.2d at 620, ¶ 27. Here, the trial court made written findings supporting its decision to award child support above the standard calculation. The trial court found, among other things, that the “children’s needs and the family’s historic child-related expenses” warranted child support above the standard calculation. (FF 2.11, CP 39-40; FF 2.19(2), CP 41; CP 450)

The husband relies on the trial court’s oral comments that its award of child support “has never been about need” to claim that the trial court’s award of child support above the standard calculation was improper. (App. Br. 30) But to the extent the trial court’s oral comments are inconsistent with its written findings supporting its award of child support above the standard calculation, they cannot be used to impeach the written findings. *Marriage of Raskob*, 183 Wn.App. 503, 519-20, ¶ 32, 334 P.3d 30 (2014). In any event, the trial court was correct – child support is not intended merely to cover the child’s “subsistence” but to “sustain the child at a standard of

living concomitant with her divorcing parents' incomes." *P.O.P.S. v. Gardner*, 998 F.2d 764, 767 (9th Cir. 1993); *see also McCausland*, 159 Wn.2d at 619-20, ¶ 26 ("RCW 26.19.001 requires that children receive support adequate to meet their basic needs *and* additional support commensurate with the parents' income, resources, and standard of living") (emphasis added).

In this case, the trial court acknowledged that in addition to the "children's needs," the family's "wealth" had afforded the family a "high" standard of living during the marriage. (FF 2.11(6), CP 39; FF 2.19(2), CP 41; CP 450) This high standard of living is evidenced by the trial court's unchallenged findings that the mother's monthly expenses of \$24,000, including those related to the daughters, were reasonable. (FF 2.11(6), (7), (10), CP 39-40; FF 2.19(2), CP 41)

There is nothing "arbitrary" in the amount of child support ordered by the trial court. (App. Br. 31) While the transfer payment of \$4,000 and the unchallenged award of \$20,000 in monthly spousal maintenance appears to allow the mother to come close to meeting her monthly expenses of \$24,000, in reality it still leaves a deficit in her household. Even with the rental income that the

mother will receive, her net income after taxes is less than \$17,000.⁸ (CP 458) Meanwhile, after paying child support, the father will have over \$30,000 available to meet his claimed monthly expenses at trial of nearly \$19,000, leaving him with a monthly surplus of \$11,000. (CP 458; Ex. 215)

The father claims that the fact that the parents are required to “contribute 50/50 to the children’s expenses not included in the transfer payment” is a reason to *not* award child support above the standard calculation. (App. Br. 30) But in fact the trial court’s decision to make the mother equally responsible for these expenses when her proportionate share of the income is 34%, contrary to RCW 26.19.080(1), is a reason *to* award child support above the standard calculation. The mother needs additional funds in her household in order to contribute the same amount towards the children’s extraordinary expenses because her income is significantly less than the father. As set out in the mother’s conditional-cross appeal (Cross-Appeal Argument § VI.B), if this Court remands on the issue of the amount of the transfer payment, it should also remand for the

⁸ The mother’s monthly net income for purposes of child support is \$18,162.50, but this amount includes \$1,641.50 in imputed income that she does not in fact have available to her. (CP 458)

trial court to reconsider the parents' obligation on the children's extraordinary expenses.

In any event, the extraordinary expenses that the parents will share equally are only a fraction of the cost necessary to meet the children's "basic needs" and maintain their standard of living. The monthly expenses for vacations, housing, utilities, and food and supplies in the mother's household, plus the children's clothing of \$1,000 per month, are over \$11,000. (Ex. 54) Allocating only half of the vacation expenses and the mother's household expenses to the children still leaves monthly expenses of over \$6,000 related to the children. The father's proportionate share of those expenses is \$3,958, which dwarfs the standard calculation of \$1,709 and is in fact approximately the transfer payment awarded by the court.

By ordering child support of \$4,000 the trial court met the "primary goal of preventing a harmful reduction in [the children]'s standard of living, in the best interests of the children whose parents are divorced." *Marriage of Mattson*, 95 Wn. App. 592, 600, 976 P.2d 157 (1999). This Court should affirm this, and all, of the trial court's wholly discretionary decisions.

