

No. 49066-8-II  
(consolidated with No. 49763-8-II)

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

PAMELA R. FLAGELLA,

Respondent,

and

ROBERT N. FLAGELLA,

Appellant.

APPEAL FROM THE SUPERIOR COURT  
FOR CLARK COUNTY  
THE HONORABLE JAMES E. RULLI

BRIEF OF RESPONDENT

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## I. INTRODUCTION

The husband challenges the trial court's discretionary decision awarding approximately half of the community estate, or 56% of the entire marital estate, to the wife following a 20-year marriage. The husband's challenge is premised on his claim that the trial court failed to properly characterize certain assets. However, the husband produced no evidence tracing his purported separate property interest in the family home or the hopelessly commingled funds in his Dow 401(k). The trial court thus properly found that these assets were entirely community property and awarded the wife half of each.

The husband also challenges the trial court's decision crediting him with \$85,000 of community property that he wasted during the marriage. The trial court's decision was wholly appropriate in light of the fact that he failed to produce any documentation to support his claim that the funds were used to "investigate" a purported business opportunity.

The husband also appeals the trial court's denial of his motion to modify the \$6,000 monthly maintenance award, which lasts until December 2019. Although the husband was laid off on April 1, 2016, three days after trial and six weeks before entry of the final decree on

May 13, he did not move for reconsideration or to modify the maintenance award until June 30, six weeks after the final orders were entered. The trial court properly found that the husband's prolonged failure to seek relief from the court did not constitute an unforeseen substantial change in circumstances warranting modification. The trial court also found that the husband, a chemical engineer who has historically earned a six-figure salary, continued to have the ability to pay maintenance. The trial court properly considered all of the factors set forth in RCW 26.09.090 in denying the husband's request to modify maintenance.

The trial court's maintenance order and property distribution ensure that the parties will be in roughly equal positions for the rest of their lives. This Court should affirm and award the wife her fees on appeal.

## **II. RESTATEMENT OF FACTS**

### **A. The parties were married 20 years.**

Respondent Pamela "Pam" Flagella, age 60, and appellant Robert "Bob" Flagella, age 64, were married for 20 years. (CP 1, 595) After dating for three years, Bob and Pam married on September 23, 1995. (RP 71; CP 1) Pam has two daughters who were then in eighth and third grade, respectively. (RP 71) Bob did not have any children

and there are no children from this marriage. (CP 601; RP 12) The parties separated on June 5, 2014, and Pam filed a petition for legal separation in Clark County Superior Court on August 13, 2014. (CP 1-3, 600) The parties subsequently sought dissolution, and the trial court entered the decree of dissolution and its findings of fact and conclusions of law on May 13, 2016. (CP 599-629; RP 11-12)

**B. The husband earns \$170,000 per year, while the wife was primarily a homemaker during the marriage.**

Bob, a chemical engineer, worked at Union Carbide Corporation, which subsequently merged with Dow Chemical, for 20 years before the parties married in 1995. (RP 66-67, 230, 232; CP 39) He continued working there until 1997, when he was laid off. (RP 177-78; Ex. 60) Bob then worked for two years at Aluminum Oxide Laboratories, and then a year at Honeywell Electronic Materials. (Ex. 60) In 2000, Bob took a position at CH2M Hill, an engineering firm, where he worked until he was let go in March 2013. (RP 25, 210; Ex. 60) Within a month, Bob found another position at Glumac, where he earned \$170,000 per year as a senior project manager by the time of trial. (RP 211, 214, 217, 122; Ex. 60)

Pam obtained her associates degree from Boise State University in 1978 and began working at Arthur Anderson that same year. (RP 17, 51) Pam left her job on October 1, 1995, a week after

the parties married, when they agreed that Pam would stay home and care for the children. (RP 50-51, 18) When Bob was laid off from Union Carbide in 1997, Pam worked part-time at a temp job for a year and a half, before eventually resuming her role as homemaker. (RP 50) Once the children were in college, Pam returned to the work force for a few years doing administrative work for a privately held, family-owned business until the company was bought out in August 2010 and her position moved to Alabama. (RP 184-85, 50, 242-43) At that time, Pam and Bob agreed that she would retire rather than relocate the family. (RP 184-85, 50) She has not worked since 2010. (RP 12)

After the parties separated, Pam enrolled at Clark College, where she is currently pursuing a Microsoft certificate, which will allow her to reenter the job market as a clerical administrative assistant. (RP 51, 239) Although she has considered obtaining a four-year degree, she will be 60 by the time she completes the Microsoft certification. (RP 51-52) Given her age and background, Pam will be lucky to make \$30,000 when she reenters the workforce. (RP 85)

**C. The trial court granted the wife's motion to compel discovery after the husband failed to provide pertinent financial information regarding the parties' assets.**

During the dissolution action, Pam sought discovery from Bob regarding the balances and values of the parties' retirement accounts, inheritances, and business ventures – information that only he controlled. (CP 483-85, 820-24; RP 96) Bob maintained some of his records in boxes at the family home, where Pam was residing, yet refused Pam's multiple offers to retrieve these documents. (CP 483-84, 487-95, 478) On February 19, 2016, Pam moved to compel discovery because Bob provided deficient responses to her requests, and sought sanctions. (CP 820-24) Only then did Bob retrieve his records and begin to "go through the documents" for production. (CP 478)

On March 18, the trial court granted Pam's motion to compel and ordered sanctions prohibiting Bob "at trial from putting forth either new evidence not previously provided or evidence that is inconsistent with the discovery provided from March 11, 2016 and prior." (CP 520-21) This sanction applied to both "oral testimony and exhibits." (CP 521) Bob has not challenged this decision on appeal.

