

No. 44300-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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In re the Marriage of:

WENDY LEE TATE,

Respondent,

and

GREGORY E. TATE,

Appellant.

APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE JAMES R. ORLANDO

BRIEF OF RESPONDENT/CROSS-APPELLANT

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## I. INTRODUCTION

As the experienced trial court judge recognized, “this is a case about power and control, domestic violence and the damage created.” (CP 397) Appellant husband abused his family – verbally, emotionally, financially, and physically – throughout a 15-year marriage. By the time the parties separated, respondent wife showed signs of post-traumatic stress disorder, and their children were “genuinely frightened” of their father. The husband continued to exert control over the wife in the dissolution action by denying the community had an interest in property that both parties had managed, without compensation, for years, causing the wife to incur substantial attorney fees in this action and in a separate lawsuit she was forced to file against the husband, his parents, and the businesses associated with the property.

After a 7-day trial, the trial court properly granted the wife a 10-year protection order, limited the husband’s residential time with the children, and awarded the wife maintenance and a slightly disproportionate share of the marital estate. Substantial evidence supports the trial court’s finding that the parties had a community interest in property owned with the husband’s parents, and the trial

court properly left it to the court in the separate civil lawsuit to determine the “extent and value” of that interest. (CP 175)

On appeal, the husband challenges virtually every discretionary decision of the trial court. But the court erred only in awarding the wife a fraction of her fees below, despite finding the husband intransigent. (CP 178, 399) This court should remand to the trial court to reconsider its award of fees. Otherwise, this court should affirm and award the wife fees on appeal.

## **II. CROSS-APPEAL - ASSIGNMENT OF ERROR AND RELATED ISSUE**

Did the trial court err by refusing to award the wife all or a substantial portion of her fees when it found the husband “significantly more intransigent” in resisting the wife’s efforts to prove the parties’ interest in property owned with the husband’s parents that both parties “spent countless hours working to improve, promote and maintain?” (FF 2.15, CP 178; CP 398, 399)

## **III. RESTATEMENT OF FACTS**

### **A. The wife was a stay-at-home mom and the husband worked for Boeing during a 15-year marriage.**

Respondent Wendy Tate and appellant Gregory Tate married in February 1996. (9/19 RP 96) Their two sons were born in October 1996 and July 1998; their daughter was born in May 2004.

(9/19 RP 85) On August 26, 2011, two weeks after the parties separated, Wendy filed a petition for legal separation that was later converted to a petition for dissolution, at both parties' request. (CP 297-98; 9/19 RP 96-97)

Greg has worked at Boeing for 34 years in CAD training and support, and earned approximately \$95,000 annually at the time of trial. (9/21 RP 51-52) Wendy sold water ski boats for Washington Water Sports when the parties met, and was a para-educator with the school district when the parties married. (9/19 RP 94, 97; 9/21 RP 20) With Greg's agreement, Wendy stopped working outside the home after their oldest child's birth in 1996. (9/19 RP 94-95, 97-98) However, in the last few years of the marriage, Wendy's mother, a real estate agent, gave Wendy a job researching homes for potential buyers, so she could earn some money working from home. (9/18 RP 191)<sup>1</sup> Until the market crashed and her mother could no longer afford to employ her, Wendy earned an extra \$100 to \$300 per month to help meet the

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<sup>1</sup> Greg makes much over the fact that Wendy herself once had a real estate license. (See App. Br. 9, 48) Wendy acquired the license in 1991, 5 years before the parties married, and never used the license, which expired after a year. (9/19 RP 148)

family's expenses in this \$12-per-hour job her mother "pretty much made up" for her. (9/18 RP 191-92; 9/19 RP 41, 148-49)

Before and during marriage, however, Wendy also provided unpaid services for "Tate Lake," a private water ski lake in eastern Washington that Wendy and Greg owned with Greg's parents. Wendy marketed Tate Lake and dealt with boaters who rented the lake for waterskiing. (See Restatement of Facts § C.2, *infra*)

After the parties separated, Wendy started school to become a licensed therapist. (9/19 RP 181-84) Wendy anticipated that she could complete her education in 2 to 4 years. (9/19 RP 183-84)

**B. The husband abused the wife emotionally, verbally, financially, and physically. The children, who were also victims, witnessed their mother's abuse.**

Greg abused Wendy throughout the marriage. In 2003, before their daughter was born, Wendy sought therapy to help deal with the domestic violence. (RP 9/19 RP 20-21) Wendy's therapist described her at the time as suffering from anxiety, and testified that it was "evident" that Wendy was "in a marriage where there was domestic violence, particularly control." (9/19 RP 20-21) The therapist counseled Wendy to leave, but because Wendy had no money and no access to the parties' financial information, she felt

“trapped.” (9/19 RP 21) Wendy was too frightened to leave, describing Greg and his family as “vindictive.” (9/19 RP 21)

Wendy returned to therapy in 2007, suffering from even worse anxiety and concerned that Greg was now directing his abuse towards their sons. (9/19 RP 23) Nevertheless, Wendy ceased therapy, apparently still too scared to leave the marriage. (9/19 RP 23) Overwhelmed, depressed, exhausted, and scared, Wendy returned to therapy a third time in August 2011, when the parties finally separated. (9/19 RP 24) The therapist diagnosed Wendy with post traumatic stress disorder. (9/19 RP 24)

The guardian ad litem appointed to investigate parenting issues also concluded that “more likely than not,” there was domestic violence in the Tate home. (9/18 RP 79) The guardian ad litem believed Greg’s domestic violence was more emotional than physical, “but no less frightening for that fact” and “serious” (9/18 RP 79, 80), and testified that Greg exhibits symptoms of “narcissistic personality disorder.” (9/18 RP 83)

**1. The husband used money to control the wife.**

Greg exerted “total control” over the parties’ finances. (9/19 RP 150) He maintained all passwords for the computer and for the family’s accounts, which he held in his name. (9/19 RP 103, 151;

9/20 RP 27) The only money Greg made available to Wendy was rental income from the Issaquah condo the parties owned (See Restatement of Facts § C.1, *infra*), which she used to pay for food, gas, the children's expenses, and her cell phone. (9/19 RP 168; 9/20 RP 65) The income was unreliable, as Greg diverted it if he was angry over a perceived slight. (9/19 RP 165) When Greg did make the \$1,095- a-month rental income available, it was often times not enough to meet the family's expenses, as food alone for the family averaged \$1,000 per month. (9/18 RP 188; 9/20 RP 7)

If Wendy asked Greg for additional money, he swore at her or called her a "fucking child." (9/19 RP 167-68) Once, when Wendy asked for gas money when she and the children were leaving Tate Lake to return home to Sumner, Greg initially refused, yelled at her in front of the children for being "wasteful," and then handed a \$20 bill to the older son, then a 4<sup>th</sup> grader, telling him to only give it to Wendy if she ran out of gas. (9/19 RP 170-71)

