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DIVISION II
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STATE OF WASHINGTON
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No. 39218-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re Marriage of:

TINA MARCIA SCALF,
fka TINA MARCIA SCALF-FOSTER,

Respondent

and

JACKIE CRAIG FOSTER,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR LEWIS COUNTY
THE HONORABLE RICHARD L. BROSEY

BRIEF OF RESPONDENT

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I. RESTATEMENT OF ISSUES

1. The trial court did not find that Mr. Foster met his burden of proving the existence of an oral prenuptial agreement by clear, cogent and convincing evidence. Did the trial court err in declining to enforce the alleged oral prenuptial agreement?

2. The trial court found that the marital community had contributed $35,000 in improvements to the parties' residence during the marriage after Mr. Foster had attempted to place that property beyond the court's reach by conveying it to his children for no consideration. Did the trial court err in recognizing a community interest in those improvements?

3. The trial court's unchallenged findings of fact included findings that Mr. Foster had abused quit claim deeds, had grossly violated his fiduciary duty to Ms. Scalf by quit claiming property to his children, grandchildren and a nonexistent corporation and had attempted to place property beyond the reach of the court in non-bona fide transactions. Did the trial court abuse its discretion in awarding the parties' community real property to Ms. Scalf while awarding the parties' interest in the real property held in Mr. Foster's transferees' names to him?

4. Did the trial court abuse its discretion by ordering Mr. Foster to pay Ms. Scalf's attorney fees at trial when Mr. Foster received substantial assets in the property division, had received over half a million

dollars for the sale of his business, and had engaged in intransigence in the form of financial misconduct?

II. RESTATEMENT OF THE CASE

A. INTRODUCTION.

Jack Foster ("Mr. Foster") appeals the trial court's distribution of property in the decree dissolving his marriage to Tina Scalf ("Ms. Scalf"). This restatement of the case is based on the trial transcript and on the trial court's findings of fact. Because Mr. Foster has not assigned error to any of the trial court's findings of fact, they should be accepted as verities on appeal. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991); *Marriage of Vander Veen*, 62 Wn. App. 861, 865, 815 P.2d 843 (1991). The trial court's findings included the following findings of financial misconduct on the part of Mr. Foster:

- Mr. Foster "engaged in a number of real estate transactions whereby he quit claimed his interest in real property without any consideration [and] placed pieces of real estate in corporations that do not exist. [Mr. Foster] has abused and overused quit claim deeds and has treated every parcel, including those acquired during the marriage, as his own." CP 25.

- With respect to one of the parties' more valuable parcels of real estate, "[t]he parties prepared mutual quit claim deeds to be recorded by the surviving spouse upon the death of the first spouse to expire. [Mr. Foster's] recording of the quit claim deed [Ms. Scalf] gave him was a gross violation of his fiduciary duty to his wife. The transfer to his son and daughter was done in an attempt to put this piece of real property beyond the reach of the Court. It was not a bona fide transaction." CP 25

This Court should affirm the trial court's orders and award attorney fees on appeal to the wife based on the husband's intransigence and on the wife's need and the husband's ability to pay.

B. THE PARTIES' MARRIAGE.

Mr. Foster and Ms. Scalf met in 1985. 2/2/2009 RP 21. After dating for several months, they parted ways, only to reconnect in 1994. 2/2/2009 RP 21. The parties lived together in Ellensburg at that time and then were married on March 18, 1995. 2/2/2009 RP 21; CP 23. During the marriage, the parties separated briefly in the winter of 1996-1997 and in March of 2007 and then separated for good on December 15, 2007. 2/2/2009 RP 27-28, 61; CP 23.

At the time of trial, Ms. Scalf was 57 years old, and Mr. Foster was 67 years old. 2/2/2009 RP 20. At the time the parties began living together, Ms. Scalf owned her own home in Ellensburg while Mr. Foster owned a home and a real estate brokerage business in Packwood. 2/2/2009 RP 22-23, 33. After the parties became engaged, Ms. Scalf sold her home and the parties moved into Mr. Foster's Packwood home in 1995. 2/2/2009 RP 23. While the parties lived in Ellensburg, Ms. Scalf worked for the Washington State University Cooperative Extension in Kittitas County and also taught fitness classes. 2/2/2009 RP 23. When the couple moved to Packwood, Ms. Scalf resigned her position and then worked part-time from 1995 to 1997. 2/2/2009 RP 24, 27. After 1997, Ms. Scalf worked as a real estate agent in Packwood until 2001, when her daughter was killed in a tragic automobile accident. 2/2/2009 RP 29. In 2002 or 2003, Ms. Scalf began working part-time as a waitress and then restarted her full-time real estate career in 2003. 2/2/2009 RP 30-31. She has worked full-time as a real estate agent in Packwood since that time. 2/2/2009 RP 30-31.

