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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

SHANTEL P., WAZNY,

Appellant,

v.

STEVEN D. WAZNY

Respondent

APPELLANT'S BRIEF

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Assignments of Error

- A. The trial court erred in considering undivided and undisclosed property using incorrect presumptions and burden of proof.
1. Are undivided and/or undisclosed assets presumed to be community Property? Yes.
 2. Is the standard of proof for identifying undivided or undisclosed property a preponderance of the evidence? Yes.
 3. If good faith is questioned, does the spouse whose lack of disclosure is questioned bear the burden of proof on good faith? Yes.
 4. Is a spouse entitled to rely on the other party's fiduciary duty of spousal disclosure as to property and debt? Yes.
 5. If the issue is fraud, is the burden of proof regarding good faith on the spouse defending the fraud? Yes.
 6. Is the spouse alleging fraud entitled to a presumption of fraud under the Uniform fraudulent Transfers Act? Yes.
 7. If a spouse presents evidence entitling her to a presumption of fraud, is her burden of proof "substantial evidence?" Yes
 8. Is it error of law not to consider circumstantial evidence? Yes.

B. Applying the correct standard of proof, the trial court should have either granted relief or remanded property issues to a hearing.

Issues:

1. When an asset is omitted from a CR2A agreement, is it undivided as a matter of law, to be divided 50-50? Yes.
 2. When an asset is undivided, is its value, distributions and income to be divided 50-50 to the parties? Yes.
 3. When parties contest whether funds are undivided community assets or a loan, should the wife be allowed a trial, in which her burden of proof is the preponderance, and the husband bears the burden of showing good faith? Yes.
 4. When a spouse cannot prove funds transfers until after the decree, is it error to find that she could have protected her interests prior to the divorce? Yes
 5. Is a spouse entitled to rely upon the fiduciary duty of the other spouse to disclose property and debt? Yes.
- C. The trial court erred when it interpreted the CR2A agreement to assign a debt to the wife, and amounts ordered to reimburse the husband should be disgorged.
- D. The trial court erred in failing to grant a trial for any issues in which there was a genuine issue of material fact presented.

E. The trial court erred in its findings and its decisions regarding attorneys fees. Issues:

1. Should the Court of Appeals reverse Trial Court rulings and award fees to the wife based upon the CR2A, while disgorging the fees awarded to the husband? Yes.
2. Did the trial court err in considering fault, and failing to consider need and the ability to pay in denying the wife's request for fees for her successful post-decree enforcement motions? Yes.
3. Did the trial court err to award to the husband undocumented billable hours, an award compensating clerical tasks, and attorneys fees that are not segregated? Yes.
4. Should the Court of Appeals award fees in this appeal based upon the CR2A or upon need and ability to pay? Yes.

I STATEMENT OF THE CASE

A. Proceedings below

This contentious dissolution was purportedly settled when the CR2A agreement was executed by the parties on September 4, 2013. CP 1—8. However, the “agreement” reflected a stalemate for some of the parties’ claims. The CR2A was based upon income disclosed by Mr. Wazny,(the husband) but Ms. Wazny (the wife) strong suspected hidden income and assets-- Hence the caveat:

Any undisclosed property shall remain 50% each to the parties as tenants in common and may be brought back to Court. Prevailing party entitled to attorney fees and costs on court ruling. CP3.

After several months subpoenaing and analyzing more than 1 year of post-decree activity of bank records of AJP (the company holding the main marital business, a 10% share in a chain of Jack-In-The-Box restaurants), NHG (another company with 1 to 3 jack in the box restaurants.)and the husband ‘s personal account, the wife filed a Motion to Enforce the Decree, including *inter alia*, the “undisclosed property” section of the CR2A agreement, unpaid living expenses, build a deck on the family home¹, and assignment

¹ She was successful and does not appeal the ruling on the funds and deck, however, she appeals the denial of attorneys fees and the finding that the CR2A agreement assigns the Equity Line of Credit to her to pay.

of a Bank of America Equity line (ELOC) to her side of the debt ledger. Her undivided and undisclosed property motion included the business NHG, never divided, and its community distributions, which were not divided or disclosed; and community distributions from AJP that were secreted until after the divorce. She also filed a Motion to Show Cause to vacate the CR2A agreement, regarding a debt division based on false disclosures and regarding the valuation of the community share of AJP.

The husband initially agreed to bring all motions before one judge, and signed an agreed order “to Exceed page limitations for Post Decree Motions”. CP711-712 He later objected, and successfully argued, that the decree enforcement issues be heard on the Commissioner’s calendar. The Court, ruled orally on April 22, 2016, CP 1023—1043, on the “property “ issues, but sent other Decree issues, i.e.,the deck, to the Commissioner’s calendar.

The wife moved for reconsideration and clarification, since the trial court had split her post-decree motion issues, retaining all property allegations but treating them as “vacate” issues, thus changing the burden of proof for the wife. The wife wanted the record to be clear that all the motions were ruled upon.

The wife's post decree motion came before the commissioner, with all original issues. The Commissioner reviewed the Trial Court's April 22 oral ruling, and decided to consider only issues of the quit claim deeds, funds owing, deck construction, assignment of the equity line of credit (ELOC) in the CR2A, and attorneys fees for those issues. She granted the wife's motion for quit claim deeds, to award funds, to pay for the deck, denied fees to both parties and ruled the CR2A had assigned the ELOC to the Wife to pay. She ordered further discovery to determine credit to the husband his payments on the ELOC. CP 1019—1022.

Honorable Jack Nevin, subsequently denied the Motion for Reconsideration and Clarification, reserved the issue of final attorney fee award, and clarified that the court did keep jurisdiction of all of the issues, whether undisclosed and undivided property in the Motion to enforce Decree, or Vacate issues. CP 1070-1074.

Judge Nevin denied all of the property issues, using the same evidentiary standard for all, finding that the wife could have discovered the information prior to the CR 2A, rejecting circumstantial proof as insufficient, and ruling she could not prove facts with a high degree of certainty. CP 1070-1074; 1023-1043.

In a final hearing the court awarded fees to the husband per the CR2A for all of the property issues/ The husband asserted and the court found, an inability to segregate fees.

The final judgment offset amounts due to the wife for the expenses and deck, reduced crediting the husband for payments on the ELOC and his attorney fee, resulted in a net judgment of \$2429.30 against the wife. August 12, 2016, CP 1114-1115.

B. Statement Of The Case: Decree Enforcement Issues Appealed

The wife's Motion to Enforce the Decree asked to clarify the CR2A, that she did not agree to pay the ELOC, to divide the omitted NHG business and to divide significant community assets omitted from the husband's disclosures—distributions from NHG, (\$31,733.33); and AJP funds secreted to his friend and business partner's bank account, until after the CR2A was signed. (\$300,000.00). The omitted assets also included thousands of dollars of unreported miscellaneous payments received by the husband from AJP during 2013.

UNDIVIDED ASSET. NHG

The community asset, "separate entity" NHG was valued at "no value" in a letter dated July 10, 2013, based on financial data from December 2012. It was not valued as of September 2013 and Mr. Wazny

did not disclose that it was highly profitable at that time. The community had a “10% interest in the equity and the earnings distribution of the LLC.” CP 488-489. It is undisputed that NHG was never divided; it is omitted from the CR2A. CP 1—8. Therefore, the wife still owns 50% of NHG as a tenant in common, and that interest needs valuing and dividing..

