

FILED  
Court of Appeals  
Division II  
State of Washington  
3/15/2018 10:57 AM

NO. 50979-2-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CATHERINE S. SHUBECK,

Respondent,

vs.

JOHN R. SHUBECK and SHELLY A. WILLIAMS

Appellants.

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**BRIEF OF RESPONDENT CATHERINE S. SHUBECK**

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## I. INTRODUCTION

This appeal comes before the Court following a five day bench trial in which the trial court found Appellants John R. Shubeck and Shelly A. Williams fraudulently transferred assets with actual intent to hinder, delay, or defraud Respondent Catherine S. Shubeck. The trial court also found these transfers were constructively fraudulent. Appellants are appealing the judgment entered by the trial court, and assigning error to numerous findings of fact and conclusions of law.

The main thrust of Appellants' argument is that Mr. Shubeck never had an interest in any of the transferred assets to begin with, and therefore, he could not have fraudulently transferred them. However, the evidence demonstrates otherwise. The evidence clearly establishes Mr. Shubeck had a community property interest in these assets and that he and Ms. Williams engaged in a fraudulent transfer.

Appellants' initial brief was previously stricken as it did not conform to the Rules of Appellate Procedure. Parts of Appellants' amended brief also fail to conform to the rules, but rather than move to strike again, Respondent requests that this Court simply disregard those portions that do not conform.

Because Appellants failed to provide a verbatim report of proceedings, the findings of fact entered by the trial court are verities and

binding upon the Appellate Court. Respondent intends to rely on the findings of fact. The exhibits admitted into evidence at trial closely align with the findings of fact as well.

## II. STATEMENT OF THE CASE

### A. Portions of Appellants' amended brief fail to conform to the Rules of Appellate Procedure and should be disregarded.

Appellants' initial brief was stricken, in part because it cited to exhibits not admitted into evidence at trial and in numerous cases failed to cite to any part of the record for the factual assertion being made. *See* January 17, 2018 Order Striking Appellants' Brief. The order striking the brief specifically states that an amended brief shall "not state any fact, including background facts, without a footnote referring to the record on appeal." *Id.* Portions of Appellants' amended brief, again, cite to facts not found in the record, and again, utilizes the appendix to present documents not admitted into evidence at trial. Rather than move to strike again, this Court should simply disregard those portions of the brief.

Specifically, Appellants' introduction section is utilized to present unsubstantiated factual assertions. Pursuant to RAP 10.3(a)(3), the introduction section should be a "concise introduction." Appellants' introduction is anything but concise. Instead, it is twelve pages of rambling and unsubstantiated claims. Appellants appear to have willfully

disregarded the Court's previous order not to state facts, including background facts, without citing to the record. As such, any reference to unsubstantiated factual assertions in the introduction section ought to be disregarded.

Appellants have again utilized the appendix portion of the brief to present documents that are not in the record. An appendix portion of a brief "may not include materials not contained in the record on review." *See* RAP 10.3(a)(8). The appendix documents are utilized to advance factual and legal assertions throughout the brief. Specifically, Appendix A, B, and D should be disregarded. These are spreadsheets which appear to be created by Appellants depicting Ms. Williams' alleged net worth during certain time periods and what assets she allegedly owned. These are not in the record before the Court.

Appellants also rely on their trial brief and declarations previously filed in this case at the trial level. A trial brief is neither sworn testimony nor an exhibit. It is a summary of facts the party believes will be demonstrated through evidence at trial. Any reference to it should be disregarded. Any declarations previously filed for the purpose of motion practice should also be disregarded as the statements therein were not testimony given at trial and Respondent did not have an opportunity to cross examine the declarant.

**B. The Findings of Fact entered by the trial court are verities and binding on the Appellate Court. Respondent will rely on the Findings of Fact throughout this appeal.**

The party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence. *Bulzomi v. Dept. of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Where the appealing party, following a trial, fails to provide a verbatim report of proceedings, the findings of fact entered by the trial court become “verities and binding upon [the appellate] Court.” *Morris v. Woodside*, 101 Wn.2d 812, 815, 682 P.2d 905 (1984)(citing to *Chace v. Kelsall*, 72 Wn.2d 984, 987, 435 P.2d 643 (1967)).

Appellants failed to provide a verbatim report of proceedings even though there was a five day trial.<sup>1</sup> As such, the findings of fact are verities and binding upon this Court. Respondent intends to rely on the findings of fact entered by the trial court, and incorporates the same herein. *See* CP 232-240.

It is worth noting that Appellants contend on numerous occasions that there is nothing in the record to support particular findings of fact. For instance, they assert that “there was no evidence presented...by exhibit or by a witness at trial” as to the value of the Pilchuck Property. *See* Appellants’ Amended Brief at pg. 16. They also assert that there is “no

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<sup>1</sup> The five days of trial are verified by CP 335-347.

evidence” that supports the conclusion that Mr. Shubeck “retained possession and control over assets” after the transfers occurred. *See* Appellants’ Amended Brief at pg. 18. While there may not be an exhibit that supports these findings, Appellants ignore the possibility that testimony given at trial may support a finding of fact. Because this Court does not have a verbatim report of proceedings before it, there is simply no way to refute some of the findings of fact—unless an exhibit demonstrates otherwise. However, as described in more detail below, the exhibits closely align with the findings of fact.

**C. The exhibits admitted into evidence at trial closely align with the findings of fact entered by the trial court.**

*i. Exhibits demonstrating Mr. Shubeck’s interest in the 6th Lane Property.*

On or about August 27, 2010, Mr. Shubeck and Ms. Williams, “as a married couple” entered into a Real Estate Purchase and Sale Agreement for the purchase of the property located at 809 6th Lane FI, Fox Island, WA 98333 (“6th Lane Property”). *See* EX 20. On September 7, 2010, Mr. Shubeck gave to Ms. Williams \$80,000 which was deposited into her Wachovia #3720 bank account. EX 15 at 02195. On or about September 22, 2017, Ms. Williams withdrew these funds, and other funds, and deposited them into her Wells Fargo #8035 bank account. *See* EX 15 at 2203-2204 and EX 41 at 02719 and 02727. On September 24, 2010, Ms.