**D. Based on the evidence presented, the trial court characterized the marital estate, and divided the community property equally, resulting in a slightly disproportionate distribution of the overall marital estate to the wife.**

The parties appeared for a two-day trial before Clark County Superior Court James Rulli, commencing on March 28, 2016. (CP 548) The parties were the only witnesses at trial. In dispute were the character and distribution of the marital estate and spousal maintenance for Pam. The parties agreed that Pam was in need of maintenance, but disputed the amount and duration of maintenance. (See CP 528, 540)

**1. The parties stipulated prior to trial that the wife's premarital 401(k) and pension were her separate property.**

Pam contributed to a 401(k) plan and pension during her premarital employment with Arthur Anderson. (RP 65-66) Because Pam left her position on October 1, 1995, just one week after Pam and Bob married, the parties stipulated at trial that the 401(k) and pension were her separate property. (RP 6-7, 17, 65; CP 529, 533) The 401(k) balance was \$151,764 at the time of trial. (CP 608; Ex. 2) When she is 62, Pam will be eligible for a monthly annuity of \$1,070 from her pension, beginning on March 1, 2019. (Ex. 3 at 1) The trial

court awarded Pam the 401(k) and the pension as her separate property. (CP 608, 604)

**2. The trial court found that the husband's Dow 401(k) was community property when he failed to provide any evidence tracing its separate character.**

Bob had both a 401(k) and pension plan for his work with Union Carbide and, after the companies merged, Dow. (RP 66-67) Bob will be 65 on October 20, 2017, at which time he will be eligible for his full pension benefits of \$2,151 per month. (RP 233; Ex. 15 at 1; CP 1) The parties agreed at trial that the community and separate property components of Bob's Dow pension account would be calculated by the time rule method set forth in *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008). (RP 7-8; CP 529-30) The trial court awarded each party 50% of the community share of the Dow pension plan, and awarded Bob his separate share. (CP 604, 606)

The parties disputed the character of Bob's Dow 401(k). After Bob left Union Carbide, he continued to write checks for the "Dow stock fund" with money from the joint accounts. (RP 42-43, 46-47, 68, 180; Ex. 36 at 1-2) Yet, prior to and throughout trial, Bob did not produce any documentation of "the Dow stock or any of the Dow information" (RP 230) aside from a single 401(k) account statement

dated June 30, 2015. (RP 230, 261; CP 597; Ex. 13) This statement showed that nearly 70% of his Dow 401(k) assets were allocated to stock investments, including Dow “Company Stock.” (Ex. 13 at 1, 3) All of these Company Stocks have an “inception date” during the marriage, from July 1996 to as recent as May 2009. (Ex. 13 at 9)

Because Bob presented no evidence of what Company Stock he owned prior to the marriage, or the value of the 401(k) when the parties married, Pam asked that the entire Dow 401(k) be characterized as community property. (RP 67-70) Bob, however, asserted that the Dow 401(k) was partly his separate property, and proposed that the 401(k), like the pension, be characterized using the time rule method. (RP 231-32) Despite Bob having “no idea” whether he contributed the same amounts prior to marriage as he did in 1997, he acknowledged that his proposed formula “assumes each year was exactly the same as far as contributions, market growth.” (RP 231-32)

After requesting an updated account statement at the conclusion of trial, the trial court characterized the entire Dow 401(k) as community property when Bob “provided no statements showing the value of the property before the marriage on 9/23/1995, during

the marriage or at date of separation on 8/13/2014.” (RP 235-37; CP 597)

The trial court valued the Dow 401(k) at \$356,877, which included the balance from a \$50,000 loan against the account that Bob took post-separation. (RP 117-18; CP 608; Ex. 13 at 4) Bob agreed that the \$43,000 remaining balance should be included in the 401(k)'s total value, and the debt should be allocated to him. (RP 236-37, 264-65) The trial court awarded Bob \$196,803 of the 401(k). (CP 608; RP 264) Pam received 44.8% of the total 401(k) value, or \$160,074, to “equaliz[e] a 50/50 distribution of property to the parties.” (RP 264-65; CP 608)

**3. The trial court evenly split the proceeds from the sale of the family home between the parties.**

Bob claimed he inherited money in 2001 when his mother passed away. (RP 189-90) Although Bob did not provide any evidence in discovery about the amount of the inheritance or what he did with it, the trial court allowed Bob to testify that he inherited \$82,000 in a GE Elfun mutual fund account from his mother, as well as an additional \$35,000 that he put into “the general accounts.” (RP 195) At the time of trial, the GE mutual fund account balance was \$4,149.49, which Bob conceded was “a community asset that ought to be divided equally.” (RP 192, 202; CP 608; App. Br. 24 n.3)

For the first time at trial, Bob claimed that he used approximately \$100,000 of his inheritance from the GE mutual fund account as half of the down payment on the family home that was purchased in 2010. (RP 192, 195-97) Despite Bob's violation of the court's March 18 order prohibiting such surprise evidence, and over Pam's objection, the trial court allowed Bob "to explore" whether or not "there is a separate property interest in the residence." (RP 194-95) In support of his testimony, Bob provided only the parties' 2010 tax return showing that \$100,000 in capital funds had been liquidated in December 2010 from an Elfun account. (RP 192-93; Ex. 75 at 4) However, with the exception of Bob's testimony that funds he inherited from his mother were deposited in the Elfun account in 2001, Bob failed to provide any documentation or "accounting of what happened to the GE Funds between the date he acquired them and the date the marital home was purchased" (CP 597), including whether and how much of the liquidated funds were used towards the marital home. The trial court, therefore, characterized "the GE Mutual Funds and all of the proceeds from the sale of the home" as community property. (CP 597) The trial court awarded the remaining \$4,149.49 in the GE mutual fund account to

Bob, and awarded each party an “equal share of the sale proceeds” for the family home. (CP 608, 604)

**4. The trial court awarded the husband’s American Century IRAs, which the parties contributed to during the marriage, to the wife.**

Prior to marriage, Bob had two American Century IRA accounts: a Select IRA opened in 1986 and a Growth IRA opened in 1987. (RP 187; Ex. 66 at 2) The only premarital account statements Bob provided showed that he contributed \$1,000 to each account in 1994, and that he invested no additional funds into either IRA throughout all of 1995. (Exs. 64, 65) As of December 1995, the Select account value was \$6,337.26, while the Growth IRA had a value of \$6,135.98. (Exs. 64, 65) During the marriage, Bob continued to contribute to both IRAs from the parties’ joint accounts. (Ex. 36 at 56-62; RP 44). At the time of trial, the Select IRA was valued at \$25,715.25, and the Growth IRA at \$26,380.72. (Ex. 66) The trial court awarded Pam both IRA accounts as community property. (CP 604, 608)

**5. The trial court allocated to the husband \$85,000 of community funds that he lost in a failed business venture without the wife’s consent.**

Bob received a \$100,000 severance package when he was let go from CH2M Hill in March 2013. (RP 210) Without telling Pam,

he invested \$5,000 per month “beginning in the last quarter of 2013 until . . . August of 2014” into “exploring a business venture.” (RP 264, 115, 98, 26, 28) He paid his purported business partner, Amy Judson, and her daughter, Samantha Floyd, a total of \$85,000 in community funds for “expenses” relating to the “business investigation.” (RP 115-17) Pam did not know that Bob was pursuing this “business venture” until she discovered the monthly withdrawals on the parties’ bank account and credit card statements in March 2014, a few months before the parties separated. (RP 38-40, 81; Exs. 32-34) Although Pam told Bob to stop making payments to Ms. Judson and her daughter, he continued to do so even after the parties separated in June 2014. (RP 39-40, 80-81)