2013 INCOME FROM NGH

On 12/17/2013—less than 1 month after the Decree of Dissolution of the parties was entered on November 21, 2013 CP 706-709, the husband received the Community distribution for 2013 from the NHG bank account ending in 7330-- \$31, 733.33. CP 287. A corporate officer’s signature issuing the check was “Steve D. Wazny,” himself. CP 10. *It is uncontested* that this check represented the community’s share, in partner Chopra’s words, “On July 23, 2013, Mr., Wazny borrowed \$25,000 from AJP Enterprises, LLC. This was paid back a few months later once he received his portion of the business distribution.” CP 837. On 7/23/13, Mr. Wazny had been a signor of the AJP check out of account 1698 to himself for \$25,000.00. CP 271. The husband paid \$25,000 to AJP on *the same day* he received the NHG distribution, 12/17/13. CP418.

The husband’s income and asset disclosures prior the CR2A mediation, included only limited salary income from AJP for the years 2011, 2012, and up to September 1, 2013, CP 622-653. He did not disclose the

\$2000.00 he received from NHG in December 2012. CP 9, nor the community's entitlement to any "distributions."

The husband regularly counter-signed checks for NHG. CP 1—12. During 2013 the main corporate account, 7330, received deposits, \$137,000 to over \$500,000 per month, came from accounts ending in 7363 and 6480. CP 29—54. Account 7363 was a restaurant at the Graham location generating between \$51,000-\$81,000 monthly. CP 110—129. Account 6480, "merchant account Pac. Hwy.E." always deposited to NGH account 7330. CP 148—188. It generated from \$57,000 to over \$100,000 per month in 2013. CP 150—174. NHG began to operate in mid-December, 2012, and immediately generated this cash pattern as a going concern.

The opening deposit for NHG, \$275,000.00, CP 18, came from "paj Trust" likely a source of Mr. Chôpra, one of the 2 other majority partners.² By January 31, 2013, \$125,000 was transferred to the main AJP account #1698. CP 22. By May, 2013, \$258,995.90 was transferred to AJP, CP 34, more than re-paying the opening deposit. By September, 2013, the

² Another deposit for \$94,000.00, from an unknown source on December 13, 2012, was immediately transferred out on December 14 to account ending in #1698—the main account for AJP. CP 19.

husband knew that NHG profitable, but did not disclose it. NHG also transferred \$100,000 to AJP account 1698 in October, 2013. CP 48.

2014 AND 2015 COMMUNITY DISTRIBUTIONS FROM NHG

During 2014, deposits from the NHG accounts continued consistently, and increased. CP 130—141; 175—186, and in April 2014, added a “Tillicum” account #3820, consistently depositing \$30,000 to \$50,000 per month into NHG account 7330. CP 189—206.

The wife’s available records, obtained to early 2015, demonstrated that all of these accounts showed stable or increased income in 2015. CP 142-144; 187-188; 207—210.

In December 2014, NHG issued a check (issued above Mr. Wazny’s signature again) to “Steve Wazny” for \$31,667.00. CP 11.

The wife requesting her 50% share of the distribution from this undivided asset for 2014; she is asking for the same amount for 2015, and going forward until the business is divided per the CR2A, based upon the established annual profit distribution from 2013 and 2014. None of these amounts are contested by the husband. The husband has not claimed that the business was divided in the dissolution.

COMMUNITY UNDISCLOSED AJP DISTRIBUTIONS IN 2012-13.

Prior to 2013, the family income from AJP—which started with 18 Jack in the Box restaurants on September 13, 2010, and increased to 44 restaurants on April 4, 2012, CP 492, had established a pattern. The husband received a regular salary. Then, the community received additional distributions. At first, the additional distributions varied, however, by September of 2011 they were consistent. Distributions were paid to Mr. Chopra, the majority partner, and the community at the same time. The community share would approximate the 10% ownership. Thus, in September, October, and November, 2011, Chopra's salary of \$12,500 was paid, and husband's salary of \$7083.33 was paid; Chopra's \$70,000 monthly distribution and the community \$7000.00 monthly distribution were both paid. CP 212; 217—235.

After the dissolution was filed, beginning in January 2012, Chopra continued to receive \$70,000 or more in monthly distributions, but the husband received only the salary check. No regular community distribution was paid during the pendency of the divorce, to December of 2013. CP 213-214; 236-287.

The main checking account for AJP ends with 1698; the husband is a signatory signs almost all of the company checks, including the salary and

distribution checks to himself. Id. The 44 AJP Jack in the Box restaurants generate deposits into this main account.

The husband's "proof of income" prior to the parties' mediation in September 2013 was "check stubs" that listed a gross monthly salary amount. they did not show deductions, or that Mr. Wazny had signed his own paycheck. CP 622—653. There were no disclosed tax returns for any years later than 2011. CP 665-661. The wife's *post decree* subpoena of his bank account showed, in addition to the income disclosed, unreported miscellaneous checks to him from AJP account 1698³ For a CHART of the income flow, see CP 212—216.

Then, after the CR 2A agreement on 9/4/13 and before the decree was entered on 11/21/13, the husband received a bank transfer of \$190,000 from the #7964, account of *his business partner, Chopra*. CP 283. On February 14, 2014, the husband received another \$110,000 wire from Mr. Chopra's bank account. CP 290.

³ (Jan., \$2318.69; CP 260, Ap., \$6702; CP 267, July, \$25,000; CP 271, July \$1106.22; CP 272. October, 2815.83, CP 282, \$6500, Nov. CP 254³; Dec. 20 \$4105.08, CP 287) and unexplained cash (Jan \$1500.00; (CP 259) Feb. \$1698.00; (CP 262) Aug. \$1750.00 (CP 273—275); Sept. \$2450.00 (CP 280)) in 2013—all prior to the dissolution. CP 214. This equals \$30,945.82 of unreported income, when the \$25,000 is not counted.

During all of 2012 and 2013, Chopra received disbursements above his usual salary from the business totaling \$2,414,271.00, but the community received no regular distribution. See CHART, CP 212-216 and CP 240—288. The \$300,000 came without any explanation. There is no loan, no loan documents, and no payments. \$300,000 is not exactly 10% of the distribution taken by Chopra, however, the business is closely held and not all payments to partners, can be tracked i.e., for expensive vehicles, for personal tax payments. (CP 212—318) \$300,000 is in the financial neighborhood to equal the community profits that the husband had not taken. It appears the husband secreted the community distributions in Mr. Chopra's account, so that they were not traceable, pending the divorce.

The wife claims the \$300,000 as undisclosed community property, earned prior to the dissolution; at 50% per the CR2A--\$150,000.00.

Post-divorce, In the new year, starting in January, 2014, regular distribution checks to the husband again appeared. In March 2014, AJP paid to the husband 3 months of retro-active bonus funds in 3 checks of \$7778.00 each, and each month thereafter he receives that amount in addition to his regular salary. CP 215, 292-318. Since the first month after the decree was signed, January, 2014, the husband has netted an income—combining salary and regular distribution-- of over \$15,000 per

month, not the \$8750 he reported for the CR2A. The husband diverted receiving this community distribution for 2 years, at a value of roughly \$200,000.00. Over that same period, extraordinary distributions were paid to Mr. Chopra in June 2012 (\$778,000; CP 244; December 2012 , \$250,000 , P 257 and September 2013, \$214,171,00 CP 279-- total, \$1,242,171.00. These funds, at the 10% community interest, would make up the additional \$100,000, that the husband received.

