

No. 35734-8--II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

In Re the Marriage of:

CHERYL ANN GREENLAND,

Respondent,

and

GEORGE TRUMAN GREENLAND,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY
THE HONORABLE BRIAN E. CHUSHCOFF, PRESIDING

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

A. FACTS

Petitioner, Cheryl Ann Greenwood, hereinafter Cheryl, was born on 07/07/1958. RP 1 at 21. Cheryl earned a bachelor's degree in 1993 in Human Services and Education from Western Washington University. RP 1 at 23. In 1997, Cheryl began work as a licensed massage therapist for a hospital. RP 1 at 24. From 1999 to 2000, Cheryl took a second job in the hospital's employee assistance program. RP 1 at 25. In 2000, Cheryl was promoted to the hospital's marketing department, where she worked until 2003. RP 1 at 25. In 2003, Cheryl worked in San Diego during a separation from her husband, George Greenland (George). RP 1 at 21-22, 25. In 2003, for a short period of time, Cheryl was unemployed. RP 1 at 33; EX 9. In 04/04, after returning to Washington, Cheryl went to work as a medical receptionist. RP I at 26. Cheryl works 30 to 40 hours per week at her job. RP 1 at 26.

George has a teenage son, B., from another relationship. RP 2 at 63; RP 3 at 63. George's current child support obligation is \$350.00 per month. RP 3 at 63. George's son resides with him much of the time. RP 3 at 109; EX 68 at 4.

Cheryl was married prior to her marriage to George. RP 1 at 24. Cheryl has an adult daughter. RP 1 at 22. Cheryl received approximately

\$35,000 from her second divorce. RP 1 at 24; RP 2 at 49; EX 69. Cheryl also received \$491.00 per month from her ex-husband's deferred compensation account, but those payments ended in October 2006. RP 2 at 50-52.

Cheryl and George began cohabitating in May 1996. RP 1 at 21. The parties were married on 07/04/96 in Nevada. RP 1 at 21; CP 119. Cheryl and George had no children during their marriage. RP 1 at 22.

When George and Cheryl began living together, George was employed as a computer technician for Thurston County. RP 1 at 36; RP 3 at 22. George earned \$3,300 per month. RP 3 at 22. George quit his job with Thurston County in August 1997, one month after George and Cheryl were married. RP 1 at 37. In January 1998, George went to work for a local computer store for \$8.00 per hour. RP 1 at 38; RP 3 at 22. In 1999, George went to work for a local credit union, earning \$4,000 per month. RP 1 at 38-39; RP 3 at 22-23. About six months later, George went to work for a software company, again earning about \$4,000 per month. RP 1 at 38; RP 3 at 22-23. In 2000, George worked for the State of Washington Department of Social and Health Services as information technology manager for six months, earning about \$5,000 per month. RP 1 at 39; RP 3 at 23. After quitting work for the State in September 2000, George attempted a couple of business ventures that proved unsuccessful. RP 1 at

39-40; RP 3 at 23-24. In 2003, George went to work as a mortgage loan officer with a mortgage company. RP 1 at 40; RP 3 at 24-25. In March 2004, George went to work as a card dealer at a local casino, and left that job in February 2005. RP 1 at 39; RP 3 at 25. In 2006, George worked for a labor contractor, earning \$9.00 to \$11.00 per hour. RP 3 at 20-21. George received unemployment compensation when he was not working. RP 3 at 25-26. When he was working, George earned twice as much as Cheryl earned. RP 3 at 26.

In 1998, George and Cheryl's combined income was \$33,895, and George earned \$4,500 in unemployment. RP 1 at 28-29; EX 1. In 1999, George and Cheryl's combined income was \$25,160.00, and George earned \$8,478 in unemployment. RP 1 at 29; EX 2. In 2000, George earned \$31,374 while working for DSHS, and George received \$2,063 in unemployment compensation. RP 1 at 29-30; EX 3, 4. In 2000, Cheryl earned \$27,063. RP 1 at 31; EX 5. In 2001, George earned \$4,055 in unemployment compensation, and Cheryl earned \$34,792. RP 1 at 31-32; EX 6, 7. In 2002, Cheryl earned \$35,562. RP 1 at 32-33; EX 8. In 2003, Cheryl earned \$9,152 in wages and \$10,424 in unemployment compensation. RP 1 at 33; EX 9. In 2004, Cheryl earned \$17,246, and in 2005, she earned \$24,040. RP 1 at 34; EX 10, 11. .

George and Cheryl resided at 6100 Laguna Lane S.E., in Lacey, hereinafter "Laguna Lane", except for their separation. RP 1 at 44-45. George and his mother, Betty Watson, purchased Laguna Lane in 1994. RP 1 at 45; RP 3 at 20. Laguna Lane is a three bedroom, two-and-half bath, single-family house, approximately 1,400 square feet in size, located in a residential neighborhood. RP 3 at 42. George and Betty paid \$96,500 for Laguna Lane, with a \$25,000.00 down payment. RP 3 at 28, 30-31; EX 45. Betty gifted the \$25,000.00 down payment on Laguna Lane to George. RP 3 at 138. Betty also signed the note to finance the balance of the purchase price. RP 3 at 139; EX 45. Betty died in November 2004. RP 1 at 55.

George took out a second mortgage on Laguna Lane in 1996, in order to pay off certain debts. RP 3 at 32-33; EX 46. In 1999, motivated by a drop in interest rates, George and Cheryl refinanced both the first and second mortgages on Laguna Lane. The term of the replacement mortgage was 20 years, and the monthly payment was \$604.00 RP 3 at 34-35; EX 47. Both George and Cheryl signed the new deed of trust. RP 1 at 47; EX 13. In signing the new deed of trust, George and Cheryl pledged their community credit for the mortgage payment. RP 1 at 47-48; EX 13; EX 47. Both Cheryl and George made payments on the mortgage during their marriage. RP 1 at 48.