Another time, Wendy's brother offered to sell her his used Suburban, at a significant discount, because he knew she needed a larger car to transport the parties' three children. (9/19 RP 173-74) Wendy "begged and begged" Greg to buy the car, but he refused. (9/19 RP 174) Greg acquiesced only when Wendy signed a

“contract” in which he agreed to “consider” buying the Suburban if Wendy used the condo rental income to pay not only her “budget” for food, the children’s expenses, and her cell phone, but also the home phone, cable, water, and garbage bills. (Ex. 89, *emphasis in original*) If any of these bills were not paid, “the Suburban will be sold immediately to pay the back bills,” and the contract required Wendy to “make an appt. before the end of Aug. with O.B. Gyn. to inquire about the possibility of having extreme mood swings and possible solutions.” (Ex. 89) Even on these conditions, Greg still only agreed to pay \$4,100 towards the purchase of the Suburban; Wendy was required to “make arrangements for the balance with her family.” (Ex. 89, *emphasis in original*) (9/19 RP 173-80)

**2. The husband verbally abused the wife.**

Greg verbally abused Wendy. The children witnessed this abuse, describing “constant loud, violent arguments,” which frightened them. (9/18 RP 49) Even a “tiny or small or relatively insignificant trigger” would cause a “big explosion” from Greg in front of the children. (9/18 RP 62) While Greg “yelled and screamed,” with the veins in his neck bulging and his face red, Wendy “would be quiet and try to placate” him (9/18 RP 62), and

the older son either tried to diffuse the situation or get the younger children “out of the blast radius.” (9/18 RP 49-50)

Friends and relatives also witnessed Greg’s abuse. Wendy’s aunt saw Greg call Wendy a “f-ing bitch in front of his kids and saying that she needs to be out of the picture.” (9/19 RP 77-78) A friend testified to Greg exploding in anger when Wendy “disobeyed” him by bringing home a puppy for the children. (9/18 RP 151) The friend had to physically come between Wendy and Greg, who was “adamantly upset and angry and yelling [and] screaming,” and feared that Greg might kill the dog.<sup>2</sup> (9/18 RP 151) The same friend testified that Wendy lost her “spunk” after years of “constantly being verbally abused” by Greg. (9/18 RP 160)

**3. The husband physically abused the wife and the children.**

Greg also used physical tactics to intimidate Wendy and the children, including throwing and breaking things. (9/20 RP 10-11) Greg threw a chaise lounge so violently that the feet broke off, and also threw a child’s chair at Wendy that broke into pieces. (9/20 RP 13) He threw their son’s hamster across the floor. (9/20 RP 13) He

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<sup>2</sup> Greg claimed that he was allergic to dogs, but there was no other evidence that he was as “extremely” allergic as he claimed, and none that would justify such an extreme reaction. (See 9/19 RP 66-67; 9/18 RP 105; 9/20 RP 17-18; 9/25 RP 82)

threw the dog's bed into a fire, despite the younger son's protests and the other children being "visibly upset." (9/18 RP 150; 9/19 RP 58) Greg threw a piece of wood at their younger son, leaving a bruise, (9/20 RP 14) and grabbed the older son by the arm, dragging him around the house while yelling at him. (9/20 RP 87)

**4. After years of abuse in the family, the children were estranged from their father.**

By the time the parties separated in 2011, the children were "genuinely frightened" of their father, and resisted spending time with him. (9/18 RP 45) While the dissolution was pending, the guardian ad litem recommended that the children spend one alternating weekend day with the father. (See 9/18 RP 50, Exs. 15, 41, 42) At trial, the guardian ad litem recommended that the children and father participate in reconciliation therapy, and that the alternating weekend day residential schedule should continue pending the outcome of that therapy. (9/18 RP 80-81; Ex. 12)

**C. The parties owned the family home, a rental condominium, and an interest in Tate Lake.**

**1. The husband had no equity in his condo when the parties married. Within two years, the parties had purchased a home and refinanced it to pay off the condo's mortgage.**

When the parties married in February 1996, Greg owned a condominium at Lake Sammamish. (9/19 RP 100) The amount

owed on the condo was equal to its market value. (9/19 RP 107) Shortly after the parties married, Greg used \$9,800 in proceeds from the sale of Wendy's separate property vehicle to pay years of delinquent property taxes he owed on the condo. (9/19 RP 99-100)

The debt on Greg's Issaquah condo was paid off within the first couple of years of the parties' marriage. (9/19 RP 107-08; 9/24 RP 122) Wendy testified that the parties refinanced their family home on Lake Tapps, purchased in February 1997, to pay off the mortgage. (9/19 RP 107-08) Greg produced a promissory note purportedly signed by both parties on November 3, 1997, and claimed his father paid off the mortgage. (9/24 RP 121-22; Ex. 8) The trial court found that \$32,000 of the \$80,000 mortgage was paid by Greg's father, and that the remainder was paid by the parties' refinance of the Lake Tapps home. (Finding of Fact (FF) 2.8, CP 175)

**2. The parties owned a private ski lake in eastern Washington with the husband's parents.**

In 1991, Greg and his parents, John and Maxine Tate, purchased a half interest in a 78-acre property in eastern Washington for \$50,000. (9/21 RP 55-56; 9/24 RP 14-15) The Bonney family purchased the other half interest. (9/21 RP 56) The

Tates and Bonneys formed a partnership to create a private water ski lake. (9/24 RP 15-17; Ex. 106)<sup>3</sup> Greg oversaw the excavation of the property, and the ski lake was functional and being rented out for \$450 per weekend by 1993. (9/21 RP 56-60)

By 1999, the relationship between the Tates and the Bonneys had deteriorated. (9/20 RP 39) Wendy mediated between the families (9/20 RP 39), and the Tate family began discussing buying out the Bonneys. (9/24 RP 42-43; Exs. 49, 107) The family discussed how to transition ownership upon the elder Tates' death, as "easy and inexpensive as possible," and contemplated forming a limited partnership. (Ex. 49)

In an October 1999 letter to Greg and Wendy, John laid out his expectations in owning the Lake moving forward. (9/20 RP 57-58; Ex. 107) He wrote that owning the lake was a "lot like getting married; there is a major commitment involved." (Ex. 107) John told the parties that "someone has to stay on top of maintaining the property and improvements and has to stay on top of operating the business. That means that you are going to have to be available

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<sup>3</sup> A portion of the property was also leased as farmland. (9/25 RP 69)

most of the time to deal with the renters and will need to spend a lot of time at the lake.” (Ex. 107)

On May 22, 2000, the Tates acquired the Bonneys’ interest in the property. (9/20 RP 80-81) The purchase and sale agreement listed both the elder and younger Tates as “buyers.” (Ex. 102) The statutory warranty deed conveying all interest in the property listed the grantors as William Bonney, Kathy Bonney, John Tate, Maxine Tate, and Greg Tate, and the grantees as John Tate, Maxine Tate, Greg Tate, and Wendy Tate. (Exs. 47, 48; 9/20 RP 36)