Statement of the Case: Vacate issues Appealed

The wife's vacate issues, based upon the omissions and misrepresentations of the husband, re-allocate the debt division and to re-determine the true value to the community of the divided asset, AJP.

HUSBAND AGREED TO "PAY" SHAM COMMUNITY DEBT

The CR2A divided "community" debt. The husband's total was \$142,234. CP 7. The wife's total was \$51,163 in personal debt and \$247,070 against the family home, almost \$300,000. CP 6-7.

SHAM DEBT #1: A "personal loan" of \$25,000 to AJP, was represented to be a community debt in the husband's responses to interrogatories. CP 968. These responses were provided in 2012. Yet the only \$25,000 "loan" that he ever repaid, was the July 2013 loan for \$25,000, per Mr. Chopra. CP 336-339. The husband's debt payment from January 2011 through November 2014, obtained by the wife post-divorce,

CP 319—409, shows no loan payments to Mr. Chopra. Either the loan never existed, or it was a short-term advance in 2013 that was paid after the husband received the diverted community distributions. (purportedly paid by check, 12/17/13, CP 418.)

SHAM DEBT #2: The husband promised to pay the ELOC in the amount of \$42,319; (noted as “Buy-in to AJP”, CP 7.) Yet, he later claimed that the wife had agreed to pay this debt because of a hand-written interlineation at CP 6 of the CR2A agreement, that “wife takes 1st and 2nd.” The interlineation is initialed by only 3 persons and the wife testified she did not initial or agree. CP 919. As soon as the wife realized that the husband claimed that she agreed to pay the ELOC that appeared on his debt list, she sent an e-mail to him on 12/29/13 that the personal BOA line of credit is not the same as a “second mortgage” and she did not agree to pay it. CP. 985. There is no corresponding deduction from Mr. Wazny’s debt list in the CR 2A, CP7. Also, ELOC loan, \$42.319, is not subtracted from the wife’s equity calculation on the CR 2A. She did not agree to pay it but the court erroneously ruled that she must pay that loan. CP 1021.

SHAM DEBT #3: The husband promised to pay a Bank of America World Mastercard debt of \$16,004. And Alaska Air VISA debt of \$2917. CP 7. The exact account numbers cannot be perfectly tracked, but

approximately that amount was paid on 2 BOA credit cards, see the Chart and accompanying source bank statements at CP 319—404. However, there is no record of any payments on a “Milage Plus United” card, on husband’s debt list for \$14,961.00. CP 7. If that account existed, it was paid through the business.

As to the Bank of America Mastercard and the World VISA cards, although the husband made payments during 2013 until August 2014, (after which no further payments were made) and comparing the amounts paid (CP 320-321, with supporting documents attached in date order) with the miscellaneous, unreported, payments to the husband from AJP, CP 213-215, with source documents in date order), the extra AJP funds were sufficient to pay off the debts reported as “community debt.” CP 738.

SHAM DEBT #4: Loan on Trophy Boat: There is not one payment on an alleged boat loan for \$18,000 in source documents CP 319—409, and the husband has not denied that there is no trophy boat loan. CP 806-809.

SHAM DEBT #5: loan on Lexus for \$19,000. CP 7. The business accounts show that regular payments were made for a Lexus, with a lump sum pay-off when the dissolution was finalized. CP 214-215, column on far right. There are no payments to Lexus before or after the divorce by the husband, CP 319—409. AJP made regular payments to

Lexus during 2013, and paid a final lump sum payment to Lexus on 12/17/13, in the amount of \$41,081.81. (Charted, CP 214-215; cancelled checks at CP 264, 267, 268, 270, 271, 277, 282, 285, and 286.

Loan papers show the pay-off of the lien on the title of the Lexus was for a loan to purchase the jeep for the daughter. CP 422—424. The husband argued that he had “both” a jeep loan and a Lexus loan against the same car, CP 810, however, the financial documents verify that AJP paid off the Lexus and then the husband used the Lexus to finance the jeep.

Subtracting the “debt” to AJP, the ELOC, the \$14,961 credit line, the loan on the Trophy boat and the loan on the Lexus, none of which existed, or if they existed, the husband did not pay, from \$142,234—husband’s CR2A purported debt--the husband actually has paid only \$22,737. The wife is left to pay not only her CR2A debt of \$300,000.00, but also (per the Commissioner’s ruling) the ELOC—an additional \$42,319 that was used to purchase the community business AJP

THE VALUE OF THE BUSINESS AJP

The wife’s basis for her claim that AJP should be valued again is that the newly discovered information regarding the additional income received by the husband, and the \$300,000 distributions he ultimately received post-dissolution, would have increased the likely value of the

business to the community. The expert declaration submitted by the husband verified that the valuation “as of December 2012” is not changed because none of the new information produced by the wife was “knowable” as of that date, except the bank records of Mr. Wazny up to December 2012. CP 823. The evaluator declined to opine whether the knowledge the husband had in *September 2013, when the CR 2A was signed*, would have changed the valuation to the community of AJP. He also failed to consider whether the diverted distributions would have increased the business share value.

.Statement of the Case: Attorney fee issues.

The wife appeals the denial of her attorneys fees and the award of un-segregated fees to the husband, resulting in her paying attorney fees for all issues and the husband being enriched by fees representing his attorney’s work on both the successful and unsuccessful issues.

DENIAL OF FEES FOR WIFE’S SUCCESSFUL MOTIONS

The wife requested fees to be awarded for her need to bring the motion to clarify the CR 2A regarding the ELOC, exchange of quit claim deeds, payment owed by the husband for living expenses, and building a deck on the family home. ⁴ CP 903—911. The Commissioner deferred all property

⁴ She also requested relief as to property issues, since her motion for clarification and reconsideration was still pending before the Judge, and she was not certain if a portion

issues to the judge, and ruled against the wife on the ELOC ordering her to pay it. She granted the wife's motion for quit claim deeds, for enforcement of household expenses of \$1000.00 with interest from October 1, 2013, \$35,000 for the deck on the house plus interest; she found the husband had withheld payment "because of disputed items." Both parties requested attorney fees and the court ruled "The wife is not without fault, contributed to issues herein, and is not entitled to fees and costs; Mr. Wazny is not entitled to fees and costs." CP 1019—1022

The wife's fee motion was based on need and ability to pay. CP 910. She submitted her Financial Declaration CP 763—769 showing that her income of \$1092 per month, was inadequate to pay monthly house hold expenses. CP 544-594. Other than a post-dissolution inheritance (a trust account worth \$220,000) CP 765, the wife's financial data shows a spouse left with a family home she cannot afford, which was bereft of a deck for which she paid in advance, without cooperation for payment in any amount from the husband until the court ruled. The wife also submitted CP 211—318, proving that the husband's monthly income, after taxes,

of those requests were retained by the judge when they were part of her motion to enforce the CR2A and not part of her vacate motion.

exceeds \$16,000. (Chart on CP 215-216 and chronological attached source documents. This was not denied by the husband.

The wife documented her fees in the amount of \$35,840; CP 603—620; and planned to submit a segregated fee bill after the court ruled to reflect the issues in this court's ruling. CP 1006.

FEES GRANTED TO HUSBAND.