Contemporaneously with that refinance, George executed a quitclaim deed as grantor in his separate estate to George and Cheryl, husband and wife. RP 1 at 45-47; EX 12. The quitclaim deed recited its purpose: “*To Create Community Property Interest.*” RP 1 at 47; EX 41. George put Cheryl on the title to Laguna Lane because she loved him. RP 2 at 80. The lender did not require that George quitclaim an interest in Laguna Lane to Cheryl. RP 1 at 81.

During their marriage, George and Cheryl maintained separate bank accounts. RP 1 at 41. Cheryl did not sign on George’s bank account. RP 1 at 42. George deposited into his account his paychecks, unemployment payments, and money received from his mother. RP 1 at 41. Both Cheryl and George made payments on the mortgage during their marriage from their separate accounts RP 1 at 48. During their marriage, Cheryl also wrote numerous checks to George from her account to pay community bills. RP 1 at 49-51. Cheryl also wrote checks from her account to pay the mortgage on Laguna Lane. RP 1 at 51-53; EX 15. During their marriage, Cheryl and George made very few improvements to Laguna Lane. RP 1 at 53.

After the 1999 refinance, George and Cheryl engaged in a series of refinances of the mortgage on Laguna Lane. In 2001, in addition to obtaining a lower interest rate and a 15-year term, George and Cheryl

increased the principal of the mortgage to pay off \$14,697.53 in community credit card debt that they had accumulated while cohabitating or married. RP 3 at 36, 38; EX 48. In 2003, George and Cheryl refinanced again to obtain a 5.2 percent interest rate and a payment of \$725.00 per month. RP 3 at 39; EX 49.

In November 2003, upon her return from San Diego, George and Cheryl entered into a debt consolidation agreement with American Financial Solutions (AFS). RP 1 at 69-70. Pursuant to that agreement, George and Cheryl owed a monthly payment of \$659 to AFS. RP 1 at 70; EX 23. In the last few months of their marriage, Cheryl paid the mortgage on Laguna Lane and George paid AFS. RP 2 at 64.

George and Cheryl separated on 10/12/05. RP 1 at 21; CP 120. At the time of separation, the mortgage payment on Laguna Lane was \$735. RP 1 at 55. In October 2005, Cheryl knew that the mortgage on Laguna Lane was delinquent, but she was afraid to tell George because he had threatened to kill her. RP 2 at 65-66.

B. PROCEDURE

Cheryl filed for dissolution of marriage on 11/10/05. RP 1 at 22; CP 1. Cheryl then sought and obtained a temporary order on 11/29/05 that restrained George from molesting or disturbing Cheryl or entering or remaining within 500 feet of her home or work. CP 6. The 11/29/05

temporary order also required George to pay the mortgage on Laguna Lane, and required each party to pay 50 percent of the monthly AFS payment, with Cheryl to pay her 50 percent directly to George. CP 7. George was also ordered to make the monthly AFS payment, and to bring that account current. CP 7. The trial court also ordered George to pay \$500 in temporary attorney fees to Cheryl by 12/01/05. CP 8.

Pursuant to the 11/29/05 order, Cheryl made payments totaling \$1,650 directly to George, but George did not forward the payments to AFS. RP 2 at 15. George also failed to make payment on the mortgage, and on December 13, 2005, a notice of mortgage foreclosure dated 12/13/05 was sent to Cheryl and George. RP 2 at 13-14; Ex 33. George also failed to timely pay Cheryl the attorney fees awarded by the trial court. CP 9.

In response to George's failure to comply with the 11/29/05 order, Cheryl sought and obtained an order of contempt dated 02/13/06. CP 9-13. Therein, the trial court found George in contempt for failure to pay community debts, despite receipt of \$1,650 from Cheryl in payment of those debts. CP 10. The 02/13/06 order also entered judgment against George and for Cheryl \$1,831.86, and provided that George must pay that amount in three monthly payments by 04/01/06 to purge the contempt. CP 12. The 02/13/06 order also relieved Cheryl of the obligation to pay 50

percent of the AFS payment, and ordered Laguna Lane to be sold if the mortgage fell more than two payments behind. CP 12. The 02/13/06 order further provided that the \$7,752.27 in costs to cure the mortgage on Laguna Lane would be rolled into the mortgage balance, and would be the separate liability of George. CP 12. The 02/13/06 order also ordered that George was responsible for \$750 in refinance costs. CP 12. The 02/13/06 order awarded Cheryl an additional \$1,000 in attorney fees against George. CP 12.

George paid Cheryl only \$610.46 of the \$1,831.85 judgment. RP 2 at 17. George refinanced the mortgage on Laguna Lane, with a new monthly payment of \$935.63 per month. RP 2 at 20-21; EX 35.

On 05/09/06, a second notice of default was issued on the Laguna Lane mortgage. RP 2 at 21-22; EX 36. The notice recited a delinquency of \$3,396.55, missed payments of \$2,433.36, and costs of \$1,272.20. RP 2 at 22-23; EX 36. Prior to receiving that notice of default, Cheryl and not received any notice from George that he was not making the mortgage payments. RP 2 at 29. On 05/23/06, Cheryl, through her counsel, wrote to George's counsel, suggesting a sale of Laguna Lane. RP 2 at 23-25; EX 37. George's counsel responded with a letter wherein it appeared that George was willing to cooperate in the sale of Laguna Lane. RP 2 at 26-27; EX 38.

In May 2006, George filed a motion to amend the trial court's 11/29/05 order. RP 2 at 28. Therein, George proposed the Cheryl pay half the mortgage on Laguna Lane. RP 2 at 28. In its order of 06/05/06, the trial court denied revision of the 11/29/05 order. CP 15. The 06/05/06 order directed that Laguna Lane be immediately listed for sale, and that Cheryl was to select a realtor, and ordered George to cooperate in the sale. CP 12-13. The 06/05/06 order awarded Cheryl \$750 in attorney fees against George, payable within 30 days. CP 12. In June 2006, George reinstated the mortgage on Laguna Lane by paying \$4,504.63. RP 2 at 33-34; EX 42.