Williams made the down payment on the 6th Lane Property with these funds, which included Mr. Shubeck's \$80,000. EX 41 at 02719. Mr. Shubeck was named on the statutory warranty deed, deed of trust, and mortgage. See EXS 21, 22, and 42. Mr. Shubeck also wrote Ms. Williams a check for \$5,140.22 for the closing costs on the home. EX 4 at 00579.

From the time of purchase, in September 2010, until the 6th Lane Property sold in December 2016, Mr. Shubeck's income was almost exclusively used to pay the mortgage, property taxes, homeowner's dues, utility bills, and other household expenses for the property. He would transfer money from his account to Ms. Williams' bank account and she would in turn pay the bills. All of these transfers and payments can be traced using the Appellants' bank records, which is described in more detail below.

From October 2010 through March 2012, on a monthly basis, Mr. Shubeck would transfer from his Columbia Bank account #3346 to Ms. Williams' Columbia Bank account #3354 the funds to pay for these expenses. See EX 2 at 00314-00362 and EX 11 at 01462-01676. A number of these transfers identify what the transfer was for; specifically whether it was for a "mortgage payment," "property tax funding," or "homeowner's dues." *Id.* A review of Ms. Williams' Columbia Bank

account #3354 demonstrates that her account was almost entirely funded by Mr. Shubeck's income and funds. *See generally* EX 11.<sup>2</sup>

Starting in March 2012, Mr. Shubeck started using a different bank account, his Columbia Bank account #3338, to transfer the funds. *See* EX 1 at 00138-00276. He used this account to facilitate the transfers until about February 2015, at which point the banking records demonstrate that he stopped using his Columbia Bank account all together. *Id.* He ultimately closed the account in May 2015.<sup>3</sup> EX 1 at 00282. After he stopped using his Columbia Bank account in February 2015, Mr. Shubeck began to use a Red Canoe Credit Union account, whereby he would write checks to Ms. Williams on a regular basis. *See* EX 3 at 00473-00529. This only lasted through June 2015, at which point Mr. Shubeck began to have his paychecks deposited directly into Ms. Williams' newly opened US Bank account #3816. *See* EX 13 at 01838-1908. Mr. Shubeck

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<sup>2</sup> Some of the funds in Ms. Williams' Columbia Bank #3354 came from another one of Ms. Williams' Columbia Bank accounts; specifically her Columbia Bank account #8581 account. This is a business account she opened up for a company called Nautical Threads. However, a review of that business account demonstrates that it too was almost entirely funded by Mr. Shubeck's income and funds. *See generally* EX 12. More or less, Ms. Williams was just shifting around Mr. Shubeck's funds from different accounts. Ms. Williams utilized the Nautical Threads account to pay the 6th Lane Property expenses from January 2015 until the account was closed in July 2015. *Id.* at 01810-01826.

<sup>3</sup> It is noteworthy that Mr. Shubeck stopped utilizing this bank account shortly after Ms. Shubeck began to pursue enforcement actions in New Jersey. *See* EX 36 and 57. On May 27, 2015, the New Jersey court entered an order freezing Mr. Shubeck's assets, including his Columbia Bank account. *Id.* That order also describes the various attempts Ms. Shubeck made at serving Mr. Shubeck with motions and letters, and how Mr. Shubeck evaded the same. *Id.* Ms. Williams likewise closed all of her Columbia Banking accounts at about the same time. *See* EXS 9-12.

continued to direct deposit his paychecks into Ms. Williams' US Bank account through at least September 2016. *Id.* During this entire period of time, Ms. Williams used Mr. Shubeck's income to pay the mortgage and bills on the 6th Lane Property. *Id.* at 02007-02059.

Between 2011 and 2015, Mr. Shubeck and Ms. Williams filed joint tax returns and deducted the mortgage interest on the 6th Lane Property. *See* EX 32. During those years, Mr. Shubeck and Ms. Williams received tax refunds, ranging from \$3,637 to \$22,236. *Id.* Also reflected in the tax returns and W-2's is the annual earning discrepancy between Mr. Shubeck and Ms. Williams. *Id.* Mr. Shubeck averaged income of about \$225,000, while Ms. Williams was receiving Social Security disability as her lone source of income in the average annual amount of \$18,000. *Id.*

*ii. Exhibits demonstrating Mr. Shubeck's interest in Pilchuck Property.*

On or about February 24, 2014, at a point in which Mr. Shubeck and Ms. Williams were married, they purchased a vacant piece of land commonly known as 1350 Pilchuck Heights Drive, Fox Island, WA 98333 (the "Pilchuck Property"). *See* EX 115. At the time of sale, Mr. Shubeck quit claimed his interest in the property to Ms. Williams. *See* EX 114.

Thereafter, Mr. Shubeck and Ms. Williams began construction on a new home on the Pilchuck Property. Mr. Shubeck's funds and assets were

used to construct the home. Specifically, Mr. Shubeck and Ms. Williams jointly took out a home equity line of credit to fund construction. *See* EX 18 at 02412-02435. The 6th Lane Property was used as collateral for the line of credit. *Id*; *see also* EX 116. When the 6th Lane Property sold in December 2016, proceeds from that sale were used to pay off the home equity line of credit. *See* EX 116. Also, between July 2015 and August 2016 Ms. Williams was writing checks from her US Bank account #3816 to various contractors for the construction of the home. *See* EX 13 at 01909-01994. As described above, Mr. Shubeck was depositing his paycheck into Ms. Williams' US Bank account during this same period of time, and his income was being used to pay for the construction costs. Additionally, Ms. Williams was paying for construction costs using her Bank of America VISA card. *See* EX 16 at 02298-02366. She would then pay off her VISA card with funds from bank accounts in which Mr. Shubeck had deposited his income. *See* EX 12 at 01822 and EX 13 at 01999-02059.

*iii. Exhibits demonstrating Mr. Shubeck's interest in the 2003 Lexus ES300, 2006 Dodge Ram Truck, and 2005 Regal Cruiser boat and trailer.*

On November 23, 2008, which was prior to Mr. Shubeck and Ms. Williams' marriage, Mr. Shubeck wrote a check in the amount of \$10,000.00 to Ms. Williams for purchase of her 2003 Lexus ES 300. EX 4

at 00569. Mr. Shubeck then became the sole title holder to the vehicle. *See* EX 30.

