

NO. 46464-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARY JO FABER,

Respondent,

v.

KENNETH L. FABER,

Appellant,

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Kenneth L. Faber (“Mr. Faber”) and Respondent Mary Jo Faber (“Mrs. Faber”) were both retired and had no dependent children when they separated in 2012. Their subsequent marital dissolution proceedings focused on issues of property distribution. The trial court followed the statutory mandate to consider “the economic circumstances of each spouse or domestic partner at the time the division of property is to become effective,” and gave Mr. Faber credit for the Social Security benefits he was entitled to receive at the time of trial, but had elected to defer.¹ It also credited Mr. Faber with possessing a \$220,000 inheritance which he acknowledged having received, but claimed not to be able to fully account for. In addition, the trial court counted as part of Mr. Faber’s assets \$45,124 in community property proceeds related to a Certificate of Deposit (“CD”). Finally, the trial court also awarded Mrs. Faber \$15,000 in attorney’s fees. None of these decisions was an abuse of discretion. Even if the award to Mr. Faber overstated his assets, any such error was harmless. The resulting distribution of property would still be just and equitable. Accordingly, this Court should affirm the trial court’s decision.

II. RESPONDENT’S RESTATEMENT OF THE CASE

Mr. and Mrs. Faber were married on September 11, 1993. CP 1. At that time, Mr. Faber was “financially strapped,” but Mrs. Faber

¹ See RCW 26.09.080, analyzed in detail below in Section III.D.

contributed more than \$79,000 of her separate property to the purchase of a community home and car. CP 148:6 to 150:8; CP 152:2-4; CP 718. By the time they separated approximately nineteen years later, on May 8, 2012, Mr. and Mrs. Faber had accumulated substantial assets. CP 1; CP 38-39.

As of the date of separation, Mr. Faber was 61 years old, and Mrs. Faber was 69. CP 1.² Both were retired, and they had no dependent children. CP 40; 124-125. Shortly after Mrs. Faber filed her Petition for Dissolution, the trial court issued a temporary restraining order (TRO).³ The TRO prevented the parties from “transferring, removing, encumbering, concealing, or in any way disposing of any property except in the usual course of business.” Trial commenced slightly more than a year later, on September 4, 2013. CP 110.

During his testimony, Mr. Faber acknowledged that he was currently entitled to receive Social Security benefits in the amount of \$1,743.00 per month. CP 304. However, Mr. Faber voluntarily elected to defer receipt of his Social Security benefits, so that he could take advantage of the increase in monthly payment that occurs if benefits are deferred until the standard retirement age or beyond. CP 95, 304-305.

² As of the eventual date of trial, on September 4, 2013, Mr. Faber was 62, and Mrs. Faber 70. CP 1.

³ Neither the Petition for Dissolution nor the TRO was included in Mr. Faber’s Designation of Clerk’s Papers, but both have been listed in Mrs. Faber’s Supplemental Designation of Clerk’s Papers, a copy of which is attached to this brief as Appendix A.

One of the key factual issues at trial was the disposition of Mr. Faber's inheritance from his father, who had passed away a year and a half before the parties separated. CP 185:13-17; CP 336:11 to 340:18; 349:1 to 350:22; 382:6 to 393:19. Mr. Faber repeatedly stated that he had received approximately \$220,000 in cash or cash equivalents from his father.⁴ CP 339:20-23; CP 349:4-7. However, he was unable to account for the precise disposition of these funds, stating that he was "not really sure where all that money went." CP 349:10-11. The court expressly found Mr. Faber's testimony on this issue to not be credible. CP 29:8-10.

Evidence introduced at trial established that on May 7, 2012, the day before the parties separated, Mr. Faber transferred \$171,939.21 to his two adult children, Katy and Jason Faber. CP 401:15 to 403:5; CP 406.⁵ By his own account, Mr. Faber made these transfers because he knew his wife "wanted out of our marriage," and in order "to keep her from getting any" of the money. CP 92. Some large part, and possibly all, of this money transferred to the Faber children ultimately traced to Mr. Faber's inheritance. CP 406:8-23. However, between \$45,124 and \$66,000 of the funds transferred to Mr. Faber's children were community property. CP 190:19 to 192:5.⁶

⁴ Mr. Faber also received his father's former house, which he then deeded to the marital community. CP 241. *See also* Brief of Appellant, at p. 6.

⁵ *See also* Brief of Appellant, at p. 20 (asserting that "[m]ost recently, Mr. Faber distributed \$171,939.21 to his two adult children *and to himself*") (emphasis added).

⁶ *Compare* Brief of Appellant, at p. 7 (suggesting that \$66,000 of the \$70,000 CD came from community funds) *with* CP 191:22 to 192:5 (Mrs.

The record from trial also shows that on or about December 7, 2012, Mr. Faber and his children opened Wells Fargo PMA accounts with balances totaling \$166,529.78. CP 200:3 to 201:5; Ex. 34 and 35. According to Mr. Faber, the money to fund these accounts came from the \$171,939.21 which he had transferred to his children the day before the separation. CP 402:13 to 409:11. Critically, Mr. Faber was named as a joint owner on each of these accounts. Ex. 34 and 35. Mr. Faber testified that these accounts remained in existence as of the date of trial, and that he had the ability to spend all of these funds. CP 407:9-13; 393:12-19. On or about January 25, 2013, a total of \$50,152.03 was withdrawn from these two accounts and placed in an account titled “Dennis L. Faber Supplemental Needs, Kenneth L. Faber TTE.” Ex. 34, 35, and 36. As of June 30, 2013, the total balance in all three accounts was \$166,721.35. Ex. 72, 73, and 74.

