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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Kitsap County Superior Court Cause No. 11-3-00231-0

In re the Marriage of
DEBORAH SHAWN TANNER,

Petitioner/Appellant,

vs.

ANTHONY DARRELL TANNER

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Deborah Shawn Tanner challenges the trial court's division of property in the dissolution of her 10-year marriage to Anthony Darrell Tanner.[1] Under the facts presented in this case, the trial court manifestly abused its discretion in unfairly and inequitably dividing the parties' martial property by: (1) overlooking the parties' clear intent on the separate character of the house on Miller Bay Road and the 1951 Chevrolet panel truck, (2) ignoring Deborah's right to equitable reimbursement for the separate property contribution she made to satisfy the community's home equity line of credit obligation, (3) awarding Darrell 79 percent of the community assets, and (4) denying Deborah's request for her costs and reasonable attorney fees even though Darrell had superior financial resources and had abrogated court orders and delayed proceedings with his intransigent conduct. This court should reverse and remand.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the home at 24680 Miller Bay Road (hereinafter "Miller Bay Road house") was a community asset, despite finding that it was purchased with Deborah's separate funds and Darrell had quit claimed any community interest in the home to Deborah. CP at 301-02.

[1] Please note that, because the parties share a common last name, the author refers to them by their given names, intending no disrespect. The author further honors Mr. Tanner's preference and refers to him by his middle name, Darrell.

2. The trial court erred in "finding" that Deborah was not entitled to equitable reimbursement for her separate property investment into the Miller Bay Road house.[2] CP at 302.

3. The trial court erred in finding the 1951 Chevrolet panel truck to be a community asset and awarding it to Darrell when the evidence submitted by both parties traced the source of funds to Deborah's separate property. CP at 301.

4. The trial court erred and manifestly abused its discretion in concluding that "the percentage division of values in its division of assets and liabilities is not the preferred method of distribution. The division of the assets is fair and equitable." CP at 306.

5. The trial court erred and manifestly abused its discretion in concluding that it was fair and equitable to award Darrell 79 percent of the community property following the parties' 10-year marriage. CP at 300-13.

6. The trial court erred in denying Deborah's request for her costs of suit and reasonable attorney fees. CP at 313.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Deborah used her separate property funds for purchase of the 1951 Chevrolet panel truck, and as a down payment on the Miller Bay Road house, and Darrell executed a valid quit claim deed conveying any community interest in the house to Deborah as her separate property. Did the trial court err in overlooking the parties' intent and classifying the Miller Bay Road house and the 1951 Chevrolet panel van as community assets?

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[2] Please note that the trial classified its decision denying Deborah equitable reimbursement for the value of her separate property used to satisfy the community obligation as a finding of fact. However, this court is not constrained by the trial court's erroneous classification and may properly consider it as a conclusion of law.

2. Deborah took out a $50,000 Home Equity Line of Credit (HELOC) on the Miller Bay Road house in order to meet community obligations and debts of Darrell's separate business interest. When Deborah sold her Miller Bay Road house during the proceedings and with prior court approval, funds from that sale satisfied the HELOC. Did the trial court manifestly abuse its discretion in concluding that Deborah was not entitled to equitable reimbursement after satisfying the community HELOC with proceeds from the sale of her Miller Bay Road home?

3. Darrell and Deborah had been married for only 10-years when they separated. In addition to awarding Darrell his Subchapter S-Corporation, which was a going concern, the trial court awarded Darrell 79 percent of the community property. Did the trial court manifestly abuse its discretion in its markedly disproportionate division of property?

4. The trial court awarded the family business to Darrell along with 79 percent of the community's assets, such that Darrell had the ability to pay the costs of suit. Nonetheless, Darrell appeared pro se and through three different attorneys during the course of trial, violated court orders, and occasioned discovery delays and trial continuances. Did the trial court err by denying Deborah's request for the costs of suit and her reasonable attorney fees despite Darrell's ability to pay and his intransigence?