On or about March 29, 2011, during the time in which Mr. Shubeck and Ms. Williams were married, they purchased a 2005 Regal Cruiser boat and trailer for \$43,060.00. *See* EX 9 at 00987. Just a few weeks prior, on March 10, 2011, Mr. Shubeck wrote to Ms. Williams a check for \$35,000.00 and in the memo line wrote "Boat." *See* EX 1 at 00003.

On or about April 7, 2011, during the time in which Mr. Shubeck and Ms. Williams were married, they purchased a 2006 Dodge Ram truck. *See* EX 124. Mr. Shubeck made a direct down payment to the dealership for the truck in the amount of \$5,000. *See* Appellants' Amended Brief at pg. 27-28, fn 88. Mr. Shubeck and Ms. Williams were jointly titled on the truck. *See* EX 28.

*iv. Exhibits demonstrating fraudulent transfer.*

On September 27, 2012, the New Jersey court ordered Mr. Shubeck to pay lifetime spousal support to Ms. Shubeck in the amount of \$1,154 per week. *See* CP 235. Within a matter of weeks, Mr. Shubeck transferred to Ms. Williams his interest in all of the above described property and more.

On October 11, 2012, Mr. Shubeck quit claimed his interest in the 6th Lane Property. *See* EX 23. Also on October 11, 2012, Mr. Shubeck transferred his interest in the 2006 Dodge Ram truck. *See* EX 28. Also on October 11, 2012, Mr. Shubeck transferred his interest in the 2005 boat trailer. *See* EX 29. On or about October 18, 2012, Mr. Shubeck withdrew \$24,719.49 from his Vanguard investment account and those funds were deposited into Ms. Williams' Columbia Bank account #8581 (the Nautical Threads business account). *See* EX 12 at 01711-01712. On or about October 23, 2012, Mr. Shubeck withdrew \$23,768.20 from his UBS investment account and those funds were also deposited into Ms. Williams' Columbia Bank account #8581. *See* EX 12 at 01712-01713. On November 5, 2012, Mr. Shubeck transferred his interest in the 2003 Lexus ES 300. *See* EX 30. In February 2014, when Mr. Shubeck and Ms. Williams purchased the Pilchuck Property, he executed a quit claim deed transferring his interest in the property to Ms. Williams. *See* EX 114.

Mr. Shubeck paid the spousal support from the time it was entered through December 2015. *See* CP 237. It was administered by the state of New Jersey through a wage garnishment. *Id.* Mr. Shubeck had appealed the spousal support decision to the appellate division of the New Jersey court, which issued its opinion in late September 2014 affirming the trial court's ruling. *See* EX 55. Mr. Shubeck decided to stop paying the

spousal support shortly after the Appellate Court affirmed the spousal support order. *See* EX 40. In the Appellate Court opinion, the Court described Mr. Shubeck as having “acted in bad faith, failed to appear, failed to be responsive to mediation sessions, failed to make and maintain reasonable positions throughout the case, and basically stonewalled [Ms. Shubeck], causing her to borrow significantly from her parents.” *Id.* After the New Jersey appellate decision, Mr. Shubeck wrote Ms. Shubeck, via her counsel, a letter explaining to her that he was not going to pay her support anymore. *See* EX 40. In that letter he wrote, “As of January 2, 2015, I have retired from EMC after nearly 25 years of service...I had to decide whether it is reasonable to comply with the court order to pay alimony...I do not choose to be financially enslaved to [Ms. Shubeck] anymore.” *Id.* Low and behold, Mr. Shubeck had not actually retired from the workforce, but instead, just changed jobs. *See* EX 32 at 02633-02634. Also, he was making the same income, if not more, working for his new employer. *Id.*

Shortly after Mr. Shubeck stopped paying the support, Ms. Shubeck initiated enforcement proceedings in New Jersey. From February 2015 through August 2015, Ms. Shubeck sent letters, motion packages, and other legal documents to Mr. Shubeck at the 6th Lane Property address, where he did in fact reside. *See* EX 57 and EX 36 at 02673-

02675. The letters were continually returned. *Id.* This culminated in the New Jersey court finally entering an order on May 27, 2015 freezing Mr. Shubeck's assets. *See* EX 36. This order specifically froze Mr. Shubeck's Columbia Bank account. *Id.* At the same time these enforcement proceedings were being undertaken, Mr. Shubeck withdrew his money and stopped banking with Columbia Bank. *See* Ex 1 at 00282. On June 29, 2015, after the order freezing assets was entered, Ms. Shubeck's counsel sent out subpoenas to Columbia Bank, including copies to Mr. Shubeck and Ms. Williams. EX 57 at 02919. Ms. Williams also then immediately ceased banking with Columbia Bank and withdrew all of the funds in those accounts. *See* EXS 9-12. Thereafter, Mr. Shubeck began to deposit his paychecks directly into Ms. Williams newly opened US Bank account #3816. *See* EX 13 at 01838-1908.

Unable to enforce the spousal support order from New Jersey, Ms. Shubeck had the spousal support order registered here in Washington. *See* CP 238-239. She petitioned the court to register the order on January 19, 2016. *Id.* Ten days later, Mr. Shubeck and Ms. Williams executed a Separate Property Agreement, seeking to make Ms. Williams the exclusive owner of the assets involved in this case, and much more. *See* EX 50. The Separate Property Agreement left Mr. Shubeck with assets consisting of wine, golf clubs, a piano, and other musical accessories. *Id.*

On March 7, 2016, Ms. Shubeck reduced the spousal support arrears that had accrued to a judgment. *See* EX 58.<sup>4</sup> The very next day, Mr. Shubeck and Ms. Williams jointly petitioned the court for legal separation. *See* CP 239. The present case was initiated on or about April 6, 2016. *See* CP 398-405. On July 15, 2016, the court approved the terms of legal separation, which were again, jointly prepared by Mr. Shubeck and Ms. Williams. *See* EX 34. Pursuant to the decree of legal separation, the property of Mr. Shubeck and Ms. Williams was to be allocated pursuant to their Prenuptial Agreement and Separate Property Agreement. *Id.* As such, Mr. Shubeck was left with essentially nothing and Ms. Williams with all of the couple's assets. *Id.* Also, it mandated that Mr. Shubeck pay to Ms. Williams monthly support in the amount of \$9,600 per month. *Id.* Even after the legal separation, Mr. Shubeck and Ms. Williams continued to live together, make equal use of the assets, and carry on a marital relationship. *See* CP 239.