Mr. Foster did not work during the marriage, claiming that "he'd already made his money." 2/2/2009 RP 31. In 1994, Mr. Foster sold his

Packwood real estate brokerage business for $325,000.[1] 2/2/2009 RP 35. Under cross examination, Mr. Foster admitted he "turned [his] license in" and did not deny that he did so because he was under investigation for fraud:

> Q And those – you were suspended from the practice of selling real estate; is that correct?
>
> A No, I wasn't.
>
> ...
>
> Q You lost your license?
>
> A No. I turned my license in.
>
> Q Because you were under investigation for fraud; isn't that correct?
>
> A I turned my license in.
>
> Q Because you were under investigation for fraud?
>
> A I do not know that for a fact. 2/3/2009 RP 32.

During the marriage, Mr. Foster lived off the $3,000 per month payments from the sale of his business, plus income he received from deeds of trust on properties he had sold. 2/2/2009 RP 163. At no time during the marriage did Mr. Foster file any income tax returns reflecting any income from his real estate transactions or the sale of his real estate

[1] Mr. Foster testified that the sale price, including interest, was $555,000 2/2/2009 RP 163.

brokerage business. 2/2/2009 RP 56; 2/3/2009 47-48 (direct questioning by the trial court). Mr. Foster further admitted that he paid no income tax on a $38,000 payment he received in 2007 on the sale of a deed of trust. 2/3/2009 RP 49; *see* discussion of Cannon Road property, pp. 10-11 *infra.*

C. THE PARTIES' REAL ESTATE TRANSACTIONS.

Before and during the marriage, both parties engaged in various real estate transactions. Mr. Foster testified that he and Ms. Scalf agreed to "keep our property separate." 2/2/2009 RP 186; 2/3/2009 RP 25. Ms. Scalf denied that any such agreement existed. 2/3/2009 RP 59. There was no written prenuptial agreement. 2/3/2009 RP 36. Although Mr. Foster claimed that various parcels of real property acquired during the marriage were his separate property, the trial court found that Mr. Foster did not provide "any evidence property acquired during the marriage was obtained with separate funds other than his own self-serving testimony." CP 25. Accordingly, the trial found that Mr. Foster had failed to meet his burden of establishing that any of the property acquired during the marriage was his separate property. 2/3/2009 RP 101-02.

During the two day trial, the trial court heard evidence relating to the parties' real estate transactions as summarized below:[2]

[2] Although the trial did not issue any findings of fact relating to the values of the various parcels, the evidence presented relating to values is summarized for the Court's information

1. Property Awarded to Mr. Foster.

109 Fairway Drive—the Parties' Residence. Mr. Foster acquired this property prior to the marriage. 2/2/2009 RP 33, 164. On January 14, 1997—at the time the parties first separated—Mr. Foster quit claimed his interest in this property to his son and daughter. 2/2/2009 RP 33; Trial Exhibit 1. In 1999, the parties made improvements to the property, including a new paved driveway and a four bay garage, at a total cost of $38,000. 2/2/2009 RP 34-35. Throughout the marriage, Mr. Foster paid the property taxes. 2/2/2009 RP 37. At trial, Ms. Scalf, an experienced real estate agent in the Packwood market, estimated the value of this property at $285,000. 2/2/2009 RP 44.

Lot 2, Eagle Peak. This property, also referred to as the "driving range," was acquired by the parties in approximately 1999. 2/2/2009 RP 63. At that time, the property was undeveloped, but during the marriage the parties cleared the land and developed it into an operating driving range located next to the High Valley golf course outside Packwood. 2/2/2009 RP 63-65. In addition, the parties built a three-bay RV storage building and six small storage units on the property. 2/2/2009 RP 65. Prior to the addition of the RV storage building, the Windermere real estate firm had performed a comparable market analysis on the property

and estimated its value at $250,000. 2/2/2009 RP 66. Ms. Scalf estimated at trial that the property was currently worth $280,000. 2/2/2009 RP 67.