The husband moved for attorneys fees first in response to the wife's combined motions. CP 789. The issue of fees was reserved by Judge Nevin in his April 22 oral ruling. CP 1039; the husband submitted a fee and cost request . CP 882-889. The wife argued that any fees awarded would need to be segregated. CP 1038.

The husband also moved for his unsegregated fees before the Commissioner, CP 933; 994—1001. He claimed "intransigence" on the part of the wife and his Counsel stated the fees were incurred for "all issues equally" and "I cannot separate them". CP 994. These fees were denied by the Commissioner. CP 1019—1022.

The husband then moved for his unsegregated fees before Judge Nevin. CP 1075. He requested fees, costs and expert costs totaling \$34,133.95. CP 1078.—1080. His attorney John Miller declared: "There is no way for me or my office staff to segregate the work that has been

performed in this case because respondent has been bringing motions at both the court Commissioner level and before this court related to the exact same issues. . . “CP 1077.

The wife objected to fees not segregated, to clerical time charged at \$120 per hour, to charges for unrelated work, (a family Trust, irrelevant to this proceeding) to \$4,425 in un-itemized time was charged for “research” from March 22—June 1, to lack of qualification. The wife argued that the itemizations, dates, letters from counsel, and subjects in court documents were bases to segregate fees.. CP \$1081—1089.

Judge Nevin, who had orally ruled on April 22, CP 1023, awarded unsegregated fees requested up to June 22, ROP 14; The Court reduced the un-itemized \$4,425 to \$1,000.,and subtracted \$760 that was for drafting Mr.Wazny’s Trust. It awarded \$20,058. ROP 17-19. The court stated “second-guessing other people’s fees is not my favorite task” and that the CR2A was “inextricably intertwined” with the other issues raised, and that property issues are “the bulk of the case”, ROP 14-16.

STANDARDS OF PROOF: The Trial court erred by assigning incorrect presumptions and burdens of proof regarding various property claims.

PREPONDERANCE OF THE EVIDENCE. FOR ISSUES OF
UNDIVIDED PROPERTY AND UNDISCLOSED PROPERTY.

For undisclosed and undivided property, a spouse need only prove the existence of the property, presumed to be community property, and prove its value by a preponderance of the evidence. At that point, she is entitled to 50% of the value. This presumption is statutory: When acquired during the marriage and not as a result of the separate property of the other spouse, the property is presumed to be Community Property. RCW 26.16.030; Failure to allow the non-acquiring partner the presumption of community property is an error of law. *Marriage of Street* 125 W.2d 865, 890 P.2d 12 (1995). Property in only one of the spouse's names does not change the presumption of community property; the presumption must be rebutted by showing acquiring funds that are separate property. *Marriage of Lindsey* 101 Wash.2d 299, 678 P.2d 328 (1984).

Both parties to a dissolution have the same substantial interest to be protected, therefore, the standard of proof must protect them equitably. Proof should not be disproportionately difficult for either person, and thus each spouse must prove his or her case by a preponderance of the evidence. *Marriage of Wehr* 165 W. App 610, 207 P.3d 1045 (2011).

HUSBAND HAS BURDEN OF PROOF TO SHOW GOOD FAITH:

If, as in this case, the other spouse's good faith is being questioned regarding the existence or disclosure or division of the property, then good faith is the burden of proof of the questioned spouse:

In every case where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of a third person or persons, the burden of proof shall be on the party asserting the good faith.

RCW 26.16.210.

The statute fortifies the common law rule of the fiduciary relationship between husband and wife, which does not cease upon contemplation of divorce. *Seals v. Seals*, 22 Wash.App. 652, 655, 590 P.2d 1301 (1979). A party who is entering into a property settlement contract continues to owe the same duty and has the burden of proof if his good faith is questioned:

We hold that a party to a property settlement agreement owes a fiduciary obligation and a duty of good faith and fair dealing to attempt to draft formal contract language that will honor that agreement. Any deliberate effort to draft language intended to subvert the agreement is a breach of the fiduciary obligations of marriage and a blatant violation of the duties of good faith and fair dealing in the contractual relationship.

In re *Marriage of Sievers*, 78 Wn.App. 287, 897 P.2d 388 (Div. 1 1995)

In *Sievers*, the wife questioned the good faith of the husband, and the trial court correctly imposed the burden of proving good faith on the husband.

Undivided and undisclosed property should be determined by the preponderance of the evidence because that is the standard that would have applied if those assets had been determined at the time of the dissolution, but for the parties omitting them or failure to disclose them.

VACATE ISSUES MUST BE SHOWN BY CLEAR, COGENT, AND CONVINCING EVIDENCE. UNLESS PRESUMPTIVE FRAUD APPLIES.

The wife's only vacate issues, per her motion, are the "sham" debt and the valuation of the AJP family business. For a vacate action, the general burden at trial is "clear, cogent, and convincing" *Marriage of Maddix* 41 Sn. App 248, 703 P.2d 1062 (1985). In *Maddix*, where the parties disagreed regarding alleged misrepresentations regarding the value of the husband's business, the trial court was ordered to hold an evidentiary hearing to resolve disputed facts. The court further ruled that if the wife had sufficient information to protect her interests prior to entry of the decree, then she could not in any event challenge the decree.

In the instant case, the trial court imposed upon the wife this higher fraud burden of proof, regarding all property issues, whether undivided, undisclosed, or fraudulently represented.

It was error to use a fraud analysis for undivided property., i.e., (The NHG business, and its distributions) The parties contracted in their CR2A

agreement to split undivided property 50-50, and to send any such issues back to the trial court. CP 1—7. Undivided property was community property. It was contemplated by the CR2A, and there is no fraud issue. Evidence is by the preponderance.

It was error to use a fraud analysis for undisclosed property. Undisclosed property was contemplated by the CR2A, and there is no dispute as to the existence or amount of the asset. (the NGH annual distributions for 2014, 2014, 2015, and 2016.) Because the husband's good faith is questioned in not disclosing the profitability of NHG in 2013, nor the community distribution in early December, 2013, he bears the burden of proof as to good faith, and proof is by the preponderance.

Regarding the undisclosed \$300,000 of AJP distributions, claimed by the husband to be "loans", the wife must prove by the preponderance of the evidence that the amounts exist, (already admitted) and that they are not loans. The good faith of the husband is in question, it is his burden to prove that the transfer of funds from AJP to his partner, then to him was a *bona fide* loan and not secreted community distributions.

FOR VACATE ISSUES. (value of AJP and Sham debts) THE WIFE IS ENTITLED TO RELY UPON THE UNIFORM FRAUDULENT TRANSFERS ACT (UFTA).

For any claims of the wife in which a fraud standard (clear, cogent and convincing) is correctly applied, she is allowed to prove her claim by circumstantial evidence, and can argue a rebuttable presumption of fraud under the UFTA. If she can establish a genuine issue of material fact, then it was error for the trial court to determine the matter without providing both parties a trial. *Sedwick v. Gwinn* 73 Wn.App. 879, 873 P.2d 528 (1994).

UFTA applies to domestic relation cases. The statute, RCW 19.40 *et seq.* applies broadly to any "creditor" and any "debtor."

The plain language of the UFTA broadly encompasses relatives, among many business relationships. However the common law rule is far more precise, dealing specifically and exclusively with transfers between spouses. The common law provides a thorough, long-standing, and examined history we should apply to "supplement [the UFTA's] provisions" for interspousal transfers. RCW 19.40.902. The common law's specificity on interspousal transfers deals more precisely with interspousal property transfers than the "insider" statute, RCW 19.40.051(b).