### III. ARGUMENT

#### A. Standard and Scope of Review

On appeal, findings of fact are reviewed under a substantial evidence standard, defined as a “quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Clayton v.*

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<sup>4</sup> Ms. Shubeck would later obtain a second judgment in October 2016 for arrears that continued to accrue. *See* EX 58.

*Wilson*, 168 Wn.2d 57, 62-63, 227 P.3d 278 (2010). “If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.” *Sunnyside Valey Irr. Dist. V. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003). Conclusions of law are reviewed de novo. *Id.* at 880.

**B. The assets in question have never been the separate property of Ms. Williams, and Mr. Shubeck has always had an interest in them.**

The main thrust of Appellants’ argument is that the assets in question were always the separate property of Ms. Williams and that she only “gratuitously” allowed Mr. Shubeck to be named on the title for a short period of time. *See* Appellants’ Amended Brief at pg. 31. Appellants contend that funds in bank accounts were never commingled, that through tracing, it is clear that Ms. Williams purchased all of the assets in question using her own separate funds. *Id.* at pgs. 31-36. Appellants also contend that they abided by their Prenuptial Agreement, which, according to them, demonstrates Ms. Williams is the sole owner of the assets. *Id.* These arguments and conclusions are premised on a misguided and faulty interpretation of the law.

In Washington, “all property acquired during marriage is presumptively community property.” *In re Marriage of Mueller*, 140 Wn. App. 498, 501, 167 P.3d 568 (2007). A party may rebut this presumption

by offering “clear and convincing evidence that the property was acquired with separate funds.” *Schwarz v. Schwarz*, 192 Wn. App. 180, 189, 368 P.3d 173 (2016). Commingling of separate and community funds may give rise to a presumption that all assets are community property. *Id.* at 190. Where community and separate funds are hopelessly commingled such that they cannot be distinguished or apportioned, then the entire amount is rendered community property. *Id.*

Spouses can also enter into contractual agreements to change community property into separate property, but to recognize such an agreement, courts again require “clear and convincing evidence” to overcome the “heavy presumption” that the property is characterized as community. *In re Marriage of Mueller*, 140 Wn. App. at 501. To establish clear and convincing evidence, the party purporting to convert community property to separate property must show both (1) the existence of the agreement and (2) that the parties mutually observed the terms of the agreement throughout their marriage. *Id.* A prenuptial agreement is unenforceable if the conduct of the parties is inconsistent with the terms of the agreement. *See In re Marriage of Sanchez*, 33 Wn. App. 215, 217-218, 654 P.2d 702 (1982); *see also In re Marriage of Fox*, 58 Wn. App. 935, 939-940, 795 P.2d 1170 (1990). The requirement of clear and convincing evidence is not met through the use of self-serving declarations

of the spouses claiming the property is separate. *Schwarz*, 192 Wn. App. at 189.

In the present case, all of the assets in question, except the 2003 Lexus ES 300 and Mr. Shubeck's investment accounts, were acquired during the marriage, making them presumptively community property.<sup>5</sup> Thus, Mr. Shubeck had an interest in them. To overcome this presumption, Appellants have to present clear and convincing evidence that the property was not community in nature, but instead the separate property of Ms. Williams. They fail to do so.

*i. Through tracing, it is clear that Mr. Shubeck's income and funds were used to purchase and maintain the property.*

Appellants' primary argument, that Ms. Williams' funds were solely used to purchase the assets, is premised on form over substance. They argue that because the funds used to purchase assets came from Ms. Williams' sole bank account, that the assets are therefore hers alone. *See* Appellants' Amended Brief at pg. 31. However, this analysis fails to take into account where those funds were derived from. The evidence is clear that funds used to purchase these assets came from Mr. Shubeck. He

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<sup>5</sup> The Lexus ES 300 was purchased by Mr. Shubeck from Ms. Williams in 2008, prior to their marriage, and he was named as the sole title holder, making it his separate property going into the marriage. Of course, that changed once he transferred it back to Ms. Williams. Likewise, the investment accounts were Mr. Shubeck's separate property, assuming he acquired them prior to the marriage, until he transferred the investment funds to Ms. Williams.

simply transferred or deposited the funds directly into Ms. Williams' account and she then used those funds to buy assets, pay for the mortgage, pay property taxes, pay utility bills and other household expenses, pay homeowners dues, and pay construction costs. There is also evidence that Ms. Williams would shift these funds around between her bank accounts, further commingling funds. In the case of *Rustad v. Rustad*, which is cited to by Appellants, the court stated that the "community or separate character of real property is determined by the character of funds used in its purchase." 61 Wn.2d 176, 178, 377 P.2d 414 (1963). Here, Mr. Shubeck's income and funds were used to purchase and pay for the real property. To the extent there is an argument furthered by Appellants that assets were purchased by Ms. Williams' separate funds, it is overcome by the vast commingling that occurred.

If evading creditors was as simple as depositing one's income into an account held by one's spouse, or perhaps an account held by a corporate entity, anyone could get away with fraudulent transfer. The statute would have no teeth. Instead, more rigorous analysis is needed to see where the funds derived from, as opposed to gleaning the surface, which is what Appellants would have this Court do.

To the extent that Appellants assert that Ms. Williams had ample funds to pay for the assets by herself, those arguments should be

disregarded as they rely on homemade spreadsheets submitted in the appendix portion of the brief, and those spreadsheets were not admitted into evidence at trial. Further, even if she had the separate funds to finance everything on her own, which the banking records and tax returns demonstrate she could not, the fact of the matter is that Mr. Shubeck paid for most everything.