In March 2006, Mr. Foster prepared quit claim deeds pursuant to which he would transfer his interest to Ms. Scalf and Ms. Scalf would transfer her interest to Mr. Foster, claiming that it was an estate planning strategy. RP 2/2/2009 57-58; Trial Exhibits 10, 12. Mr. Foster advised Ms. Scalf that they each should hold the quit claim deeds and only record one in the event that the other spouse died. 2/2/2009 RP 58; Trial Exhibit 10. Ms. Scalf never recorded the quit claim deed in her favor. 2/2/2009 RP 60. However, after the parties separated for good in December 2007, Ms. Scalf discovered that Mr. Foster had indeed recorded her quit claim deed to him. 2/2/2009 RP 61-62. At the same time, she discovered that Mr. Foster had then conveyed the property to his son and daughter on December 21, 2007, shortly after the parties separated. 2/2/2009 RP 62; Trial Exhibit 11.

Skate Creek and Alder. At some point, this one acre lot was transferred by Mr. Foster into his grandson's name. 2/2/2009 RP 36. Throughout the marriage, Mr. Foster paid the property taxes. 2/2/2009 RP 36. During the marriage, the parties improved the property by drilling a well. 2/2/2009 RP 37. Ms. Scalf estimated the value of this property at $48,000. 2/2/2009 RP 44-45.

Hideaway Lane. This five acre property is located on a hill east of Packwood and has a view of Mt. Rainier. RP 2/2/2009 38. At some point, this property was transferred to Retsof Corporation, whose address is listed in the Lewis County property records as 109 Fairway Drive in Packwood--Mr. Foster's address.[3] 2/2/2009 RP 39, Trial Exhibit 2. According to a search of the Washington Secretary of State's website, Retsof Corporation does not exist. 2/2/2009 RP 97; Trial Exhibit 31.[4] Mr. Foster testified that Retsof Corporation was dissolved in the early 1990's. 2/2/2009 RP 168. Throughout the marriage, Mr. Foster paid the property taxes on this property. 2/2/2009 RP 40. The value of this property was estimated at $80,000. 2/2/2009 RP 45.

Wenas Valley Property. This ten acre parcel in Selah, Yakima County is improved with a metal building with a three bay RV-height garage, a well, a septic system and electricity. 2/2/2009 RP 42. Mr. Foster acquired this property before the marriage. 2/2/2009 RP 116. A renter paid rent of approximately $450 per month to Mr. Foster. 2/2/2009 RP 42. The Retsof Corporation is listed as the owner of this property. 2/2/2009 RP 42; Trial Exhibit 3. The value of this property was estimated at $100,000 - $150,000. 2/2/2009 RP 45.

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[3] "Retsof" is "Foster" spelled backward. 2/2/2009 RP 43.

[4] However, information was found for a "Retsof Family LLC," formed in 2008. Trial Exhibit 31. Mr. Foster was listed as the registered agent for Retsof Family LLC. Trial Exhibit 31.

Okanagan Gold Mine. This 30 acre parcel in Okanagan County is located on BLM leased land and has a well and gold mine on it. 2/2/2009 RP 43-44. Mr. Foster testified that the parcel is the sole means of access to 12,000 acres of BLM land, so the family used the land for hunting. 2/3/09 RP 12. This property was received by Mr. Foster in his first marital dissolution, but at some point it was transferred to Mr. Foster's children, Douglas Foster and Kari Engstrom. 2/2/2009 RP 46; Trial Exhibit 4.

Cannon Road. Cannon Road is a five acre parcel in Lewis County. 2/2/2009 RP 46, 48; Trial Exhibit 5. On January 13, 1997, while the parties were separated for the first time, Mr. Foster conveyed this property to his grandson, Kory Khile, for no consideration. 2/2/2009 RP 48; Trial Exhibit 5. Throughout the marriage, Mr. Foster paid the property taxes on this parcel and also paid for improvements to the property. 2/2/2009 RP 48-49; Trial Exhibit 6. Later, at Mr. Foster's direction, his grandson conveyed via quit claim deed portions of this property to other grandchildren of Mr. Foster. 2/2/2009 RP 50; Trial Exhibit 7.