The trial court issued its oral ruling on September 12, 2013. CP 20-35. It credited Mr. Faber with possession of a \$220,000 cash inheritance, and also credited him with \$45,124 in community proceeds from the Homestreet Bank CD. CP 29:6-10; 25:14. Based in part on these two findings, the trial court indicated that it was awarding Mr. Faber

Faber testimony that \$24,875.98 of the \$70,000 CD came from non-community sources, leaving \$45,124.02 derived from community property funds). *See also* CP 574:11-12. In any event—whether the community funds amounted to \$45,124 or \$66,000—it is impossible to tell from the record whether some or all of these community funds ultimately traced to Mr. Faber’s inheritance.

separate and community property totaling \$745,258.20, and awarding Mrs. Faber separate and community property totaling \$667,117.63. CP 29:11-16. However, the court had made a math error, resulting in an undercounting of Mr. Faber's assets.⁷ It also overlooked a \$7,273 IRA belonging to Mr. Faber, and subsequently changed its mind about whether to credit Mrs. Faber with \$20,000 she had withdrawn from an IRA during the dissolution proceedings. CP 39 (handwritten ¶ 9.1); CP 38 (handwritten addition to ¶ 2.8); *compare* CP 33. As a result, the final distribution of assets, as reflected in the written Findings of Fact and the Decree of Dissolution, both dated January 24, 2014, was \$764,981.48 for Mr. Faber, and \$687,117.63 for Mrs. Faber.

	Mr. Faber	Mrs. Faber
<i>Assets as assigned in oral ruling</i>		
• Tacoma House	\$247,500 ⁸	
• Puyallup House		\$235,000 ⁹
• Toyota truck	\$22,489 ¹⁰	
• Honda		\$4,474 ¹¹
• Savings bonds (separate property)	\$6785.16 ¹²	
• Savings bonds (community property)	\$3831.20	\$3831.20 ¹³
• CD proceeds	\$45,124 ¹⁴	
• Simple IRA		\$62,933.32 ¹⁵

⁷ As demonstrated in the table below.

⁸ CP 23:16; CP 26:18-19

⁹ CP 26:20-25.

¹⁰ CP 23:21-25.

¹¹ CP 23:19-21.

¹² CP 23:4-7

¹³ CP 23:7-10

¹⁴ CP 25:13-14

¹⁵ CP 24:19 to 25:5

	Mr. Faber (cont.)	Mrs. Faber (cont.)
• Roth IRA		\$192,479.11 ¹⁶
• 457 Deferred Compensation (separate property)	\$33,579.12 ¹⁷	
• 457 Deferred Compensation (community property)	\$168,400	\$168,400 ¹⁸
• Tools	\$10,000 ¹⁹	
• Inheritance	\$220,000 ²⁰	
Totals as assigned in oral ruling	\$757,708.48²¹	\$667,117.63
Adjustments in FOFs/CGLs and Decree of Dissolution, as modified by Order on Respondent's Motion for Reconsideration		
• Mr. Faber's American Funds IRA	\$7,273.00 ²²	
• Adjustment to Mrs. Faber's IRAs		\$20,000 ²³
• A sum to compensate Mrs. Faber for taxes due on the Canyon Road (Puyallup) property		+\$3,165.30 ²⁴ -\$3,165.30 ²⁵
TOTAL VALUE OF ASSETS AWARDED:	\$764,981.48	\$687,117.63

¹⁶ CP 25:6-10.

¹⁷ CP 26:1-2. In the Brief of Appellant, at p. 10, this sum is incorrectly placed in Mrs. Faber's column.

¹⁸ CP 26:5-7.

¹⁹ CP 28:20-22.

²⁰ CP 29:6-10.

²¹ Compare CP 29:11-15 (giving tentative figure for Mr. Faber of \$745,258.40).

²² CP 39 at top of page; CP 44 at ¶3.3(12). See also CP 86 at *10.

²³ CP 38 at ¶ 2.8(6); CP 44 at ¶ 3.2(4) and (5). See also CP 57 at note 1.

²⁴ CP 44 at ¶ 3.2(13) (adding in this sum)

²⁵ CP 747 at ¶ 1 (removing sum of \$3,165.30 which had previously been added to Mrs. Faber's total).

When comparing the income streams generated by its property distribution, the trial court credited Mr. Faber with receipt of \$1,743 per month in Social Security benefits, and concluded that Mr. Faber would have a monthly income of \$3,678.18 and Mrs. Faber a monthly income of \$3,639.08. CP 30-31, 40. Finally, the Court also ordered Mr. Faber to pay Mrs. Faber \$15,000 in attorney's fees. CP 43.

After the trial court entered its written Findings of Fact and Conclusions of Law on January 24, 2014, Mr. Faber filed a Motion for Reconsideration containing a lengthy list of alleged errors. CP 48-54. Because the parties had problems securing a complete trial transcript, and agreed to set the motion over, the trial court did not rule on the Motion for Reconsideration until June 17, 2014. CP 106-107; 746. The trial court denied most of the relief requested. CP 764-47.²⁶ In response, Mr. Faber filed a timely Notice of Appeal. Although the Notice of Appeal states that Mr. Faber seeks review of the Order Denying the Motion for Reconsideration as well as of the Decree of Dissolution, the Brief of Appellant makes only four assignments of error. According to Mr. Faber, the trial court allegedly erred by: 1) including a nonexistent certificate of deposit in the property division; 2) including Mr. Faber's inheritance in the property division; 3) including Social Security benefits not actually

²⁶ But as noted in the table above, the trial court did strike the award of \$3,165.30 to Mrs. Faber that had previously been added to the Findings of Fact.