Bob provided no documentation of business plans, incorporation documents, profit and loss statements, or any paper trail at all. (RP 28-29) Because “this transpired without the knowledge or consent of Ms. Flagella and, further, Mr. Flagella failed to produce any documentation to support his reasons for the expenditure of the party’s community funds,” the trial court allocated the \$85,000 loss to Bob as marital waste. (RP 264, 26-27, 38, 80-81)

Overall, the trial court awarded each party half of what it found was community property, awarded Pam those assets that the parties stipulated were her separate property, and awarded Bob his separate property portion of his Dow pension. In total, Pam received 56% of the marital estate, plus her separate property pension and half of the community portion of the Dow pension.<sup>1</sup> (*See* CP 630-35)

**E. The trial court awarded the wife maintenance for three and a half years.**

Pam initially received \$5,000 per month in spousal support under temporary orders entered on October 8, 2014. (RP 49; CP 67) At trial, Pam requested \$7,000 per month for seven years, until she reached the age of 67 and could receive full Social Security. (CP 540; RP 61-62) Pam sought the higher maintenance because she would have two increased expenses after the dissolution: a higher monthly rent and private health insurance costs. (RP 56)

The trial court awarded monthly maintenance of \$6,000 to Pam for three and a half years, commencing on May 1, 2016, and ending on November 1, 2019. (CP 596) The trial court found this short-term maintenance appropriate after considering all of the

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<sup>1</sup> Neither party sought to establish the present value of either pension.

factors in RCW 26.09.090, including the length of the 20-year marriage and Bob's "ability to continue to earn in excess of \$170,000 a year," compared to Pam's approximately \$29,000 earning capacity. (CP 593-96) The maintenance award leaves Pam netting approximately half of Bob's net income per month. (CP 596)

**F. The trial court denied the husband's motion to modify maintenance brought after final orders were entered. The husband lost his job, but the trial court found that he was still employable and had made insufficient effort to locate new employment.**

At trial, Bob testified that his position at Glumac was not "secure." (RP 214-15) Nevertheless, he assured the trial court that he "anticipate[d] working with them in the future." (RP 214-15) Bob then lost his job on April 1, just three days after the two-day trial ended on March 29. (CP 746-48, 755, 795) He did not bring this to the trial court's attention, despite the court allowing the parties to supplement their briefing until April 13. (CP 755) The trial court entered the final decree of dissolution on May 13, which Bob appealed on June 9. (CP 755, 652-54)

On June 30, three months after the final orders were entered, Bob moved to modify the maintenance award because he "was laid off roughly contemporaneously with the time of [the] divorce." (CP 791-93) Following a September 16 hearing, the trial court denied

Bob's motion on December 9. (CP 754-56; 9/16 RP 3-5) The trial court did not find that Bob's change in circumstances was unforeseen because he could have brought "his lack of employment to the attention of the court prior to the entry of the Decree and Findings" on May 13, 2016, nearly six weeks after he lost his job. (CP 755) Although there had been "a possibility that he might get a consulting position with the company," Bob "had the information that he was losing his job," and yet "did not inform the Court of the possibility he was losing his position" despite having "the opportunity to do so" for several weeks. (9/16 RP 3-4)

The trial court also found that Bob still had the ability to pay the maintenance. The trial court found that Bob was "underemployed because he's had the historical earnings and ability to earn six figures for years and years," "he is employable," "he has the ability to gain employment," the "efforts that he's made so far have not been sufficient to reach that level that [the court] expected," and Bob submitted "insufficient proof" that he "cannot become reemployed at the basis he's been at historically throughout his life." (9/16 RP 4-5, 12; Ex. 60; CP 750)

Further, Bob received nearly \$17,000 in accumulated vacation and severance pay when he lost his job in April. (CP 747)

The trial court found that Bob “had substantial liquid funds” at the time he filed his petition to modify, and that his bank statements not only “reflect[ed] these cash amounts,” but also “significant monthly spending.” (CP 755, 739-43, 785-90)

On June 29, 2016, Bob sought to stay enforcement of the trial court’s property award to Pam during the pendency of this appeal by depositing \$50,000 into the court registry and pledging the Dow 401(k) as alternate security. (CP 829-31) Pam objected, seeking additional security and an advance award of attorney fees under RAP 7.2(d), as the stay would leave her with inadequate funds to defend the trial court’s decree on appeal. (CP 799-806) The trial court partially stayed the property distribution, granted Pam’s motion for additional security, and awarded her \$15,000 in suit money for her appellate fees. (CP 832-34) Bob sought review of this decision in this Court, which was denied by a commissioner on September 12, 2016. He does not further challenge this decision in his appeal.

Bob appealed the trial court’s order denying his motion to modify on December 13, and this Court consolidated Bob’s appeals on December 16, 2016. (CP 809-10, 835)

### III. ARGUMENT

**A. The trial court made a fair and equitable property distribution following the 20-year marriage.**

**1. The trial court's decree places the parties in roughly equal positions for the rest of their lives.** (Response to App. Br. 1, 41)

Bob's appeal of the trial court's property distribution is premised largely on claimed errors in characterizing the marital estate. But the trial court properly characterized the parties' assets based on the evidence presented. In any event, the character of property is not controlling. The trial court "may distribute all property, whether categorized as community or separate." *Marriage of Wright*, 179 Wn. App. 257, 261, ¶ 5, 319 P. 3d 45 (2013), *rev. denied*, 180 Wn. 2d 1016 (2014). While the trial court must consider the character of property, its ultimate goal is to make a just and equitable property division considering all of the factors under RCW 26.09.080. *Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97, *cert. denied*, 473 U.S. 906 (1985).

Here, the trial court was well within its discretion to award Pam a slightly disproportionate division of the entire marital estate after a 23-year relationship. "[T]he trial court's paramount concern when distributing property in a dissolution is the economic condition in which the decree leaves the parties." *Marriage of Williams*, 84

Wn. App. 263, 270, 927 P.2d 679 (1996), *rev. denied*, 131 Wn.2d 1025 (1997). Where the spouses were in a long-term marriage, “the court’s objective is to place the parties in roughly equal financial positions for the rest of their lives.” *Wright*, 179 Wn. App. at 262, ¶ 7.