On March 27, 2007, Kory Khile sold a one acre portion of this property to the Motmans in exchange for a deed of trust. 2/2/2009 RP 52; Trial Exhibit 8. On April 23, 2007, Kory Khile transferred his interest in the deed of trust to Ms. Scalf in exchange for $38,000 cash paid directly to Mr. Foster, not to Kory Khile. 2/2/2009 RP 53-54; Trial Exhibit 8. Mr.

Foster admitted keeping all of these funds rather than turning them over to his grandson. 2/3/2009 RP 35.

The value of the remaining lots on Cannon Road was estimated at trial at $145,000.[5] 2/2/2009 RP 55.

Soldatna, Alaska Lots. Mr. Foster also owned three one acre lots located in Soldatna, Alaska, but sold one lot during the marriage. 2/2/2009 RP 74. To Ms. Scalf's best recollection, Mr. Foster had sold the one lot for $25,000, and she estimated the value of the two remaining lots at $25,000 each. 2/2/2009 RP 74.

2. Property Awarded to Ms. Scalf.

140 Kehoe Road, White Pass. This property was Ms. Scalf's mother's home. 2/2/2009 RP 94. At the time of separation, the home was in both Ms. Scalf's and her mother's names. 2/2/2009 RP 94; Trial Exhibit 21. Ms. Scalf estimated the value of this property at $115,000. 2/2/2009 RP 95.

Lot 13, Eagle Peak (1/2 interest). This parcel was acquired by the parties in approximately 1999 and is a six acre parcel which has been since subdivided into three two acre lots. 2/2/2009 RP 67-68. The couple owned a one-half interest in the parcel with Jim Pierson, and the parcel was held in the name of "F&P Development Inc.," although to Ms. Scalf's

[5] $42,500 for each of the two remaining one acre lots and $60,000 for the two acre lot, for a total of $145,000. 2/2/2009 RP 55.

knowledge, F&P Development Inc. never actually existed. 2/2/2009 RP 68; Trial Exhibit 13. Ms. Scalf testified that she conducted a search on the Washington Secretary of State's website and found nothing regarding F&P Development Inc. 2/2/2009 RP 97; Trial Exhibit 31. Prior to her discovering that the corporation apparently did not exist, on February 25, 2006, Ms. Scalf signed a quit claim deed as an officer of F&P Development Inc. conveying that corporation's interest in the property to Mr. Foster. Trial Exhibit 13. The deed was prepared by Mr. Foster. 2/2/2009 RP 71. At trial, Ms. Scalf estimated the combined value of the three two acre parcels at $180,000. 2/2/2009 RP 71.

High Valley Park 8, Sherwood Court. This property was acquired by Mr. Foster on March 23, 2007 at a Lewis County tax sale. 2/2/2009 RP 73; Trial Exhibit 16. Ms. Scalf estimated the value of the property at $48,000 at trial. 2/2/2009 RP 74.

High Valley Park 10, Mary Lane. This property is located across the street from the parties' residence at 109 Fairway Drive and has a "nice cedar building with metal roof," a three-bay garage, a small artist's studio, septic, water, power and a gravel driveway. 2/2/2009 RP 72. A one-half interest in the property was acquired by Mr. Foster on April 6, 2005. Trial Exhibit 15. At the time of separation, Mr. Foster owned the one-half interest, sharing the property with his brother. 2/3/2009 RP 20. At trial,

Ms. Scalf estimated the market value of the property at $180,000. 2/2/2009 RP 73.

Deed of Trust Note on Lot Sold in Soldotna, Alaska. As of August 14, 2007, $13,500 was owed on the deed of trust note relating to the sold parcel in Alaska. Trial Exhibit 17.

D. THE PARTIES' PERSONAL PROPERTY.

Other than requesting that the Court reverse the trial court's award of attorney fees and a cash judgment of $35,000, Mr. Foster does not seek review of the trial court's division of personal property. However, the trial court considered the nature and extent of the personal property in arriving at its decision. CP 25.

E. MR. FOSTER'S FALSE ACCUSATION OF THEFT AGAINST MS. SCALF.

Mr. Foster claimed that Ms. Foster stole $6,700 from his bank account, causing a check he had written to settle a lawsuit to be returned for non-sufficient funds. 2/2/2009 RP 170. However, under cross examination and under direct examination by the trial court, he admitted that the check was returned because he had in fact closed the account after writing the check. 2/3/2009 RP 29-31, 44-45.