received by Mr. Faber as part of his current income stream; and 4) ordering Mr. Faber to pay Mrs. Faber's attorney's fees.²⁷

III. ARGUMENT

A. Summary of the argument.

In a marital dissolution proceeding, a trial court has substantial discretion to make a just and equitable distribution of the parties' property. Here, the trial court was bringing a marriage of almost 19 years duration to an end. It properly followed the statutory mandate to consider the economic circumstances of the parties as of the time of trial, and correctly took account of Mr. Faber's entitlement to receive Social Security benefits, even though he had elected to defer them. The trial court's factual findings regarding the magnitude of Mr. Faber's assets, including his inheritance, were supported by substantial evidence and reasonable inferences therefrom. Any error in over-counting Mr. Faber's assets was harmless, because correction would still leave Mr. Faber with more assets than Mrs. Faber. Mr. Faber has no grounds to complain about the justice or equity of such a distribution. This Court should affirm the trial court's decision in its entirety, and award Mrs. Faber her reasonable attorney's fees and costs incurred on appeal.

B. This Court reviews a decision allocating marital property for an abuse of discretion.

This Court affirms trial court decisions in dissolution actions "unless no reasonable judge would have reached the same conclusion."²⁸

²⁷ Brief of Appellant, at pp. ii-iii.

The emotional and financial interests affected by such decisions are best served by finality. “The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.”²⁹

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or made for untenable reasons.³⁰ The decision is based on untenable grounds if its factual conclusions are not supported by substantial evidence.³¹ An error of law constitutes an “untenable reason,” and therefore the general abuse of discretion standard of review also incorporates a *de novo* standard of review for alleged errors of law.³²

C. Arguments not properly raised in the appellant’s opening brief are waived on appeal.

Mr. Faber makes four assignments of error which define the scope of this appeal.³³ The Argument section of Mr. Faber’s brief is properly

²⁸ *In re Marriage of Landry*, 103 Wn.2d 807, 809–10, 699 P.2d 214 (1985).

²⁹ *Id.* at 809.

³⁰ *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

³¹ *Id.* at 660 (noting that “[t]he court’s findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence in the record”).

³² *Farmer v. Farmer*, 172 Wn. 2d 616, 624-625, 259 P.3d 256 (2011).

³³ See Brief of Appellant, at pp. ii-iii (listing assignments of error and associated issues). See also RAP 10.3(g) (stating in part that “[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto”).

limited to addressing his express assignments of error, but his Statement of the Case contains an ambiguous discussion of a Motion for Reconsideration which he filed in the trial court.³⁴ This Motion for Reconsideration raised many issues distinct from Mr. Faber's current assignments of error, including the characterization of a truck as separate or community property, the valuation of Mr. Faber's tool collection, the characterization of Mrs. Faber's Roth IRA as separate or community property, and the treatment of Mr. Faber's alleged separate liabilities. CP 48-54. Because his opening brief neither expressly assigns error to, nor makes arguments directed toward, the trial court's resolution of these issues, these issues are not preserved for appeal, regardless of anything Mr. Faber might try to argue in his appellate reply brief.³⁵

D. The trial court properly considered the Social Security benefits Mr. Faber was entitled to receive at the time of trial, but elected to defer.

At the time of trial, Mr. Faber was 62 years old, and was entitled to receive \$1,743 per month in Social Security. CP 304. However, Mr. Faber informed the court that he was voluntarily deferring receipt of those benefits. CP 95, 304-305, 314. According to Mr. Faber, the fact that he chose to defer benefits to which he was currently entitled means that the

³⁴ Brief of Appellant, at pp. ii-iii (assignments of error).

³⁵ See, e.g., *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) (noting that “[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration”).

trial court could not properly consider them when making a “just and equitable” disposition of the marital property.³⁶ This is nonsense.

The statute governing the disposition of property in marital dissolution proceedings, RCW 26.09.080, states in pertinent part as follows:

In a proceeding for dissolution of the marriage . . . the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

. . . .

(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective

Under this statute, consideration of “the economic circumstances of each spouse” is mandatory.³⁷ Moreover, both common sense and well-settled Washington law establish that consideration of a person’s “economic circumstances” at a given point in time includes taking account of their likely future income.³⁸ For example, Washington courts routinely

³⁶ See Appellant’s Brief at pp. 20-27; CP 34:3-6. *See also* RCW 26.09.080 (calling for a “just and equitable” disposition of property and liabilities).

³⁷ This follows from the statute’s use of the word “shall.” *See also In re Clark’s Marriage*, 13 Wn. App. 805, 808, 538 P.2d 145, (1975) (stating that “RCW 26.09.080 *requires* the court to consider all relevant factors in arriving at a ‘just and equitable’ distribution of property”) (emphasis added).

³⁸ *See, e.g., In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007) (noting that “future earning potential is a substantial factor to be considered by the trial court in making a just and equitable property distribution”). *See also In re Marriage of Hurd*, 69 Wn. App. 38, 45, 848

consider the parties' expected pension benefits when making property distributions, even though those benefits are not yet being paid at the time of trial.³⁹ To do otherwise would amount to ignoring what are frequently very substantial assets or income streams, and would make it impossible to place the parties "in roughly equal financial positions for the rest of their lives."⁴⁰

Social Security old-age benefits share many features with pension payments, but federal law prevents Washington courts from dividing and distributing Social Security benefits in a dissolution proceeding.⁴¹

However, although a trial court cannot calculate a present value of future

P.2d 185 (1993) (noting that "[v]ested or matured benefits [payable in the future] are property which *must* be allocated in a dissolution action") (emphasis added). As a matter of common sense, Mr. Faber should admit that he would be more financially secure now if he had a substantial additional future income source. However, his opening brief implicitly argues that a trial court cannot properly consider any future income, since that future income has not yet been received at the time of trial. See Brief of Appellant, at p. 21. This truly is nonsensical.