IV. STATEMENT OF FACTS

Deborah and Darrell married on February 14, 2001 and separated 10-years later, on February 19, 2011. CP at 299. At the time Deborah and Darrell married, Deborah owned her own home in Miller Bay Estates. RP at 32-33. When they married, Deborah also had a few separate property accounts, including one account with funds from an earlier personal injury award and a retirement account with funds earned in her employment

before she married Darrell. *See* CP at 220-22. Darrell entered their marriage with his sub-chapter S Corporation, Olympic Home Inspections, Inc. (hereinafter "OHI"), and several classic cars. *See* RP 93-98, CP at 222-23.

A. *Miller Bay Road house and Home Equity Line of Credit (HELOC)*

A few months after they married, Deborah sold her separate property house in Miller Bay Estates and used the proceeds from that sale as a down payment for a new home on Miller Bay Road. RP at 32-34, 159. Deborah closed on the Miller Bay Road house in July 2001 and, at that time, Darrell executed a quit claim deed conveying any community interest in the house to Deborah as her sole and separate property. RP at 32-34, 159-160; CP at 359-61. The mortgage on the Miller Bay Road house was in Deborah's name alone. RP at 32-34. The parties lived in the Miller Bay Estate house until Deborah purchased the Miller Bay Road home, at which time she, Darrell, and Deborah's three children from her previous marriage moved into the house together. RP at 35.

Several years later, after conducting a detailed cost-benefit analysis and consideration of Darrell's poor credit from his prior bankruptcies, Deborah and Darrell decided that Deborah should take out a $50,000 HELOC in her name on the Miller Bay Road home. RP at 42-50, 55. The sum of $35,000 of the proceeds from the HELOC was wired directly into

Deborah and Darrell's joint checking account. RP at 44, CP at 371-74. These funds were used to pay community expenses and debts, including the mortgage on the parties' other real property on Chico Way, the community's VISA account balance, and the payoff of the Cadillac Escalade vehicle. RP at 45; CP at 367-77. Other HELOC funds were disbursed as loans to Darrell's business, OHI, totaling $24,500. RP at 46-47, CP at 368-70, 382-414. OHI repaid only $10,000 of the loans it received from Deborah and the HELOC. *See* CP at 368-70. The balance Deborah owed on the HELOC on April 7, 2011 was $48,639.12. RP at 49; CP at 377.

B. *Olympic Home Inspections, Inc.*

In October of 2001, Deborah left her job at Frontier Bank and began working full time for OHI, which Darrell had run since approximately 1991. RP at 93-98. In her work with OHI, Deborah created forms for Darrell to use in his inspections, redesigned the format for Darrell's inspection reports, wrote a computer program for Darrell to use to create his reports in the redesigned format, maintained all financial records, paid bills and taxes, and went with Darrell when he performed his home inspections. RP at 93-98. The parties worked the business together, and for most of their marriage used the business account for payment of their

personal expenses in lieu of direct compensation for their services to the business. RP at 95.

C. *Chico Way house*

Before marrying Deborah, Darrell leased a house on Chico Way. CP at 223. Darrell apparently had an oral, "gentleman's agreement" that he would lease-to-own the property. RP at 242-44, 265-66. Still, there was no writing memorializing this agreement until Darrell signed a Purchase and Sale Agreement in July of 2001, which transaction closed in September, 2001 after the parties' marriage. RP at 51. Darrell originally took title to the house as his sole and separate property. CP at 744-55. However, throughout most of their marriage, the parties operated the Chico Way property as a residential rental and used community funds to pay the mortgage shortfall after application of rental funds. RP at 53, 197. Ultimately, in 2003, Darrell quit claimed to the marital community his interest in the Chico Way house and the parties jointly took out a loan against the Chico Way house secured by a deed of trust on the property. CP at 484-505.

D. *Personal Property*

Although Deborah continued to reside in the Miller Bay Road house after she and Darrell separated, Darrell took most of the personal property items from the house. RP at 176. By Darrell's own admission, the value

of the personal property that Darrell took was approximately $25,000. RP at 176; CP at 301.