F. MR. FOSTER TREATED ALL PROPERTY HE ALLEGEDLY GAVE TO HIS CHILDREN AND GRANDCHILDREN AS HIS OWN.

Mr. Foster claimed that he lived in the parties' home at 109 Fairway Drive rent-free and that he had agreed to maintain the home for as long as he lived there, including paying all taxes, insurance and upkeep. 2/3/09 RP 9. However, under direct questioning by the trial court, he admitted that he had no evidence to support such a claim. 2/3/2009 RP 45-46. Further, under direct questioning by the trial court, Mr. Foster admitted that he never filed any gift tax returns on any of his purported transfers of property to his children or grandchildren. 2/3/2009 RP 46-47.

III. ARGUMENT

A. STANDARD OF REVIEW

The trial court has broad discretion in distributing property in a dissolution action, and its decision will only be reversed upon a showing of manifest abuse of discretion. *Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999); *Marriage of Fiorito*, 112 Wn. App. 657, 667-68, 50 P.3d 298 (2002). In a dissolution action, credibility determinations are critical, and the appellate court will not review them. *Fiorito*, 112 Wn. App. at 667. As stated by our supreme court nearly twenty-five years ago:

> [T]rial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by

> tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion. *Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985)(citations omitted).

Here, the trial court found problems with Mr. Foster's credibility and trustworthiness in several regards. The court caught Mr. Foster red-handed in falsely testifying that Ms. Scalf had stolen money from his bank account and thereby caused him to bounce a check to settle a lawsuit against him when, in fact, he had closed the bank account. 2/3/2009 RP 29-31, 44-45. When confronted on the stand, Mr. Foster did not deny having exited the real estate brokerage business due to a fraud investigation of his activities. 2/3/2009 RP 32. Further, the court's findings of fact (to which Mr. Foster does not assign error) note that Mr. Foster abused quit claims deeds, grossly violated his fiduciary obligations to Ms. Scalf and attempted to place property beyond the reach of the court in non-bona fide transactions. CP 25. Mr. Foster utterly fails to show any abuse of discretion in the trial court's property division. This court should affirm the trial court.

B. MR. FOSTER FAILED TO MEET HIS BURDEN IN CLAIMING THE EXISTENCE OF AN ORAL PRENUPTIAL AGREEMENT.

Mr. Foster points to the fact that the trial court did not issue a specific finding of fact as to the existence of an oral prenuptial agreement and claims that this amounts to error. *Appellant's Brief* 1, 5. However, at no time did Mr. Foster request such a finding. In the absence of a specific finding on a factual issue, there is a presumption that the party with the burden of proof failed to sustain his burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997)(*citing Smith v. King*, 106 Wn.d2 443, 451, 722 P.2d 796 (1986); *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *rev. denied*, 118 Wn.2d 1012 (1992)); *Stuewe v. Dept. of Revenue*, 98 Wn. App. 947, 952, 991 P.2d 634 (2000).

In order to establish the existence of an oral prenuptial agreement in this case, Mr. Foster bore the burden of establishing the existence of the agreement by clear, cogent and convincing evidence. *Marriage of Dewberry*, 115 Wn. App. 351, 361, 62 P.3d 525 (2003)(*citing Granquist v. McKean*, 29 Wn.2d 440, 445, 187 P.2d 623 (1947)). Further, Mr. Foster bore the burden of showing that "the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they point to some other relationship...or may be accounted for on some other hypothesis, they are not sufficient." *Dewberry*, 115 Wn.

App. at 362 (*citing Granquist*, 29 Wn.2d at 445). Mr. Foster failed to provide such clear, cogent and convincing evidence, as only his testimony supported his claim.

This case bears much more of a resemblance to *Marriage of Mueller* than it does to *Dewberry*. *Marriage of Mueller*, 140 Wn. App. 498, 167 P.3d 568 (2007). In *Mueller*, the court reversed the trial court's finding of an oral separate property agreement because the spouse asserting the existence of the agreement failed to meet the "clear, cogent and convincing evidence" standard. *Mueller*, 140 Wn. App. at 504-05. The court distinguished *Dewberry*, noting that in *Dewberry* the terms of the agreement were "clear and simple," "several witnesses" testified knowing specifically about the oral pre-nuptial agreement and that the parties "continually affirmed" the agreement with "painstaking and meticulous effort" over the years. *Mueller*, 140 Wn. App. at 506 (quoting *Dewberry*, 115 Wn. App. at 356, 362). Here, Mr. Foster failed to produce the clear, cogent and convincing evidence needed to establish the claimed oral agreement. The trial court made no error in not finding and enforcing the alleged oral agreement.