³⁹ See, e.g., *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1977) (holding that "[i]t is clear that retirement pay, even though benefits are not presently available, is . . . deferred compensation and subject to equitable distribution under RCW 26.09.080") (emphasis added); and *In re Marriage of Hurd*, 69 Wn. App. at 43 (Mr. Hurd had become eligible to retire by the time of separation, but testified at trial that he planned to continue working and defer receipt of his benefits).

⁴⁰ *In re Marriage of Rockwell*, 141 Wn. App. 235, 248, 170 P.3d 572 (2007) (citing to *Washington Family Law Deskbook*, § 32.3(3) at 17 for this proposition applicable to longer-term marriages).

⁴¹ See, e.g., *Rockwell*, 141 Wn. App. at 244–45; and *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999) (citing 42 U.S.C. § 407(a) of the Social Security Act and its interpretation under *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979)).

Social Security benefits and award that value as a precise property offset as part of its property distribution, Washington courts have expressly held that “*the possibility that one or both parties may receive Social Security benefits is a factor the court may consider in making its distribution of property.*”⁴²

Rather than discuss this controlling Washington authority in his opening brief, Mr. Faber incorrectly asserts that “[t]here is no Washington case law squarely on point with this issue.”⁴³ Based on this incorrect assertion, Mr. Faber presents extensive argument about two Michigan cases which he claims support ignoring potential Social Security benefits when dividing marital property.⁴⁴ Clearly, however, Michigan cases are not binding authority in Washington courts, and cannot overrule settled Washington law such as *Rockwell* and *Zahm*. Moreover, neither Michigan case is even relevant to the property division issue here.

Mr. Faber concedes that one of his two Michigan cases, *Clarke v. Clarke*, 823 N.W.2d 320, 297 Mich. App. 172 (2012), involved a question about child support. In Michigan as in Washington, child support is governed by different considerations than is the division of marital

⁴² *Rockwell*, 141 Wn. App. at 244-45 (emphasis added). See also *In re Marriage of Smith*, 158 Wash. App. 248, 260, 241 P.3d 449 (2010) and *Zahm* 138 Wn.2d at 223 (approving Court of Appeal’s holding that “[a] trial court could not properly evaluate the economic circumstances of the spouses unless it could also consider the amount of social security benefits currently received”).

⁴³ Brief of Appellant, at p. 24.

⁴⁴ *Id.* at pp. 24-27.

property.⁴⁵ The *Clarke* case hinged on interpreting the Michigan child support statutes and regulations, focusing particularly on: 1) whether Social Security benefits not yet paid counted as “income” within the meaning of the official Michigan Child Support Formula (“MCSF”); and 2) whether the “plaintiff’s refusal to collect early social security retirement benefits in and of itself constituted the [‘]unexercised ability to earn[’],” as that later phrase is used in MCSF 2.01(G).⁴⁶ Clearly, the Michigan court’s explication of the meaning of these terms as used in the Michigan child support regulations has no bearing on how a Washington court should implement a property distribution under RCW 26.09.080.

Perhaps sensing this, Mr. Faber argues that his second Michigan case, *Moore v. Moore*, 619 N.W.2d 723, 242 Mich. App. 652 (2000), is “more directly on point.”⁴⁷ It is not. *Moore* involved a motion for adjustment of alimony, rather than an initial property division upon dissolution of a marriage. In Michigan as in Washington, “[a]n alimony award can be modified upon a showing of changed circumstances.”⁴⁸ By

⁴⁵ For Washington, compare RCW 26.09.080 (property division) with RCW 26.09.100 (child support) and RCW 26.19.001 *et seq.* (child support schedule). As explained in more detail below, one critical distinction between decisions regarding child support and decisions regarding property distribution is that the former are subject to modification with changes in circumstances, but the latter are not.

⁴⁶ *Clarke*, 823 N.W.2d at 180 and 184.

⁴⁷ Brief of Appellant, at p. 26.

⁴⁸ *Moore*, 619 N.W.2d at 724. For Washington, *see, e.g., Johnson v. Johnson*, 32 Wn. App. 147, 149, 646 P.2d 152 (1982) (noting that “ the court may . . . modify maintenance upon a showing of a substantial change of circumstances that was not within the contemplation of the parties at the

contrast, at least in Washington, a trial court's property division is final, subject only to the right of appeal or vacation under CR 60.⁴⁹ Thus, the Michigan court's assumption that a future modification proceeding could be used to take account of deferred pension benefits when received has no application to a Washington proceeding concerned with a final property distribution.⁵⁰ In Washington, future Social Security benefits either affect the property distribution in the trial court's initial disposition (or on appeal from that disposition), or they do not affect it at all. *Moore* may well have been correct to state that a party's decision to "defer election of pension benefits to a later date when the benefits would be larger should . . . be viewed as a possibly prudent investment strategy," but neither this characterization nor *Moore* as a whole has any bearing on the issue at hand: whether potential future receipt of Social Security benefits may be considered by a Washington court charged with making a just and equitable property division.

As previously noted, this issue has been resolved in Washington by *Zahm* and its progeny. Mr. Faber is unlikely to admit this point, and will

time the decree was entered"). In Washington, child support payments are also subject to modification proceedings. See RCW 26.09.100(2) and (3).⁴⁹ See, e.g., *In re Marriage of Little*, 96 Wn.2d 183, 634 P.2d 498 (1981). See also *Washington Family Law Deskbook*, § 32.4(1)(b)(ii) (noting the potential application of CR 60). Here, Mr. Faber cannot plausibly argue that Mrs. Faber would be able to make a well-founded CR 60 motion to set aside a counterfactual judgment of the sort he desires, at that future time when he eventually decided to accept Social Security benefits.