Clayton v. Wilson, 168 Wn.2d 57, 227 P.3d 278 (2010). In *Clayton*, there were transfers between spouses as to third parties. The case upheld findings of common law and several UFTA bases for fraud, because of the specific, supplemental statute on inter-spousal transfers. Similarly, here,

the wife is entitled to prove presumptive fraud under UFTA—and she is entitled to rely also upon the statutory and common law establishing the fiduciary duty of good faith and fair dealing to her. Since the law that is specific to domestic relations supplements general law on fraud, trial court erred in holding that the wife is not entitled to these presumptions.

The UFTA was adopted to codify common law notions of fraud at the time. *Osawa v. Onishi* 33 Wn.2d 546, 206 P.2d 498 (1949) is a case decided soon after the 1945 adoption of the statutory fraud code, and it details how the statute embodies element of common law fraud. It held that UFTA applies to all people with claims against others, not only “creditors” in the formal sense. As a spouse entitled to a property division of her community assets in the possession of Mr. Wazny, Shantel Tracy-Wazny is a creditor of Mr. Wazny. *Osawa* early recognized that circumstantial evidence, not direct evidence, is the usual type of evidence available to prove fraud:

A fraudulent intent is seldom confessed or blazoned upon a banner. In most cases it can only be proved by circumstantial evidence, and there is no circumstance more persuasive and more often recognized by the courts as convincing than the fact that a debtor, on the eve of a suit against him, transfers all of his property to another, thus placing it beyond the reach of execution.'

33 Wn.2d at 555.

UFTA establishes three scenarios of “presumptive fraud,” which supplement the common law, in a domestic relations context. *Clayton v. Wilson*, 168 Wn.2d 57, 227 P.3d 278 (2010). These are:

- i. Property is transferred when a person owes a debt, and the transferor receives no equivalent value (RCW 19.40.051 (a));
- ii. Circumstantial evidence shows a transfer was made or an obligation was incurred with intent to “hinder, delay, or defraud” a creditor. RCW 19.40.041(a);
- iii. A transfer is made in which there is no “reasonably equivalent value” received, when the debtor was about to incur debts that he reasonably should have known would be beyond his ability to pay as they became due. . RCW 19.40.041(b).

“Value” “ does not include an unperformed promise made otherwise than in the ordinary course of the promisor’s business;”. . . “RCW 19.40.031 (a). When one of these presumptions applies, the burden of proof for the person alleging fraud decreases:

Under Washington's UFTA, the actual intent to defraud must be demonstrated by "clear and satisfactory proof". *Clearwater v. Skyline Const. Co. Inc.*, 67 Wash.App. 305, 321, 835 P.2d 257 (1992), review denied, 121 Wash.2d 1005, 848 P.2d 1263 (1993). In contrast, constructive fraud must be shown by "substantial evidence". *Clearwater*, at 321, 835 P.2d 257.

Sedwick v. Gwinn 73 Wn.App at 885. The wife's burden under UFTA therefore was to show "substantial evidence," including circumstantial evidence, that she is entitled to a presumption of fraud, for those of her claims for which preponderance does not apply.

The trial court erred in rejecting circumstantial evidence in the wife's property motions. Circumstantial evidence can create presumptive fraud, and can be sufficient for a finding of clear, cogent, and convincing evidence. *Dept. Labor and Industries v. Rowley* 340 p.3d 929, 185 W.App 154 (2014) (where the Department 's burden was by clear, cogent and convincing evidence, the court erred ruling that only direct evidence would be accepted.); *Tan v. Le* 177 Wn.2d 649, 300 P.3d 356 (2013) (in defamation action, malice is proven by clear, cogent and convincing evidence, and circumstantial evidence. i.e. hostility, self-interest, and avoidance of the truth, could support a finding.)

II. APPLYING CORRECT STANDARDS, RELIEF SHOULD HAVE BEEN AWARDED TO THE WIFE OR AN EVIDENTIARY HEARING ALLOWED.

A. The trial court Erred by not ordering the undivided community asset, NHG, divided 50-50 per the CR 2A

The CR2A, if unambiguous, is a contract to be enforced. *Bryand v. Palmer Coking Coal Co.* 67 Wn. App 176, 834 P.2d 662 (1992) There is no dispute that the business NHG exists. CP 488-489, and that it was

acquired during the marriage. There is no dispute that it was not divided in the CR2A agreement. It is not mentioned. CP 1—7. Assets not divided in a divorce action may continue to be titled in both ex-spouses as tenants in common. *Seales v. Seales* 22 W. App. 952, 590 P.2d 1301 (1979), citing *Yeats v. Estate of Yeats* 90 W.2d 201, 580 P.2d 617 (1978) and *Olson v. Roberts* 42 W.2d 862, 259 P.2d 418 (1953); *Marriage of Tang* 57 Wn. App 648, 789 P.2d 118 (1990), upholding a CR2A that declined to divide certain property and to hold title in both ex-spouses as tenants in common. The wife owns NHG as a tenant in common and is entitled to have it valued and divided 50-50, per the CR2A. The trial court erred in denying her relief and in denying her fees.

The trial court erred in requiring that the wife prove that NHG is a community asset by clear, cogent and convincing evidence; she has the right to presume its community character. The husband presented no evidence controverting the community character of the asset and as a matter of law she is entitled to the relief requested.

B. The trial court Erred by not awarding 50% of the uncontested, undisclosed 2013 community distribution for NHG to the wife

During the mediation that resulted in the CR2A in September, 2013, The husband did not disclose that the community was entitled to a

distribution from the community asset, NHG, for 2013. Paid the 17th of December, 2013. The \$31,733.33, paid a few days after the Decree was entered, is an uncontested community distribution. The wife is entitled to 50% of that undisclosed distribution as a matter of law on this record.

The trial court erred by ruling that the wife could have known about the distribution and divided it in the CR2A; it did not occur until a few days after the decree was entered and therefore was an undisclosed property. The trial court erred in ruling the 2013 distribution needed to be proven by clear cogent and convincing evidence. The wife is entitled to a presumption that the funds are community property, and under the CR2A that she is to receive 50% of them. The trial court erred in ruling that the wife's evidence is only circumstantial. Bank records show the distribution a few days after the decree was signed, and the husband's witness, Mr. Chopra, supports that the distribution was a distribution owed from the business. CP 837. This admission removes the 2013 NHG payment from circumstantial proof to direct proof.

The wife is also entitled to divide the property because the husband breached his fiduciary duty.
Seales v. Seales 22 W. app 952, 590 P.2d 1301 (1979) is the leading and closely comparable case. A partition case, Ms. Seales filed to divide property that her husband failed to disclose during the divorce, for the

family business which he managed. The husband did not update his interrogatories but argued that the wife should have served subpoenas to learn of business funds that were not divided. *Seales* found an affirmative fiduciary duty to disclose.

Here, since the funds were not paid until a few days after the divorce, Ms. Wazny could not have learned of them, even by subpoenaing records prior to the entry of the decree. It was the husband's statutory and common law fiduciary duty to disclose these funds for the Cr2A property division. *Seales* stands for not allowing profit from this wrongful act.

The trial court Erred by not awarding 50% of the uncontested distribution from NHG to the community to the wife, for 2014, 2015, and until the business is divided.