In addition to the household personal property valued at approximately $25,000, Both Darrell and Deborah owned certain vehicles as their respective separate property. *See* CP at 300-02. Among these vehicles was a 1951 Chevrolet panel truck. *See* CP at 300-01. The Court, found that the 1951 Chevrolet panel truck had been purchased with Deborah's separate funds but that it had been converted to a community asset because of repairs to the vehicle at the community's expense. RP at 244. Then, in awarding the 1951 Chevrolet panel truck to Darrell, the trial court further found that it was worth only $3400. RP at 244.

However, both parties testified that: (1) the 1951 panel truck was purchased with Deborah's separate funds, (2) Darrell could produce no documentation that the marital community had paid anything toward the panel van, (3) Darrell had removed it from the Miller Bay Road property despite temporary orders to the contrary, (4) the panel van was in good enough condition for Darrell to have driven it in the 4th of July parade just a few weeks before trial, and (5) the van was worth between $7000 and $15,000. RP at 69-70, 179-180, 195-198.

The trial court further noted that Darrell had other community personal property in an Edward Jones IRA account valued at approximately

$12,000 when the trial court entered temporary orders in the dissolution. *See* RP at 246-47. These temporary orders restrained both parties from transferring, borrowing, lapsing, surrendering, or changing any retirement accounts. CP at 142. Darrell disregarded this temporary order, and cashed out the $12,594 in his individual retirement account in June of 2011. *See* RP at 147, 174, 246-47.

Despite Darrell's violation of the court's temporary orders, the trial court overlooked that violation and decided not to include the value of that liquidated account in the allocation of assets to Darrell. RP at 246-47; CP at 302.

E. *Procedural History*

After Deborah and Darrell separated on February 19, 2001, they each filed a petition for dissolution of their marriage on February 23. CP at 1-6, 106-08. During the proceedings below, Darrell appeared pro se and through three different attorneys. *See* CP at 85-87, 151-54, 195, 207. These multiple substitutions of counsel occasioned significant discovery delays, requiring Deborah to seek a trial continuance so that she could compel Darrell to respond to her outstanding discovery. CP at 155-89. Darrell's attorney turnover also required an additional trial continuance. CP at 195, 199-209. Based on Darrell's dilatory tactics, the court did not

hold trial on the dissolution petition until 18-months after it was filed. *See* CP at 1-8, 298.

F. *Characterization and Division of Property*

The court found that Deborah and Darrell had community property valued at approximately $124,736. CP at 301-02. The trial court applied $2,700, which was in a community investment account, to an outstanding tax liability. CP at 300-01. Accordingly, the trial court divided approximately $122,036 worth of other community assets. *See* CP at 300-01.

The trial court characterized OHI, the Chico Way house, and the personal property among the parties' community property. CP at 300-01. Importantly, the trial court found that, even though it had already been sold, the Miller Bay Road house been a community asset—despite Deborah's application of separate funds to its purchase and the 2001 quit claim deed from Darrell conveying it to her as her sole and separate property. CP at 301-02. The trial court further noted that the $50,000 HELOC, although satisfied, had been a community obligation. CP at 301-02.

The trial court then awarded Darrell all of the separate property that he brought to the marriage, OHI, to which the court did not assign a value,

and $96,436 worth—or 79 percent—of the community property. CP at 300-02, 308-10.

Conversely, the trial court awarded Deborah only 21 percent of what it identified as community property. CP at 302-03, 310-11. The trial court further denied: (1) Deborah's request for equitable reimbursement for her separate property investment in the Miller Bay Road house even though the proceeds from its sale were used to satisfy the community HELOC obligation, (2) her request to be awarded the Chico Way property, and (3) her request to receive her 1951 Chevrolet Panel Van. CP at 302-03, 310-11.

Deborah appeals the trial court's division of property. CP at 318. Enforcement of the trial court's division of property as to the Chico Way real property is stayed pending Deborah's appeal. CP at 328-29.