Wendy understood from this deed, as well as from her interactions with Greg’s parents, that she and Greg owned an interest in “Tate Lake.” (9/20 RP 86-87) Although John Tate testified at trial that the deed was “in error,” he also admitted that he never told Wendy that neither she nor Greg had an ownership interest in Tate Lake. (9/24 RP 20, 22)

After the Bonneys conveyed their interests to the Tate family, Wendy became concerned about liability if there were an accident on Tate Lake. (9/20 RP 50-51, 120) Wendy consulted with an attorney friend, who suggested forming an LLC to protect the families’ personal assets. (9/19 RP 131-32; 9/20 RP 50-51) On June 11, 2003, the elder and younger Tates signed a quit claim deed

conveying Tate Lake to Tate Farms, LLC as a “gratuitous transfer.” (Exs. 52, 92)

Wendy understood the only reason for this quit claim deed was to protect both families’ personal assets. (9/20 RP 77-78, 122-23) Prior to the transfer, both John and Greg told Wendy “numerous times” that she would be a member of the LLC. (9/20 RP 117, 122-23, 126) It was only after this dissolution action was commenced that Greg and John took the position that John was the only member of the LLC. (9/20 RP 87) The only evidence to support this claim was the Master application to the State to form an LLC, which listed only John as a member.<sup>4</sup> (Exs. 123, 124)

Early in this litigation Greg acknowledged an interest in Tate Lake, referring to himself as a “shareholder.” (9/24 RP 47, 49) This was consistent with his actions prior to separation. In 2006, for instance, Greg signed the lease as “lessor” when the LLC rented out a portion of the property that was not being used for the private ski lake. (Ex. 56) Greg and Wendy received K-1s reporting their share of income as partners in Tate Lake. (Exs. 51, 54) Greg reported himself and Wendy as “landholders” of the property in a

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<sup>4</sup> John’s wife (and Greg’s mother) Maxine has not participated in these proceedings.

Form 7-2190 "Report of Individual's Landholdings." (Exs. 56, 64) When water easements for Tate Lake were revisited in 2006, Greg, Wendy, and John were all involved in the discussions. (Ex. 157)

Both before and during the marriage, Wendy provided significant uncompensated services for Tate Lake. (9/19 RP 47, 48-50; 9/20 RP 38-48) Wendy negotiated and scheduled rentals, marketed Tate Lake by distributing advertisements to ski shops, worked boat shows, and created the Tate Lake website. (9/20 RP 39-43; *see also* Ex. 46) Wendy created the rules book and waivers for renters to sign. (9/20 RP 40, 46; Ex. 82) Wendy made arrangements with professional water skiers to come to Tate Lake and give lessons and clinics. (9/20 RP 42)

Greg also spent significant time at Tate Lake, doing maintenance and making improvements. (9/19 RP 154-59; 9/20 RP 34-35; Ex. 66) Even though their own personal bills remained unpaid (causing them to regularly receive shutoff notices), and the family home where Wendy and the children spent most of their time was deteriorating, the parties put "every extra cent of money" into Tate Lake. (9/20 RP 27-33, 111)

Greg's refusal to acknowledge the parties' interest in Tate Lake substantially increased Wendy's fees. Wendy was forced to

pursue discovery to obtain financial information on the property, which both Greg and John Tate resisted, causing her to file various discovery motions. (See CP 505, 572, 585, 589, 600) Wendy was also forced to sue Greg, his parents, and the LLCs associated with Lake Tate in King County. (9/18 RP 4-16) By the time of trial, Wendy had incurred \$150,000 in attorney fees. (CP 614)

**D. After a 7-day trial, the trial court entered a protection order, a parenting plan, and a child support order, divided the parties' assets, and awarded the wife four years of maintenance.**

After a 7-day trial in which Greg disputed parenting, child support, property, maintenance, and Wendy's request for a protection order<sup>5</sup>, Pierce County Judge James Orlando saw the parties' marriage as paralleling the use of Tate Lake, "two people in a boat on a manmade lake going nowhere." (CP 397)

The trial court granted Wendy a 10-year protection order after finding that "there has been emotional and physical abuse inflicted by Greg Tate on Wendy and the children" and that Greg "represents a credible threat to the physical safety of [Wendy]." (CP 141, 397) The trial court found that Greg's belief that Wendy's claim of abuse was "blown out of proportion" was evidence of his "failure

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<sup>5</sup> Greg claims the trial lasted four days (App. Br. 13), but in fact the trial was held over seven days: September 18, 19, 20, 21, 24, 25, and 26.

to show empathy [and] is consistent with someone with a narcissistic personality.” (CP 397)

The trial court found five factors under RCW 26.09.191 warranted sole decision-making for Wendy as well as restrictions on Greg’s residential time. (CP 151; *see* Argument § B.2, *infra*) The trial court ordered that Greg and the children pursue reconciliation therapy with Dr. Lawrence McCollum, who was to consult with the guardian ad litem, the children’s therapist, and Wendy’s therapist. (CP 152, 156) The trial court ordered that once the children’s therapist determined that reconciliation therapy was complete, Greg could seek additional residential time; meanwhile, Greg’s residential time with the children would remain one weekend day on alternating weekends. (CP 156) The trial court also ordered that Wendy may “request modification of visitation if [Greg] fails to comply with treatment or counseling as ordered by the court.” (CP 144)

The trial court awarded monthly maintenance of \$2,000 to Wendy for 48 months. (CP 186) The trial court found that the parties had agreed that the wife stay home to care for the children, and that this “suspension of the wife’s outside employment and career efforts has resulted in her decreased earning potential.” (FF

2.12, CP 177) The trial court found that Wendy had the need for maintenance and Greg, whose monthly gross income was \$9,480, had the ability to pay. (FF 2.12, CP 177; CP 398)

For purposes of child support, the trial court found Wendy's monthly net income was \$3,268.36, including imputed income of \$2,080. (CP 168) The trial court found Greg's monthly net income was \$5,301.50, after payment of maintenance. (CP 168) The trial court ordered Greg to pay child support of \$1,627.97 for the three children. (CP 160)

As for Tate Lake, the trial court found that the community had an interest in the property that should be awarded to Wendy. (CP 179, 183, 398) The trial court found it was "clear that Greg and Wendy spent countless hours working to improve, promote, and maintain the Tate Lake properties. . . . Tate Lake was a priority for this couple." (CP 398) The trial court acknowledged that John Tate was not a party to the dissolution, but found that "his inconsistent statements and behaviors over the years support a finding of a community interest," and that "he treated [Greg and Wendy] as partners or shareholders of said LLCs." (FF 2.21, CP 179) The trial court concluded that the "extent and value" of the parties' interest must be established in the King County lawsuit that Wendy had

commenced after Greg and John claimed that the parties had no interest in Tate Lake. (CP 175)

The trial court awarded the family residence to Wendy at a net value of \$180,000. (CP 175, 184) The trial court found that Greg had a separate interest of \$32,000 in the condo, which was valued at \$214,000, and awarded Wendy half the \$182,000 community interest. (FF 2.8, CP 175) The parties' personal property was divided as proposed by Wendy. The chart on the following page summarizes the trial court's property distribution:

		WENDY	GREG
Lake Sammamish Condominium	\$214,000 SP \$ 32,000 CP \$182,000	\$ 91,000	\$123,000
Lake Tapps residence	\$180,000	\$180,000	
Tate Family, LLC's	Unknown	Unknown	
Boeing Retirement	SP \$ N/V CP \$ N/V	1/2 CP	SP 1/2 CP
IRS tax refunds	Not Valued	1/2	1/2
Boeing Incentive Plan Payment	\$ 5,575		\$ 5,575
Vacation and sick leave	\$ 5,500		\$ 5,000
Vehicles/Boats	\$102,900	\$ 56,900	\$46,000
Bank Accounts	\$ 30,168	\$ 9,079	\$ 21,062
Personal property	\$ 14,500		\$ 14,500
<b>Total</b>		<b>\$336,979</b>	<b>\$215,137</b>

The trial court found that "on balance" Greg was "significantly more intransigent," primarily on the Tate Lake issue. (CP 399; *see also* FF 2.15, CP 178) But it was concerned about the

amount of fees the parties incurred, finding that “it should not cost \$300,000 to get your marriage dissolved and I cannot justify the fees involved by awarding them to either side.” (CP 399) The trial court awarded \$20,000 in fees to Wendy, “considering their economic positions after dissolution,” and its determination that Greg was in contempt for failing to deliver a boat he had been ordered to turn over to Wendy before trial. (CP 399)

#### **IV. RESPONSE ARGUMENT**

##### **A. Substantial evidence supports the trial court’s protection order.** (Response to App. Br. 25-28)

“The decision to grant or deny a protection order is reviewed for an abuse of discretion. Findings will be upheld on appeal if they are supported by substantial evidence in the record.” *Marriage of Stewart*, 133 Wn. App. 545, 550, ¶ 13, 137 P.3d 25 (2006), *rev. denied*, 160 Wn.2d 1011 (2007). On appeal, “substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. In evaluating the persuasiveness of the evidence and the credibility of witnesses, [the court] must defer to the trier of fact.” *Marriage of Akon*, 160 Wn. App. 48, 57, ¶ 26, 248 P.3d 94 (2011) (citations omitted).

- 1. The trial court found that a protection order was warranted, because the husband committed domestic violence and posed a credible threat to the wife's safety.**

Contrary to the husband's claim (App. Br. 25-26), the trial court made written findings supporting entry of its protection order. The trial court found that the husband "committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of [the wife]" (CP 141) by "checking the box" in the mandatory form next to this statutory basis for a protection order. *See* WPF DV-3.015 (Mandatory Form, 6/2012). While use of this preprinted form appears to be the basis for the husband's complaint on appeal, the trial court was *required* to use it. RCW 26.50.025 (a protection order "*shall* be issued on the forms mandated by RCW 26.50.035(1)") (emphasis added).

The trial court's finding as to the ultimate facts – that the husband "committed domestic violence" and "represents a credible threat" - was more than adequate to support the protection order. RCW ch. 26.50 does not require that the trial court make any specific findings before granting a protection order. *See City of Seattle v. May*, 151 Wn. App. 694, 698, ¶ 9, 213 P.3d 945 (2009), *rev. granted*; 168 Wn.2d 1006 (2010) (no requirement for specific

findings before making protection order permanent), *affirmed on other grounds*, 171 Wn.2d 847 (2011); *see also Spence v. Kaminski*, 103 Wn. App. 325, 331, 12 P.3d 1030 (2000) (RCW ch. 26.50 “does not require any particular wording in the order”).

*Spence* expressly rejected a claim, identical to the husband’s on appeal here, that “preprinted findings on a form are insufficient to indicate the factual basis for the court’s conclusions.” 103 Wn. App. at 332. In rejecting a comparison of findings for protection orders with the requirement for specific findings when an individual is involuntary committed, the *Spence* court held that a “protection order authorized by the chapter 26.50 RCW does not result in a massive curtailment of [appellant]’s liberty.” 103 Wn. App. at 332. So long as the restrictions are reasonable “based on a demonstrated need to protect [the petitioner] from domestic violence,” the form finding referencing the definition of domestic violence is sufficient. *Spence*, 103 Wn. App. at 332-33.

## **2. Substantial evidence supports the findings.**

Domestic violence is defined in part as “physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.” RCW 26.50.010(1). As the husband acknowledges, the

wife's assertion that he "threw an ax" "meet[s] the statutory definition of domestic violence." But is wrong when he claims that "she did not testify about it at trial." (App. Br. 26) In fact, the wife testified at length about this incident. (See 9/20 RP 10-13)

Wendy testified how "scared" and "shocked" she was when Greg, who had been drinking, began swearing, screaming, and shaking with rage because she had moved his ax. (See 9/20 RP 10-13) To try to defuse Greg's rage, Wendy turned and started walking away, and "he threw the beer bottle and the huge ax blade and the stick all at [her], and it landed right behind [her]." (9/20 RP 11) Wendy testified how scared she was when Greg came "right up" to her after he threw the ax and beer, and how relieved she was when Greg just glared at her and walked away. (9/20 RP 13)

This was not an "isolated" incident, as claimed by the husband on appeal. (App. Br. 26) Instead, it was part of an ongoing pattern of domestic violence that included the husband throwing objects at his wife and children, breaking or burning personal items in front of them, verbal abuse, and generally creating a fearful environment for the family. (9/20 RP 12, 14, 87-88, 161-63; 9/18 RP 46-50, 150, 186-87) See *State v. Goodman*, 108 Wn. App. 355, 361-62, 30 P.3d 516 (2001) (even if destroying

the community home and killing the family dog is not a crime against the co-owner spouse, the court may consider it as an act of domestic violence if it was intended to cause emotional harm to the spouse), *rev. denied*, 145 Wn.2d 1036 (2002).

Even if throwing an axe at his wife were an “isolated” incident, *Marriage of C.M.C.*, 87 Wn. App. 84, 940 P.2d 669 (1997) *aff’d sub nom*, *Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1988) (App. Br. 26) does not support the husband’s claim that it would not warrant entry of a protection order. *C.M.C.* considered RCW 26.09.191 parenting plan restrictions, not a RCW ch. 26.50 protection order. RCW 26.50.010 does not require a petitioner to prove a “history” of domestic violence. Instead, a petitioner can prove, as the wife did here, that the husband engaged in the “infliction of fear of imminent physical harm, bodily injury or assault, between family or household members” to warrant entry of a protection order. RCW 26.50.010.