Based upon the same authorities and argument as above, The wife is entitled to a continuing 50% property interest in the distributions from this undivided asset for each year. The amount for 2014 is \$31,667.00. Each subsequent year the amount is approximately the same, according to partner AJ Chopra. CP 837. The court erred as a matter of law in not ordering these amounts divided and awarding the wife her fees.

C. The Trial court Erred as a matter of law that the wife agreed, in the CR2A agreement, to pay the BOA Equity line of Credit.

The CR2A is a Contract and Contract law applies. To be enforceable, it must be signed by the person being bound by it. *Bryand v. Palmer Coking Coal Co.* 67 Wn. App 176, 834 P.2d 662 (1992).

The meaning of a CR2A agreement is disputed if material terms are disputed. *In re Feree* 71 Wn.App 35, 856 P.2d 706 (1993). Parts of a CR2A agreement that are unenforceable may be stricken. *In re Marriage of Coy* 160 Wn. App 797, 248 P.3d 1101 (2011).

An attorney does not have the authority to waive any of his client's substantial rights in a settlement agreement without the client's specific authority. *In re Houts* 7 Wn. App 476, 499 P.2d 1276 (1972).

The record is uncontested that the wife never signed or initialed the handwritten interlineation that purports to make her pay the "2nd" mortgage." The typed portion of the CR2A unambiguously assigned the ELOC to the husband. The wife cannot be bound, as a matter of law, to a change in the agreement that she never signed.

The ELOC was never subtracted from the husband's debt list, or subtracted from the wife's total equity in the family residence. Adding the interlineation creates an ambiguity in the agreement. It is not at all clear that "2nd Mortgage" is the same as "equity line of credit." Further, since the listed debt on the house was not changed by the interlineation, it

appears to merely clarify liens included in the “house payment”, and it does not appear to add any debt to the wife’s side of the ledger. The court must interpret this agreement as a matter of law to keep the *typed* amounts of debt and equity for the residence, and debt to the husband. The trial court erred in changing the CR2A by transfer the ELOC debt to the wife.

Even if the court were to find that the wife signed the interlineated change (for which there is no evidence-- the husband’s declared that she agreed, but not that she initialed)—it could exercise its equitable power to revise a CR2A agreement, A court has discretion to relieve a party from a stipulation in a CR 2A agreement if such relief is necessary to prevent an injustice. *Baird v. Baird* 6 Wn. App 587, 494 P.2d 1387 (1972). In this case, the trial court erred in not considering the injustice of the impact of its ruling, to add almost \$50,000 debt to the wife, the very debt used to purchase the lucrative family business, AJP, which was awarded to the husband, the financially dominant spouse.

As a matter of law and as a matter of equity, the wife should not pay the Equity Line of credit. She must be re-imbursed by the husband for the payments that she was ordered to make, offset and reflected in the final judgment. CP 1114-1115.

D. The Trial Court erred by finding that the wife’s evidence of undisclosed property did not create cause for relief.

The undisclosed distributions from AJP was not contested, other than the claim that \$300,000 in funds was a loan and not a community distribution representing amounts owed the community for 2012 and 2013. However, AJP is the business of the husband, (formerly of the community) which creates the presumption that payments are distributions. There is no loan document, no payments, and the loan was represented to be verbal. The loan is not legally a binding loan, since it is outside the statute of frauds. The funds were transferred outside the ordinary course of business. The court should have ordered that the funds are secreted community assets, as a matter of law.

If, however, there is a genuine issue of fact regarding the funds, The court erroneously assigned a “clear and convincing” burden of proof; the correct burden is preponderance. The asset, created during marriage must be presumed to be community property.

The wife is not required to prove fraud for property that presumptively belongs to her because the business belonged to the community in 2012 and 2013. Additionally, the wife has raised a question regarding the good faith of the husband in characterizing \$300,000 that he received from his business partner as a “loan” and not as a distributions, the presumed source of funds from the partner. It is the husband’s burden of proof to

show good faith. He has not shown any good faith, no documentation, nor any explanation of any of the statutory fraud circumstances. On this record, the wife was entitled to a judgment as a matter of law that the \$300,000.00 was undisclosed community property, of which she is entitled to 50%, or to a hearing in which she need only prove her case by the preponderance of the evidence, with the husband bearing the burden to prove good faith.

However, if the wife is found to have to prove fraud, Under UFTA, the wife is entitled to a presumption of fraud, under 3 separate sections of the statute. Combined with the husband's statutory obligation to prove good faith, and his fiduciary duty, the wife's is also entitled to rely upon circumstantial evidence to show presumed fraud, by substantial evidence.

Presumptive fraud under RCW 19.40.051(a): As to debts owed prior to a transfer, a transfer made without receiving equivalent value for the transfer, is presumed fraudulent. "Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business;". . . "RCW 19.40.031 (a). The transfers of all business distributions to Chopra's account were made without any equivalent value of the community. They were fraudulent. The supposed 'loans' from Mr. Wazny's business partner Chopra out of his account are presumptively fraudulent transfers since they are outside the usual course of business,

and Mr. Chopra received no value. There have been no payments on this “loan” in 3 years. These transfers are outside the ordinary course of business for which no promise is performed and no consideration given. Mr. Chopra’s personal account, which received all AJP distributions, served as a holding account for the community distributions for the Waznys until he transferred them back to Mr. Wazny as a \$300,000 “loan” sans documents, consideration, payments, or performance. If substantial evidence of presumptive fraud is shown, then the burden is on the transferor to prove good faith. The wife has shown substantial circumstantial evidence, erroneously rejected by the trial court, and even if this matter is ordered to hearing, she is entitled to a presumption of fraud.

Presumptive Fraud under RCW 19.40.041(a):

Presumptive fraud is demonstrated by circumstantial evidence showing a transfer was made or an obligation was incurred with intent to “hinder, delay, or defraud” a creditor. The wife was known to be a creditor of the husband as soon as the divorce was filed, “pending litigation” being a statutory circumstance that triggers the presumption. At least 6 of the 11 statutory circumstances of presumed fraud apply to this case: (1) the transfer or obligation was to an insider, (2) the debtor retained control of the asset, (3) the transfer was concealed, (4) there was litigation pending, (5) the transfer was a large part of the assets of the transferor, (6) the

transfer was close in time to the owing of a substantial debt. The wife is also entitled to a presumption of fraud under this statutory section.

Presumptive fraud, under RCW 19.40.041(b) A transfer in which there is no “reasonably equivalent value” received for the transfer, when the debtor was about to incur debts that he reasonably should have known would be beyond his ability to pay as they became due, presumes fraud. “value” “ does not include an unperformed promise made otherwise than in the ordinary course of the promisor’s business;”. . . RCW 19.40.031 (a). The transfer of the assets to Mr. Chopra’s personal account, laundered as a “loan” from his partner, is not given for value, since it admittedly is not in writing, more than 3 years has passed without performance, and it was not in the usual course of business. It is a classic fraudulent transaction for no value. The bank records trace the funds from AJP bank account, to Chopra’s account and then back to Mr. Wazny’s hands. This is strong circumstantial proof that Mr. Wazny hid the community’s distributions in his partner’s account until after the divorce. Mr. Wazny knew that he would have to pay an equalizing payment in return for receiving more assets and being the financially dominant spouse—in this case the amount of \$190,000 was set by the CR2A. Mr. Wazny also knew that he wanted to purchase a new home, for which he signed purchase papers and loan papers prior to the divorce. He was able to make

a \$100,000 down payment on his new home and the equalizing payment to the wife, by receiving the \$300,000 from his partner as a “loan” instead of having to pay taxes on “income” and instead of having to split the community distribution with his ex-wife, and pay his obligations from his half of the community distribution. By transferring the funds to Chopra and taking them back as a “loan”, he hid the distribution, avoided splitting the funds with his wife, and could immediately pay off his divorce obligations. He could buy his new home *before the decree was entered*.

