

No. 49066-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ROBERT N. FLAGELLA,

Appellant,

v.

PAMELA R. FLAGELLA.

Respondent

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REPLY BRIEF OF APPELLANT  
(Consolidated)

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## INTRODUCTION

It is undisputed that the trial court intended to divide the community property evenly after awarding each party their own separate property. But numerous characterization errors threw off the intended asset distribution. Pam responds that characterization errors aside, the distribution is fair. The court erroneously characterized about \$450,000 in Bob's separate property as community property. And characterization substantially affected the trial court's decision, such that the court almost certainly would have divided the property differently if it had the proper character in mind. Reversal is thus required.

The court also erred in awarding Bob \$85,000 that no longer exists, but was spent to pursue a business investment gone bad. Pam shared greatly in Bob's successful investing, and ought to share in this failure too. But in any event, Pam fails to address the court's error in awarding Bob the entire amount, not his one-half share.

The court also refused to modify maintenance even though Bob lost his job through no fault of his own. Bob has no income from which to pay maintenance, and no job prospects. At age 67, he fears that will not change. Refusing to modify maintenance under these circumstances is punitive. This Court should reverse.

## ARGUMENT

### A. Standards of review.

While Pam acknowledges, as she must, that courts “must have in mind the correct character and status of the property as community or separate before any theory of division is ordered,” she claims that the award, regardless of Bob’s claimed characterization errors, is just and equitable. BR 17-19, 34-36; *In re Marriage of Schwarz*, 192 Wn. App. 180, 191, 368 P.3d 173 (2016) (quoting *Blood v. Blood*, 69 Wn.2d 680, 682, 419 P.2d 1006 (1966) (citing *Shaffer v. Shaffer*, 43 Wn.2d 629, 262 P.2d 763 (1953))). Arguing that characterization is not “controlling,” Pam essentially asks this Court to overlook characterization errors if it believes the overall distribution is fair regardless of characterization. BR 17-19, 34-36. Pam omits the controlling law on this point.

Caselaw providing that character is not “controlling” simply means that the character is not weighted more heavily than the other statutory factors governing the disposition of assets in a dissolution. See e.g., *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985). Characterization errors require reversal “where (1) the trial court’s reasoning indicates that its division was significantly influenced by its characterization of the

property, and (2) it is not clear that had the court properly characterized the property, it would have divided it in the same way.” *In re Marriage of Byerley*, 183 Wn. App. 677, 690, 334 P.3d 108 (2014) (quoting only *In re Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989); accord *In re Marriage of Langham*, 153 Wn.2d 553, 563 n.7, 106 P.3d 212 (2005); see also *In re Marriage of Skarbek*, 100 Wn. App. 444, 450, 997 P.2d 447 (2000).

In *Byerley*, for example, the trial court “intended to equally divide only the property it regarded as community in nature ... leaving the parties’ separate property completely out of the calculations.” 183 Wn. App. at 690-91. Thus, the court reversed and remanded, holding that characterization “appear[ed] to have significantly influenced the trial court’s division” and that it remained “unclear whether the court would have made the same division” absent the characterization error. *Id.* The same is true here. The court plainly intended to divide the community assets 50/50, awarding each party their separate property. CP 634-35; RP 265. Reversal is thus required under *Byerley*, its predecessor and progeny.

Pam’s equity argument also misses the mark. BR 18-19. Pam focuses on having been awarded 56% of the marital estate, claiming that number is fair. *Id.* The point, however, is that the court awarded

Pam all her separate property, and 50% of the community property. Bob too should have received his separate property, and 50% of the community property.

**B. The trial court erroneously failed to apportion Bob's Dow Chemical 401(k).**

It is undisputed that Bob acquired his Dow 401(k) and paid into it for 20 years before the parties married. Pam agreed that Bob's separate portion should be backed out of the distribution, so long as the community did not contribute to his 401(k) after Bob left the company. It did not. The court erred in refusing to apportion the 401(k).