Appellants also argue that Mr. Shubeck's transfers are contributions "toward living expenses, akin to paying rent." See Appellants' Amended Brief at pg. 15. However, there is no evidence in the record to support this claim, such as a rental agreement. The record before the Court actually refutes this claim all together. The banking records demonstrate that Mr. Shubeck was essentially the sole payer of the 6th Lane Property mortgage, property taxes, household bills, and homeowner's dues. Rent would make him partially responsible for these expenses, not entirely responsible.

*ii. Appellants failed to comply with the terms of their Prenuptial Agreement.*

As a separate basis for asserting the property in question is and always has been Ms. Williams' separate property, Appellants rely on their Prenuptial Agreement. Appellants argue that the trial court voided their Prenuptial Agreement. See Appellants' Amended Brief at pgs. 36-44. However, the trial court did not necessarily "void" their Prenuptial

Agreement. Instead, there was a showing through substantial evidence that the Appellants failed to abide by the terms of their Prenuptial Agreement, and therefore, it could not be used as an offer of proof to demonstrate that the assets in questions were Ms. Williams' separate property. Appellants took actions that significantly contradicted the terms of their Prenuptial Agreement. Specifically, Mr. Shubeck transferred his interest in the 2003 Lexus ES300, even though per the terms of the Prenuptial Agreement, it was supposed to remain his separate asset. *See* EX 49 at 02804. Mr. Shubeck was supposed to retain separate possession of his investment accounts, yet he transferred the funds in those accounts to Ms. Williams. *Id.* Also, and very importantly, Appellants were supposed to retain "separate and distinct accounts, not to be comingled and treated as a joint asset," yet there was vast commingling. *Id.* Also, "liabilities that are the separate responsibility of either party shall continue to be ONLY the responsibility of that party to pay," yet Mr. Shubeck's funds were used to pay for almost everything, including assets that are alleged to be the separate property of Ms. Williams. *Id.*

Appellants also argue that per the Prenuptial Agreement all future homes will be the separate asset of Ms. Williams. *See* Appellants Amended Brief at 36 and EX 41 at 02803. It does say that, but the words written in the Prenuptial Agreement do not take precedence over the

actions taken by Appellants, which demonstrate Ms. Williams was not the sole owner of the future homes. The record also demonstrates that Mr. Shubeck was named on a statutory warranty deed, deed of trust, mortgage, and home equity line of credit. Mr. Shubeck continued to pay the mortgage, property taxes, homeowner's dues, and construction costs, even after he transferred his interest in both the 6th Lane Property and Pilchuck Property. Mr. Shubeck maintained possession of and utilized the assets through the time of trial. Appellants also filed joint tax returns, utilized mortgage interest deductions, and jointly benefited from the tax benefits. The evidence overwhelmingly supports the conclusion that the property was community in nature, and thus, Mr. Shubeck had an interest in it.

**C. The transfers were fraudulent and made with intent to hinder, delay, or defraud and are also constructively fraudulent.**

The Uniform Voidable Transactions Act, RCW 19.40 et seq (formerly known as the Uniform Fraudulent Transfer Act) was amended in 2017 with an effective date of July 23, 2017. *See* S.B. 5085, 65th Leg., 2017 Sess. (Wa. 2017); *see also* RCW 19.40.900. At the time of trial<sup>6</sup>, the previous rendition of the statute, the Uniform Fraudulent Transfer Act (the "UFTA"), was in effect. The judgment and conclusions of law are premised on the UFTA. This Court should analyze this case under the

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<sup>6</sup> Trial went from June 26, 2017 through June 30, 2017.

UFTA. For purposes of this brief, Respondent relies on the UFTA and those cases interpreting it.

“A fraudulent transfer occurs where one entity transfers an asset to another entity, with the effect of placing the asset out of the reach of a creditor, with either the intent to delay or hinder the creditor or with the effect of insolvency on the part of the transferring entity.” *Thompson v. Hanson*, 167 Wn.2d 414, 419, 219 P.3d 659 (2009). The UFTA provides for what are essentially two varieties of fraudulent transfer. The first is a fraudulent transfer made with intent to hinder, delay or defraud a creditor. *See* RCW 19.40.041(a)(1). The second variety is what has been called a constructively fraudulent transfer. *See* RCW 19.40.041(a)(2) and RCW 19.40.051(a); *see also Clearwater v. Skyline Const. Co., Inc.*, 67 Wn. App. 305, 320-321, 835 P.2d 257 (1992).

*i. The transfers were made in an effort to hinder, delay, or defraud Ms. Shubeck.*

Under RCW 19.40.041(a)(1), actual intent to hinder, delay, or defraud a creditor must be shown through “clear and satisfactory proof.” *Skyline Const.*, 67 Wn. App. at 321. The statute provides factors to consider when determining actual intent, which have become known as “badges of fraud.” *See* RCW 19.40.041(b); *see also Douglas v. Hill*, 148 Wn. App. 760, 767-768, 199 P.3d 493 (2009). The factors include whether:

- (1) The transfer or obligation was to an insider;
- (2) The debtor retained possession or control of the property transferred after the transfer;
- (3) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (4) The transfer was of substantially all the debtor's assets;
- (5) The debtor removed or concealed assets;
- (6) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (7) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (8) The transfer occurred shortly before or shortly after a substantial debt was incurred.

The Appellants' argue that Ms. Shubeck failed to present clear and convincing evidence that the transfers were made with intent to hinder, delay, or defraud, and instead the transfers were made in good faith. *See* Appellants' Amended Brief at pgs. 45-46. Appellants' good faith argument goes back to their premise that the property was never Mr. Shubeck's to begin with, and therefore he could not have transferred it. *Id.* As already described above, that is not the case.