The trial court erred as a matter of law in disregarding the evidence because it was circumstantial, and in applying incorrect burdens of proof.

The trial court erred in failing to require the husband to bear the burden to prove good faith. Since the husband failed to show any evidence of good faith, on this record the trial court erred in not awarding \$150,000.00, or 50%, to the wife, per the CR 2A agreement.

If the husband raised a genuine issue of material fact as to his good faith, then the wife is entitled to a hearing, in which she only has to prove her case by a preponderance of the evidence.

Even if the wife’s burden is to prove fraud, she is entitled to, and has shown presumed fraud. The husband has the burden of proving good faith and she has the burden to prove fraud by substantial evidence, --including

presumptions created by circumstantial evidence and presumptions of community property--not by clear, cogent, and convincing evidence.

Trial court erred regarding fiduciary duty of husband

Finally, The trial court erred in ruling that in order to get a hearing, the wife had to demonstrate that she could not have known about the undisclosed property prior to the CR2A agreement. On this record, instead, the trial should have found that the wife had proven she could not have known about the \$300,000 since it rested in the personal account of Mr. Chopra until after the decree was signed. Even if the wife had subpoenaed the husband's accounts in September 2013, the funds were hidden in Mr. Chopra's account that was not disclosed as part of the divorce proceedings. The wife learned about the fake loan and the pattern of doubling personal monthly income (after the divorce) when the husband took the regular, additional \$7000+ monthly business distributions as they were earned, only by chance when the husband produced bank records in post-divorce communications between the parties' attorneys. CP 725-726. The pattern could be demonstrated only after the divorce, because he no longer diverted and hid the money. Only then could she show that the husband received twice as much money every month as he reported at the CR2A mediation.

The trial court erred as a matter of law in finding that the wife could have discovered the undisclosed \$300,000 prior to the divorce.

Trial Court Erred in ignoring husband's fiduciary duty

The trial court also erred as a matter of law in not finding that the husband violated his fiduciary duty to the wife, (his "good faith duty embodied in RCW 26.16.) The husband has a fiduciary duty to disclose information to the wife regarding community assets. He faked and depressed his income, he omitted the amounts due from NHG, and he omitted the \$300,000 due from AJP. In addition to the statute, RCW 26.16.210, well-established common law recognizes the fiduciary duty, especially to the financially dependent spouse. *Seales v. Seales* 22 W. app 952, 590 P.2d 1301 (1979).

E. The Trial Court erred by denying the Motion to Vacate the debt distribution.

A basis to vacate a decree is fraud. CR 60 . A CR 2A agreement may be vacated because of fraud. . *DeLisle v. FMC Corp* 42 Wn. App 576, 705 P.2d 283 (1985).

A spouse has a fiduciary obligation to honestly disclose and represent community property to his spouse; this is particularly true of affairs to which one of the spouses has superior access and knowledge. *Seals v. Seals* 22 Wn. App 652.P.2d 1301(1979).

Since the wife learned only post decree, by tracking his personal spending from his bank account, that the husband never in fact made payment on

the “debt” he promised to take, there is a material issue of fact whether the wife had sufficient information prior to the decree. The husband overtly represented that his monthly income plus distribution netted only about \$8700. The wife was able to discover his income was actually double that amount, and also that he never made payments on the purported “community debts” he promised to pay. But that actual payment conduct was not available prior to the CR2A, because it had not happened yet. The husband argued that he disclosed debts in his responses to interrogatories and the wife should have requested further documentation and updates to require proof of each debt as represented. However, see Husband’s original responses, sent in early 2012 and never updated, in which he did not produce his bank records, CP 971, or documents evidencing mortgages or contracts (CP 972) or financial credit accounts (CP 970). The trial court relied upon *Marriage of Maddix* 41 Wn. App 248, 703 P.2d 1062(1985) in ruling that Ms. Wasny had sufficient notice to protect her interests in property prior to signing the CR2A and in dismissing all of her property claims. The Trial court misapplied *Maddix*, since that case ordered a party to have a hearing upon showing a genuine issue of fact; the trial court further erred in discounting circumstantial evidence as valid evidence to create a genuine issue of material fact.

The wife has shown cause because her financially superior husband never actually had to pay most of the debt that he claimed were his share of community debt, and never disclosed each account he listed, resulting in a CR2A agreement, with a division of debt based upon fraud.

At a hearing, it would be the husband's burden to prove good faith. On this record, he has not done so because he failed to document the debt, or any payments thereon, for the "sham" debt. He did not deny that he listed debt as community debt that AJP paid for, or that he received \$10,000's extra miscellaneous unreported income with which to pay, or that never existed at all. He never produced proof of a boat loan, a Lexus loan, or billings on or payments to numerous credit card accounts that were listed as community debt. The wife met her burden to show cause why the court should not reform the debt distribution so that the husband pays his fair share, at least the amount he purported to promise to pay.

F. The Trial Court erred by denying the Motion to Vacate the AJP division.

The wife presented a material issue of fact that community income had been withheld from the evaluator, and that the 9 months of business operation in 2013 would have significantly changed the business valuation. The evaluator, Mr. Deaton, who was hired individually by Mr. Wazny to defend his reports, argued in a circular fashion. He asserted that

no new information could have been known in December 2012 and therefore it would not change a business valuation done at that time. He thus avoided the question of the impact of the value of the AJP business to the community, if he had known that the community should have received distributions of \$300,000 additional over 2012 and 2013.

If Ms. Wazny had known about the extreme profitability of the business, would she have agreed to value it at \$75,000 in the CR2A? If she had known that the community was entitled to at minimum an extra \$7778, tax free, every month in distributions (\$93,336.00 in additional annual income that she could have shared in if she were married and owned half of the family business), then should she have received a different distribution of assets that would compensate her for the high value of the business being transferred to the husband? The wife has shown cause that she should have and that the business should be re-valued based upon the data now known, regarding profits and distributions that should have been made in 2012 and 2013 prior to the divorce. The agreement valuing and dividing the family business is tainted by fraud.

G. The Trial Court erred by denying Attorneys Fees to the Wife and by failing to require adequate documentation of attorneys fees and failing to segregate the husband's attorneys fees.

Washington follows the American rule concerning attorneys' fees and litigation expenses. *Rorvig v. Douglas*, 123 Wash.2d 854, 861, 873 P.2d 492 (1994). The American rule states fees and expenses are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *State ex rel. Macri v. City of Bremerton*, 8 Wash.2d 93, 102, 111 P.2d 612 (1941); *Fiorito v. Goerig*, 27 Wash.2d 615, 619-20, 179 P.2d 316 (1947). CR 54(d) authorizes a prevailing party to recover costs as provided in RCW 4.84 or any other applicable statute.