**1. The community did not contribute to Bob's Dow 401(k) after he left the company, in which case Pam agreed that his separate portion should be backed out of the asset distribution.**

Bob worked for Union Carbide Corporation for 20 years before the parties married and for two years after. RP 66-67, 175-78. When Bob left the company, he had three accounts that became Dow Chemical accounts when Union Carbide merged with Dow: a 401(k), a Defined Benefits Plan, and a stock account. RP 177, 179-80. The parties agreed before trial that Bob's Dow Defined Benefits Plan would be apportioned as 20/22 Bob's separate property and 2/22 community property, based on Bob's pre and post-marital years at

the company. RP 232-34; CP 529-30. Bob liquidated most of his Dow stock account to purchase the marital home in 2010. RP 180-81, 196. Thus, the only account at issue is Bob's Dow 401(k).

After merging with Union Carbide, Dow was only legally required to keep two years of account information. RP 230. Thus, Bob could not obtain his 401(k) account statements dating back to the 1995 marriage date. RP 179, 230-31. Bob asked the trial court to apportion his Dow 401(k) as 20/22 his separate property and 2/22 community property, using the same formula the parties agreed to for his Dow Defined Benefits Plan. RP 232-34.

Pam agreed that if the community did not contribute to Bob's Dow 401(k) after he left Union Carbide, then the "separate property component of it should be backed out of the marital equation":

Q. Let us assume, Ms. Flagella, that Mr. Flagella did not contribute any money to his retirement plan after he left that employment. Do you believe his retirement plan should be afforded the same treatment as yours, which is to say that a separate property component of it should be backed out of the marital equation?

A. A separate property component?

Q. Yes.

A. I agree with that.

RP 70. Attempting to walk away from this concession, Pam now misconstrues the evidence. BR 7-9, 25-26, 29-31.

Pam omits that in addition to his Dow 401(k) and pension plan, Bob also had a Dow stock account. BR 7; RP 177, 179-80. This omission is important in that Pam asks this Court to hold that three checks written to Union Carbide for “stock” after Bob left Union Carbide, were community expenditures into Bob’s Dow 401(k). BR 25-26, 29-31. That is false.

Pam ignores Bob’s testimony (and briefing) that these checks were used to purchase Dow stock held in Bob’s Dow stock account, not his Dow 401(k). RP 179-80; BA 11. At trial, Pam acknowledged that she did not know what these checks were for. RP 67-68.

Pam nonetheless suggests that since these checks were written for “stock,” they must have gone into Bob’s 401(k). BR 7-8, 25-26, 29. This argument is based on two unreasonable assumptions: (1) that Bob could continue contributing money to his former employer’s 401(k) plan when he was no longer employed by them; and (2) that since Bob’s 401(k) holds stock, any stock purchased from Union Carbide had to be for stock held in his 401(k). Again, Bob unequivocally testified that he did not contribute to his 401(k) after leaving Dow. RP 178. Pam acknowledged that she could

not contribute to her former employer's 401(k) after quitting, and had no reason to believe Bob's 401(k) plan was different. RP 66, 69.

Pam offers nothing other than her own speculation that the checks she relies on were actually payments into Bob's 401(k), not stock purchases in the separate and distinct Dow stock account. BR 7-8, 25-26, 29. Again, Pam admits that she did not know what these checks were for. RP 67-68. Bob, who wrote the checks and handled the parties' investments, testified unequivocally that these checks purchased stock held in the Dow stock account that he later liquidated to buy the family home. RP 82, 179-81; Ex 36 at 1-2.

Pam claims that she "did not concede that 'Bob should be awarded the separate portion of the Dow 401(k),' " arguing that she "merely testified that the separate property component of the Dow 401(k) should be given 'the same treatment' as her Arthur Anderson 401(k)." BR 25 n.3 (quoting BA 9, 12). That is false. Pam agreed that "a separate property component of [the 401(k)] should be backed out of the marital equation." RP 70. In any event, Pam was awarded her entire Arthur Anderson account, so giving Bob's 401(k) "the same treatment" would mean awarding Bob the separate portion of his 401(k).