V. ARGUMENT

The trial court erred by: (1) overlooking the parties' documented and expressed intent to identify the Miller Bay Road home as Deborah's separate property, instead classifying the Miller Bay Road home as a community asset; (2) concluding that Deborah was not entitled to equitable reimbursement after she satisfied a community debt, the HELOC, with proceeds from the sale of her separate property house; (3) awarding Darrell 79 percent of the community assets and his business,

which was a going concern; and (4) denying Deborah's request for the costs of suit and her reasonable attorney fees when Darrell had the ability to pay but employed intransigent tactics that caused discovery delays and occasioned trial delays. This court should reverse and remand for the trial court to equitably divide the property, either by honoring Deborah's right to equitable reimbursement for the exhaustion of her separate property interest in the Miller Bay property to the satisfaction of the community debt, or by equally dividing the community property acquired during the parties' only 10-year marriage.

A. *The trial court erroneously overlooked the parties' documented intent and characterized the Miller Bay Road house as community property such that this court should reverse for the trial court to recharacterize and redistribute the property.*

Appellate courts review de novo a trial court's classification of property as separate or community. *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). A trial court's mischaracterization of property may be grounds for an appellate court to reverse the trial court's allocation of assets and liabilities if (1) the court's distribution was significantly influenced by the erroneous characterization and (2) it is not clear that the court would have effected the same distribution absent the mischaracterization. *In re Marriage of Griswold*, 112 Wn. App. 333, 346, 48 P.3d 1018 (2002); *see also In re Marriage of Smith*, 158 Wn. App. 248, 259, 241 P.3d 449 (2010).

In characterizing property as community or separate, Washington law relies largely on a presumption that property acquired during marriage is community property, but that presumption may be rebutted with clear and convincing evidence. *In re Estate of Borghi*, 167 Wn.2d 480, 484-85, 219 P.3d 932 (2009); chapter 26.16 RCW. When the character of real property is at issue, an acknowledged writing provides clear and convincing evidence of the spouses' intent regarding the property's character. *See Borghi*, 167 Wn.2d at 485. Such an acknowledged writing includes a quit claim deed from one spouse to the other conveying that property to the recipient spouse as his or her separate property. *See Borghi*, 167 Wn.2d at 485. Thus, a quit claim deed between and among spouses can effectuate both a transfer and a recharacterization of real property. *Borghi*, 167 Wn.2d at 485.

Once the separate character of property is established, a presumption arises that it remains separate property. *Borghi*, 167 Wn.2d at 484. Accordingly, a court will maintain that property's separate character until the party challenging the characterization meets his or her burden of producing "direct and positive evidence" that the spouse owning it intended to change its character to community property. *Borghi*, 167 Wn.2d at 484-85; *see also, Hamlin v. Merlino,* 44 Wn.2d 851, 857-58, 272 P.2d 125 (1954). A party seeking to superimpose a community interest on

a separate asset, such as through improvements to a separate property house, bears the burden of proving both (1) the investment of community funds or labor and (2) the increase in value to the asset attributable to that community investment. *In re Marriage of Elam,* 97 Wn.2d 811, 816-17, 650 P.2d 213 (1982). This burden is met by production of competent evidence of the increase in value of the property offset by the benefit to the community derived from use and enjoyment of the property. *In re Pearson-Maines and Maines*, 70 Wn. App. 860, 869-70, 855 P.2d 1210 (1993). Moreover,

> To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere conjecture. The proof of damages must not be speculative or self-serving. Furthermore, proof of special damages requires a witness who evidences special knowledge and experience respecting the type of service rendered and the reasonable value thereof.

Fairchild v. Davis, 148 Wn. App. 828, 832-33, 207 3d 449 (2009) (internal citations omitted).

Here, Deborah sold her separate property home in Miller Bay Estates in 2001 and used the proceeds from that sale as a down payment for her Miller Bay Road house. RP at 32-34; CP at 359-61. Although Deborah purchased the Miller Bay Road house in the summer of 2001, a few months after she married Darrell, she paid the down payment with her separate funds from the sale of her prior residence and took out a

mortgage in her own name. *Id.* Also in the summer of 2001, Darrell executed a quit claim deed conveying any community interest in the house to Deborah as her separate property. *Id.* Darrell identified the deed as a generous gesture on his part, testifying as follows:

> So, as courtesy and generosity to me I – you know, that was her and her first husband's deal. I didn't feel like any of that was going to be mine. So I – we had a conversation about it that I would sign off on Miller Bay, quitclaim it.