The trial court has broad discretion and “is obligated only to make a fair, just and equitable division of the marital property” in light of all of the circumstances of the marriage. *Marriage of Wright*, 78 Wn. App. 230, 237, 896 P.2d 735 (1995); *Marriage of Nicholson*, 17 Wn. App. 110, 118, 561 P.2d 1116 (1977) (quoted source omitted). This Court is “reluctant to encroach upon this discretion by providing a precise formula prescribing the amount of property to be distributed or maintenance to be awarded to the supporting spouse.” *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984); *Marriage of Rockwell*, 141 Wn. App. 235, 243, ¶ 12, 248, ¶ 22, 170 P.3d 572 (2007) (“[T]he court is not required to divide community property equally”; “[i]f a trial court’s finding is within the range of the credible evidence, we defer.”), *rev. denied*, 163 Wn.2d 1055 (2008).

The trial court awarded each party 50%, or approximately \$546,800, of the community estate. (CP 609) Pam also received \$151,764 in separate property per the parties’ stipulation, for a total

award of 56% of the nearly \$1.25 million marital estate. (RP 6-7; CP 608) That Pam, who has a significantly lower earning capacity than Bob, received a slightly disproportionate division of the entire marital estate following the 20-year marriage does not render the distribution inequitable.

**2. The trial court did not abuse its discretion by allocating \$85,000 in marital waste to the husband.** (Response to App. Br. 28-33)

The trial court properly allocated \$85,000 to Bob as marital waste where he unilaterally spent community funds without Pam's knowledge or consent. RCW 26.16.030 prohibits a spouse from giving away community property "without the express or implied consent of the other." RCW 26.16.030(2). "In making its property distribution, the trial court may properly consider a spouse's waste or concealment of assets." *Marriage of Wallace*, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn. 2d 1011 (2003); *Marriage of White*, 105 Wn. App. 545, 551, 20 P.3d 481 (2001) ("trial court is permitted to consider, as one relevant factor, a spouse's unusually significant contributions to (or wasting of) the assets on hand at trial"); *Marriage of Morrow*, 53 Wn. App. 579, 588, 770 P.2d 197 (1989) (husband's dissipation of assets is a factor that should be considered); *Marriage of Steadman*, 63 Wn. App. 523, 527, 821 P.2d

59 (1991) (“the dissipation of the marital property [i]s a relevant factor to the attainment of a just and equitable distribution of marital property”) (quoting *Marriage of Clark*, 13 Wn. App. 805, 808, 538 P.2d 145, *rev. denied*, 86 Wn.2d 1001 (1975)) (internal quotation marks omitted).

It is undisputed that Bob unilaterally lost \$85,000 in community funds. (See App. Br. 28-29) Bob claims to have invested the money in a “business investigation,” yet he failed to produce *any* paper trail of the purported business. (RP 26-29, 113, 115-17; see App. Br. 30-31) Because Bob “demanded” that he be in charge of the parties’ investments, which Pam “didn’t have a choice” but to be “okay” with, she did not know that he was squandering away \$85,000 “into exploring a business venture.” (RP 82, 115; see also RP 209: Bob conceding he did not “know one way or another” whether Pam was aware of the investment) Even after Pam discovered the withdrawals in March 2014 and confronted Bob, he “wouldn’t stop giving money to Amy Judson” – despite Pam expressly telling him not to. (RP 39-40, 80; Ex. 33; Ex. 32 at 37, 40-41; Ex. 34 at 11-12)

Accordingly, the trial court did not err by allocating the \$85,000 of marital waste to Bob “in the overall distribution of

property,” given Bob’s “fail[ure] to produce any documentation to support his reasons for the expenditure of the party’s community funds,” and that “[a]ll of this transpired without the knowledge or consent of Ms. Flagella.” (RP 264)

**B. The trial court did not mischaracterize the property.**

The trial court’s characterization of property is a mixed question of law and fact. *Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002), *rev. denied*, 148 Wn. 2d 1023 (2003). “The character of property, whether separate or community, is determined at the time of acquisition.” *Marriage of Schwarz*, 192 Wn. App. 180, 189, ¶ 17, 368 P.3d 173 (2016). The time and method of acquisition, the intent of the donor, and “whether or not a rebuttable presumption of community or separate character is overcome” are factual questions. *Schwarz*, 192 Wn. App. at 192, ¶ 24. The “factual findings upon which the court’s characterization is based may be reversed only if they are not supported by substantial evidence.” *Griswold*, 112 Wn. App. at 339. The trial court’s ultimate characterization of the property is a question of law reviewed *de novo*. *Grizwold*, 112 Wn. App. at 339.

**1. The trial court properly characterized the proceeds from the family home as community property. (Response to App. Br. 23-28)**

Bob's failure to produce any discovery regarding his inheritance is fatal to his efforts at clearly and convincingly tracing a separate property interest in the family home. Not only did Bob fail to establish that he used his inheritance for the down payment, but he also failed to show that the account holding the purported inheritance contained only separate property funds.

"Property acquired by purchase during the marriage status is presumed to be community property, and the burden rests upon the spouse asserting its separate character to establish by clear and satisfactory evidence his or her claim to the contrary." *Witte's Estate*, 21 Wn.2d 112, 125, 150 P.2d 595 (1944); *Schwarz*, 192 Wn. App. at 189, ¶ 17 (party may rebut this community presumption only "by offering clear and convincing evidence that the property was acquired with separate funds"). "The requirement of clear and satisfactory 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." *Schwarz*, 192 Wn. App. at 189, ¶ 17 (quoted source omitted). Furthermore, a "rebuttable presumption

arises that property acquired with separate funds during the marriage is presumed to be a gift to the community.” *Marriage of Skarbek*, 100 Wn. App. 444, 450, 997 P.2d 447 (2000).

Because the parties purchased the family home during the marriage, it is presumptively community property. Bob failed to offer clear and convincing evidence rebutting this presumption. Instead, Bob relied on self-serving testimony that he used \$100,000 of his inheritance, held in the GE Elfun account, for part of the \$200,000 down payment. (RP 197-98) The only evidence he offered in support of this testimony was a 2010 joint tax return showing that the parties had sold nearly \$100,000 in capital shares of “ELFNX,” which Bob testified stood for “the Elfun fund,” the same year they purchased the family home. (RP 197; Ex. 75 at 4)

Bob’s evidence proves only that the parties liquidated nearly \$100,000 from the GE mutual fund account in December 2010. Bob provided no documentation of when the GE Elfun account was opened, where the mutual funds initially came from, whether the community contributed funds to the account from 2001 to 2010, or what the parties used the liquidated funds for in 2010. (CP 597) Even if Bob *had* successfully established that the GE mutual fund account was entirely his inheritance, mere evidence that his separate

property was available for the down payment is insufficient to defeat the community property presumption. *Schwarz*, 192 Wn. App. at 189, ¶ 17.