Pam also argues that she conceded Bob's separate portion would be backed out of the equation "only if the parties did not contribute any funds to the account after Bob left Union Carbide – which Pam maintained that they did." BR 25 n.3 (quoting RP 67-70). This too is false. Pam did not "maintain" that the community contributed to Bob's 401(k) after Bob left Dow, nor did she testify "that she believed Bob was contributing to his 401(k) with the checks written to Union Carbide for 'stock.'" BR 31 (citing RP 67-70). Rather, Pam admitted that she did not know whether Bob paid into his 401(k) after leaving the company, or even whether he could have. RP 69-70. When testifying about the checks, Pam admitted that she did not know what they were for. RP 67-68.

In short, Pam had no idea whether the checks at issue went into Bob's Dow 401(k) or whether it was even possible for him to contribute to his 401(k) after leaving Union Carbide. *Compare* BR 25 n.3 *with* RP 67-70. Thus, the only evidence before the trial court was that Bob paid into his 401(k) for 20 years before the marriage, the community paid in for two years after the marriage, and the community did not (and could not) pay in after Bob left the company. RP 82, 179-81; Ex 36 at 1-2.

**2. Pam ignores most of the flaws in the trial court's analysis.**

Since it is undisputed that Bob acquired his Dow 401(k) before the parties married, it was plainly separate property when acquired, and a presumption arises that it remained separate property. **Schwarz**, 192 Wn. App. at 189; RP 66-68, 177. Thus, the trial court erred in applying a “strong” presumption that Bob’s Dow 401(k) was community property, and in requiring Bob to rebut that presumption with “‘clear and convincing evidence’ that the property was acquired with separate funds.” CP 596.

The court erred again in failing to even mention commingling, much less “hopeless comingling.” CP 596-97; RP 260-61. This error is significant, where “commingling in the ordinary sense” is not sufficient to change the character of separate property. **Schwarz**, 192 Wn. App. at 190. An asset that can be apportioned is not rendered entirely community. *Id.* Only “hopeless comingling” gives rise to the presumption that the entire asset is community. *Id.*

Pam ignores the trial court’s incorrect presumption that Bob’s Dow 401(k) is community property. She argues that the trial court’s failure to address hopeless comingling is harmless error “because the record supports such a finding.” BR 28 n.5. As addressed

immediately below, the record supports that his Dow 401(k) could easily be apportioned as Bob requested, consistent with **Schwarz**, *supra*. Pam cannot blow past the trial court's utter failure to conduct the proper analysis.

**3. The trial court erred in failing to apportion Bob's Dow 401(k).**

Here, as in **Schwarz**, it is reversible error to characterize as entirely community an asset that can be apportioned into its community and separate components. 192 Wn. App. at 194. In **Schwarz**, husband established his IRA before marriage, but could not obtain any pre-marriage account statement. *Id.* at 192-93. It was undisputed that the community contributed to husband's IRA after the marriage. *Id.* at 193. Husband's expert apportioned the IRA balance 86% separate property and 14% community property, calculating the separate portion of the IRA as everything contributed before the marriage plus appreciation. *Id.* The trial court adopted that approach and the appellate court affirmed. *Id.* at 194.

The appellate court also reversed the trial court's community characterization of wife's brokerage account, holding that it could be apportioned. *Id.* at 219. There, wife deposited community and separate cash and assets from eight different sources into her

brokerage account. *Id.* The majority was separate. *Id.* The appellate court nonetheless reversed, holding that “any reasonable approach to apportioning is acceptable” and that the inability to apportion “to the penny will not excuse the court from apportioning” the asset. *Id.*

Pam does not respond to the analysis of either of these assets. BR 27-31. The first demonstrates that an asset that is both separate and community can be apportioned on a percentage basis. The second shows that where the community funds in an account are minimal by comparison to the separate funds and could be carved out, it is reversible error to characterize the entire account as community property. Rather, the account must be apportioned.