RP at 159-160. The validity of that quit claim deed has never been at issue.

Accordingly, even though Deborah purchased the 1951 Chevrolet panel van and Miller Bay Road house and the during her marriage to Darrell, she established their separate character by showing the separate source of the funds used to purchase the assets, and including the quit claim deed under which Darrell conveyed any community interest in the Miller Bay Road house to Deborah as her separate property in 2001.

Conversely, Darrell presented no "direct and positive" evidence that Deborah intended to change the character of either the 1951 panel van or the Miller Bay Road house to community property. While Darrell testified that he lived in the house, performed routine maintenance, and installed certain fixtures and features, and repaired the van, those factors alone do

not establish either a community interest in the property or that Deborah intended to change the assets' character. *See* RP at 198.

Further, despite Darrell's testimony on the use and enjoyment the parties' derived from their occupancy of the Miller Bay Road house and use of the panel van in the work of OHI, Darrell offered no competent evidence, such as receipts, time logs, or proof of appreciation of value in the Miller Bay Road house derived from any "improvements" and repairs he claimed to have made to the Miller Bay Road house and the panel van.

Despite the dearth of evidence presented to show that Deborah ever took any steps or expressed any intention to convert the Miller Bay Road house and panel van into community property, the trial court overlooked the parties' clear intent, and erroneously characterized them as community assets. In discussing the Miller Bay Road house, the court stated:

> The deed could be helpful in that respect because it clearly has language in it that says [the house] is to be [Deborah's] sole and separate property, but even though [Darrell] had executed quitclaim deed . . . it was clear to me from the testimony that it was intended as their joint residence.

RP at 240. As to the panel van, the court ruled:

> There is a 1951 Chevy panel truck. It doesn't appear to be currently that operable. The testimony is that its [sic] deteriorated. I give that a value of $3,400. I do believe that asset was initially purchased with the wife's separate funds, but that it was repaired with community funds, and so it was converted to a community asset, and I award that to the husband.

RP at 244.

The result of the Court's decision was an inequitable windfall for Darrell because Deborah sold the Miller Bay Road house to relieve herself of the liability, even though she had to pay just over $100 to close the sale, and she did not receive any proceeds from the sale herself; instead, the sale extinguished the community HELOC to the sole benefit of the community estate and to the benefit of Darrell's separate property (OHI). CP at 302-03, 362-66. Accordingly, based on the trial court's mischaracterization of the Miller Bay Road house as a community asset sold to satisfy a community debt, the trial court did not consider restoring Deborah's separate property investment in the Miller Bay Road house to her. *See* RP at 236-55. In so doing, the Court failed to do equity.

Because the court mischaracterized the Miller Bay Road house and the 1951 panel van as community assets, then, the court's ultimate division of property was concomitantly askew. Since it is not clear that the trial court's division of the assets would have been the same absent this mischaracterization, this court should reverse and remand in accordance with *Griswold.*

B. *The trial court erred in denying equitable reimbursement to Deborah after she satisfied the community HELOC debt with proceeds from her separate property Miller Bay Road house.*

Appellate courts review a trial court's decision regarding the right to equitable reimbursement for an abuse of discretion. *Miracle v. Miracle*,

101 Wn.2d 137, 139, 675 P.2d 1229 (1984). A trial court is required to "do equity" in dissolution proceedings. *Miracle*, 101 Wn.2d at 139. In effecting an equitable distribution in dissolution proceedings, a court may enforce a party's right to equitable reimbursement and may even impose an equitable lien to protect that reimbursement right. *Miracle*, 101 Wn.2d at 137. When a court enforces a party's right to equitable reimbursement in dividing marital property, it protects that party's right to reimbursement and, thus, preserves the equities. *Miracle*, 101 Wn.2d at 139. The Court "must take into account all relevant circumstances in deciding whether a right to reimbursement has arisen." *Id.*

Here, Deborah invested her separate funds into purchasing the Miller Bay Road house in 2001. CP at 302-03. Then, several years later, Deborah took out a $50,000 HELOC on the Miller Bay Road house, which was only in her name. RP at 32-35. Deborah and Darrell carefully evaluated their options, and decided together that their best option was for Deborah to take out the HELOC on the Miller Bay Road house in her name only. RP at 42-50, 55.