VI. CROSS-APPEAL ARGUMENT

A. **The trial court erred in failing to order the parties to pay their proportionate share of postsecondary support.**

The trial court erred in ordering the parents to equally share the cost of the daughters' postsecondary support. (CP 451-52) "[T]he legislature intends that the child support obligation should be equitably apportioned between the parents. RCW 26.19.001. Postsecondary educational support is child support. The schedule achieves equitable apportionment of support for minor children based on the income of the parents." *Marriage of Daubert & Johnson*, 124 Wn. App. 483, 502, ¶ 44, 99 P.3d 401 (2004), *rev'd on other grounds by Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). Accordingly, "postsecondary support *must* be apportioned according to the net income of the parents." *Daubert & Johnson*, 124 Wn. App. at 505, ¶ 52 (emphasis added).

In this case, the mother's proportionate share of the income is only 34%. (CP 458) The trial court erred in ordering the mother to pay more than her proportionate share of postsecondary support by making the parents equally responsible for the cost. Although the trial court purportedly made findings warranting a "deviation" (CP 39, 41, 450), those findings were directed towards the trial court's

decision to award child support above the standard calculation – not to deviate from the requirement that parties share in the cost of postsecondary support in proportion to their incomes. In fact, those findings do not address postsecondary support at all – which is not surprising since the children were ages 12 and 7 at the time of trial – nor does it address the fact that the mother will no longer have maintenance available to her when the daughters start college.

This Court should reverse and remand with directions to the trial court to order the parents to pay their proportionate share of postsecondary support.

B. The trial court erred in ordering the parents to share equally in the “payment for expenses not included in the transfer payment.” (Conditional Cross-Appeal)

Only if this Court remands for the trial court to reconsider its award of child support above the standard calculation, this Court should also remand for the trial court to reconsider its decision requiring the parents to each pay half of the children’s extraordinary expenses. In addition to the parents’ basic child support obligation, the trial court ordered the parents to equally share in the cost of “expenses not included in the transfer payment,” including extracurricular activities, dental, orthodontia, counseling, daycare, electronics, and cell phones. (CP 452) These expenses fall under

“special child rearing expenses” and are governed by RCW 26.19.080(3), which provides that “these expenses shall be shared by the parents in the same proportion as the basic child support obligation.” This statutory language is mandatory. *Marriage of Yeamans*, 117 Wn. App. 593, 599-600, 72 P.3d 775 (2003).

“Once the trial court determines that extraordinary expenses are reasonable and necessary, it is required to allocate them in proportion with the parents' income.” *Yeamans*, 117 Wn. App. at 600. The trial court apparently ordered the parents to each pay half the cost of these expenses in conjunction with its decision to order child support above the standard calculation. (*See* RP 1273) If this Court remands on the issue of the transfer payment, this Court should also remand on this issue and direct the trial court to apportion extraordinary expenses in proportion to the parents' incomes.

C. This Court should award attorney fees to the wife.

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).

The husband's appeal of wholly discretionary decisions is meritless. His complaints about the trial court's property distribution amounts to 2% of the entire marital estate and is solely intended to further reduce the only liquid asset awarded to the wife – her money judgment. His complaint about the trial court's award of child support above the standard calculation is also without merit in light of the mother's undisputed and unchallenged monthly household expenses. The husband has nearly double the income of the wife (CP 458), and she should not be required to use the maintenance and property awarded to her to defend the trial court's discretionary decisions. The wife will comply with RAP 18.1(c).

VII. CONCLUSION

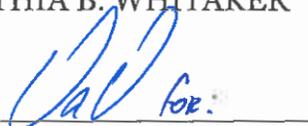
This Court should affirm the trial court's discretionary decisions, reverse the trial court's legal error in requiring the parties to equally share the cost of postsecondary support, and award attorney fees to the wife. If this Court remands on the issue of the transfer payment, this Court should also remand for the trial court to reconsider its apportionment of the children's expenses that are not included in the transfer payment.

Dated this 20th day of April, 2016.

SMITH GOODFRIEND, P.S.

LAW OFFICES OF
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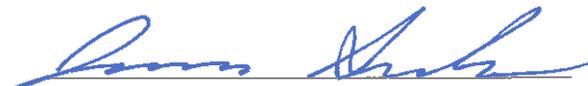
DECLARATION OF SERVICE

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

That on April 20, 2016, I arranged for service of the foregoing Respondent/Cross-Appellant's Brief, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 20th day of April, 2016.


Jenna L. Sanders