⁵⁰ *Moore*, 619 N.W.2d at 724 (clearly presuming the possibility of a future modification action that would consider the pension at issue as income once the relevant party had elected to receive it).

no doubt try to distinguish these cases in his Reply Brief. Perhaps he will argue that *Zahm*'s statement that

[a] trial court could not properly evaluate the economic circumstances of the spouses unless it could also consider the amount of social security benefits currently received

means that *only* benefits “currently received” can be considered.⁵¹ A close reading of *Zahm* shows that this argument fails. *Zahm* cites approvingly to *Mahoney v. Mahoney*, 425 Mass. 441, 681 N.E.2d 852 (1997), describing it as a case where “the trial court had considered the husband’s anticipated social security old age benefits when distributing the marital assets,” and noting that “[t]his approach was affirmed on appellate review.”⁵² It goes on to briefly survey cases from other states’ courts that have made similar arguments, and concludes that “[t]his approach is consistent with the objectives of RCW 26.09.080.”⁵³ No other approach—

⁵¹ *Zahm*, 138 Wash. 2d at 223.

⁵² *Id.* at 222 (emphasis added).

⁵³ *Id.* The Washington Supreme Court also briefly discussed cases from other state’s courts that had rejected considering a party’s Social Security benefits as part of the process of reaching a just distribution of marital property. *Id.* At least one of the contrary cases cited, *In re Marriage of Swan*, 301 Or. 167, 720 P.2d 747 (1986), has since been overruled on this point. See *In re Marriage of Herald & Steadman*, 355 Or. 104, 322 P.3d 546, 558 (2014), *cert. denied sub nom. Herald v. Steadman*, 135 S. Ct. 944 (2015), (noting that “this court’s statement in *Swan* that a court may not ‘consider’ Social Security benefits in dividing property in dissolution actions swept too broadly”). The Oregon Supreme Court’s recent decision on this point was influenced by its conclusion that “*Hisquierdo* notwithstanding, most courts have allowed consideration of a party’s anticipated Social Security benefits as a factor, among others, to be considered in fashioning an equitable property division in a dissolution action.” *In re Marriage of Herald & Steadman*, 322 P.3d at 554 (emphasis added) (citing to *In re Marriage of Zahm*, 138 Wn.2d 213).

and certainly not one that allowed consideration of benefits currently received, but prohibited consideration of benefits a party was entitled to receive but voluntarily deferred—would be similarly consistent with the objectives of the statute.⁵⁴

Finally, neither *Rockwell* nor *Smith* is even conceivably vulnerable to the potential distinction between Social Security benefits “currently received” and anticipated benefits, discussed immediately above. Both of these cases use the same inherently future-oriented language in approving the consideration of Social Security benefits: “[t]he *possibility* that one or both parties may receive Social Security benefits is a factor the court may consider in making its distribution of property.”⁵⁵ Moreover, in *Rockwell* the Court of Appeals approved of the trial court’s consideration of “the Social Security that [the ex-wife] *would have received* but is not entitled to draw due to the structure of her federal pension.”⁵⁶ If it is not an abuse of discretion to consider Social Security benefits that a party *would have*

⁵⁴ Consideration of future benefits no more necessarily entails “a formal calculation of the value of petitioner’s social security benefits” or a “specific counterbalancing property award” than does consideration benefits currently received. *See Zahm* at 221.

⁵⁵ *Rockwell*, 141 Wn. App. at 244-45 (emphasis added); *Smith*, 158 Wn. App. at 260.

⁵⁶ *Rockwell*, 141 Wn. App. at 245 (emphasis added). *Smith*, confronted with a similar issue, found that “[c]haracterizing pension received in lieu of Social Security as separate property is *not mandatory* in Washington, particularly where the parties never suggested that characterization.” *Smith*, 158 Wn. App. at 260-61 (emphasis added). Properly understood, *Smith* reinforces the trial court’s discretion to consider even *counterfactual* receipt of Social Security benefits. Mr. Faber’s entitlement to receive Social Security benefits is not counterfactual.

received under hypothetical facts, but in fact was *not* entitled to receive, then it cannot be an abuse of discretion to consider Social Security benefits that a party is in fact entitled to receive but voluntarily defers.

In this case, the trial court followed Washington law, and considered Mr. Faber's entitlement to receive Social Security benefits as a factor relevant to the just and equitable distribution of the parties' property. CP 31:9-11; CP 34:3-18. Doing so was not error. On the contrary, if the trial court had failed to consider the Social Security benefits to which Mr. Faber was currently entitled at the time of trial, it may well have "result[ed] in a patent disparity in the parties' economic circumstances."⁵⁷ Attempting to roughly equalize the parties' expected incomes without taking Mr. Faber's Social Security into account would have required depriving Mrs. Faber of some income source and giving it to Mr. Faber.⁵⁸ Then, Mr. Faber could destroy the purported parity between the parties at the moment of his choosing, simply by electing to take his Social Security benefits. That would not have been a just and equitable result, and the trial court wisely avoided it. This Court should affirm the trial court's treatment of Mr. Faber's Social Security benefits.

E. The trial court did not err by including Mr. Faber's inheritance in the property division.

During trial, Mr. Faber testified that he had received approximately \$220,000 in cash or cash equivalents from his father, either shortly before

⁵⁷ *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1997) (noting that any such "patent disparity" is a manifest abuse of discretion).