Finally, the husband’s “denial of being ‘a credible threat to the physical safety of the petitioner’ does not mean that the trial court erred in making such findings.” *Gourley v. Gourley*, 124 Wn. App. 52, 59, 98 P.3d 816 (2004) *aff’d*, 158 Wn.2d 460, 145 P.3d 1185 (2006). Wendy testified that despite the parties’ separation,

she still feared Greg. (See 9/20 RP 16) Her therapist testified to an incident, post-separation, when Wendy, upon seeing Greg outside his brother's home and close to her home, had a "panic attack, chest tight, heart beating, sweating, very, very anxious" (9/19 RP 31), and testified that it would be detrimental to the wife's health and welfare to have any future contact with the husband. (9/19 RP 29) Fear of physical harm based on uninvited contact and threats is sufficient to support a protection order. See *Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002).

**3. Allowing the wife to seek modification if the husband does not comply with counseling requirements did not modify the parenting plan.**

The protection order required the husband to engage in reconciliation counseling with the children as ordered in the parenting plan. (CP 143, 156) The protection order also provided that if the husband did not comply with reconciliation counseling, the wife "may request modification of visitation." (CP 144) This provision did not "allow a protection order to serve as a de facto modification of a parenting plan," as claimed by the husband. (App. Br. 27) The order does not *require* the court to modify the residential schedule if the father fails to comply with the terms of

the protection order and parenting plan. Instead, it merely gives the mother an avenue to pursue modification if warranted by the father's failure to comply with the parenting plan.

It is presumed that a party is capable of, and will comply with court orders. *See Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). Thus, a failure to comply may warrant modification of the order. Indeed, RCW 26.09.260 allows the court to modify a parenting plan if a parent is twice found in contempt or fails to exercise residential time under the parenting plan. RCW 26.09.260(2)(d), (8). In this case, if the father fails to comply with the parenting plan by completing counseling, the mother could ask the court to modify the parenting plan. Authorizing a review of this kind was a proper exercise of discretion, and is no different than the provision in the parenting plan that allows the father to seek an increase in his residential time once the children's therapist determines that the reconciliation counseling has been completed. *See Marriage of Adler*, 131 Wn. App. 717, 726, ¶¶ 18, 19, 129 P.3d 293 (2006) (affirming a trial court's authority to reserve review of a parenting plan if certain conditions are met), *rev. denied*, 158 Wn.2d 1026 (2007).

**B. Findings based on substantial evidence support the trial court's discretionary decision to limit the father's residential time until he completes reconciliation counseling.** (Response to App. Br. 28-33)

“Trial courts must necessarily be allowed broad discretion in custody matters, because so many of the factors to be considered can be more accurately evaluated by the trial judge, who has the distinct advantage of seeing and hearing witnesses, and is in a better position to determine their credibility.” *Chatwood v. Chatwood*, 44 Wn.2d 233, 240, 266 P.2d 782, 786 (1954). Thus, appellate courts are “extremely reluctant” to disturb child placement decisions. *Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001). Here, after 7 days of trial, the trial court fashioned a parenting plan that was well within its discretion in the best interests of the children by imposing limitations on the father's residential time until the completion of reconciliation counseling.

**1. The trial court could allow the children's therapist to determine when reconciliation therapy was complete.**

The trial court's order providing that “upon [the children's therapist]'s belief that the [reconciliation] counseling has been completed, the father can seek a review hearing for increased residential time” (CP 156) was well within its discretion and

consistent with RCW 26.09.260. By statute, a parent who is required to “complete evaluations, treatment...may not seek expansion of residential time [ ] unless that parent has fully complied with such requirements.” RCW 26.09.260(9).

The trial court did not delegate its “statutory authority to permanently determine a parent’s residential schedule without the right of court review” (App. Br. 29) by allowing the counselor to make a determination as to when counseling is complete, because ultimately it is the trial court that will determine the residential schedule. The father’s reliance on *Marriage of Kirshenbaum*, 84 Wn. App. 798, 804, 929 P.2d 1204 (1997) (App. Br. 29) is therefore misplaced. In *Kirshenbaum*, the mother argued that a parenting plan provision giving an arbitrator the power to summarily suspend her visitation improperly delegated the court’s statutory authority to alter terms of the parenting plan. This court disagreed, holding that the trial court may give an arbitrator authority to suspend visitation as long as the parties have the right of court review. *Kirshenbaum*, 84 Wn. App. at 807. The *Kirshenbaum* court recognized that delegations of authority to determine the parents’ and children’s evolving emotional states and relationships provide

“an efficient and flexible solution to disputes and threats to the children’s welfare as they arise.” 84 Wn. App. at 807.

It appears that the father’s true complaint is his claim that the therapist “would never state her belief” that reconciliation therapy is complete, “thereby blocking him from a hearing.” (App. Br. 29) But his only support for this assertion was a purported pretrial declaration from the therapist declining to participate in custody litigation, which the father never brought up to the trial court. (App. Br. 29)<sup>6</sup> The father points to no evidence (because there is none), that the children’s therapist would not, if ordered, report the status of the reconciliation counseling to the court in order for the father to pursue increased residential time.

**2. Substantial evidence supports the trial court’s imposition of RCW 26.09.191 limitations.**

Substantial evidence supports all five of the statutory bases the trial court found to impose 26.09.191 restrictions (CP 151):

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<sup>6</sup> Appellant’s citation to the record does not support his claim that he “pointed out” this fact to the trial court. (App. Br. 29, *citing* CP 213) In the cited pleading, the father complains that the guardian ad litem had recommended that the reconciliation counselor, not the children’s therapist, decide when reconciliation counseling is complete. (CP 213) But as the mother pointed out, “decisions regarding progression to further residential time are best made by collaboration with [the children’s therapist], the counselor with whom the children have established a long term relationship.” (CP 215)

- The abusive use of conflict which creates the danger of serious damage to the children's psychological development;
- Neglect or substantial nonperformance of parenting functions;
- The absence or substantial impairment of emotional ties between the parent and children;
- Physical or a pattern of emotional abuse of the children;
- A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault which causes grievous bodily harm or the fear of such harm.

The father complains that there is no evidence to support the trial court's finding that his "abusive of conflict [ ] creates the danger of serious damage to the children's psychological development," claiming that the guardian ad litem "specifically found" no abusive use of conflict. (App. Br. 31) But the guardian ad litem did not state that the father did not engage in the abusive use of conflict. Instead, the guardian ad litem stated that he could not make that determination based on any of the father's actions *since separation*, because the father's "access to the children has been so limited since the initial orders were entered that he hasn't had much of an opportunity to engage in abusive use of conflict vis a vis the kids," thus acknowledging that "the issues that have arisen between Greg and the kids during the investigation have been driven more by the relationship predating the separation." (Ex. 12 at 5) That relationship, as described by the children, was one in which

the children were “genuinely afraid of him” because of the “constant furious arguments between their parents with [the father] yelling and screaming at [the mother],” causing the children to “walk[ ] on eggshells to try to prevent temper explosions.” (Ex. 12 at 6)

The father acknowledges that there is evidence to support the trial court’s finding that there was “neglect or substantial nonperformance of parenting functions.” As he aptly points out, Wendy testified that “Greg abandoned and neglected the family every weekend from March to October.” (App. Br. 31; *See* 9/19 RP 65; 9/20 RP 89) Consequently, it does not matter that “other evidence may contradict” this testimony; “evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.” *Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993, 996 (2002), *rev. denied*, 149 Wn.2d 1007 (2003).