There is overwhelming evidence that these transfers were made with intent to hinder, delay, or defraud Ms. Shubeck. All of the above

factors are prevalent in this case. The trial court went on to describe additional factors it considered demonstrated actual intent to defraud, hinder, or delay. *See* CP 243-244. This includes the January 2015 letter Mr. Shubeck sent to Ms. Shubeck telling her that he had to decide whether it was reasonable to comply with a court order, that he was retiring, and that he was not going to be enslaved to her. The court also considered that thereafter, Mr. Shubeck evaded enforcement efforts by Ms. Shubeck, began to secrete his income into Ms. Williams' bank account, and did not tell the state of New Jersey that he was in fact still working. The court also considered that Mr. Shubeck and Ms. Williams entered into a Separate Property Agreement ten days after discovering that Ms. Shubeck had petitioned the Washington court to register the New Jersey order here. The court also considered that one day after judgment was entered against Mr. Shubeck for the spousal support arrears, he and Ms. Williams filed a joint petition for legal separation seeking to allocate the assets per the terms of the Separate Property Agreement, which left Mr. Shubeck with nothing. The court also considered that Mr. Shubeck and Ms. Williams jointly prepared their own decree of legal separation that solidified this allocation of assets and provided that Mr. Shubeck pay to Ms. Williams \$9,600 per month in spousal support. Even after the legal separation, the court found that Mr. Shubeck and Ms. Williams continued to "live

together, make equal use of the assets...and carry on a marital relationship.” CP 239. The court held that the legal separation was in and of itself a fraudulent transfer made with intent to hinder, delay, and defraud Ms. Shubeck. *Id.* at 244.

The present case is similar to a number of cases in which one spouse transfers assets to the other spouse in an effort to hinder, delay or defraud a creditor. In *Clayton v. Wilson*, 168 Wn.2d 57, 227 P.3d 278 (2010), a husband's conveyance of 90.5% of marital community property to his wife was found to have been made with actual intent to hinder, delay, or defraud a creditor. In *Wilson*, Mr. Wilson, the husband, was accused of molesting the plaintiff. *Id.* at 61. Realizing that potential civil claims would likely ensue, two weeks after his arrest and well before any civil judgment was entered against him, Mr. Wilson and his wife, Ms. Wilson, executed a property settlement agreement conveying 90.5% of the community assets to Ms. Wilson. *Id.* Included in the conveyance was a piece of property that Mr. Wilson continued to reside in after the transfer took place. *Id.* at 61-62. The court affirmed the voidance of the property agreement that purported to transfer the community property. *Id.*

In *Douglas v. Hill*, 148 Wn. App. 760, 199 P.3d 493 (2009), Ms. Hill, the wife, embezzled money from the plaintiffs, and plaintiffs obtained a judgment against her. Subsequently, Mr. Hill, the husband who

had previously been discharged from the judgment debt through a bankruptcy, acquired separate real property by quit claim deed from his son. *Id.* at 763. In order to refinance the property, Mr. Hill had to quit claim a deed in favor of Ms. Hill and himself, as husband and wife. *Id.* Shortly thereafter, the plaintiffs recorded the judgment in the county in which the property was located. *Id.* Almost immediately after the judgment was recorded, Ms. Hill quitclaimed the property back to Mr. Hill as his separate property. *Id.* The court found this was a fraudulent transfer with intent to hinder, delay, or defraud. *Id.* at 768. A question as to whether the real property was separate or community property was also posed. *Id.* at 769. The court found that the property was “best characterized as community,” reasoning that in addition to both parties having previously been named on the deed, Ms. Hill had been depositing her paychecks into Mr. Hill’s bank account to pay for the mortgage, and the parties had filed joint tax returns, thus both benefiting from the mortgage interest deduction. *Id.* at 769-770.

Whether a legal separation, or for that matter a divorce, can be the basis for a fraudulent transfer appears to be one of first impression before this Court. However, other jurisdictions interpreting the UFTA have found that a divorce can be the basis for a fraudulent transfer. Washington applies and construes its version of the UFTA “to effectuate its general

purpose to make uniform the law with respect to the subject of [the UFTA] among states enacting it.” RCW 19.40.903. The Minnesota Supreme Court recently addressed this issue in *Citizens State Bank Norwood Young America v. Brown*, 849 N.W.2d 55 (2014). In *Brown*, the plaintiff sought judgment solely against Gordon Brown, a married man. *Id.* at 58. While the lawsuit was pending, Mr. Brown and his wife, Judy Brown, mutually petitioned to dissolve their marriage. *Id.* An uncontested decree of dissolution was entered, but the Browns still lived together. *Id.* Pursuant to the dissolution decree, Mr. Brown transferred significantly all of his assets to Ms. Brown. *Id.* After the plaintiff obtained judgment against Mr. Brown it was unable to collect on the judgment and filed an action against the Browns claiming violations under Minnesota’s Uniform Fraudulent Transfer Act. *Id.* at 58-59. The Minnesota Supreme Court found in favor of the plaintiff and held that an uncontested divorce can be and was the basis for the fraudulent transfer. *Id.* at 61. Other jurisdictions have also found that an uncontested divorce can be the basis for a fraudulent transfer action. (*see e.g. Mejia v. Reed*, 31 Cal.4th 657, 74 P.3d 166 (2003); *see also Fadel v. El-Tobgy*, 245 Or. App. 696, 264 P.3d 150 (2011)). The similarities between the above described cases and the present one are unparalleled. It is clear that these

transfers were made with actual intent to hinder, delay, or defraud Ms. Shubeck.

*ii. The transfers are also constructively fraudulent.*

“A transfer made without adequate consideration is constructively fraudulent.” *Skyline Const.*, 67 Wn. App. at 320-321; *see also* RCW 19.40.041(a)(2)(ii) and RCW 19.40.051(a). In other words, it is “fraudulent without regard to actual intent of parties... if the debtor intended to incur, or believed he or she would incur, more debts than debtor would be able to pay; or debtor was insolvent at time of or as result of transfer.” *Id.* Proof of constructively fraudulent transfers need only be shown by “substantial evidence.” *Id.*

When Mr. Shubeck transferred his interest in the real and personal property in question, he did not receive any consideration in exchange for it. At the time he transferred the property, he knew that a lifetime spousal support obligation hung over him. He eventually ceased paying the support and by all means became insolvent, as he refused to pay the support and had no assets of value in which the Plaintiff could collect on.<sup>7</sup> There can be no doubt that Mr. Shubeck’s transfers were constructively fraudulent.

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<sup>7</sup> “A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.” RCW 19.40.021(b); “A debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s assets, at a fair valuation.” RCW 19.40.021(a).