⁵⁸ As Mr. Faber indeed repeatedly suggested. *See, e.g.*, CP 95-105.

or after his father's death in December, 2009. CP 339:20-23; CP 392:12-23; CP 400:18-21. On appeal, Mr. Faber argues that he "no longer has all of the funds he inherited," and that the trial court consequently erred by crediting him with \$220,000 in separate property as part of the property distribution.⁵⁹

Mr. Faber's argument about his inheritance fails to identify any abuse of discretion by the trial court. It overlooks the substantial evidence in the record that although Mr. Faber attempted to transfer some of his inheritance to his children, he retained effective control of most of the money. The record also amply warrants an inference that Mr. Faber was concealing the remainder of the funds. As demonstrated by the corresponding citations, each of the following points is either a fact supported by substantial evidence or a credibility determination within the trial court's exclusive purview:

- Mr. Faber received approximately \$220,000 in cash or cash equivalents from his father shortly before or after his father's death in December, 2009. CP 339:20-23.
- Between August 2009 (before the death of Mr. Faber's father) and August, 2010, Mr. Faber purchased \$187,131.44 in CDs from Homestreet Bank. CP 60, 187-190; Ex. 24, 26, and 27.

⁵⁹ Brief of Appellant, at pp. 17-20. Mr. Faber has abandoned any argument that he in fact did not receive approximately \$220,000 in cash from his father's estate, or did not initially have effective control over it.

- Some but not all of the money used to purchase these CDs is readily traceable to Mr. Faber's father: as much as \$66,000 of it was community property of Mr. and Mrs. Faber, which may or may not have had its origins in Mr. Faber's father's funds. CP 190-191.⁶⁰
- "In early May of 2012, Mr. Faber distributed \$85,797.88 to his son, Jason, and \$86,141.33 to his daughter Katy."⁶¹ These distributions are traceable to the Homestreet Bank CDs, which in turn were an indeterminate mixture of funds from Mr. Faber's father and other funds. CP 193, 196, 199, 401, 403, 405.
- Mr. Faber made these transfers to his children on May 7, 2012, one day before the parties' separation, with the intent of making these funds inaccessible to Mrs. Faber. CP 92.⁶²
- As of December 7, 2012, Mr. Faber was once again in control of a substantial part of the funds traceable to the Homestreet Bank CDs, as he was made the joint signatory with his children on two Wells Fargo accounts containing a total of \$166,569.45. Ex. 34 and 35.

⁶⁰ See also Brief of Appellant, at p. 7 (itemizing \$66,000 in community property used to purchase the \$70,000 CD from Homestreet Bank on August 10, 2010). Compare CP 712-13 (Mrs. Faber testifying that there were \$45,000 in community funds embodied in the same CD).

⁶¹ Brief of Appellant, at pp. 18-19.

⁶² As Mr. Faber stated, "when my wife said she wanted out of our marriage and wanted all the cash from the CDs, I closed them out prematurely, paid a penalty, and had the checks written out to my children to keep her from getting any of their inheritance." CP 92.

- As of June 30, 2013, Mr. Faber remained in effective control of accounts traceable to the original three Homestreet Bank CDs in the total amount of \$166,721.35. Ex. 36, 72, 73, and 74.⁶³
- To the best of Mr. Faber’s knowledge, these accounts still existed at the time of trial in September, 2013. CP 407:6 to 407:12.⁶⁴
- The trial court expressly found that Mr. Faber was not credible in asserting that he could not account for all of the funds he inherited. CP 29:6-10.

Given this record, the trial court did not abuse its discretion by crediting Mr. Faber with separate property from his inheritance in the amount of \$220,000. Contrary to Mr. Faber’s contention, it is not true that “[t]here is no evidence in the record to support an accurate value of Mr. Faber’s inheritance as of the date of trial.”⁶⁵ Trial exhibits 72 through 74 establish a balance of \$166,721.35 in Wells Fargo accounts subject to Mr. Faber’s control as of June 30, 2013.⁶⁶ Mr. Faber testified that these

⁶³ Exhibit 36 and Exhibit 74 include account statements for an account titled “Dennis L. Faber Supplemental Needs, Kenneth L. Faber TTE” (the “Trust”), through the period ending June 30, 2013. Mr. Faber is the trustee of the trust, and able to dispose of its assets. CP 233:14-24; CP 392-393.

⁶⁴ Mr. Faber’s testimony cited here explicitly refers to the two accounts shared with his children, for which statements are given by Ex. 34 and 35. However, nothing in the record suggests that the account on which Mr. Faber is the trustee (Ex. 36 and Ex. 74) had been drawn down by the date of trial.

⁶⁵ Brief of Appellant, at p. 20.

⁶⁶ Mr. Faber argues, with regard to his initial distribution “to his two adult children and himself,” that he would have at best a one-third interest in such funds. *See* Brief of Appellant, at p. 20. This is incorrect: a joint

accounts still existed at the time of trial in early September, 2013. CP 407:6 to 409:9.⁶⁷

Although there is a discrepancy between the initial approximate inheritance amount of \$220,000 and the \$166,721.35 balance of the Wells Fargo accounts on June 30, 2013, the trial court found Mr. Faber's inability to account for the missing funds to be not credible. CP 29:6-10. Indeed, the facts clearly support an inference that Mr. Faber was concealing part of the inheritance funds. Under Washington law, a party who attempts to hide property from a former spouse, or from the court, has no valid complaint if the court draws reasonable inferences against him in the allocation of marital property.⁶⁸ Although it is certainly true that "[i]f

account holder is entitled to draw on all of the funds in an account. *See, e.g., In re Coffey's Estate*, 195 Wash. 379, 383, 81 P.2d 283, 285 (1938) (stating that "[e]ach party to a joint account has absolute power to withdraw the entire account, and while the parties to the joint account are still living, one joint tenant may claim the entire account as his own"). *See also* RCW § 30A.22.140 (stating in part that "[p]ayments of funds on deposit in an account having two or more depositors may be made by a financial institution to or for any one or more of the depositors named on the account without regard to the actual ownership of the funds by or between the depositors").