George sought revision of the 06/05/06 order, and on 06/30/06, the trial court ordered that the sale of Laguna Lane was not revoked, but that George was to post a \$10,000 bond by 07/30/06, to bring the mortgage current, and to provide proof of payment to Cheryl. CP 39. George thereafter failed to post the bond, and provided proof to Cheryl that the mortgage payments current only twice in the four months before trial. RP 2 at 31-32, 35-37; EX 44.

Trial was held on 10/26/06 and 10/30/06. RP 1, 2, 3.¹ The trial court issued its oral ruling on 11/01/06. RP 4. On 12/08/06, the trial court entered findings of fact, conclusions of law, and a decree of dissolution. CP 119-27; CP 128-36. Therein, the trial court found that Laguna Lane was community property, and awarded it to George. CP 120, 129. The trial court ordered that George was to pay the mortgage on Laguna Lane. CP 131. The trial court found that Cheryl was entitled to a lien on Laguna Lane in the amount of \$51,034.89, with interest at 7 percent, a monthly payment of \$586.92, to be secured by a deed of trust. CP 123, 130, 133-34. The trial court reduced previously unpaid attorney fees to judgment in Cheryl's favor, but otherwise denied Cheryl's request for attorney fees. CP 122, 123, 133.

IV. ARGUMENT

A. STANDARDS OF REVIEW

The trial court has broad discretion in awarding property under RCW 26.09.080, and its award will be reversed only upon a showing of a manifest abuse of discretion. *Marriage of Brewer*, 137 Wn. 2d 756, 769, 976 P. 2d 102 (1999); *Marriage of Kraft*, 119 Wn. 2d 428, 450, 832 P. 2d

¹ Cheryl designates the reports of proceedings as follows:

1. 10/26/06 trial, morning session-RP 1
2. 10/26/06 trial, afternoon session-RP 2
3. 10/30/06 trial RP 3
4. 11/01/06 oral ruling RP 4

871 (1992); *Marriage of Kaseburg*, 126 Wn. App. 546, 556, 108 P. 3d 1278 (2005); *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P. 3d 1131, *rev. den.* 148 Wn. 2d 1011, 64 P. 3d 650 (2003); *Marriage of White*, 105 Wn. App. 545, 549 n. 1, 20 P. 3d 481 (2001); *Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P. 2d 954 (1996); *Marriage of Wright*, 75 Wn. App. 230, 234, 896 P. 2d 735 (1995). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Marriage of Gillespie*, 89 Wn. App. 390, 398-99, 948 P. 2d 1338 (1997).

Review is limited to whether the trial court's distribution of property was fair, just and reasonable. *Marriage of Crosetto*, 82 Wn. App. 556; *Marriage of Wright*, 75 Wn. App. 234. The trial court, having heard first-hand all of the evidence, is in the best position to determine what is fair, just and equitable. *Marriage of Brewer*, 137 Wn. 2d 769; *Marriage of Wallace*, 111 Wn. App. 707. An equitable division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances, past and present, and an evaluation of the future needs of the parties. *Marriage of Crosetto*, 82 Wn. App. 556

In a marriage dissolution, all property, both separate and community, is before the court for dissolution. *Friedlander v. Friedlander*, 80 Wn. 2d 293, 305, 494 P. 2d 208 (1972); *Marriage of Olivares*, 69 Wn.

App. 324, 328-29, 848 P. 2d 1281, *rev. den.*, 122 Wn. 2d 1009, 863 P. 2d 72 (1993). In making its distribution, the trial court focuses on the property before it, and if an asset has been disposed of by the parties, the trial court has no ability to distribute that asset. *Marriage of Kaseburg*, 126 Wn. App. 556; *Marriage of White*, 105 Wn. App. 549. In making its distribution, the trial court may also consider a spouse's significant contributions to, or wasting of, assets on had at trial. *Marriage of White*, 105 Wn. App. 551.

Characterization of property as community or separate is not controlling in division of property between spouses in a dissolution proceeding. *Marriage of Brewer*, 137 Wn. 2d 766; *Marriage of White*, 105 Wn. App. 549 n. 7. Mischaracterization of property is not grounds for setting aside a trial court's property distribution if it is fair and reasonable. *Marriage of Kraft*, 119 Wn. 2d 449; *Baker v. Baker*, 80 Wn. 2d 736, 745-46, 498 P. 2d 315 (1972); *Worthington v. Worthington*, 73 Wn. 2d 759, 768, 449 P. 2d 478 (1968); *Marriage of Gillespie*, 89 Wn. App. 399; *Marriage of Shannon*, 55 Wn. App. 137, 141-42, 777 P. 2d 8 (1989). Instead, remand is required only if (1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized

the property, it would have divided it in the same way. *Marriage of Kraft*, 119 Wn. 2d 449 (quoting *Marriage of Shannon*, 55 Wn. App. 142).

The law favors characterization of property as community property instead of separate property unless there is clearly no question as to its character. *Marriage of Brewer*, 137 Wn. 2d 766 n. 46; *Marriage of Davison*, 112 Wn. App. 251, 258, 48 P. 3d 358 (2002). See also, *Volz v. Zang*, 113 Wash. 378, 383, 194 P. 409 (1920) (“*The policy of the law is in favor of community property...*”).

The standard of review of the trial court’s findings of fact and conclusion of law is whether the findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law. *In re; LaBelle*, 107 Wn.2d 196, 728 P.2d 138 (1986).

The foregoing principles guide the Court’s review in this case.