There was also substantial evidence that the father had “substantially impaired emotional ties with his children.” As the guardian ad litem reported, the sons were “clearly frightened of their father.” (Ex. 15 at 5) While the daughter was less frightened, she thought the father was “too mean” to her brothers, and the

guardian ad litem reported “there was no enthusiasm whatsoever among the children for visiting their father.” (Ex. 15 at 5)

While the father blames his estrangement from the children on the mother, the guardian ad litem denied that Wendy was intentionally trying to destroy the relationship between the children and Greg, while acknowledging that her actions at times had been “counterproductive.” (9/18 RP 74) The guardian ad litem believed that while the mother may have told the children more than they should know, the children’s expressed reluctance to spend time with their father was not “manipulated.” (9/18 RP 126)

Finally, there is more than substantial evidence to support the trial court’s finding that the father engaged in a “history of domestic violence” and “physical, or a pattern of emotional abuse of the children.” The father seems to argue that because his abuse was largely directed toward the mother (as opposed to the children) that RCW 26.09.191 limitations are not supported. (App. Br. 33) As a matter of fact, that is wrong: there was substantial evidence that the father directed his abuse toward the children as well as the mother. Wendy testified to an incident when, because the younger son was not picking up the yard fast enough to suit him, Greg threw wood at the son, bruising his arm. (9/20 RP 14) Wendy also testified that

Greg would “quite often” grab the older son by the arm, dragging him around the house while yelling at him. (9/20 RP 87) The guardian ad litem testified that Greg admitted once slapping the younger son. (9/18 RP 46)

This argument is also wrong as a matter of law. Even if the father’s abuse was directed only toward the mother, and not the children, this court has recognized that children witnessing domestic violence between their parents causes psychological harm, and justifies 26.09.191 restrictions. *Marriage of Stewart*, 133 Wn. App. 545, 551, ¶ 15, 137 P.3d 25 (2006). The trial court properly imposed limitations on the father’s residential time with the children as a result of his years of abuse and his estranged relationship with them. The trial court’s parenting plan was well within its discretion and supported by substantial evidence.

**C. The trial did not determine the rights of third parties by finding and awarding the community’s interest in Tate Lake to the wife and concluding that the promissory note to John Tate was barred by the statute of limitations.** (Response to App. Br. 34-39)

As a preliminary matter, the husband has no standing to challenge the trial court’s decisions relating to Tate Lake and the promissory note from John Tate based on his claim that the trial court had “no authority to determine rights of John Tate.” (App.

Br. 34) Under his theory of the case, the husband is not aggrieved by this decision, because his “proprietary, pecuniary, or personal rights were not substantially affected” by the trial court’s determination that the parties held an interest in property also owned by John Tate. RAP 3.1; *See e.g. Breda v. B.P.O. Elks Lake City* 1800 So-620, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) (clients were not “aggrieved” by the trial court’s sanction of their attorney for his own misconduct, thus could not appeal the sanctions). In any event, the trial court’s decision did not “determine the rights” of John Tate, a third party:

**1. The trial court only determined property rights in Tate Lake between the parties.**

Substantial evidence supports the trial court’s determination that the parties held a community interest in Tate Lake and the associated LLC’s, and it did not abuse its discretion by awarding that interest to the wife. *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied* 148 Wn.2d 1011 (2003) (trial court has “broad discretion” in the division of property). The trial court did not “determine rights of John Tate” (App. Br. 34), and clearly ruled that the “extent and value” of that interest would be determined in the pending lawsuit in King County, to which both

John Tate and the husband are parties. (CP 175) Nothing in the dissolution decree purports to deprive John Tate of his interest in these properties. (See CP 175, 183, 398)

This court in *Wallace*, 111 Wn. App. 697, rejected a claim similar to the one made here when it affirmed the trial court's decision awarding to the wife property that the husband had fraudulently conveyed to his father after the parties separated. The *Wallace* court held that the trial court did not "disestablish a third party's interests" because it acknowledged that it lacked authority to set aside the husband's conveyance to his father, and the wife would have to separately set aside the conveyance in another action against the father. 111 Wn. App. at 709-10.

Furthermore, the husband's reliance on *Marriage of Soriano*, 44 Wn. App. 420, 722 P.2d 132 (1986) (App. Br. 34-35) is misplaced. In *Soriano*, the wife was awarded a lien against stock owned by the husband and held as security by a bank. However, the bank claimed to have a perfected interest in the stock that had priority over the wife's. The wife obtained an order from the dissolution court requiring the bank to turn over the shares to the wife's appointed trustee. This court vacated that order, holding that while there was no dispute that the dissolution court could grant

the wife a lien on the stock, it had no authority to determine the substantive rights of the bank by ordering it to turn over the stock to the wife's trustee. *Soriano*, 44 Wn. App. at 422-23.

As in *Wallace*, the trial court here did not determine any rights of John Tate. Instead, it recognized that those rights – versus the wife's interest – would be determined in the King County action that was already pending when the dissolution decree was entered. (CP 175, 398) Unlike in *Soriano*, the trial court here did not order John Tate to turn over any assets purportedly owned by him. Instead, the trial court exercised its “practically unlimited power over the property [ ] between the parties,” *Soriano*, 44 Wn. App. at 422, by awarding to the wife the community interest in the properties, as it is established in the King County lawsuit.

**2. Substantial evidence supports the trial court's finding that the parties had a community interest in Tate Lake.**

The trial court properly determined that the parties had a community interest in Tate Lake, as it was acquired during marriage with the purchase from the Bonneys in 1999. *Marriage of Mueller*, 140 Wn. App. 498, 501, ¶ 1, 167 P.3d 568, 570 (2007) (“All property acquired during marriage is presumptively community property.”), *rev. denied*, 163 Wn.2d 1043 (2008). The statutory

warranty deed named both husband and wife as “grantees,” in addition to the husband’s parents. (Ex. 47) “Interests in common held in the names of a husband and wife, whether or not in conjunction with others, is presumed to be community property.” RCW 64.28.020(2).

Claiming that the parties contributed no money to the acquisition of Tate Lake,<sup>7</sup> the husband argues, without authority, that the parties “could not acquire an interest through labor alone.” (App. Br. 35) But our courts have long held that a party’s contribution of labor, as opposed to money, is adequate consideration in forming a partnership. In *Fields v. Andrus*, 20 Wn.2d 452, 148 P.3d 313 (1944), for instance, our Supreme Court affirmed a determination that a partnership to own a transfer business was formed between father and son despite there being no written agreement and evidence that only the father financially contributed to the business. The Court held that evidence of the son’s otherwise-uncompensated labor, and that the father regularly consulted with the son about the business, was sufficient to prove

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<sup>7</sup> This is untrue. The parties contributed at least \$500 to the purchase when the community paid the earnest money deposit, and Wendy testified that “every extra cent of our money” went into Tate Lake, even to the extent of leaving the family’s bills unpaid. (9/20 RP 37-38, 111)

that the son's labor over the years was consideration for an interest in the partnership. *Fields*, 20 Wn.2d at 453-54.