⁶⁷ Comparison of Exhibits 34, 35, and 36 with Exhibits 72, 73, and 74 also shows that no significant withdrawals were made from these accounts (apart from the withdrawals that funded the Trust) between December, 2012 and June 30, 2013. These accounts were also subject to the TRO issued on July 10, 2012. Finally, if Mr. Faber had evidence that any substantial withdrawals were made between June 30, 2013 and the trial commencing September 4, 2013, he should have presented it at trial.

⁶⁸ *See, e.g., In re Marriage of Wallace*, 111 Wn. App. 697, 707-08, 45 P.3d 1131, 1136 (2002) (holding that "[i]n making its property distribution, the trial court may properly consider a spouse's waste or concealment of assets"). *See also In re Marriage of Nicholson*, 17 Wn.

one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial,” here Mr. Faber failed to convince the trial court that he no longer had control over the totality of the funds.⁶⁹ Accordingly, the trial court did not err in crediting Mr. Faber with \$220,000 which originated as his inheritance from his father.⁷⁰

F. Any error crediting Mr. Faber with CD proceeds in the amount of \$45,124.00 was harmless.

As modified on reconsideration, the Decree of Dissolution awarded Mr. Faber separate and community property in the amount of \$764,981.48.⁷¹ It awarded Mrs. Faber separate and community property in the amount of \$687,117.63.⁷² Thus, the trial court awarded Mr. Faber \$77,863.85 *more* than it awarded Mrs. Faber. In view of the substantial discretion possessed by the trial court in crafting a just and equitable property distribution, Mrs. Faber does not claim that this was error.

Mr. Faber, however, contends that the trial court erred by crediting him with \$45,124 in proceeds from one or more CDs that no longer existed at the time of trial.⁷³ Mrs. Faber stands by her testimony that

App. 110, 118, 561 P.2d 1116 (1977) (noting that an appellant has a duty “to make a full and fair disclosure of all property, both separate and community, as he had its management and control”, and that an appellant who fails to do so “must not be surprised if the courts take that fact into consideration in making an equitable distribution of property”).

⁶⁹ *In re Marriage of Kaseburg*, 126 Wn. App. 546, 556, 108 P.3d 1278, 1284 (2005).

⁷⁰ *See, e.g., Rockwell*, 141 Wn. App. at 248 (noting that “[i]f a trial court’s finding is within the range of credible evidence, we defer”).

⁷¹ *See supra* at pp. 5-6 (table with calculations).

⁷² *Id.*

⁷³ Brief of Appellant, at pp. 16-17.

\$45,124 in community funds were used to purchase the last \$70,000 CD from Homestreet Bank in August, 2010. CP 712-713, RP (9/9/13) at pp. 57-58.⁷⁴ However, she acknowledges that these funds (together with funds from the other two Homestreet Bank CDs) may have been transferred to Mr. Faber's children on May 7, 2012, and then transferred back to Mr. Faber on December 7, 2012. CP 401-403; Ex. 34 and 35. They remained in Mr. Faber's control as of June 30, 2013. Ex. 72, 73, and 74. Thus, the community funds that contributed to the purchase of the August 10, 2010 CD from Homestreet bank may have been already counted by the trial court as part of \$220,000 which it credited to Mr. Faber as of the date of trial.

If this Court accepts the trial court's decision to credit Mr. Faber with control of \$220,000 of inherited funds as of the date of trial, then it

⁷⁴ Mr. Faber's discussion of this issue mischaracterizes the record. *Compare* Brief of Appellant, at p. 16. When Mrs. Faber initially responded to Mr. Faber's Motion for Reconsideration, on February 24, 2014, the transcript for the proceedings on September 9, 2013 was still not available. *Compare* CP 55 (showing response date of 2/24/14) and CP 491 (showing transcription date of 3/13/14). *See also* CP 106-107 (discussing other problems securing transcripts). Since he had no recourse to the transcript of his client's testimony on this issue, Mrs. Faber's attorney had to discuss what his client "may well have testified" about. CP 58. However, the parties eventually obtained the transcript, and Mrs. Faber submitted an updated response to the Motion for Reconsideration, which discussed her actual testimony on these issues. CP 708-726. Strikingly, Mr. Faber also now apparently concedes that more than \$45,000 in community property was used to purchase the third CD from Homestreet Bank on August 10, 2010. *See* Brief of Appellant, at p. 7. Thus, the only real question is whether Mr. Faber retained possession of these community funds at the time of trial.

might be double-counting to *also* credit him with possessing \$45,124 in community property funds.⁷⁵ However, any such error would be harmless, and would not require remand.⁷⁶ Reducing Mr. Faber’s asset total by \$45,124 to correct for any double-counting would bring it down to \$719,857.48, which would still be *greater* than Mrs. Faber’s \$687,117.63.⁷⁷ Mr. Faber cannot complain of an abuse of discretion based on an alleged “patent disparity in the parties’ economic circumstances” if the correctly-stated property allocation continues to give him more assets than Mrs. Faber.⁷⁸

⁷⁵ Because the record is unclear as to whether the \$45,000 to \$66,000 in community property used to purchase the last Homestreet Bank CD ultimately traced back to funds owned by Mr. Faber, it is also unclear whether the trial court was counting those community funds as part of the \$220,000 inheritance with which it credited Mr. Faber as of the date of trial. CP 38-39.