B. THE TRIAL COURT DID NOT ERR IN CHARACTERIZING THE HOUSE AS COMMUNITY PROPERTY.

Separate property may be changed into community property by several means, including by deed. *In re Witte’s Estate*, 21 Wn. 2d 112, 125, 150 P. 2d 595 (1944). (“*The status of property, when once fixed, remains so in character until changed by deed, by agreement of the parties, by operation of law or by the working of some form of estoppel.*”); *Volz v. Zang*, 113 Wash. 383 (“[S]eparate property may be changed by a

proper conveyance or agreement into community property.”). George did precisely that when he quitclaimed his interest in Laguna Lane to himself and Cheryl. RP I at 47; RP III at 113-14; EX 12. The quitclaim deed recites, on its face, that George’s purpose in executing it was “...*To Create Community Property Interest.*” EX 12. George’s quitclaim deed to himself and Cheryl therefore fixed character of the property as community property. *Bryant v. Stablein*, 28 Wn. 2d 739, 747, 184 P. 2d 45 (1947).

George argues that the trial court invoked a presumption of gift by placing Cheryl on the quitclaim deed. BA at 20-21. The trial court’s characterization of Laguna Lane as community property contains no mention of such a presumption. CP 103-118; RP 4 at 5. Nor did the trial court need such a presumption, as the quitclaim deed was effective to change the character of Laguna Lane from separate to community property. *Bryant*, 28 Wn. 2d 747.

George misplaces reliance upon *Marriage of Hurd*, 69 Wn.App. 38, 848 P. 2d 185, *rev. den.*, 122 Wn.2d 1020, 863 P. 2d 1353 (1993) and *Marriage of Olivares*, 69 Wn.App. 324, 336, 848 P. 2d 1281, *rev. den.*, 122 Wn. 2d 1009, 863 P. 2d 72 (1993). BA at 20-21. Neither *Hurd* nor *Olivares* involved a quitclaim deed such as George’s deed to himself and Cheryl. In *Hurd*, during the parties’ marriage, the husband requested that purchasers of the husband’s separate property lot on Guemes Island deed

the property back in the names of both the husband and wife. The husband later testified that his purpose in placing the wife's name on the deed was "*love and affection*". On appeal, the court concluded that placing both husband and wife on the deed as grantees created a presumption of gift. 69 Wn. App. 51-52. The court, however, remanded the case for a determination of what the husband meant by "*love and affection*", and to enter a finding whether the husband intended the deed as a gift to their community. *Ibid.* Here, in contrast, the quitclaim deed's recited purpose, to create a community property interest, is unambiguous, and therefore no further finding as to George's intent is necessary. To the extent that *Hurd* applies here, a presumption of gift as a result of the quitclaim deed is no less supportable here than in *Hurd*.

In *Hurd*, the court held that such a presumption of gift can be overcome only by clear and convincing proof. 69 Wn. App. 51. Such a burden of proof means that the fact to be proven must be shown to be "*highly probable*". *Estate of Mumby*, 97 Wn. App. 385, 391, 982 P. 2d 1219 (1999). In this regard, George offers only his self-serving testimony that he placed Cheryl's name on the quitclaim deed at the request of his ailing mother, and because the title company apparently required such a transfer at the time of the 1999 refinance of Laguna Lane. BA at 21. Such testimony is insufficient to satisfy the clear and convincing burden of

proof. George's testimony is also inadmissible to contradict the quitclaim deed's plainly stated purpose to create a community property interest.

Marriage of Schweitzer, 132 Wn. 2d 318, 326-27, 937 P. 2d 1052 (1997); *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P. 2d 222 (1990).

Equally misplaced is George's reliance upon *Marriage of Olivares*, 69 Wn. App. 324, 336, 848 P. 2d 1281, *rev. den.*, 122 Wn. 2d 1009, 863 P. 2d 72 (1993). In *Olivares*, the appellate court affirmed the trial court's finding that an automobile purchased by the husband with his separate credit, with the wife's name placed on the title, was a gift to the wife. 69 Wn. App. 336. *Olivares* does not support George's position.

George argues that the quitclaim deed was executed without consideration to him, and is therefore voidable. BA 21-23. George's argument is neither factually nor legally supportable. The quitclaim deed was executed contemporaneously with the 1999 refinance of Laguna Lane. EX 12, 47. As part of that refinance, George and Cheryl signed the note and deed of trust, thereby obligating the Greenland's marital community. RP 1 at 47-48; EX 13; EX 47. RCW 26.16.030 (3) ("*Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.*"). The

signatures of George and Cheryl on the refinance note presumably created a community obligation. *National Bank of Commerce*, 1 Wn. App. 713, 718, 463 P. 2d 187 (1969). Cheryl's promise to pay the note and her promises in the deed of trust constituted sufficient consideration for the quitclaim deed. *Emberson v Hartley*, 52 Wn. App. 597, 601, 762 P. 2d 364, *rev. den.*, 112 Wn. 2d 1007 (1989).

George misplaces reliance upon *Yeager v. Yeager*, 82 Wash. 271, 144 P. 22 (1914). BA at 21-23. Cheryl's signatures on the 1999 refinance note and deed of trust distinguish this case from *Yeager*. In *Yeager*, unlike this case, the parties had been estranged. In *Yeager*, unlike this case, the wife's execution of a deed conveying her community property interest in the parties' real property came at the request of the husband, who offered to pay her \$15.00 per month in exchange, as part of a post-separation settlement of the parties' differences. 82 Wash. 272. In *Yeager*, unlike this case, the wife had recently been released from a sanitarium. 82 Wash. 273. In *Yeager*, unlike this case, the wife executed the deed to her husband at a meeting held the office of husband's attorney, when the wife was unrepresented. *Ibid.* In *Yeager*, the court concluded that the husband's attempt at reconciliation with the wife was not made in good faith. Here, in contrast, the trial court made no finding regarding the good faith of George's quitclaim deed. CP 119-27. In this case, unlike the wife

in *Yeager*, George is highly educated, with a bachelor's degree in engineering and a master's degree in information systems, and has experience in real estate lending. RP 1 at 34-35; RP 3 at 24-25. In this case, unlike *Yeager*, the quitclaim deed was not executed in connection with reconciliation efforts between the parties, but was executed contemporaneously with a refinance of Laguna Lane. In short, *Yeager* bears no resemblance to the facts of this case.