***iii. The trial court applied values to the transferred property.***

Appellants assert that the trial court failed to define the value of the assets at the time of transfer. *See* Appellants Amended Brief at pgs. 46 and 47-49. However, the trial court did give value to the assets transferred. *See* CP 236-237. Specifically, the court found that the 6th Lane Property had a value of \$314,000 at the time of transfer in 2012. *Id.* The value of the Pilchuck property was identified as being at least worth \$1,000,000. *Id.* The 2006 Dodge Ram truck had a value of \$22,000 at the time of transfer. *Id.* Mr. Shubeck's Vanguard investment account had a value of \$24,719.49 at the time of transfer. *Id.* Mr. Shubeck's UBS investment account had a value of \$23,768.20 at the time of transfer. *Id.* The Boat and trailer were purchased new for approximately \$42,000 in 2011. *Id.* at pg. 234.

***iv. Ms. Williams must remain personally liable on the fraudulent transfer judgment in the event Mr. Shubeck stops paying spousal support again.***

Appellants seek clarity on the scope of Ms. Williams' future liability on the fraudulent transfer judgment. *See* Appellants Amended Brief at 48-49. Appellants more or less contend that she should have no further liability in the event Mr. Shubeck stops paying the spousal support again. *Id.* However, the UFTA provided a creditor with a wide variety of

remedies, and based on the circumstances of this case, Ms. Williams should remain personally liable.

The UFTA expressly allows for judgment against both the transferor and transferee. Pursuant to RCW 19.40.081(b), “to the extent a transfer is voidable in an action by a creditor...the creditor may recover judgment for the value of the asset transferred...or the amount necessary to satisfy the creditor's claim...The judgment may be entered against: (1) The first transferee of the asset or the person for whose benefit the transfer was made.” See also *Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App 695, 705, 934 P.2d 715 (1997). Aff’d, 135 Wn.2d 894, 959 P.2d 1052 (1998); see also *Thompson v. Hanson*, 168 Wn.2d 738, 239 P.3d 537 (2009)(holding that no additional requirements, such as proving actual intent to hinder, delay, or defraud the creditor on the part of the transferee, was required under the law). Thus judgment against Ms. Williams is appropriate in the present case.

The UFTA provides a creditor with a number of remedies. See RCW 19.40.071. For instance, an “attachment or other provisional remedy against the asset transferred or other property of the transferee.” *Id.* at (a)(2). Additionally, a creditor is afforded, “subject to applicable principles of equity and in accordance with applicable rules of civil procedure...any other relief the circumstances may require.” *Id.* at

(a)(3)(iii)(emphasis added). Thus, the trial court has wide latitude and discretion in determining what remedy should be afforded a creditor.

Ms. Williams must remain personally liable, to an extent, if Mr. Shubeck stops paying the spousal support again. She is the owner and beneficiary of all the fraudulently transferred assets. Mr. Shubeck has no interest in them anymore. If Mr. Shubeck were to suddenly stop paying the support again, he could avoid enforcement action and execution on real and personal property because he is not the record owner anymore. The UFTA makes it clear that judgment can be had against both a transferor and a transferee. In this case, there is no evidence that Ms. Williams was a good faith transferee. The opposite is true—she was complicit. The court specifically found that “Ms. Williams *stated* that the reason her and Mr. Shubeck entered into a Prenuptial Agreement was not to keep their assets separate from one another, as she trusted Mr. Shubeck, but instead was to ensure that assets remained out of the reach of Ms. Shubeck.” *See* CP 232 (emphasis added). The court further found that after the spousal support order was handed down by the New Jersey court, “Mr. Shubeck and Ms. Williams *both stated* that after witnessing what happened in the New Jersey proceeding, they decided to secure the various

assets they had purchased by transferring title to Ms. Williams in order to keep them out of the reach of Ms. Shubeck.” *Id.* at 235(emphasis added).<sup>8</sup>

Appellants contend that in *Clayton v. Wilson*, 168 Wn.2d 57 (2010), the Washington Supreme court remanded the case because the trial court “failed to define the scope of the fraudulent transfer.” See Appellants’ Amended Brief at 49. However, it was not the Washington Supreme Court that remanded the case; it was the Washington Court of Appeals that remanded it in *Clayton v. Wilson*, 145 Wn. App. 86, 106, 186 P.3d 348 (2008). There, this Court stated the “case is remanded to the trial court for the *sole purpose* of amending the conclusions and judgment to clarify that *Mrs. Wilson is liable to Andrew to the extent of the former community property. In all other respects the judgment is affirmed.*” 145 Wn. App. at 106 (emphasis added). Thus, this Court found Mrs. Wilson liable to the full extent of the value of the transfer of community property. Similarly, in the present case, Ms. Williams should be liable to the full extent of the transfer. As discussed above, the trial court did in fact apply values to the transferred property. Thus, Ms. Williams should remain liable up to that amount. With that said, the judgment entered by the trial court does not specifically state that this is the extent of Ms. Williams’ liability. See CP 249. Respondent does not oppose remand for the sole

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<sup>8</sup> Appellants have not pointed to any evidence that suggests they didn’t *state* these things.

purpose of clarifying the extent of Ms. Williams' liability, much like what was done in *Clayton v. Wilson*.

**D. The trial court did not err in awarding reasonable attorney fees.**

Appellants' primary assertion that the trial court erred in awarding attorney fees is that the lawsuit apparently didn't need to happen and that Respondent protracted litigation, thus the award is not reasonable. *See* Appellants' Amended Brief at 49.

An appellate court "will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion." *Berryman v. Metcalf*, 177 Wn. App. 644, 656-657, 312 P.3d 745 (2013). A determination of reasonable attorney fees begins with a calculation of the "lodestar," which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Id.* at 660. Here, the trial court did not abuse its discretion. Respondent's counsel submitted a declaration in support of the fees outlining the work he had done on the case. *See* CP 348-376. As described in the declaration, and verified by the docket in this case, counsel engaged in a significant amount legal work. This included preparation of motions and pleadings, legal research, a five day trial, and extensive discovery which included review of thousands of pages of bank records. *Id.* There was extensive motion practice, some of it stemming from the Appellants' failure to provide

discovery or for their failure to appear for their depositions. *Id.* Respondent's counsel also submitted an unredacted billing statement demonstrating the legal work performed in this case over a period of nearly one and a half years. *Id.* Respondent sought \$89,826.00 in reasonable attorney fees and the court reduced the award to \$83,826.00. *Id;* see also CP 249.