The trial court was well within its discretion to find Bob's self-serving testimony insufficient to satisfy his burden of clear and convincing evidence (App. Br. 25), especially in light of the parties' conflicting testimony. (*Compare* RP 234-35: "no question" in Bob's mind that Pam knew that the inherited funds were going towards the down payment<sup>2</sup> *with* RP 75-76: Pam testifying that Bob "never shared" with her the amount of his inheritance or the subsequent investments he placed it in) 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. The trial court did not err in finding that Bob failed to establish a separate property interest in the marital home.

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<sup>2</sup> Pam "did not respond" to Bob's testimony on this point (App. Br. 25) because Bob introduced this surprise evidence for the first time at trial, in violation of the trial court's March 18 order prohibiting all "oral testimony and exhibits" "inconsistent with the discovery provided from March 11, 2016 and prior." (CP 521) Although Pam did not have the benefit of discovery on this issue, the trial court allowed Bob to "explore" his separate property interest claim over Pam's objections. (RP 190-95)

**2. The trial court properly characterized the hopelessly commingled Dow 401(k) as community property (Response to App. Br. 9-19)**

The trial court properly characterized the entire Dow 401(k) as community property because it was impossible to trace the separate property component. Neither party disputes that there is both a separate and community property interest in the 401(k). (*See, e.g.*, RP 178-79, 231-32; App. Br. 10-11) However, unlike with the Dow pension where neither party claimed that they made further contributions after Bob was laid off, the parties contested whether and to what extent the community contributed to the Dow 401(k) after he left the company.<sup>3</sup> (*See* CP 46-47, 67-70, 178; Ex. 36 at 1-2)

The trial court thus properly characterized all of the Dow 401(k) as community property when Bob failed to provide *any* evidence of its value prior to or during the marriage, leaving the trial

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<sup>3</sup> Pam did not concede that “Bob should be awarded the separate portion of the Dow 401(k).” (App. Br. 9, 12) Pam merely testified that the separate property component of the Dow 401(k) should be given “the same treatment” as her Arthur Anderson 401(k) *only if* the parties did not contribute any funds to the account after Bob left Dow – which Pam maintained that they did. (RP 67-70)

court unable to distinguish or apportion the separate property interest from the community property portion.<sup>4</sup>

**a. Hopelessly commingled funds give rise to a conclusive community property presumption.** (Response to App. Br. 12-15)

All property possessed by either party during a marriage is presumed to be community property. *Schwarz*, 192 Wn. App. at 189, ¶ 18. The party claiming separate property can rebut the community property presumption by establishing through a preponderance of the evidence that the asset was acquired prior to marriage. *Schwarz*, 192 Wn. App. at 189-90, ¶ 18. If a party establishes that property “was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.” *Marriage of Shui*, 132 Wn. App. 568, 584, ¶ 26, 125 P.3d 180 (2005) (quoted source and emphasis in original omitted), *rev. denied*, 158 Wn.2d 1017 (2006).

However, because property will retain its separate character “as long as it can be traced or identified,” the commingling “of

<sup>4</sup> It was “sufficient” for Pam to testify that her Arthur Anderson 401(k) was her separate property “without any other evidence” (App. Br. 19) because Bob stipulated that it was entirely her separate property. (RP 6-7) In addition, Pam *did* provide documentary evidence that she had left her position with Arthur Anderson on October 1, 1995 – one week after the parties’ wedding on September 23, 1995 – and testified that she did not make any subsequent contributions to the account. (RP 17-18; Ex. 3 at 2)

separate and community funds may give rise to a presumption that all are community property.” *Schwarz*, 192 Wn. App. at 190, ¶¶ 19-20. If separate property “becomes so commingled that it is impossible to distinguish or apportion it, then the entire amount becomes community property.” *Shui*, 132 Wn. App. at 584, ¶ 26 (quoted source omitted). Commingling occurs when “(1) a substantial amount of separate property is (2) intermixed with (3) a substantial amount of community property to the extent that (4) it is no longer possible to identify whether the remainder is the separate property portion or the community property portion.” *Shui*, 132 Wn. App. at 584, ¶ 26 (quoted source omitted). This presumption is “conclusive, arising only after the effort at tracing proves impossible.” *Schwarz*, 192 Wn. App. at 190, ¶ 20. “The burden is on the spouse claiming separate funds to clearly and convincingly trace them.” *Shui*, 132 Wn. App. at 584, ¶ 26 (quoted source omitted).

**b. The Dow 401(k) is hopelessly commingled because the husband failed to clearly and convincingly trace his separate property.** (Response to App. Br. 16-19)

Bob “provided no statements regarding the value of the property before the marriage on 9/23/95, during the marriage, or at date of separation on 8/13/2014,” thus failing to meet his burden of

tracing his separate property interest “with some degree of particularity.” (RP 261; *see, e.g.*, RP 231: Bob conceding that he does not have “any proof or any written document that shows what the 1995 separate property value was of that Dow 401k”; RP 232: Bob testifying he has “no idea” if he contributed the same amounts before and during the marriage) The trial court can only distribute property based on the evidence before it. (*See, e.g.*, RP 250: trial court explaining that in valuing the parties’ assets, “I go by what I have” when “the parties don’t provide me with that information”) Because the record is devoid of any means of tracing Bob’s separate property interest, the trial court did not err in characterizing the 401(k) as community property.<sup>5</sup> (CP 596)

Bob misplaces his reliance on *Marriage of Schwarz*, 192 Wn. App. 180, 368 P.3d 173 (2016). (App. Br. 17-19) While a party may not be obligated to provide “exhaustive” account statements in order to trace a separate property interest (App. Br. 19), *Schwarz* does not excuse a party from its burden of providing clear and convincing evidence to prove an asset is not hopelessly commingled. *See* 192

<sup>5</sup> The trial court’s omission of the phrase “hopelessly commingled” when characterizing the 401(k) as community property (App. Br. 16) is harmless because the record supports such a finding. *See, e.g., Fite v. Fite*, 3 Wn. App. 726, 733, 479 P.2d 560 (1970) (“trial court can be sustained on any ground within the proof”), *rev. denied*, 78 Wn.2d 997 (1971).

Wn. App. at 194-95, ¶¶ 31-32 (wife’s evidence “largely sufficient to overcome the community property presumption” where she “testified and in almost all cases presented supporting documentary evidence,” despite not providing “an exhaustive 13-year tracing of every account”).

For example, in *Schwarz*, one of the assets the trial court characterized as community property was the wife’s Western National IRA, “which originated before marriage and had been contributed to thereafter *only* with funds from [her] savings.” 192 Wn. App. at 211, ¶ 65 (emphasis added). On appeal, the Court found that the wife’s IRA had not been hopelessly commingled because she provided sufficient “evidence tracing this IRA” through her testimony and account statements. *Schwarz*, 192 Wn. App. at 212, ¶ 67.