Equally misplaced is George's reliance upon *Marriage of Marzetta*, 129 Wn. App. 607, 120 P. 3d 75, *rev. den.*, 157 Wn. 2d 1009, 139 P. 3d 349 (2005), *overruled, in part, other grounds, Marriage of McCausland*, 159 Wn. 2d 607, 619, 152 P. 3d 1013 (2007). BA at 22-23. In *Marzetta*, the trial court's characterization as the husband's separate property, of bonus income from his separately owned business, conflicted with the parties' prenuptial agreement, and thereby undermined the trial court's conclusion that the wife's quitclaim deed to certain real property were unnecessary. 129 Wn. App. 620. Here, in contrast, there is no prenuptial agreement, nor any income from any separately owned business. CP 120. In *Marzetta*, the quitclaim deeds by the wife were executed at the husband's request, and were part of transactions between the parties themselves. 129 Wn. App. 613. Here, in contrast, Cheryl did not propose the quitclaim deed, and the quitclaim deed was executed

contemporaneously with a refinance of Laguna Lane. In *Marzetta*, the wife had worked before marriage as a travel agent. 129 Wn. App. 612. Here, in contrast, George was highly educated, and had relevant experience in as a lender. RP 1 at 34-35; RP 3 at 24-25. In *Marzetta*, when they married, the husband was a wealthy business owner, and the wife was not wealthy. 129 Wn. App. 612. Here, in contrast, neither George nor Cheryl was wealthy when they married, and neither owned a separate business. *Marzetta* thus does not even remotely resemble this case.

George argues that he was not represented by counsel when the quitclaim deed was executed. BA at 22. George fails to support his argument with authority, so his argument should not be considered. RAP 10.3 (a) (6) (“*The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated: The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record....*”); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P. 2d 549 (1992). To the extent that George’s argument merits consideration, where, as here, the transaction between spouses is fair and reasonable, and there is no fraud or overreaching, there is no absolute requirement that a spouse have acted upon independent advice of counsel, or that he be specifically

advised of the right to seek such counsel. *Whitney v. Seattle First National Bank*, 90 Wn. 2d 105, 111, 579 P. 2d 937 (1978).

George claims that the trial court awarded a disproportionately large amount of debt to him. BA at 23. The court is not required to divide the parties' property and liabilities equally. *Marriage of White*, 105 Wn. App. 549 n.6.; *Marriage of Nicholson*, 17 Wn. App. 110, 117, 561 P. 2d 1116 (1977). Instead, under RCW 26.09.080, the court is required to make such distribution of the parties and liabilities, either community or separate, as shall appear just and equitable, after considering all factors. *Marriage of White*, 105 Wn.App. 549; *Marriage of Crosetto*, 82 Wn. App. 556.

The non-exclusive list of factors in RCW 26.09.080 include the nature and extent of community property, the nature and extent of separate property, the duration of the marriage, and the resulting economic circumstances of each party when the property is divided. *Marriage of Crosetto*, 82 Wn. App. 556. In addition, the parties' relative health, age, education and employability are also considered. *Ibid.* The ultimate concern is the economic condition of the parties upon the dissolution decree. *Id.*

The trial court clearly had in mind the foregoing factors in making its distribution of the parties' property and liabilities. In Findings 2.8 and

2.9, the trial court considered the nature and extent of the parties' community and separate property. CP 120. In Findings 2.4 and 2.5, the trial court considered the duration of the parties' marriage. CP 120. In Findings 2.10 and 2.11, and its Memorandum of Income and Expense, the trial court, in considering the parties' community and separate liabilities, had in mind the economic condition of the parties. CP 121; CP 103-08. The trial court's oral opinion reveals that it was acutely aware of the burden placed upon the parties by their outstanding liabilities. RP 4 at 4. The trial court considered the parties' future employment prospects, finding George to be underemployed, but capable, by reason of his education and work experience, of earning substantial income. RP 4 at 6-7, 14-15. In contrast, the trial court found that Cheryl had a lesser earning capacity. RP 4 at 14. The trial court also noted that despite repeated threats of foreclosure of Laguna Lane, George rose to the occasion to save the property from foreclosure. RP 4 at 10-11. The trial court based its award of Laguna Lane to George and the award to Cheryl of the lien on the property on those factors. RP 4 at 6-7, 9-10, 15, 18-19. By characterizing Laguna Lane as community property, by awarding of the property to George, and by awarding the lien to Cheryl, the trial court did not abuse its discretion.

Nor did the trial court abuse its discretion in allocating the mortgage on Laguna Lane to George. In *Crosetto*, the trial court's allocation to the former wife of the first mortgage on the family home coincided with the award to her of the net equity in the family home, and was upheld. 82 Wn. App. 556-57. As in *Crosetto*, George was awarded Laguna Lane, and was allocated the mortgage on that property. CP 129, 131. As in *Crosetto*, there was no abuse of discretion.

George misplaces reliance upon *Marriage of Shannon*. BA at 23, 31, 34-35. In *Shannon*, the trial court's characterization of the house as community property was erroneous, as the house was purchased in the husband's name before marriage with separate funds. 55 Wn. App. 140-41. *Shannon* involved no circumstance such as the quitclaim deed in this case. Nor is it clear that had the trial court characterized the property as George's separate property, it would have divided the parties' property and liabilities differently. The trial court could still have awarded Cheryl a lien on the property in the same amount. *See, e.g., Marriage of Griswold*, 112 Wn. App. 333, 347-48, 48 P. 3d 1018, *rev. den.*, 148 Wn. 2d 1023, 66 P. 3d 677 (2003). As noted in *Marriage of Zier*, 136 Wn. App. 40, 46, 147 P. 3d 624 (2006), a trial court's mischaracterization of property is rarely a proper basis to disturb a trial court's property distribution.