⁷⁶ *See, e.g., In re Marriage of Brady*, 50 Wn. App. 728, 732, 750 P.2d 654, 656 (1988) (affirming, “[d]espite the trial court’s error . . . [because] we will not disturb the distribution of . . . properties if in our judgment that distribution is otherwise fair, just and equitable”).

⁷⁷ *See, e.g.,* Brief of Appellant, at p. 10.

⁷⁸ *Compare* Brief of Appellant, at p. 19, citing to *In re Marriage of Pea*, 17 Wn. App. at 731. It is also true that “[a] property distribution need not be equal to be ‘just and equitable.’” *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). Indeed, even if this Court were to decide both that the trial court should have only credited Mr. Faber with \$166,721.35 for his inheritance (the amount demonstrably in the three Wells Fargo accounts covered by Ex. 72, 73, and 74 as of June 30, 2013) and that the trial court should not have credited Mr. Faber with \$45,124 in CD proceeds, these two errors together would be harmless, because the parties would still have roughly equal assets (\$666,578.83 for Mr. Faber as opposed to \$687,117.63 for Mrs. Faber).

G. The trial court did not abuse its discretion in awarding Mrs. Faber reasonable attorneys' fees.

The trial court awarded Mrs. Faber \$15,000 in attorney's fees. CP 31-32; 43. Because the trial court awarded Mr. Faber between \$77,863.85 and \$32,739.85 more property than it awarded to Mrs. Faber, the fee award to Mrs. Faber was not an abuse of discretion.⁷⁹

Fee awards in marital dissolution proceedings are governed by RCW 26.09.140, which provides in pertinent part as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

An award of attorney fees pursuant to this statute rests with the sound discretion of the trial court, "which must balance the needs of the spouse requesting them with the ability of the other spouse to pay."⁸⁰ Moreover, "[a] spouse's receipt of substantial property or maintenance does not preclude the spouse from also receiving an award of attorney fees and costs when the other spouse remains in a much better position to pay."⁸¹

⁷⁹ The upper-bound \$77,863.85 figure results from subtracting the trial court's property award to Mrs. Faber from its award to Mr. Faber. *See* table *supra*, at pp. 5-6. The lower-bound \$32,739.85 figure results from deducting the \$45,124 in CD proceeds from the amount awarded to Mr. Faber. *See* the argument in Section F, *supra*.

⁸⁰ *Buchanan v. Buchanan*, 150 Wn. App. 730, 739, 207 P.3d 478 (2009), *as amended on reconsideration in part* (July 21, 2009).

⁸¹ *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197, 203 (1989).

Here, Mrs. Faber incurred substantial attorney's fees and had almost no cash assets with which to pay them. CP 220-222; 528-29; 743-745. By contrast, Mr. Faber not only had been awarded substantially more assets than Mrs. Faber, but a large part of those assets were in cash. Ex. 72, 73, and 74. The trial court did not abuse its discretion in awarding Mrs. Faber \$15,000 in attorney's fees.

H. Mrs. Faber is entitled to her reasonable attorneys' fees and costs on appeal.

RCW § 26.09.140 also gives this Court the discretion to order a party to pay the other party's reasonable attorney's fees and costs incurred on appeal. In exercising its discretion under this statute, this Court "consider[s] the arguable merit of the issues on appeal and the parties' financial resources."⁸² Here, Mr. Faber continues to have substantially greater wealth than Mrs. Faber. CP 38-39.⁸³ Moreover, Mr. Faber's appeal is little merit.⁸⁴ Mrs. Faber's will timely file an affidavit of financial need pursuant to RAP 18.1(c), and "should not be required to deplete the assets she was awarded in th[e] dissolution to defend an appeal

⁸² *In re Marriage of Raskob*, 183 Wn. App. 503, 520, 334 P.3d 30 (2014).

⁸³ See also Brief of Appellant, at p. 10.

⁸⁴ Mr. Faber failed to cite to adverse controlling authority on the issue of considering his Social Security benefits. See *supra*, at Section D. In addition, his arguments about his inheritance ignore the plain evidence in the record—in particular Ex. 72, 73, and 74—showing his continued control on the eve of trial of \$166,721.35 in Wells Fargo accounts. Finally, his arguments about the \$45,000 in proceeds from a CD at most show harmless error.

without merit.”⁸⁵ For all of these reasons, this Court should require Mr. Faber to pay Mrs. Faber her reasonable attorney’s fees and costs incurred on appeal.

V. CONCLUSION

Mr. Faber’s appeal fails to identify any abuse of discretion by the trial court. The trial court followed established Washington law in considering the Social Security benefits Mr. Faber was entitled to receive at the time of trial, but had elected to defer. Moreover, substantial evidence supports the trial court’s valuation of Mr. Faber’s inheritance. If also crediting him with \$45,124 in community proceeds from one of the Homestreet Bank CDs constituted double counting, it was harmless error. Even correcting for the possible double counting, the trial court still awarded Mr. Faber substantially more assets than it did to Mrs. Faber. This Court should affirm the trial court in all respects, and also award Mrs. Faber her reasonable attorney’s fees and costs incurred in defending against this appeal.

⁸⁵ *In re Marriage of Kim*, 179 Wn. App. 232, 256, 317 P.3d 555 review denied, 180 Wn. 2d 1012, 325 P.3d 914 (2014).

DATED this 13th day of April, 2015.

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CERTIFICATE OF SERVICE

I certify that on April 13, 2015, I arranged for personal delivery the foregoing Brief of Respondent to counsel for Appellant, Barbara McInville and Steven Fisher, at the following address:

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Dated this 13 day of April, 2015

By: 

JENNIFER WING LAW OFFICE

April 13, 2015 - 2:30 PM

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