Wife's fee request, for property per CR2A:

The wife requests the Court to reverse the trial court decisions and award her fees as the prevailing party regarding undisclosed and undivided property, and vacate issues, per the CR2A, CP 1—8, and order the husband's fees disgorged.

Wife's fee request for Decree Enforcement issues of funds due, deck on family home, quit claim deed, interpretation of CR2A"

The wife was entitled to fees for her successful motions based upon need and ability to pay; the commissioner abused her discretion in denying her fees based upon an assignment of fault. The criteria of "need and ability to pay" allows the court to consider also the burden of litigation. Thus *in Owens v. Owens*, 61 Wn.2d 6, 376 P.2d 839 (1962) where a wife had assets, but a low income, and where the award of assets did not

contemplate a need to continue to litigate regarding the divorce, award of fees to the wife were appropriate. Here the court should have awarded fees when the wife showed that she had no income to support this litigation and the husband has over \$16,000 income per month.

The trial court denied fees to the wife by finding “the wife is not without fault, contributing to the issues herein.” CP 1017. It did not consider the well-documented need or ability to pay. The record shows that the wife did not engage in any improper litigation and she only asked for fees that would be segregated as to the issues in the instant motion. Purportedly the commissioner was sympathetic to the husband who argued the wife was unreasonable (in his view) when he tried to negotiate the issues that were brought to the court. This is not a basis to deny fees, and is not either “fault” or litigation misconduct. Dissolution awards are an abuse of discretion when made based on fault *Marriage of Muhammed* 153 Wn 2d 795, 108 P.3d 779 (2005) A fee award in which the court does not make its award based on consideration of need and ability to pay is abuse of discretion. *Marriage of Rideout* 150 W. 2d 337 77 P.3d 1174 (2003). If not based upon the statutory criteria of RCW 26.09.140 the fee award will be reversed. *Marriage of Steadman* 63 Wn. App 523, 821 P.2d 59 (1991). The result of denying the wife’s fees , combined with the court ordering the bulk of the husband’s fees in the property matters,

required the wife, the financially weak party, to pay 100% of her fees although she had to access the court in order to obtain relief. In addition to being an abuse of discretion based upon failing to consider the correct factors, the result is patently inequitable.

The Trial Court erred in failing to segregate the husband's fees, and awarding amounts for undocumented and clerical work.

Segregation of fees is mandatory. Here, parts of the same case are being decided by two different courtrooms, one of which on June 28 denied the husband's requests for fees.

. . . ¶ 31 Where attorney fees are only recoverable on some of a party's claims, the award must properly reflect a segregation of the time spent on the varying claims. *Hume v. Am. Disposal Co.*, 124 Wash.2d 656, 672, 880 P.2d 988 (1994). The court must separate time spent on theories essential to the successful claim and time spent on theories relating to other causes of action. *Hume*, 124 Wash.2d at 673, 880 P.2d 988 (quoting *Travis v. Washington Horse Breeders Ass'n Inc.*, 111 Wash.2d 396, 410-11, 759 P.2d 418 (1988)).

Dice v. City of Montesano 131 Wn.App. 675, 128 P.3d 1253 (2006)

The person requesting fees has the burden of keeping adequate records to segregate his fees. An award will be reversed upon appeal unless fees have been segregated:

But the trial court, even while segregating some hours, explicitly stated that it could not separate the CPA issues from the other issues in the case. Regardless of the difficulty involved in segregation, the *Travis* court made it clear that the trial court has to undertake the task. *See* 111

Wash.2d at 411, 759 P.2d 418. *See also Fisher Prop., Inc. v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 849-50, 726 P.2d 8 (1986) (as attorney fees must be authorized by statute, agreement, or ground of equity, it would be unjust to allow recovery of all attorney fees "because of complexity"). *Smith v. Behr Process Corp.* 113 Wn.App. 306, 345, 54 P.3d 665 (2002).

Here, the trial court felt it "could not" segregate the fees and "second guess" counsel. The husband's counsel stated he could not segregate fees. (i.e., at CP 1091) As a matter of law the court erred. Since counsel refused to follow the law and keep adequate records to segregate his fees, the fee award should be reversed. The trial court erred in failing to reasonably apportion fees, but Mr. Wazny's counsel invited the error by insisting that he could not segregate fees.

The trial court awarded \$1000 for fees requested for an unidentified attorney for research over a period of 6 weeks. It also awarded fees at the rate of \$120.00 per hour to "LN", an assistant, for such tasks as e-mailing correspondence, calling the client, preparing a letter after being directed by the attorney, discussing the case with the attorney, scanning exhibits, reviewing the file, pulling and organizing exhibits, preparing papers to serve, e-filing, and talking to the expert for an hour, for total charges of \$1920.00. CP 1094 to 1098. For non-attorney staff, an attorney must submit the following information in a fee request: (1) that all of the fees requested were for legal work that would have been done by an attorney,

not for clerical work; (2), that the person is supervised by an attorney, (3) the person doing the work can demonstrate by disclosed qualifications the legal expertise to do the work by education and/or training, (4) the work has to be itemized specifically to exclude clerical tasks, (5), the time for each task claimed must be reasonable, and (6) the hourly rate must be customary and reasonable. *Absher Cont. Co. v. Kent School Dist.* # 415 79 W. App 841, 917 P.2d 1086 (1995) *Absher* disallowed copying, organizing files, preparing documents and exhibits to copy, delivering and sending documents, obtaining docket sheets. Here, the bulk of “LN”.s work was clerical, \$120 per hour seems excessive for a clerical assistant, the qualifications are unknown, and the work should be disallowed. The same is true for the \$1000 allowed of unidentified research assistant.

The Appellant requests that the fee award be reversed, because she her appeal be granted and she, instead, should be awarded fees.

However, if the Court of Appeals does not reverse on the merits, it should reverse the fees since they were not segregated. If it allows fees, it must reverse the \$1000 general legal fee and the clerical fees, and it should divide the remaining fees awarded by 50% since neither counsel nor the court were able to segregate fees.

Fees on Appeal

Finally, appellant requests fees on appeal per the CR2A and based upon need and the ability to pay. Even if she is not entitled to CR2A fees for issues of undivided or undisclosed property, she should be awarded fees per RCW 26.09.140. She will submit her updated financial affidavit.

VI. CONCLUSION:

The Court of Appeals should Reverse this matter, ordering relief by ordering the business NHG valued and divided and the distributions to date of that business divided 50-50; By ordering the \$300,000 distributions fomr 2012 -2013 of AJP to be divided 50-50, or dent to a hearing with the correct presumptions and burdens of proof, by ordering the vacate issues as to debt and value of AJP to a hearing with the correct presumptions and burdens of proof, by correctly interpret the CR2A to require the husband to pay the ELOC, and by reversing the attorneys fee award to the husband and awarding fees to the wife below and on appeal.

Respectfully Submitted this 22nd th day of December, 2016



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DIVISION II

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STATE OF WASHINGTON

BY AP
DEPUTY

No. 49393-4 II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

SHANTEL P., WAZNY,

Appellant,

v.

STEVEN D. WAZNY

Respondent

CERTIFICATE OF SERVICE OF THE APPELLANT'S BRIEF

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I CAUSED A TRUE COPY OF THE Appellant's Brief and this certificate of service to be delivered to a legal Messenger for hand delivery by December 23, 2016, to Counsel for Appellee's address of record, to wit:

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On this 23d day of December, 2016

/s/ Jean Schiedler-Brown



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