C. THE TRIAL COURT DID NOT ERR IN AWARDING CHERYL A LIEN ON THE LAGUNA LANE PROEPRTY.

George argues that the trial court erred in awarding Cheryl a lien on Laguna Lane. BA at 23-28. The trial court had authority to impose such a lien. RCW 2.28.150 provides as follows:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, *if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.* (Emphasis added).

See also, Marriage of Langham and Kolde, 153 Wn. 2d 553, 560, 106 P. 3d 212 (2005); *Robinson v. Robinson*, 37 Wn. 2d 511, 255 P. 2d 411 (1950).

The trial court set the amount of the lien at \$51,034.89 to secure the trial court's division of the equity in Laguna Lane. RP 4 at 5. ("You'll see \$51,000 or so, That is awarded for the equalizing the division of property given that the husband gets the house, but he has to pay her for it.").

The trial court's use of such a lien to secure its award finds support in *Baker v. Baker*:

In this case the record shows that substantially all of the assets, both

community and separate, were awarded to the plaintiff, presumably to enable him to carry on the operation of his business in the trading of the securities which he inherited. In addition, during the marriage of the parties, the plaintiff had acquired a college education and his Master's Degree, which would qualify him for a yearly income of approximately \$9,000, according to the testimony. The defendant, on the other hand, was awarded none of the assets, except the furniture, the Mustang automobile, jewelry and a life insurance policy. She had only 1 1/2 years of college education, majoring in art, and no employment experience except for the period of time as a retail sales lady and rate clerk prior to the birth of her daughter in 1957. Having all these considerations in mind, we cannot say that it was unreasonable for the court to award to the defendant, in lieu of assets, a judgment of \$50,000 with interest at 7 per cent, which was secured by a lien against the real property awarded the plaintiff and which was payable at the rate of \$450 per month. The value to the defendant of such a judgment lien is vastly different than an award of cash or other assets, particularly where the \$50,000 judgment is secured only by one parcel of real property valued at \$16,500, and a second parcel valued at \$50,000 subject to a mortgage balance of approximately \$35,000. Considering the entire record, we cannot say that there was a manifest abuse of discretion by the trial court in its disposition of the property in this case.

80 Wn. 2d 747.

George mischaracterizes the trial court's lien as an equitable lien. BA at 24-28. None of the authorities cited by George require the trial court, in imposing a lien as part of its property distribution under RCW 26.09.080, to comply with the conditions for an equitable lien. Moreover, George's discussion of equitable liens is premised on Laguna Lane being George's separate property. As set forth in paragraph III B above, that property became community property by reason of George's quitclaim deed. To the extent that the trial court's lien can be characterized as an equitable lien, such a lien may be imposed "*where there is no valid lien at law and one is needed to prevent an injustice.*" *Marriage of Sievers*, 78 Wn. App. 287, 313, 897 P. 2d 388 (1995). The trial court's lien was therefore proper.

George argues that in awarding the lien on Laguna Lane to Cheryl, the trial court erred by awarding his separate property without a showing of exceptional circumstances. BA.28. Even assuming, for purpose of argument, that the property remained George's separate property, the trial court is no longer required to find exceptional circumstances before awarding separate property to Cheryl. *Marriage of Griswold*, 112 Wn. App. 347-48.

D. THE TRIAL COURT DID NOT ERR REGARDING FUNDS RECEIVED BY GEORGE FROM HIS MOTHER AND SISTER.

George argues that \$71,500 obtained from his mother Betty Watson was received by George and Cheryl, was used to benefit the marital community, and should therefore have been characterized as a community liability. BA at 29-30. The trial court ruled that those amounts were not liabilities of the parties' marital community.

George's evidence in this regard is found in Exhibit 56. With the exception of the August 12, 2005 note for \$1,000 from Cheryl to George's sister Trudy, Exhibit 56 contains no promise by Cheryl to repay anyone any portion of the amounts received. Cheryl never signed a promissory note with George to his mother. RP 1 at 59. All checks from Betty Watson in Exhibit 56 are made out to George. The excerpts from Betty Watson's check registers in Exhibit 56 contain notations of checks written to George, but none to Cheryl. Cheryl never saw a check from George's mother made payable to George and Cheryl. RP at 58. Two notes in Exhibit 56 to Trudy, one for \$5000 and one for \$2,500, contain no signature or promise of repayment by Cheryl. Both of those notes reference repayment from the distribution of proceeds from Betty Watson's estate. George and Cheryl maintained separate bank accounts. RP 1 at 41.

Money received by George from his mother was deposited in George's separate account. RP 1 at 41, 56. Cheryl did not sign on George's account. RP 1 at 42. Cheryl had no say in how George spent money received from his mother. RP 1 at 57. Cheryl did not understand that funds received from his mother had to be repaid. RP 1 at 57. George used money received from his mother to pay his back and current child support, and his BMW car payment. RP 1 at 56. In 2003, while Cheryl was absent from the family home, approximately \$18,000 was received by George from his mother. RP 3 at 124-127; EX 56.

The August 31, 2006 addendum to George's mother's Will makes no mention of any amount owed by George to his mother. EX 78. Instead, the addendum confers absolute discretion upon the executrix of George's mother's estate to distribute funds to George. RP 3 at 123; EX 78. According to George, an amount not repaid to his mother during her lifetime was to be deducted from his inheritance upon her death. RP 3 at 74. George repeatedly told Cheryl that the amounts received from his mother were to come out of his inheritance. RP 2 at 61. Checks in Exhibit 57 totaling \$12,000 were written from George's separate account to his mother.

George argues that the funds received from his mother were loans, but fails to provide any authority to support such a characterization. BA at

28-29. George's argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

The amounts received by George from his mother do not meet the definition of a loan. Note *Hafer v. Spaeth*, 22 Wash.2d 378, 156 P.2d 408 (1945), *overruled in part on other grounds*, *Whitaker v. Spiegel Inc.*, 95 Wash.2d 408, 623 P.2d 1147 (1981):

A 'loan' imports an advancement of money or other personal property to a person under a contract or stipulation, express or implied, whereby the person to whom the advancement is made binds himself to repay it at some future time, ***together with such other sum as may be agreed upon for the use of the money or thing advanced.***
(Citations omitted; emphasis added).