Although the HELOC was only in Deborah's name, funds from the HELOC were deposited into Deborah and Darrell's joint checking account or were disbursed directly for community purposes or to support OHI. CP

at 371. Darrell carried the check book for that account and often wrote checks. RP at 152-60.

Darrell and Deborah withdrew from the HELOC and invested: (1) at least $24,500 into OHI, (2) $5,874.50 to pay off the purchase money loan on the 2003 Cadillac Escalade that Darrell used and was ultimately awarded, and (3) $27,000 of the funds to pay other community expenses, including a VISA balance. CP at 367-77. As of April of 2011, the HELOC balance was $48,500. CP at 377.

Thus, although the HELOC was only in Deborah's name, it was a community obligation. CP at 302-03. But, when Deborah sold her Miller Bay Road house, proceeds from that sale went automatically to the bank to pay off the community HELOC. CP at 362-66. After paying off the mortgage on the house and the community HELOC, there were no funds left from Deborah's sale of the Miller Bay Road house to restore her separate property. *Id.* Indeed, Deborah even had to bring a check for $117.52 to close the sale. CP at 363.

Accordingly, Deborah was forced to use her separate property funds to satisfy the community's HELOC debt that otherwise would have or should have been paid from community resources. Thus, Deborah had a clear and equitable interest in the restoration of her separate funds, and the trial court abused its discretion in depriving her of that right. In abusing its

discretion in making this decision, the trial court acknowledged having read *Miracle* but it concluded that it did not apply. RP at 236-39, 252-55. Moreover, the court explicitly opted not to abide by the standards established in *Miracle.* RP at 254-55. Thus, this court should reverse and remand for a redistribution of the parties' marital property to protect Deborah's interest in equitable reimbursement and reasonable parity in the parties' comparative circumstances, which should include the award of the Chico Way real property to Deborah.

C. *The trial court manifestly abused its discretion in awarding Darrell the home inspection business, which was a going concern, and 79 percent of the community property.*

While a trial court has broad discretion to divide separate and community property during a dissolution of marriage, an appellate court will reverse the division if there is a manifest abuse of discretion. *Urbana v. Urbana*, 147 Wn. App. 1, 9, 195 P.3d 959 (2008). A trial court manifestly abuses its discretion if its division of property is based on untenable grounds or made for untenable reasons. *Urbana*, 147 Wn. App. at 10. A trial court's division of property is based on untenable grounds or made for untenable reasons such that it is a manifest abuse of discretion if it causes a "patent disparity in the parties' economic circumstances." *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1977); *Urbana,*

147 Wn. App. at 10. In such circumstances, an appellate court will reverse the trial court's division of property. *Urbana*, 147 Wn. App. at 10.

When dividing property in the course of a dissolution, the trial court must effectuate a just and equitable distribution after considering all relevant factors, including: (1) the nature and extent of the community property, (2) the nature and extent of the parties' separate property, (3) the duration of the marriage or domestic partnership, and (4) the economic circumstances of each spouse or partner at the time of the division. RCW 26.09.080. In addition to these statutory factors, the trial court should also consider other factors like the parties' respective ages, prospects for future earnings, employment histories, their necessities and financial abilities, and their foreseeable future acquisitions and obligations. *Urbana*, 147 Wn. App. at 11; *In re Marriage of Zahm*, 138 Wn.2d 213, 218-19, 978 P.2d 498 (1999).

Here, the trial court considered evidence that Deborah left her job at Frontier Bank in October 2001 to work full time for Darrell's home inspection business. RP at 93-98. In the course of her work for Darrell's home inspection business, Deborah kept meticulous records, maintained the company's Quick Books system, overhauled the formatting of the inspection reports, and even wrote a computer program for the overhauled inspection reports. *Id.* Despite performing these valuable services for the

home inspection business, Deborah did not receive a regular salary for over ten years. *See Id.* After Deborah and Darrell separated, Deborah was awarded temporary spousal maintenance while she had to find a new job in a new field which required extensive training. RP at 29-30, CP at 138-43. Although Deborah was employed at the time of trial, her compensation was commission based and had topped out at $4,000 in July 2012. RP at 110-11.