The husband's reliance on *Estate of Kruse*, 19 Wn. App. 242, 574 P.2d 744, *rev. denied*, 90 Wn.2d 1017 (1978) (App. Br. 37-38) in support of his claim that Tate Lake was not owned by husband and wife in "partnership" with the husband's parents is misplaced. In *Kruse* the court affirmed the trial court's decision that certain property was community property of the deceased partner and his wife, because any work performed by their partners on the property were "relatively minor." 19 Wn. App. at 245. Here, to the contrary, the trial court found that any work by husband and wife was substantial, as they spent "countless hours" on the property. (CP 398) Further, John Tate regularly treated Wendy and Greg as owners, consulting with them about the acquisition of the property, its ongoing operations, and allowing them to present themselves as owners by signing documents on behalf of the LLCs controlling the property. (See Exs. 47, 48, 49, 54, 56, 64, 102, 107, 157) Both parties' continuous, uncompensated, labor over the years was adequate consideration for the parties' interest in Tate Lake even if they did not contribute to the purchase price.

**3. The trial court properly concluded that enforcement of the promissory note to John Tate was barred by the statute of limitations.**

The trial court properly concluded that enforcement of the 1997 promissory note signed by the parties in favor of John Tate on was barred by the statute of limitations. (CP 179) Whether an action to enforce a promissory note is barred by the statute of limitations is a mixed question of fact and law. *See In re Anderson*, 97 Wash. 688, 690, 167 P. 71, 72 (1917). The husband does not claim that the statute of limitations did not bar enforcement of the promissory note, nor can he: written contracts have a six-year statute of limitations, and the note was signed almost 15 years ago. (Ex. 8); RCW 4.16.040(1). Instead, he complains that by finding the promissory note unenforceable, the trial court somehow adjudicated the rights of John Tate, a third party. (App. Br. 34) But as this court held in *Wallace*, simply acknowledging that there is “no debt” because enforcement is barred by the statute of limitations and that the creditor father never sought payment on the debt until after the parties separated does not “determine the rights of any non party.” 111 Wn. App. at 709.

The husband’s actual complaint appears to be that he now “has the burden of repayment [of] an additional debt.” (App. Br.

34) But John Tate testified at trial that the parties have never made any payments on this note, and that he was not “holding his breath” that he would be paid back. (9/24 RP 109-13, 122) Even if enforcement of the note was not barred by the statute of limitations, the trial court could determine that the note was not an actual debt that needed to be distributed in the dissolution, or that it would be the husband’s obligation. *See, e.g., Marriage of Crosetto*, 82 Wn. App. 545, 552, 918 P.2d 954 (1996) (affirming designation of an obligation to husband’s mother to the husband since it was unlikely that he would be required to pay her back), *appeal after remand*, 101 Wn. App. 89, 1 P.3d 1180 (2000).

**D. The trial court’s property award was not based on marital misconduct.** (Response to App. Br. 39-42)

The trial court has “broad discretion” in the division of property, “because it is in the best position to determine what is fair, just, and equitable.” *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied* 148 Wn.2d 1011 (2003). Here, it was well within the trial court’s discretion to award the wife approximately 60% of the marital estate, plus the community interest in Tate Lake and the associated LLC’s once established in the King County case.

The trial court's finding regarding the "control, power, and domestic violence" in the marriage (CP 397) was not related to its property distribution. Instead, it was specifically directed to whether to grant the wife a protection order and whether to impose RCW 26.09.191 restrictions on the father's residential time. (App. Br. 39)<sup>8</sup> The trial court was not "punishing" the husband by concluding that he was "estopped from asserting any interest" in Tate Lake when he adamantly denied any interest during the dissolution trial. (App. Br. 39-40) Rather, the trial court merely "explained the inevitable legal consequences" of his position at trial, as the court did in *Wallace*, where the court awarded the wife an asset that the husband claimed the parties did not own at a value of zero because it was the "inevitable legal consequence" of the husband's position that the parties no longer owned the property because he had transferred it to his father. 111 Wn. App. at 706.

The trial court here properly found that the husband was estopped from pursuing a share of the community interest in the Tate Lake properties based on his claim that none existed. "The

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<sup>8</sup> Remarkably, the husband's argument appears to be that this finding solely impacted the property distribution, as he claims that the finding was otherwise insufficient to support the protection order or restrictions in the parenting plan.

elements of equitable estoppel are (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.” *Bd. of Regents of Univ. of Washington v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). The husband’s suggestion on appeal that he share in the community’s interest in Tate Lake is inconsistent with his earlier position that the community had *no* interest in the property. The wife would be harmed if the court were to allow the husband to share in what he claimed was a non-existent asset, because it was only through her efforts, and at her great expense, that the court determined there was any interest at all. Thus, the wife alone should reap any benefit from her efforts. In any event, at this point any benefit is purely speculative, because the value of that interest must still be determined in the King County action.

This case is nothing like *Urbana v. Urbana*, 147 Wn. App. 1, 195 P.3d 959 (2008) (App. Br. 40-41), where the Court of Appeals reversed an unexplained award of 80/20 in favor of the wife after concluding it was based on an improper consideration of the husband’s conviction of molesting the wife’s daughters from a prior

marriage. Here, the trial court's award to the wife of approximately 60% of the valued assets was well within its discretion in light of the length of the marriage, its finding that the wife leaves the marriage with "decreased earning potential," and because the award included the family home where she resides with the children. (FF 2.12, CP 177; CP 183-85) RCW 26.09.080(4) (in awarding property, the court may consider the "desirability of awarding the family [ ] to a spouse [ ] with whom the children reside the majority of the time"); *Marriage of Crosetto*, 82 Wn. App. 545, 556-57, 918 P.2d 954 (1996) (affirming award of 60% of community assets to wife when husband had superior earning capacity).

**E. The trial court properly characterized the assets and liabilities before it, and its property division in any event was not motivated by character.** (Response to App. Br. 42-47)

The trial court properly characterized the assets before it, but even if there was any error, as the husband concedes the "trial court will be affirmed unless the reasoning of the court indicates (1) that the property division was significantly influenced by the characterization and (2) that it is not clear that the court would have divided the property in the same way in the absence of the mischaracterization." (App. Br. 42, citing *Marriage of Chumbley*,

150 Wn.2d 1, 4, 74 P.3d 129 (2003)) Here, although it had the character of the property in mind, there is no evidence that the trial court's division was motivated by the character of the property. Instead, it intended to make a fair and equitable division of the property regardless of character, as contemplated by *Stachofsky v. Stachofsky*, 90 Wn. App. 135, 147, 951 P.2d 346 (declining remand due to the trial court's mischaracterization of stock because it was "clear that the court would have made the same division regardless of the mischaracterization."), *rev. denied*, 136 Wn.2d 1010 (1998).