George presented no evidence of any promise by him or Cheryl to repay his mother with an agreed sum for use of the money received from her. Instead, George testified that amounts not repaid during his mother's lifetime were to be deducted from his inheritance upon her death. RP 3 at 74. The amounts received by George from his mother therefore qualify as advancements, and are gifts. Note *Dammers v. Croft*, 162 A. 734, 735 (1932):

...That money, together with subsequent advances made by the father to pay the Camden banks, for both of which the mortgage was given to the father, were clearly advances to the son on account of his

inheritance in his father's estate at his father's death, and in no sense a debt from the son to his father. Advances of that nature by a father to a son appear to be uniformly regarded as pure and irrevocable gifts. 'An advancement creates no debt to the person making it, and in all its features and in its very nature is distinguishable from a debt or indebtedness.' Dawson v. Macknet, 42 N. J. Eq. 633, 635, 8 A. 312, 314. 'If a transaction between father and son amounts to an advancement at the time it takes place, it cannot afterwards be converted into a debt without the intervention of some new consideration.' Higham v. Vanosdol, 125 Ind. 74, 25 N. E. 140, 141. This seems to be necessarily true, since an advancement appears to be uniformly regarded as a consummated gift.

In light of the foregoing, the funds received by George from his mother came to him by way of gift, and were therefore his separate property. RCW 26.16.010 ("*Property ... owned by the husband before marriage and that acquired by him afterwards by gift, ... with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber or devise by will such property without the wife joining in such management, alienation or encumbrance, as fully and to the same effect as though he were unmarried.*"). Therefore, when George chose to use his separate property funds on property previously acquired by the parties, those

separate funds no longer exist as an asset, and George is not entitled to any reimbursement. *Marriage of White*, 105 Wn. App. 552.

Because the funds received by George from his mother constitute advancements, George therefore misplaces reliance upon the presumption in *Marriage of Hurd*, that money borrowed during marriage is presumed to be community in nature. BA at 29.

E. THE TRIAL COURT MADE A JUST AN EQUITABLE DISTRIBUTION OF THE PARTIES' PROPERTY AND LIABILITIES.

George argues once again that the trial court did not make a just and equitable distribution of the parties' property and liabilities. BA at 30-35. As set forth in paragraph III B above, the trial court's distribution of properties and liabilities was well grounded in the relevant factors.

George's chief complaint is the trial court's characterization of Laguna Lane as community property. BA at 31. George again fails to recognize that his quitclaim deed converted the property to community property. RP I at 47; RP III at 113-14; EX 12. *Bryant v. Stablein*, 28 Wn. 2d 747. The trial court therefore did not mischaracterize Laguna Lane.

George complains that the trial court saddled him with a disproportionate amount of debt. BA at 31-32. George inflates the trial court's allocation of liabilities by once again mischaracterizing the \$71,500 received from his mother as debt. BA at 32. As set forth in

paragraph III D, *supra*, the funds received by George from his mother do not qualify as loans, but instead, constitute advancements, and were therefore gifts and George's separate property. In any event, the trial court's property distribution was not disproportionate, as awards to the wife in other cases have been upheld, even though nearly twice the value of property awarded to the husband. *See, e.g., Marriage of Donovan*, 25 Wn. App. 691, 696, 612 P. 2d 387 (1980).

George argues that the origin of the house as George's separate property should be considered in making its award. BA at 33. The trial court did precisely that when it awarded Laguna Lane to George. CP 129.

George claims to be entitled to Laguna Lane free and clear of any lien in favor of Cheryl. BA at 33-34. George fails to support his argument with authority, so it should not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

George argues that the paramount concern is the economic condition in which the decree will leave the parties. BA at 34-35. The trial court was mindful of the parties' economic condition. The trial court considered many factors, including the parties' employment prospects, finding George to be underemployed, but capable, by reason of his education and work experience, of earning substantial income. RP 4 at 6-

7, 14-15. In contrast, the trial court found that Cheryl had a lesser earning capacity. RP 4 at 14.

George bemoans the \$25,000 down payment on Laguna Lane prior to his marriage to Cheryl BA 35. George testified that the \$25,000 was a gift from his mother. RP III AT 138. Whatever separate property interest George enjoyed in that amount evaporated with the quitclaim deed to George and Cheryl. *Marriage of White, supra*.

F. GEORGE'S REQUEST FOR ATTORNEY FEES AND COSTS SHOULD BE DENIED.

In support of his request for costs and attorney fees on appeal, George invites the Court to examine the merit of the issues and the financial resources of both parties. BA at 36. Attorney fees on appeal in a case such as this require the ability to pay such fees. *Marriage of Muhammad*, 152 Wn. 2d 795, 807, 108 P. 3d 779 (2005). At the time of entry of the decree, Cheryl had a negative monthly income of \$1,065.83. CP 103. Cheryl lacks the ability to pay George's attorney fees on appeal.

As regards the merits of George's arguments, as indicated in paragraphs III B, C above, George's argument against the community property characterization of Laguna Lane lacks merit by reason of the quitclaim deed to George and Cheryl. George's argument regarding the lien to Cheryl lacks merit, as the trial court did not err in awarding Cheryl

a lien on the property. George's argument regarding the money received from his mother also lacks merit, as the money constituted an advance on his inheritance, was his separate property, and, having been spent, was not before the court. George's request for attorney fees and costs on appeal should therefore be denied.

G. CHERYL REQUESTS ATTORNEY FEES AND COSTS ON APPEAL

Cheryl invokes RAP 14.1, RAP 14.2, RAP 18.1, and RCW 26.09.140. Attorney fees may be awarded on appeal for a party's intransigence at trial, regardless of the parties' resources. *Marriage of Wallace*, 111 Wn. App. 710; *Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999); *Crosetto*, 82 Wn. App. 564.