Conversely, Darrell's income increased dramatically after 2001, earning approximately $7,500 per month, significantly more than Deborah. *See* CP at 25-84. While Deborah's computer program and improved inspection reports certainly helped with Darrell's success, Darrell enjoys a reputation as an excellent home inspector. *See Id.* Indeed, Darrell had operated OHI at the time of trial for more than twenty years. CP at 86. Moreover, OHI continues to benefit from the computer program and the format for the improved inspection reports. *See* RP at 32-38.

In addition to having a lower income than Darrell, at the time of trial, Deborah also supported her 16-year-old son from her prior marriage with just $627 per month in child support from his father. CP at 27. Accordingly, at the time of trial for dissolution of this 10-year marriage, Deborah had: (1) lower income, (2) only eight-months on the job versus

Darrell's twenty years of running OHI, and (3) greater obligations because she had to care for her 16-year-old son.[3]

Despite these factors in Darrell's favor and despite the brevity of the marriage—11-years at the time of trial—the court elected to follow the principles for dividing property following long term marriages—i.e., those of twenty or more years. The principles of dividing property after long term marriages focus on putting the parties on equal footing going forward. Under the facts here, however, the Tanner marriage was of mid-term duration at best, and nearer a short-term marriage. The trial court should have followed the rule of thumb for shorter term marriages and restored the parties to the position that they were in before the marriage, or at most, should have implemented a narrow disparity in the award of the properties and liabilities under the facts before the court. *In re Marriage of Rockwell,* 141 Wn. App. 235, 243, 170 P.3d 572 (2007.)

Instead, the trial court awarded Darrell $96,436 worth—or 79 percent—of the community property. CP at 300-13. In doing so, the trial court's division caused a patent disparity in Deborah's and Darrell's financial position. Because the trial court's division created a patent

[3] Deborah acknowledges that any obligation Darrell had to care for his stepson ended upon entry of the dissolution decree. RCW 26.16.205. Thus, Deborah does not purport to argue that the court should have granted her a more equitable share of the community property in lieu of child support for Darrell's stepson because Darrell then had no duty to support him.

disparity in the parties' financial positions to Deborah's damage and detriment, the trial court manifestly abused its discretion by implementing a division of property that was neither fair nor equitable. *In re Marriage of* Pea, 17 Wn.App. 728, 731, 566 P.2d 212 (1977.) Thus, this court should reverse and remand for the trial court to equitably redistribute the property.

D. *The trial court abused its discretion in denying Deborah's request for her costs of suit and reasonable attorney fees under RCW 26.09.140 given the parties' respective financial positions and Darrell's intransigence.*

A trial court has broad discretion to award a party's costs of suit and reasonable attorney fees based on its evaluation of the financial resources of both parties *or* based on a party's intransigence. *Bay v. Jensen*, 147 Wn. App. 641, 660, 196 P.3d 753 (2008). The parties' relative financial positions and ability to pay are not a factor, however, if one party engages in intransigent conduct that requires the other spouse to obtain additional legal services. *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997). A party is intransigent for purposes of an attorney fee award under RCW 26.09.140 when that party engages in dilatory tactics to delay or obstruct proceedings, thus making the trial unduly difficult by his actions. *Bay*, 147 Wn. App. At 660.

Here, the trial court awarded Darrell his separate business (OHI), separate vehicles, and 79 percent of what it identified as the community assets. Thus, Darrell was in a financial position to pay Deborah's attorney fees and such an award is appropriate under RCW 26.09.140. *See* CP at 27-85.

Additionally, notwithstanding Darrell's ability to pay Deborah's attorney fees, Darrell violated the Court's temporary orders in the liquidation of his IRA and removal of personal property items from the Miller Bay Road house, seriously delayed the proceedings by filing late, untruthful, and incomplete discovery responses, requiring Deborah to seek a continuance to compel discovery. *See* RP at 149-151, CP at 85-87, 151-54, 195, 207. Darrell also appeared pro se and through three different counsel of record during the proceedings below, which occasioned an additional trial continuance. *Id.* Accordingly, Darrell was intransigent and this court should reverse and remand for the trial court to enter an award of Deborah's costs and reasonable attorney fees under RCW 26.09.140.