These account statements demonstrated that the wife in *Schwarz* had a Washington Mutual IRA with a value of \$5,770 as of the date of marriage; that the funds from the Washington Mutual IRA were used to purchase an IRA on April 8, 2008 with Annuity Insurance Company; that in April 2010, the wife had a Western National Life Insurance IRA with the same April 8, 2008 issue date as her Annuity Insurance IRA, which the wife testified was a result of

a name change between the companies; and that at the time of trial, her Western National IRA had a value of \$15,869. *Schwarz*, 192 Wn. App. at 204-05, ¶ 50. The Court held that, given the wife's testimony, the supporting documentary evidence, and the fact that the husband "never disputed that the origin of the Western National IRA was the separate property WaMu IRA," the wife had sufficiently traced the separate property and it was not hopelessly commingled. *Schwarz*, 192 Wn. App. at 205, ¶ 50, 212, ¶ 67.

Unlike the wife in *Schwarz*, Bob provided *no* evidence – not even his own testimony – of the Dow 401(k)'s value prior to marriage, at the time of marriage, or even when he claims he stopped contributing to it in 1997. (RP 230-32, 178) Bob could not remember how much he contributed each year, whether his contributions changed after the parties married, or what his company matched. (RP 178, 230-32) Nor did Bob claim that he used separate property funds to contribute to the 401(k) during the marriage. In fact, although Bob claims that his marital contributions were to "the Dow stock account, not the Dow 401(k) account" (App. Br. 11; RP 179-80), the 401(k) statement shows that Bob had additional "Mix-Your-Own" funds consisting of Dow "Company Stock" with "inception dates" from July 1996 to May 2009. (Ex. 13 at 2-3, 9) The checks

Bob wrote to Union Carbide during the marriage for the “Dow stock fund” could very well have been for the “Dow Stock” and “Dow ESOP Stock Fund” in his 401(k), not another “distinct” account. (App. Br. 11) (*Compare* RP 180 with Ex. 13 at 9; *see also* RP 67-70: Pam testifying that she believed Bob was contributing to his 401(k) with the checks written to Union Carbide for “stock”; Ex. 36 at 1-2)

The trial court did not err by characterizing the entire 401(k) account as community property based on the evidence before it.

**3. The trial court’s failure to make specific findings on the character of the American Century IRAs is harmless because it does not render the distribution inequitable.** (Response to App. Br. 20-22)

The trial court properly included the American Century IRAs in the community estate because, although they were opened before the marriage, Bob’s premarital contributions were minimal and it is undisputed that the community contributed to both accounts throughout the marriage. (Ex. 36 at 57-62; RP 188)

The trial court’s failure to make specific findings as to the character of property is not reversible error if this Court can sustain the trial court’s property division “on any ground within the proof.” *Fite v. Fite*, 3 Wn. App. 726, 733, 479 P.2d 560 (1970) (trial court’s allocation not reversible error “[s]ince the trial court can be

sustained on any ground within the proof”), *rev. denied*, 78 Wn. 2d 997 (1971); *Melville’s Marriage*, 11 Wn. App. 879, 880-81, 526 P.2d 1228 (1974) (no abuse of discretion for “failing to make specific findings as to the character and status of the property of the parties prior to its division,” because the “characterization of property is not controlling upon its division, but rather one of many factors to be considered by the court”); *Wright*, 78 Wn. App. at 236-37 (trial court’s failure to characterize and value certain assets was insignificant and not reversible error where it did not render the property division inequitable).

In *Wright*, the wife appealed the trial court’s failure to characterize the husband’s USAA account and retroactive pay. This Court held that the error was “not significant enough to warrant reversal and remand,” as “the characterization of the property as either separate or community does not control its disposition,” and “the trial court is obligated only to make a fair, just and equitable division of the marital property.” *Wright*, 78 Wn. App. at 236-37. Because the error did not “render[] the division of property inequitable,” this Court was “satisfied that the trial court divided the marital assets equitably” and affirmed the property division. *Wright*, 78 Wn. App. at 236-37.

Similarly, in *Melville*, the husband's net worth was over \$100,000 when the parties married; at the time of dissolution, "the parties' net worth, including both separate and community property, was approximately \$31,800." 11 Wn. App. at 880. The trial court awarded the wife \$14,000 in cash, \$2,500 in personal property, "an unvalued car," and \$2,000 in liabilities. *Melville*, 11 Wn. App. at 880. The trial court awarded the husband personal property valued at \$106,764, real property valued at \$37,550, and liabilities of \$115,206. *Melville*, 11 Wn. App. at 880. The husband was also ordered to pay \$100 per month in child support, \$4,000 in attorney fees for the wife, \$100 per month in spousal maintenance, and \$6,100 in community obligations. *Melville*, 11 Wn. App. at 880. Although the trial court made no specific findings of the character or status of *any* of the property prior to making its division, the Court upheld the decree because it was "evident from the court's oral decision and findings that it appreciated the fact [the husband] possessed substantial income-producing property prior to the marriage," and "[a]s a result, the source of his livelihood was left intact for his benefit." *Melville*, 11 Wn. App. at 880-81.

Just as in *Wright* and *Melville*, any error in the trial court's failure to make specific findings on the characterization of the

American Century IRAs is harmless because the trial court is not bound to that characterization in distributing the property, and any such error did not render the trial court's decree inequitable. It is undisputed that while Bob opened the American Century Select IRAs, before marriage, the community continued to contribute to both IRAs during the marriage. (Ex. 66; Ex. 36 at 57-62; RP 188: Bob acknowledging that there was a community property interest in the IRAs) Further, the little evidence Bob provided demonstrates that he made minimal premarital contributions to the IRAs. (See Exs. 64 and 65: no investments made in either account for all of 1995) Yet, with the marital contributions, both the Growth and Select IRAs increased in value by \$20,000 during the marriage. (Exs. 64-66) The trial court was clearly aware that the property had both a separate and community component, and properly exercised its discretion to award the funds to Pam. (CP 608, 604)

**4. The trial court's findings support its slightly disproportionate award in favor of the wife.**  
(Response to App. Br. 33-35)

The trial court's findings support its characterizations and equitable property distribution. (CP 593-97) Bob provided no evidence enabling the trial court to value his separate property portion of the 401(k) or his purported separate property interest in

the family home, despite Pam seeking this very information in discovery. Based on the little information before it, and the long duration of the marriage, the trial court properly found in favor of the community in characterizing both assets as entirely community property. *Schwarz*, 192 Wn. App. at 190, ¶ 18 (“As a general rule, the longer the duration of the marriage the more likely the court will assume that assets in the possession of the spouses are community.”) (quoted source omitted).