C. THE TRIAL COURT CORRECTLY CHARACTERIZED THE COMMUNITY REAL PROPERTY INTERESTS.

Mr. Foster claims the trial court erred when it granted community interests in his separate property or property owned by third persons, yet does not specify which properties were affected. *Appellant's Brief* 16-19. The interests in real property listed as "community" in the trial court's findings of fact are as follows:

1. Lot 2 Eagle Peak (the driving range);
2. Lot 13 Eagle Peak (1/2 interest);
3. High Valley Park 8;
4. High Valley Park 10;
5. 2 lots in Soldotna, Alaska;
6. Real Estate Contract for 1 lot in Soldotna, Alaska; and
7. Improvements to 109 Fairway Drive totaling $35,000.

Of these properties, (1) – (4) were all acquired during the marriage. 2/2/2009 RP 63, 67-68, 73; Trial Exhibit 15. There is no evidence in the record, other than Mr. Foster's testimony, as to the date of acquisition of items (5) and (6). The trial court specifically found that Mr. Foster "has not provided any evidence property acquired during the marriage was obtained with separate funds other than his own self-serving testimony." CP 25. Moreover, Mr. Foster did not assign error to this finding of fact,

and therefore it is a verity on appeal. *Haley*, 117 Wn.2d at 728. Items acquired during the marriage were presumptively community property. *Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995). Mr. Foster made no showing to overcome this presumption and, accordingly, the trial court correctly determined items (1) – (6) to be community property.

Consequently, the Court need only consider whether the trial court's designation of the parties' interest in improvements to 109 Fairway Drive totaling $35,000 constituted reversible error. It is important to note that the trial court made clear that it was not attempting to affect the rights of third parties, but that it viewed Mr. Foster's transfer of 109 Fairway Drive and other properties as fraudulent. 2/3/20009 RP 104, 108; CP 25. The trial court noted that, insofar as properties which had purportedly been transferred to third parties were concerned, it was only distributing the parties' interest in those properties, whatever that interest was. 2/3/2009 RP 104, 108.

The record is not clear as to the source of the funds used to make the improvements to 109 Fairway Drive. While Mr. Foster claimed that he paid for the improvements from his separate funds, the cost could have come from rents and profits from community-owned properties such as the driving range or the Soldatna lots, or from Ms. Scalf's earnings. Mr. Foster failed to offer any evidence of the source of the improvements other

than his own testimony, and the trial court was within its discretion to make the determination as to Mr. Foster's credibility. Improvements to separate property paid for by community funds or from the labor of the community are community property and, therefore, the trial court did not err in characterize the parties' interest in the improvements as community. *See Hamlin v. Merlino*, 44 Wn.2d 851, 858, 272 P.2d 125 (1954).

In the alternative that the improvements to 109 Fairway Drive were separate, the trial court nonetheless had the discretion to award Mr. Foster's separate property to Ms. Scalf. RCW 26.09.080; *Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985); *Marriage of Stachofsky*, 90 Wn. App. 135, 147-48, 951 P.2d 346, *rev. denied*, 136 Wn.2d 1010 (1998).

Accordingly, the trial court's characterization of property as community did not constitute reversible error, and the Court should affirm the trial court's decision in this regard.

D. THE TRIAL COURT WAS WITHIN ITS DISCRETION TO AWARD TO MR. FOSTER THE PARTIES' INTEREST IN PROPERTY PURPORTEDLY CONVEYED TO THIRD PARTIES IN NON-BONA FIDE TRANSACTIONS.

As Mr. Foster notes in his brief, the trial court has broad discretion in awarding property in a dissolution action. *Appellant's Brief* 20; *Fiorito*, 112 Wn. App. at 667-68. Mr. Foster assigns error to the trial court's

division of property based on the fact that much of the property awarded to him consists of real property which he had purportedly conveyed to his grandchildren, his children and to a corporation which apparently does not exist. *Appellant's Brief* 2. RCW 26.09.080 provides that the trial court is to "make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors...."