Ignoring these points, Pam turns to a different asset in **Schwarz**. BR 29-30. Her point seems to be that where a party provides pre and post-marital account values for an asset whose origin is separate property, he has sufficiently traced the asset. BR 30. While accurate, that does not answer whether an asset can be apportioned when the pre and post-marital account values cannot be obtained. That question is answered affirmatively by the above **Schwarz** analysis Pam ignores.

In sum, the trial court erred in refusing to apportion Bob’s 401(k). This Court should reverse.

**C. The court erred in distributing Bob’s separate property American Century IRAs as community assets.**

The trial court did not expressly address the character of Bob’s American Century IRAs, but distributed them to Pam as community property. CP 593-98, 626-51; RP 257-63. That is wrong – they are Bob’s separate property. This Court should reverse.

As discussed at length in the opening brief, Bob acquired the America Century Growth IRA (#1194) and American Century Select IRA (# 7977) long before the parties married. RP 187; Ex 66 at 2. Since these IRAs were Bob’s separate property when acquired, a presumption arises that they remained Bob’s separate property throughout the marriage. **Schwarz**, 192 Wn. App. at 188.

Pam had “no idea” whether any community funds were placed into these IRAs, but asked the court to divide them as community assets. RP 19-20. She later testified that the parties wrote checks in 1997 and 1998 to an “American Century” account, some to a “growth” account. RP 42-44 (citing Ex 36). She was not more specific. *Id.*

The checks Pam referred to were written to “American Century Investments,” with memo lines referring either to “Growth (020-000508425),” or “Value (039-000004650).” *Id.*; Ex 36 at 56-62.

The Value account number 4650 is not at issue – it was liquidated and gifted to Pam’s daughter. RP 200-02; CP 634; Ex 67. The growth account was not Bob’s IRA. The checks were written to growth account number 8425, but Bob’s growth IRA account number is 1194. *Compare* Ex 36 at 56-62 *with* Ex 66 at 2. Neither these checks, nor Pam’s testimony relying on them, show that any community funds went into Bob’s separate property American Century IRAs.

Pam incredibly claims that “[i]t is undisputed that while Bob opened the American Century Select IRAs, before marriage, the community continued to contribute to both IRAs during the marriage.”<sup>1</sup> BR 34; *see also* BR 31. As above, Bob explained at trial and in his opening brief that the checks written to American Century during the marriage were not to his IRAs (#1194 and #7977), but to a different American Century account under a different account number (#8425). BA 21; RP 200-02. The account statements and checks Pam relies on prove this point. *Compare* Ex 36 at 56-62 *with* Ex 66 at 2. Pam has no response.

Pam argues that the trial court’s failure to make specific findings on the character of Bob’s American Century IRAs does not

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<sup>1</sup> There is not more than one Select IRA – there is one Growth and one Select. RP 187; Ex 66 at 2.

warrant reversal. BR 31-34 (citing *In re Marriage of Wright*, 78 Wn. App. 230, 237, 896 P.2d 735 (1995); and *In re Marriage of Melville*, 11 Wn. App. 879, 880-81, 526 P.2d 1228 (1974)). Both are inapposite.

In *Wright*, the trial court failed to characterize and value two assets awarded to husband. 78 Wn. App. at 237. The appellate court held that this was error, but that the error was harmless where the “community interest ... if any, was very slight.” *Id.* Further, wife had already received a disproportionate property award. *Id.* The \$52,000 error here is not *di minimus*. CP 634-35.

*Melville* is also inapposite, where the court did not characterize any of the assets it distributed. 11 Wn. App. at 880-81. Thus, it could fairly be said that character did not affect the trial court’s decision. *Id.* That cannot be said here, where the trial court awarded the parties’ their separate property and divided the community property 50/50. CP 634-35; RP 265.