To the extent that Pam received a marginally higher percentage of the total marital estate, the trial court was aware of that disproportionality when it made its division. (See RP 251: trial court expressly telling the parties that it was “still considering” whether to make a disproportionate award; RP 252: court noting that it was “going to need to go line by line on the spreadsheet and decide the distribution of th[e] asset[s]”) Pam is now 60 years old, has not worked in over six years, is currently in college, and will have an earning capacity of approximately \$29,000 per year. (CP 594; Ex. 60) Bob, on the other hand, is a chemical engineer with over 40 years of experience, and “has the ability to continue to earn in excess of \$170,000 a year.” (CP 595) The trial court clearly took all of these

factors into consideration when awarding Pam 56% of the marital estate and Bob 44%.

**C. The trial court did not err in denying the husband's motion to modify maintenance.**

Under RCW 26.09.090, a trial court has broad discretion in awarding maintenance. *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984); “Maintenance is ‘a flexible tool’ for equalizing the parties’ standards of living for an ‘appropriate period of time.’” *Marriage of Wright*, 179 Wn. App. 257, 269, ¶ 23, 319 P. 3d 45 (2013), *rev. denied*, 180 Wn. 2d 1016 (2014). (quoted source omitted). “The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be ‘just.’” *Wright*, 179 Wn. App. at 269, ¶ 23.

A party may seek to modify a maintenance order under RCW 26.09.170 “only upon a showing of a substantial and material change in the condition and circumstances of the parties.” *Lambert v. Lambert*, 66 Wn.2d 503, 508, 403 P.2d 664 (1965). “The phrase ‘change in circumstances’ refers to the financial ability of the obligor spouse to pay vis-à-vis the necessities of the other spouse.” *Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001) (quoted source omitted). A “modification may be made only upon an *uncontemplated* change of circumstances occurring since the former

decree.” *Holaday v. Merceri*, 49 Wn. App. 321, 331, 742 P.2d 127 (emphasis in original), *rev. denied*, 108 Wn.2d 1035 (1987); *Lambert*, 66 Wn.2d at 508. “The determining issue is: ‘Could and should the facts now relied upon as establishing a change in the circumstances have been presented to the court in the previous hearing?’” *Holaday*, 49 Wn. App. at 331 (quoting *Lambert*, 66 Wn.2d at 509).

Whether “a substantial and material change in circumstance . . . will authorize and justify a modification . . . is addressed to, and rests within, the sound judgment and discretion of the trial judge.” *Lambert*, 66 Wn.2d at 508. This Court will not reverse a trial court’s ruling on a motion to modify absent an abuse of discretion. *Fox v. Fox*, 87 Wn. App. 782, 784, 942 P.2d 1084 (1997).

Here, the trial court properly denied Bob’s motion to modify the maintenance decree where Bob could and should have presented the facts underlying his “change in circumstances” prior to the entry of the final orders, and where he still had the ability to pay the maintenance. The trial court did not abuse its discretion.

**1. The husband had six weeks prior to the entry of the decree to inform the trial court that he had lost his job. (Response to App. Br. 35-39)**

Trial occurred on March 28 and 29, 2016. (CP 755) Glumac waited until April 1 to let Bob go to “enable[] him to have medical coverage through the month of April.” (CP 747, 755, 795) Although, Bob testified at trial that his job was not “secure,” he did not inform the trial court that there was even a possibility that he would lose his job – despite Glumac “determin[ing] that lay-offs would need to be made” as “projects in [its] industrial market decreased in the first quarter of 2016.” (RP 214-15; CP 795) Instead, he testified only that while he believed his company thought they paid him too much, he was “not looking to leave them” and “anticipate[d] working with [Glumac] in the future” through a consulting position. (RP 214-15; CP 746)

Even if Bob did not know at trial that he was going to be imminently laid off, he certainly knew that he had lost his job three days later, on April 1. Yet Bob did not inform the trial court of this based on his assumption that “the court would have ordered [him] to pay the maintenance first ordered,” and to seek a modification “if things did not turn out” with the consulting position. (CP 746) Bob’s logic is entirely flawed because, as of April 1, there was no final

maintenance order that would need to be modified. The trial court allowed the parties to supplement their briefing until April 13, did not make its oral ruling until April 22, and did not enter the final decree until May 13. (CP 755)

Bob's decision to not inform the court of his job loss before the final orders were entered appears to be a strategic one. As the trial court acknowledged, had Bob informed the court that he lost his job, the trial court could have made a different decision. (9/16 RP 6) For instance, the trial court could have awarded Pam more property and less or no maintenance. (See 9/16 RP 6: trial court wondering "if [it] hadn't have granted any maintenance, would [it] have granted her more [property]?") Instead, Bob "put [the court] in the position where [it] couldn't make that decision."<sup>6</sup> (9/16 RP 6-7)

The trial court did not "penalize[] Bob for failing to disclose his job loss before the court entered final orders." (App. Br. 38) The determining question on a motion to modify is if the facts "relied upon as establishing a change in the circumstances" could and

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<sup>6</sup> Since maintenance is modifiable, Bob apparently hoped to reduce or terminate his maintenance obligation based on his changed employment situation after final orders were entered while maintaining the property division. Had Bob brought his employment situation to the trial court's attention earlier, the trial court could have awarded Pam more assets, and that property award would not be modifiable. RCW 26.09.170.

should have “been presented to the court in [a] previous hearing.” *Holiday*, 49 Wn. App. at 331 (quoting *Lambert*, 66 Wn.2d at 509). In this case, Bob conceded that he could have informed the trial court of the loss of his job prior to the final entry of the maintenance order. (9/16 RP 4) Therefore, the trial court did not abuse its discretion in finding that “the fact that [Bob] was anticipating replacement employment, which did not materialize, did not excuse him from bringing his lack of employment to the attention of the court prior to the entry of the Decree and Findings, including his failure to file for reconsideration.” (CP 755) This was not an “uncontemplated” change of circumstances that occurred after the trial court entered its final orders. The trial court properly denied Bob’s motion to modify the maintenance order.

**2. The husband still had the ability to pay the maintenance.** (Response to App. Br. 39-41)

In denying the motion to modify, the trial court also properly found that the “change in circumstances” was not substantial enough to warrant modification, as Bob still had the financial ability to pay the maintenance. *Spreen*, 107 Wn. App. at 346 (change in circumstances must be substantial). RCW 26.09.090 lists six non-exhaustive factors for the trial court to consider, but “places emphasis on the justness of an award, not its method of calculation.”