Mr. Foster relies heavily on dictum in *Marriage of White*, 105 Wn. App. 545, 20 P.3d 481 (2001), stating "If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial." *White*, 105 Wn. App. at 549. Mr. Foster reasons that, since he and Ms. Scalf allegedly no longer owned the properties at the time of trial, the trial court abused its discretion by awarding him the parties' interests in the properties he had previously transferred to his children, grandchildren and the Retsof Corporation. *Appellant's Brief* 27. However, subsequent cases have made it clear that, under the appropriate circumstances, a trial court may indeed award one spouse whatever interest a marital community may have in property which has been previously transferred in a suspect transaction.

In making its distribution of property, the trial court may consider a party's financial misconduct, including the abuse of quit claim deeds and

other tactics designed to put property beyond the reach of the court. *Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). In fact, in such a case, the trial court does not abuse its discretion even if it awards the parties' interest in such property to the innocent spouse, subject to whatever claim the third party may have. *See Wallace*, 111 Wn. App. at 709. In addition, the distribution of the parties' interests in assets purportedly transferred to third parties does not affect the rights of those third parties and is within the trial court's discretion. *Wallace*, 111 Wn. App. at 709-10.

Wallace was further explained in the 2005 case of *Marriage of Kaseburg*, 126 Wn. App. 546, 108 P.3d 1278 (2005). The *Kaseburg* court clarified *White's* dictum when it held that, absent a showing of financial misconduct such as was present in *Wallace*, the trial court cannot divide interests in property that did not belong to the community at the time of trial. *Kaseburg*, 126 Wn. App. at 556, 561. However, the *Kaseburg* court was quick to point out that, where financial misconduct is present, the court may indeed dispose of whatever interests that parties have in property that has purportedly been transferred to third parties. *Kaseburg*, 126 Wn. App. at 560-61.

Here, as noted above, the trial court's findings of fact included that Mr. Foster had abused quit claim deeds, treated every parcel allegedly

transferred as his own, grossly violated his fiduciary duty to Ms. Scalf and attempted to place property beyond the reach of the trial court. CP 25. Mr. Foster did not assign error to any of these findings of fact. They are, therefore, verities on appeal. *Haley,* 117 Wn.2d at 728. Beyond the trial court's formal findings, the record is replete with the Court's clear conclusion that Mr. Foster engaged in financial misconduct:

> I'm convinced that absolutely none of these transactions by which Mr. Foster transferred the title to various relatives, including his son and daughter, his grandchildren, et cetera, are in fact legitimate actions....It's often been said that next to a power of attorney, a quit claim deed is perhaps the most abuse [sic] and overused and misused legal document that has ever existed. I think that's certainly the case with respect to what we have here. 2/3/2009 RP 102
>
> [the transfer of 109 Fairway Drive to Mr. Foster's children] was also done an attempt to put that piece of property beyond the reach of the Court.... 2/3/2009 RP 106
>
> So what we have basically is a course of self-dealing on the part of Mr. Foster. 2/3/2009 RP 107

It is clear that Mr. Foster engaged in exactly the kind of financial misconduct that was present in *Wallace*; the trial court therefore was within its discretion to award Mr. Foster whatever interest the parties had to the properties.[6] The Court should affirm the trial court's division of property.

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[6] The trial court made it clear that its award to Mr. Foster of properties which had purportedly been transferred to third parties was limited to whatever interest remained in the hands of the marital community. *See* 2/3/2009 RP 104, 108.

E. THE TRIAL COURT PROPERLY AWARDED ATTORNEY FEES TO MS. SCALF.

1. Standard of Review.

An award of attorney fees is at the trial court's discretion and the award should not be reversed absent an abuse of that discretion. *Marriage of Leslie*, 90 Wn. App. 796, 805, 954 P.2d 330 (1998), *rev. denied,* 137 Wn.2d 1003 (1999); *Marriage of Nelson*, 62 Wn. App. 515, 521, 814 P.2d 1208 (1991).