And the trial court did not fail to characterize the American Century IRAs – it mischaracterized and divided them as community property without any analysis. Pam unconvincingly persists in the argument that the character of the assets is not controlling. BR 31-34. Since the trial court awarded each party their separate property

before dividing the community assets 50/50, the character of the assets plainly and significantly affected the trial court's decision. **Byerley**, 183 Wn. App. at 690-91. As this Court cannot be sure that this mischaracterization did not affect the court's decision, reversal is required. *Id.*

Finally, Pam also incorrectly suggests that this characterization error "did not render the trial court's decree inequitable." BR 34. The inequity is inadvertently awarding Pam Bob's separate property, when it is clear the court intended to award the parties' their own separate property. CP 634-35; RP 265.

In sum, uncontroverted evidence proves the IRAs are Bob's separate property. This Court should reverse.

**D. The court incorrectly characterized Bob's separate property inheritance as community property.**

Pam acknowledges that Bob inherited money from his mother during the marriage. Bob testified about the nature and extent of the inheritance, explaining that it had remained in a separate property account until he liquated it to help purchase the family home. Bob is sure Pam was aware of this, and Pam did not disagree. The court mischaracterized Bob's inheritance, thus failing to consider his disproportionate contributions to the community.

Bob inherited from his mother \$82,000 in a GE Elfund account. RP 195. He left the account untouched for nine years until he sold it in December 2010, to generate funds for the down payment on the marital home. RP 195-96. The Elfund account had appreciated to about \$102,000. RP 196. Bob used \$100,000 to help purchase the house, and left the remaining \$2,000 in the account to keep it open. RP 192-97.

Pam argues that other than Bob's testimony, he did not "document[]" his inheritance. BR 23. Bob's testimony is evidence. And Pam concedes that Bob received an inheritance from his mother during the marriage, and Bob had "no question" that she knew the inheritance was spent on the family home. RP 75-76, 200, 234-35. Pam did not disagree.

The court's ruling on this point has multiple errors. CP 597; RP 261. The court faulted Bob for failing to explain "what happened to the GE funds between the date he acquired them and the date the marital home was purchased." *Id.* From the date of acquisition, the account sat untouched until Bob liquidated it in December 2010 to purchase the parties' home. RP 195-96. The parties' 2010 tax returns document the Elfund sale. RP 197; Ex 75.

The court ruled that Bob “failed to explain [1] how much of the GE Funds were used to purchase the home, [2] what the Funds were worth when they purchased the home and [3] if any portion of the Funds remained after the purchase.” CP 597; RP 261. Bob addressed all three points: (1) Bob used \$100,000 from the Elfund sale to purchase the home; (2) the account was then worth \$102,000; (3) \$2,000 remained in the account after the purchase. RP 195-97, 200. The court was wrong on each point.

Finally, the court inexplicably faulted Bob for failing “to overcome the presumption that the GE Mutual Funds ... were separate property ....” CP 597. An inheritance is presumptively separate property, but it is Pam who would have to rebut that presumption. **Schwarz**, 192 Wn. App. at 188.

Since Bob’s inheritance is separate property, the court erred in failing to consider adjusting the asset distribution to reflect Bob’s disproportionate contributions to the community. **In re Marriage of White**, 105 Wn. App. 545, 553-54 & n. 24, 20 P.3d 481 (2001). Remand is required. **Byerley**, 183 Wn. App. at 690-91.

Pam first argues that the house is presumptively community property, and thus that Bob's own testimony is not enough to rebut the community-property presumption. BR 22-24. That obscures the

point. Bob agrees the house is community property – the parties acquired it during the marriage. But the question is not the character of the house, but the character of Bob’s GE Elfun account that was nearly liquidated to purchase the house. The inheritance is plainly separate property. **Schwarz**, 192 Wn. App. at 188 (quoting **White**, 105 Wn. App. at 550).