*Washburn*, 101 Wn.2d at 182. One such factor is the “ability of the spouse [ ] from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse [ ] seeking maintenance.” RCW 26.09.090(1)(f). Reviewing courts are “reluctant to encroach upon this discretion by providing a precise formula prescribing the amount of property to be distributed or maintenance to be awarded to the supporting spouse.” *Washburn*, 101 Wn.2d at 179. In considering a party’s ability to pay, the trial court must take into account “*all relevant factors*.” RCW 26.09.090(1) (emphasis added). “The burden of demonstrating the required change of circumstances rests upon the party petitioning for the modification.” *Lambert*, 66 Wn.2d at 508.

Bob failed to establish that he no longer had the ability to pay the remaining maintenance. Bob has extensive experience as a chemical engineer, and remains employable with the “ability to earn six figures for years and years.” (9/16 RP 4; *see, e.g.*, Ex. 60: resume showing Bob consistently employed as a chemical engineer since 1975; RP 122: earning \$170,000 as a senior project manager at Glumac; RP 210: receiving \$100,000 severance package for his work with CH2M Hill) Pam, on the other hand, has been out of the

workforce for over six years and, when she reenters, has an earning capacity of only \$29,000. (RP 50, 85; CP 594).

Additionally, Bob's "employment log" demonstrated that he sent out only two resumes per week while purportedly chasing "leads," such as using Indeed.com and "comparing notes" with other associates "[s]eeking new job[s]." (CP 794) The trial court was well within its discretion to find this to be "insufficient proof" that he "cannot become reemployed at the basis he's been at historically throughout his life," and that "efforts that he's made so far have not been sufficient to reach that level that [the court] expected." (9/16 RP 5, 12)

Bob cites no authority for his proposition that the trial court cannot take into account the parties' disparate earning capabilities. (App. Br. 40-41) Doing so is not "speculation and conjecture." (App. Br. 40) Bob's reliance on *Marriage of Rouleau*, 36 Wn. App. 129, 672 P.2d 756 (1983) is entirely misplaced. *Rouleau* did not even discuss an obligor's ability to pay, holding only that a trial court may not base a maintenance award entirely on the "conjectural possibility of a future change" in the *obligee's* financial need. 36 Wn. App. at 132 (quoted source omitted). In this case, it is undisputed that Pam has the need for maintenance.

The trial court can properly consider *all* factors, including earning capacity, in determining a party's ability to pay, even if the payor "lost his income through no fault of his own." (App. Br. 41) *Fox*, 87 Wn. App. 782, does not hold otherwise. (App. Br. 41) *Fox* held only that in determining whether good faith for a voluntary reduction of income exists, "it is not appropriate to limit the focus of inquiry solely to [the husband's] individual income." 87 Wn. App. at 785. However, *Fox* in no way stands for, or even addresses, the proposition that the trial court cannot take into account a party's earning capacity when their change in financial circumstances is involuntary.

In fact, trial courts routinely consider the respective parties' earning capacity when determining maintenance. *Marriage of Terry*, 79 Wn. App. 866, 870-71, 905 P.2d 935 (1995) (trial court erred in treating marriage as short-term; reversing and remanding for necessity of a maintenance award, which "may be utilized to more nearly equalize the postdissolution economic conditions of the parties, *especially considering [the husband's] superior earning capacity*") (emphasis added); *Marriage of Bulicek*, 59 Wn. App. 630, 635-36, 800 P.2d 394 (1990) (maintenance award not abuse of discretion where trial court properly considered the statutory factors

and the husband “will be in a position to support a lifestyle more comparable to the lifestyle enjoyed by the couple during marriage than will [the wife], *given their relative earning powers*”) (emphasis added); *Marriage of Fernau*, 39 Wn. App. 695, 706, 694 P.2d 1092 (1984) (maintenance award to wife not abuse of discretion where husband “has the capacity to earn a substantially larger income than [the wife] will earn,” and the “trial court properly weighed this evidence, *as it is required to do*, in determining maintenance”) (emphasis added).

The trial court also found that Bob “had substantial liquid funds” at the time he filed his petition to modify, and that his bank statements not only “reflect[ed] these cash amounts,” but also “significant monthly spending.” (CP 755) Bob received a \$17,000 severance package from Glumac when he was let go in April 2016. (9/16 RP 6; CP 747) He also borrowed \$175,000 from his sister. (CP 743, 751). Yet on June 12, 2016, Bob listed \$65,000 of available liquid assets; two months later, on August 22, he claimed to have only \$18,651 in liquid assets. (CP 787, 741) Somehow, despite having nearly \$200,000 available to him and the monthly maintenance obligation only being \$6,000, Bob managed to spend \$46,349 in just two months.

The trial court properly considered Bob's earning capabilities, as well as all of his financial circumstances, in finding that he had the ability to pay. The trial court did not abuse its discretion in denying Bob's motion to modify.

**D. This Court should award attorney fees to the wife.**

This Court should award Pam her attorney fees on appeal to the extent that the trial court's \$15,000 suit money award, which Bob does not challenge on appeal, does not cover all of Pam's reasonable attorney fees incurred on appeal. RCW 26.09.140; RAP 18.1(a); *Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998) (awarding attorney fees to the wife "[g]iven the disparity in income and assets between the two" parties, and the husband's ability to pay), *rev. denied*, 137 Wn.2d 1003 (1999).

Although Pam requested a \$25,000 suit award when Bob moved to stay the property division pending this appeal, the trial court awarded her only \$15,000. (CP 804-06, 833) Bob's earning capacity is at least four times that of Pam's. To the extent that the suit money is insufficient for Pam to defend the trial court's decree against Bob's appeal of discretionary, fact-based decisions supported by substantial evidence, this Court should award Pam her attorney fees on appeal based on her need and Bob's ability to pay.

**IV. CONCLUSION**

This Court should affirm the trial court's orders and award respondent her fees on appeal.

Dated this 16<sup>th</sup> day of March, 2017.

SMITH GOODFRIEND, P.S.

WHEELER MONTGOMERY  
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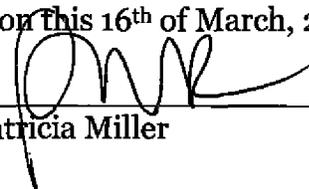
**DECLARATION OF SERVICE**

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

That on March 16, 2017, I arranged for service of the foregoing Brief of Respondent to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 16<sup>th</sup> of March, 2017.

  
\_\_\_\_\_  
Patricia Miller

**SMITH GOODFRIEND, P.S.**  
**March 16, 2017 - 4:40 PM**  
**Transmittal Letter**

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**Comments:**

Brief of Respondent's

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