2. The Trial Court Properly Awarded Attorney Fees to Ms. Scalf Based on Her Need and Mr. Foster's Ability to Pay.

The trial court did not abuse its discretion in awarding Ms. Scalf her attorney fees under RCW 26.09.140 based on her need and Mr. Foster's ability to pay. The court specifically considered the amount of separate and community property awarded to each of the parties in making the attorney fee award. CP 24. Further, the record is replete with evidence that Mr. Foster had substantial assets, such as the $555,000 he received from the sale of his business. 2/2/2009 RP 163. The amount of fees was also supported in the record. On the first day of trial, Ms. Scalf testified that she had already paid $6,300 in attorney fees, and that that amount would be sufficient provided the trial ended that day. 2/2/2009 RP 103. The trial, in fact, lasted another day, to be followed by three post-

trial hearings for presentment of orders, with the final decree and findings of fact/conclusions of law entered by the court on April 24, 2009—more than two and a half months after the trial concluded on February 3, 2009. CP 2, 22. The trial court was well within its discretion in arriving at the award of attorney fees and, therefore, the award should be affirmed on appeal.

3. The Trial Court Did Not Abuse Its Discretion in Awarding Attorney Fees to Ms. Scalf Based on Mr. Foster's Intransigence.

The trial court did not abuse its discretion in awarding attorney fees to Ms. Scalf based on Mr. Foster's intransigence. Regardless of the financial resources of the parties, the trial court may make an award of attorney fees based on one party's intransigence. *Marriage of Crosetto,* 82 Wn. App. 545, 564, 918 P.2d 954 (1996). The party challenging the trial court's decision bears the burden of proving the trial court exercised its discretion in a way that was clearly untenable or manifestly unreasonable. *Crosetto,* 82 Wn. App. at 563.

Here, Mr. Foster does not assign error to the trial court's findings of fact indicating that he engaged in the abuse of quit claim deeds, that he grossly violated his fiduciary duty to Ms. Scalf, and that he improperly attempted to place property beyond the reach of the court. CP 25. Engaging in such financial misconduct constitutes intransigence. *See*

Wallace, 111 Wn. App. at 710. Accordingly, the trial court was well within its discretion in awarding attorney fees to Ms. Scalf based on Mr. Foster's intransigence.

F. THIS COURT SHOULD AWARD MS. SCALF HER ATTORNEY FEES AND COSTS FOR THIS APPEAL.

Ms. Scalf petitions this Court for her attorney fees and costs for responding to this appeal pursuant to RCW 26.09.140 (on the basis of her need and Mr. Foster's ability to pay), RAP 18.1 (on the basis of Mr. Foster's continued intransigence) and RAP 18.9 (on the basis of Mr. Foster's frivolous appeal). Ms. Scalf will comply with RAP 18.1(c).

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,* 90 Wn. App. at 807. Moreover, Mr. Foster's intransigence at trial also supports an award of attorney fees on appeal. *Wallace,* 111 Wn. App. at 710.

This Court can also award attorney fees to Ms. Scalf to the extent that Mr. Foster's appeal is frivolous. "An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid or merit that no reasonable possibility of reversal exists." *Chapman v. Perera,* 41 Wn. App. 444, 455-56, 704 P.2d 1224, *rev. denied,* 104 Wn.2d 1020 (1985). Here, Mr. Foster did not assign error

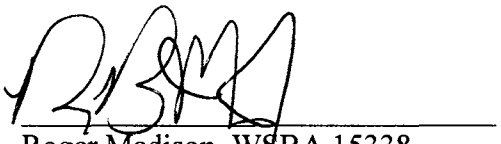
to the trial court's findings of fact that, taken by themselves, demonstrate that the trial court was within its discretion in making the property division about which Mr. Foster complains. Those same findings of fact also justify the trial court's award of attorney fees. Accordingly, this appeal is frivolous and this Court should award fees on appeal on that basis.

IV. CONCLUSION

The trial court's division of property and award of attorney fees were made within its discretion in light of the unchallenged facts of this case. This Court should affirm the trial court's decision and award Ms. Scalf her costs and fees for defending this appeal.

Respectfully submitted this 6th day of August, 2009.

MADISON LAW FIRM, PLLC
Attorney for Respondent



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DECLARATION OF SERVICE

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

That on August 6, 2009, I arranged for service of the foregoing Brief of Respondent, to the court and counsel for the parties to this action as follows:

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Dated at Olympia, Washington this 6th day of August, 2009.

Roger Madison, WSBA 15338