In awarding the attorney fees, the court stated that Mr. Shubeck's intransigence also supports an award of reasonable attorney fees. Mr. Shubeck has persistently, dating back to 2011, resisted Ms. Shubeck's efforts to collect this obligation. His obstructionist efforts in the New Jersey proceeding were well documented by the New Jersey Court of Appeals. Thereafter, his efforts to hinder, delay, and defraud Ms. Shubeck have cost her exorbitant amounts of time and money. He has consistently stonewalled her collection efforts and met her at every turn along the way to defend his unlawful actions. Mr. Shubeck had the ability to pay his debt, yet he simply refused to, and still refuses to. He has created needless litigation.

*See* CP 246. So, yes, it is true that this was needless litigation. However, it was not the Respondent's actions which rendered it needless—it was Appellants' actions. Mr. Shubeck could have paid the spousal support as it became due and owing and this case would have never risen in the first place. Mr. Shubeck could have paid the arrears at the outset of the lawsuit, thereby potentially rendering the case moot, but he never did that either. Instead, he and Ms. Williams fought tooth and nail in

unsuccessfully defending this case. In light of the circumstances, the award of attorney fees is reasonable and should be upheld.

**E. Ms. Shubeck is entitled to her reasonable attorney fees and expenses on appeal.**

If applicable law grants a party the right to recover reasonable attorney fees or expenses on appeal, the party must request the fees and expenses in its opening brief. *See generally* RAP 18.1. In this case the trial court based its decision to award fees and costs on statutory and equitable grounds. This Court should do the same.

First, the trial court based the award on the fact that this case was an action to enforce an order of spousal support, and Ms. Shubeck was the prevailing party. *See* CP 246. Under RCW 26.18.160, “in *any action* to enforce a support or maintenance order...the prevailing party is entitled to recover costs, including an award of reasonable attorney fees.” (emphasis added). An award of fees and costs under this statute extends to the prevailing party on appeal. *See Matter of Paternity of M.H.*, 187 Wn.2d 1, 13, 383 P.3d 1031 (2016). This is an action to enforce a spousal support order, which just happens to take the form of a fraudulent transfer claim. If the trial court’s decision is affirmed, Ms. Shubeck will again be the prevailing party and is entitled to her fees under the statute.

Second, the trial court based the award on Mr. Shubeck's intransigence. *See* CP 246. A court may grant a prevailing party its reasonable attorney fees based on a former spouse's intransigence. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 29-30, 144 P.3d 306 (2006). Intransigence consists of delay tactics, obstruction, and any other actions that make proceedings unduly difficult and costly. *Id.* at 30. Intransigence supports an award on appeal as well. *See Mattson v. Mattson*, 95 Wn. App. 592, 605-606, 976 P.2d 157 (1999). As stated throughout the findings of fact and in its conclusions of law, the trial court found support for an award of fees based on intransigence. *See* CP 246. This appeal is merely an extension of Mr. Shubeck's intransigence, and as described below, the appeal is also frivolous, which only furthers the intransigence argument.

This Court can also grant fees and expenses when the appeal is frivolous or when a party fails to comply with the appellate rules. *See* RAP 18.9; *see also Reid v. Dalton*, 124 Wn. App. 113, 128, 100 P.3d 349 (2004). "An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists." *See Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985).

In the present case, Appellants have both violated the appellate rules and filed a frivolous appeal. Their initial brief was stricken for failure to comply with the rules, which necessitated a motion by Ms. Shubeck. As previously described above, even the amended brief fails to comply with the rules. More importantly, this appeal is frivolous. The bank records and other evidence overwhelmingly support the conclusion that Mr. Shubeck had an interest in these assets, yet Appellants' appeal is almost entirely founded on the premise that he never had an interest in the assets. Appellants continually argue that they abided by their Prenuptial Agreement, but it is clear they ran afoul of it. By leaving out the verbatim report of proceedings, Appellants have also failed to provide this Court with a full record on review, presumably hoping to prevent the Court from reading the testimony given at trial, which further favors Ms. Shubeck. The law cited to by Appellants does not even favor their legal theory of the case, and often times it supports Ms. Shubeck's contentions. The appeal is so devoid of merit that no reasonable possibility of reversal exists. Thus, fees are appropriate here.

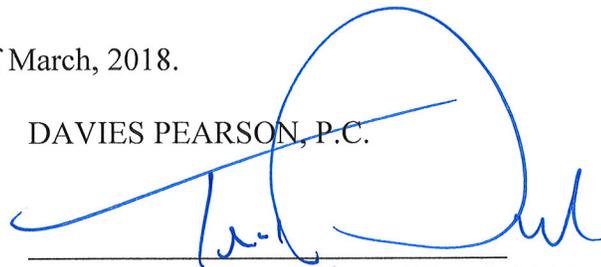
#### **IV. CONCLUSION**

For the reasons set forth above, Ms. Shubeck respectfully requests that this Court affirm the trial court's findings of fact, conclusions of law,

and judgment and award Ms. Shubeck her reasonable attorney fees and expenses incurred on appeal.

DATED this 15<sup>th</sup> day of March, 2018.

DAVIES PEARSON, P.C.

A handwritten signature in blue ink, appearing to read 'T. Dashiell', is written over a horizontal line. The signature is stylized and includes a large circular flourish.

THOMAS L. DASHIELL, WSBA #49567  
Attorneys for Respondent  
Catherine S. Shubeck

**DAVIES PEARSON, P.C.**

**March 15, 2018 - 10:57 AM**

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**Appellate Court Case Number:** 50979-2  
**Appellate Court Case Title:** Catherine S Shubeck, Respondent v John R Shubeck & Shelly A Williams,  
Appellants  
**Superior Court Case Number:** 16-2-06813-3

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