VI. ATTORNEY FEES ON APPEAL

This court should award Deborah her reasonable attorney fees on appeal in accordance with RAP 18.1, which allows a party to recover reasonable attorney fees on appeal if there is a legal basis for such award.

As discussed above, RCW 26.09.140 allows Washington courts broad discretion to award a party's costs of suit and reasonable attorney fees based on its evaluation of the financial resources of both parties *or* based on a party's intransigence. *Bay*, 147 Wn. App. at 660. RCW 26.09.140 applies equally to trial and appellate courts. *Bay*, 147 Wn. App. at 660.

Here, as discussed in greater detail above, Darrell has the financial ability to pay Deborah's reasonable trial and appellate attorney fees. Moreover, notwithstanding Darrell's financial position, his intransigence and dilatory tactics that occasioned multiple temporary orders and three trial continuances also warrant an award of Deborah's costs and reasonable attorney fees on appeal. Accordingly, this court should award Deborah her costs and reasonable attorney fees on appeal.

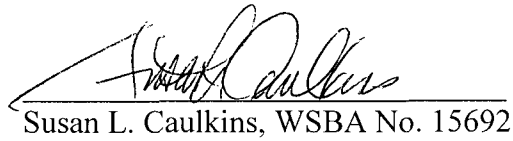
VII. CONCLUSION

Darrell and Deborah were only married for 10-years at the time of separation, which falls far short of a long-term marriage. Nonetheless, more in line with the principles of property distribution following a long-term marriage, the trial court strove to put Darrell in a better position than he was in before the marriage at Deborah's sole expense. The trial court perpetuated this inequitable distribution of the assets by overlooking Darrell's wrongful conduct, disregarding the parties' intent in characterizing their property as separate or community, refusing

Deborah's request for equitable reimbursement for the amount of her separate property that she used to satisfy the community HELOC debt, awarding Darrell both OHI and 79 percent of what it identified as the community assets, and denying Deborah's request for costs and her reasonable attorney fees. Under the facts here, the trial court manifestly abused its discretion.

Accordingly, this court should reverse and remand for the trial court to: (1) grant Deborah equitable reimbursement for the amount of her separate property that she used to satisfy the community HELOC obligation; (2) award Deborah her proper separate property interests, (3) equitably divide the community assets, including the IRA liquidated by Darrell for his sole use during the proceedings; and (4) award Deborah her costs and reasonable attorney fees at trial and on appeal.

DATED this 26 day of March, 2013.



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STATE OF WASHINGTON

BY_____
DEPUTY

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

In re the Marriage of: DEBORAH SHAWN TANNER, Petitioner, and ANTHONY DARRELL TANNER, Respondent.	No. 43994-8-II AFFIDAVIT OF SERVICE

I, Kimberly Middleton, being first duly sworn upon oath, deposes and says:

I am the legal assistant to Susan L. Caulkins at Davies Pearson, P.C., attorneys for Petitioner, Deborah Shawn Tanner.

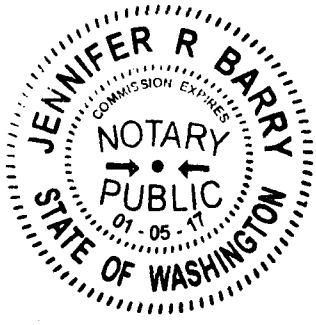
That on the 27th day of March, 2013, I placed the following document in the U.S. Mail, postage prepaid, for delivery to attorney for Respondent:

Charles Dale Creason, Esq.
P.O. Box 2511
Poulsbo, WA 98370-0964

a true and correct copy of the Brief of Appellant.

KMiddleton
KIMBERLY MIDDLETON

SUBSCRIBED AND SWORN to before me this 27th day of March, 2013.



Name: Jennifer R. Barry
Notary Public in and for the State of Washington, residing at Tacoma.
My Commission expires: 1-5-17.