Pam again sidesteps the issue, arguing that there is a rebuttable presumption “that property acquired with separate funds during the marriage is presumed to be a gift to the community.” BA 22-23 (quoting **Skarbek**, 100 Wn. App. at 450). Bob does not claim that the liquidated inheritance remains his separate property. BR 27-28. His point is that the trial court erroneously failed to consider this disproportionate contribution to the community. *Id.*

Pam next claims that she did not respond to Bob’s testimony that she knew his inheritance was used to buy the house because it was a “surprise.” BR 24 n.2. This is not a complex point that required preparation to address. Pam either knew that Bob used his inheritance to buy the house, or she did not. Pam does not need “the benefit of discovery” to determine what she knew. *Id.* Regardless, Pam does not challenge the trial court’s evidentiary ruling permitting this testimony over her objection. RP 192-95.

Finally, Pam complains that “Bob also failed to articulate how the remaining \$4,194 inheritance in the GE mutual fund account was community property (RP 192; App. Br. 24 n.3) while simultaneously claiming a separate property interest in the family home from using funds from the very same account.” BR 24. Bob’s willingness to give this small sum to the community is not a concession that his entire inheritance was a community asset.

In sum, Bob’s inheritance is plainly separate property. The trial court erred in concluding otherwise.

**E. The court erroneously awarded Bob \$85,000 he lost trying to make money for the community.**

The trial court awarded Bob a non-existent business valued at \$85,000, finding that Bob lost those funds in a business investment Pam did not know about, and failed to document his “reasons” for the investment. RP 264. Pam did not know about most of the parties’ investments, many of which did quite well. RP 82, 181. The “reasons” for the investment were that Bob has considerable expertise in manufacturing sapphire, and saw an opportunity to work with Apple and GT Solar who had partnered to manufacture sapphire in quantities sufficient to make unbreakable cell phone screens. RP 172-74. Bob did not document the business because there was no

business – the investment went into a due-diligence phase. RP 109-11, 113.

Pam argues that the trial court properly allocated the \$85,000 to Bob as “marital waste.” BR 19-21. The court did not find marital waste. CP 593-98, 599-625, 626-51; RP 257-67. It is inequitable to penalize only Bob for an investment gone bad, while the community plainly benefited from those that went well. RP 82, 181.

But even assuming the trial court had discretion to punish Bob for a bad investment, the court could not award Bob the entire \$85,000 loss. The trial court plainly intended to distribute what it characterized as community assets 50/50, but allocated the entire \$85,000 loss to Bob. CP 634-35; RP 265. That left Pam with \$85,000 more community property than Bob, despite the intended 50/50 distribution. *Id.* At most, the court should have allocated \$42,500 to Pam – 50% of the lost funds. Pam does not respond.

**F. The court’s findings are insufficient to permit meaningful review.**

The opening brief addresses the importance of adequate findings of fact. BA 33-35. The trial court characterized Bob’s entire Dow 401(k) as community property without addressing whether the 20-year premarital portion could be apportioned. *Supra*, Argument §

B. The court awarded Bob's American Century IRAs to Pam as community property, without a single finding addressing uncontroverted evidence that they are Bob's separate property. *Supra*, Argument § C. The court's finding on Bob's inheritance contradicts the only, and undisputed, evidence on that issue. *Supra*, Argument § D. And the oral ruling on Bob's investment gone bad is inaccurate and provides insufficient basis for penalizing Bob. *Supra*, Argument § E.

Pam does not respond other than to argue that the character of an asset does not control if the distribution is equitable. BR 17-19, 32-35. As discussed above, however, characterization errors require reversal where the asset division was significantly influenced by the characterization of assets, and where it is unclear that the trial court would have divided the assets the same way if it had properly characterized the assets. ***Byerley***, 183 Wn. App. at 690. Reversal is required where the trial court plainly intended to award the parties' their separate property off the top, and to divide the community property 50/50. *Id.*

**G. The court erred in declining to modify Bob's \$6,000 monthly maintenance payment after he permanently lost his job.**

Bob involuntarily lost his job, and has not found a new one despite diligent efforts. He has no income. But the trial court refused to modify maintenance, ruling that Bob should have disclosed his job loss sooner, even though he reasonably thought he would be quickly rehired. This Court should reverse.