"Intransigence is the quality or state of being uncompromising." *Schumacher v. Watson*, 100 Wn. App. 208 at 216, 997 P.2d 399 (2000). One court stated that a spouse's *"recalcitrant, foot-dragging, obstructionist attitude"* increased the cost of litigation to the other spouse, who was entitled to an award of attorney's fees. *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969). Intransigence justifying an award of attorney's fees has also been found where a spouse fails to timely respond to pleadings, thus requiring the other spouse to file a motion for default or to compel discovery. *State ex rel. Stout v. Stout*, 89 Wn. App. 118, 126-127, 948 P.2d

851 (1997). Intransigence has also been found where one spouse's numerous frivolous motions, failure to attend his own deposition, and refusal to read correspondence from the opposing attorney resulted in numerous delays and additional legal expense In re *Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997). Intransigence has been found where a spouse had "*been very expert at avoiding the service of process upon him*" and had refused to comply with a decree *Fleckenstein v. Fleckenstein*, 59 Wn.2d 131, 133, 366 P.2d 688 (1961).

George's conduct in the trial court is a paradigm of intransigence warranting an award of attorney fees. Cheryl was forced to seek and did obtain an order finding Mr. Greenland in contempt for failure to comply with the trial court's temporary order of 11/29/05. CP 5-13; EX 34. The trial court found that George failed to pay community debts as required by the temporary order, despite having received \$1,650.00 from Cheryl for those debts. CP 9. As a result of George's failure in the Fall of 2005 to timely pay the mortgage on Laguna Lane, an additional \$7,752.27 in charges were incurred, and \$7,700 had to be added back to the mortgage. RP 2 at 19; EX 34, 35, 51. As a further result of George's failure to pay American Financial Solutions, as required by the trial court's 11/29/05 order, George and Cheryl were dropped from that debt consolidation program, and incurred additional interest expense. RP 1 at 71-74; RP 2 at

10-11. In the Spring of 2006, George's repeated failure to pay the mortgage resulted in a second threatened foreclosure, resulting in an additional \$4,504.63 in charges. RP 2 at 22-25; CP 14; EX 36, 37, 42. In a letter to Cheryl, George acknowledged the jeopardy to the parties' interest in Laguna Lane resulting from the threatened foreclosures. RP 3 at 114-19; EX 77. Ultimately, George's repeated failures to pay the mortgage, as required by the trial court's temporary orders of 11/29/05 and 02/13/06, resulted in an order directing that the property be listed for sale. CP 14-17. George sought revision of the trial court's order of 06/05/06, and was ordered to post a \$10,000 bond, to keep the mortgage current, and to provide proof to Cheryl's attorney that the arrearages had been paid, and the mortgage was current. CP 38-39. George thereafter failed to post the bond, and provided proof to Cheryl that the mortgage payments current only twice in the four months before trial. RP 2 at 31-32, 35-37; EX 44. The 06/05/06 temporary order authorized Cheryl to select a realtor for the sale of Laguna Lane, but George refused to cooperate. RP 2 at 38; CP 15. \$2,250 in attorney fees awarded to Cheryl at the 02/13/06 hearing and \$750 awarded to her at the 06/05/06 hearing, was not timely paid by George. CP 12, 15; RP 2 at 42-43. Cheryl incurred \$13,000.00 in the trial court. RP 2 at 40-41. As a result of George's conduct in this case, Cheryl went to court four times between November 2005 and the time of trial.

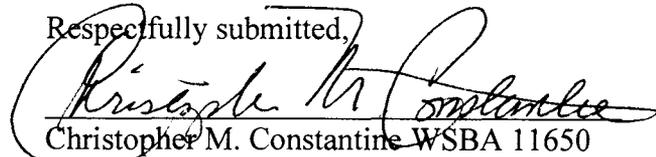
RP 2 at 12. Cheryl went to court for temporary orders in November 2005, for a contempt hearing against George in February 2006, in June 2006, in response to George's motion to require Cheryl to pay half the mortgage, and in June 2006, on George's motion for revision. RP 2 at 13. A substantial portion of Cheryl's attorney fees in the trial court were unquestionably the result of George's repeated failures to comply with the court's orders. George clearly burdened Cheryl and the trial court with considerable additional delay and expense. It is manifestly unfair for Cheryl to shoulder the burden of George's intransigence. Therefore, as in *Wallace, Mattson, and Crosetto*, an award of attorney fees to Cheryl based upon George's intransigence in the trial court is appropriate here. Further, because George's intransigence permeated the proceedings in the trial court, no segregation of fees incurred because of George's intransigence from fees incurred by other reasons should be ordered. *Marriage of Sievers*, 78 Wn. App. 312.

Alternatively, Cheryl requests an award of attorney fees based upon her need, George's ability to pay, and the merits of her arguments. *Marriage of Wallace*, 111 Wn. App. 710. George has the ability to pay Cheryl's attorney fees from the equity in Laguna Lane and other property awarded to him. CP 129-30.

V. CONCLUSION

In light of the foregoing, the trial court's findings, conclusions, orders and decree should be affirmed. The Court should award attorney fees and costs to Cheryl.

Respectfully submitted,



Christopher M. Constantine WSBA 11650
Attorney for Respondent

VI. CERTIFICATE OF MAILING

The undersigned does hereby declare that on December 3, 2007,
the undersigned served upon Respondent a copy of BRIEF OF
RESPONDENT filed in the above-entitled case by depositing it into the
United States mail, first-class postage addressed to the following persons:

Peter B. Tiller
The Tiller Law Firm
Corner of Rock and Pine
P. O. box 58
Centralia, Wa. 98531

Dated: December 3, 2007

A handwritten signature in cursive script, reading "Giuseppe M. Condolera", written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

RespondentBriefGreenlaand