**1. The Lake Sammamish condo was part community and part separate property.**

Although the husband owned the Lake Sammamish condo when the parties married in 1996, it had zero value, and in fact delinquent property taxes were subsequently paid off with the wife's separate property. (See Restatement of Facts, § C.1, *supra*) The trial court properly concluded that the community had a significant interest in the condo because it was paid off in its entirety during the marriage with community funds. See *Chumbley*, 150 Wn.2d at 8 ("this court has long held that real property purchased with both community funds and clearly traceable separate funds will be divided according to the contribution of each"). If there was any

error, it was in the trial court establishing the husband's separate interest based on his father's contribution toward the payoff of the mortgage because both parties purportedly signed the unenforceable promissory note to him.

**2. The personal property acquired during the marriage was community property.**

The trial court properly concluded that a 2000 ski boat and trailer and 1998 mobile home were community property because they were acquired during the marriage. "An asset acquired during marriage is presumed to be community property, and this presumption can be overcome only by clear and convincing proof to the contrary. [T]he burden of overcoming the community property presumption rests upon the spouse asserting the separate nature of the property acquired during the marriage and convincing evidence is 'not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose.'" *Marriage of Janovich*, 30 Wn. App. 169, 171, 632 P.2d 889 (1981), *rev. denied*, 95 Wn.2d 1028 (1981).

Here, the only "evidence" that these assets (valued, in total, at \$38,900) were separate property was the husband's "self-

“serving” statement that he used his separate property to “trade in” and acquire them. The trial court was free to reject the husband’s testimony in light of the wife’s testimony that in fact, the parties paid community cash to acquire these items (9/19 RP 151-54, 158) and when he failed to present any documentation<sup>9</sup> proving the trade and that no community funds were used to acquire these assets, which represented a small fraction of the marital estate.

**3. The trial court properly characterized the loans against the Boeing VIP as community and made the husband responsible for the obligation.**

As with its discretion in dividing property, the trial court has “broad discretion” in distributing the parties’ liabilities. *Brewer v. Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). Here, the trial court did not abuse its discretion in ordering the husband responsible for the loans taken out against the Boeing Voluntary Investment Plan in light of his greater income. While the husband claims this decision was “inequitable” (App. Br. 47), it is the trial court that is in the “best position” to determine what is “fair, just, and equitable under all of the circumstances.” *Brewer*, 137 Wn.2d at 769.

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<sup>9</sup> The husband claims that he provided documentation for the purchase of the mobile home, but once again his citation to the record does not support his claim. (App. Br. 45, *citing* 9/25 RP 30)

**F. The trial court's award of maintenance to the wife, who had largely been a stay-at-home parent, was within its discretion.** (Response to App. Br. 47-48)

An award of maintenance is discretionary, and will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Marriage of Luckey*, 73 Wn. App. 201, 209-10, 868 P.2d 189 (1994). The trial court's discretion in awarding maintenance is "wide;" the only limitation on the amount and duration of maintenance is that, in light of the relevant factors under RCW 26.09.090, the award must be "just." *Luckey*, 73 Wn. App. at 209. Here, the trial court properly found that the wife, who had stayed home to care for the children with the husband's agreement, had the need for spousal maintenance while she completes her education to become a certified therapist. (FF 2.12, CP 177; CP 398) The trial court also properly found that the husband had the ability to pay when his gross annual income exceeds \$100,000. (CP 398)

The husband apparently disagrees with the wife's decision to pursue higher education instead of immediately re-entering the work force. (App. Br. 48) But it was entirely appropriate for the trial court to consider the "time necessary [for the wife] to acquire sufficient education or training" to find employment appropriate to

her skill and interests. RCW 26.09.090(1)(b). The wife should not be required to take low-paying employment *now*, simply because the husband believes she can and should, when furthering her education will provide her, as well as the children, with greater financial opportunities in the future. The trial court's award of maintenance to the wife of less than a quarter of the husband's gross income for four years was "just" and this court should affirm.

**G. The trial court properly awarded fees to the wife, but erred in not awarding her more.** (Response to App. Br. 49 and Cross-Appeal)

The trial court properly awarded the wife attorney fees based on her need and the husband's ability to pay, his contempt of court, and his intransigence. (CP 399) The husband's income is more than three times that of the wife, warranting an award of attorney fees under RCW 26.09.140. Further, the wife was entitled to an award of attorney fees for the husband's contempt under RCW 7.21.030(3). The only error was the trial court's failure to award more than \$20,000 in fees once the trial court found the husband was intransigent. (FF 2.15, CP 178)

"An important consideration apart from the relative abilities of the two spouses to pay is the extent to which one spouse's intransigence caused the spouse seeking the award to require

additional legal services.” *Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197, 203 (1989). When intransigence is established, the financial resources of the spouse seeking the award are irrelevant. *Morrow*, 53 Wn. App. at 590. “The necessity of having to unravel numerous transactions to establish community interests justifies an award reflecting the fees and costs incurred in the process.” *Morrow*, 53 Wn. App. at 591.

Here, the wife incurred more than \$150,000 in fees, due in large part to the husband’s intransigence in taking the unreasonable position that the parties had no community interest in Tate Lake and resisting the wife’s discovery of the information that was necessary to prove the community interest. An additional award of attorney fees to the wife was “justified” because she had to “unravel numerous transactions to establish [the] community interest” in Tate Lake. *Morrow*, 53 Wn. App. at 591. This court should reverse and remand to the trial court on the sole basis for it to increase the attorney fee award to the wife due to the husband’s intransigence.

**H. The wife should be awarded her attorney fees for having to respond to this appeal.**

This court should award attorney fees to the wife for having to respond to this appeal. The trial court found that the father had

been intransigent. (FF 2.15, CP 178; CP 399) A party's intransigence in the trial court can support an award of attorney fees on appeal, especially where, as here, the husband's appeal is simply a continuance of the intransigence found by the trial court. *Marriage of Mattson*, 95 Wn. App. 592, 605-606, 976 P.2d 157 (1999).

The trial court declined to award fees below because "each party chose their course of action," resulting in high fees for both. (CP 399) But on appeal, the wife had no choice but to respond to the husband's challenge to virtually every discretionary decision of the trial court. Had he not appealed, the wife would not have filed a cross-appeal, and would not have had to incur any attorney fees in this court.

Further, the husband's appeal has no merit and this court should award the mother her attorney fees. *Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d 1023 (1983) (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees). This court should also award attorney fees to the wife based on her need and the husband's ability to pay under RCW 26.09.140. The wife will submit her affidavit of financial need within the time frame required under RAP 18.1(c).

**V. CONCLUSION.**

With the exception of remanding to the trial court to reconsider its award of only a fraction of the wife's fees, this court should affirm the trial court's rulings, and award attorney fees to the wife.

Dated this 20th day of November, 2013.

SMITH GOODFRIEND, P.S.

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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 November 20, 2013, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 20th day of November, 2013.

V. Vigoren  
Victoria K. Vigoren

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