Although Bob lost his job in April 2016, his manager, Dennis Grant, told him that Glumac intended to re-hire him as a consultant if Glumac was awarded a contract it was pursuing. CP 746, 796. Grant believed this opportunity would materialize. CP 796. Bob moved to modify maintenance in June after the contract fell through and it became clear that he would not be re-hired. CP 747, 796.

The trial court abused its discretion in declining to modify maintenance, where Bob lost his job, has not found a new job, and has no income. CP 746-52. Income loss is a substantial change in circumstances justifying a maintenance modification. *In re Marriage of Ochsner*, 47 Wn. App. 520, 524, 736 P.2d 292 (1987); see also *In re Marriage of Drlik*, 121 Wn. App. 269, 275, 87 P.3d 1192 (2004) (the parties agreeing that involuntary retirement was a substantial change in circumstances). Pam ignores these cases.

The court's rationale is punitive. CP 755; 9/16/16 RP 4. Bob's unemployment is involuntary, and the court did not find otherwise. CP 746, 791-92, 795-96. Instead, the court faulted Bob for failing to immediately disclose his job loss, which occurred after trial, but before the court entered final orders. CP 755; 9/16/16 RP 4. Bob did not immediately tell the court he had been laid off as he expected to be quickly rehired. CP 746, 791-92, 795-96.

The court ultimately concluded that Bob failed to prove that he could not "become reemployed" at \$175,000 a year. 9/16/16 RP 12. Bob submitted at least two resumes each week, networked and worked with different recruiters in a geographic range from Bellevue, Washington to Bend, Oregon. CP 750, 792, 794.

Assuming Bob could find a job, and a high-paying job at that, is impermissible speculation. *In re Marriage of Rouleau*, 36 Wn. App. 129, 132, 672 P.2d 756 (1983). Bob's job search leading up to the modification hearing did not generate a single lead. CP 747, 792. Pam's job-placement program indicated that her age is an impediment to finding work. RP 91. Bob is five years older. RP 747.

Pam evades the point, arguing that it is not speculative to base maintenance on "earning capabilities." BR 42. While a court

can consider earning capacity, it may not assume, absent any evidence, that Bob would quickly replace his income. 9/16/16 RP 12.

Pam argues that Bob's job-loss was not "uncontemplated," so cannot be a substantial change in circumstances justifying a maintenance modification. BR 39-40. This ignores the real issue – Bob had every reason to believe his job loss was temporary. CP 746, 791-92, 795-96. Its permanence was "uncontemplated."

Since he has no income, Bob cannot pay maintenance without selling assets or going into further debt (assuming he can continue borrowing money from his sister). CP 746-47. Bob already borrowed from his sister to pay the "suit money" the court ordered and his own living expenses. CP 746-47, 751.

Pam's only response is that Bob failed to demonstrate that he cannot pay the remaining maintenance obligation, citing his "extensive experience." BR 41-42. "Experience" does not generate income. Only a job generates income.

In sum, Bob involuntarily lost his job and delayed telling the court only because he initially believed he would be rehired quickly. He should not be punished because that did not happen.

**H. This Court should deny Pam's request for fees.**

Pam's request for fees is that Bob's earning capacity exceeds hers. BR 45. Fees must be based on need and ability to pay, not earning capacity. Bob has no job and received a lower percentage of assets than Pam. Her ability to pay fees exceeds his. This Court should deny Pam's request for those fees the trial court denied.

**CONCLUSION**

The trial court's many characterization errors greatly affected the intended distribution of assets. The court's failure to modify maintenance is punitive. This Court should reverse and remand with instructions to properly characterize the assets, to adjust the asset distribution accordingly, and to modify maintenance. The Court should also deny Pam's request for more fees the trial court denied.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of May, 2017.

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**CERTIFICATE OF SERVICE**

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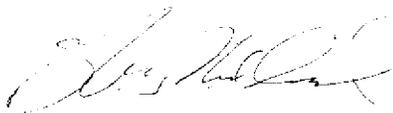
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