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Pierce County Cause No. 18-3-02294-0

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

In re the Marriage of:

MIKAYLA R. BYERS, Appellant,

and

PAUL B. BYERS, Respondent.

BRIEF OF APPELLANT

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Assignments of Error

1. It was error to award \$80,000 to the husband from Ally Bank account x2977 as an additional cash amount to be paid instead of a pre-distribution that he had already received.
2. It was error to divide and allocate \$12,000 for a 2017 tax refund when no such refund exists, as there is only a tax debt of \$12,000.
3. It was error to characterize the real property located at 9003 Canyon Drive as separate property when the community paid for it and it was extensively commingled with the community.
4. It was error to award the wife only two years of decreasing spousal maintenance despite the disparity in finances and duration of marriage.
5. It was error not to award any attorney fees to the wife at trial despite her need and the husband's ability to pay as well as his intransigence.

Issues Pertaining to Assignments of Error

1. Did the trial court err by giving Dr. Byers an additional \$80,000 from the Ally Bank account when he had already received \$80,000?
2. Did the trial court err by dividing a \$12,000 tax "refund" that did not exist instead of allocating a \$12,000 tax debt to Ms. Byers?
3. Did the trial court err in characterizing the real property located at 9003 Canyon Drive when the community paid for it and it was extensively commingled?
4. Did the trial court err in only awarding decreasing maintenance for two years when the parties were together for 18 years, the husband earns 14 times the wife each month, and the wife has extensive debt?
5. Was it error for the trial court not to award any attorney fees to Ms. Byers despite her need, Dr Byers' ability to pay, and his intransigence?

STATEMENT OF THE CASE

Paul and Mikayla Byers began their relationship in 2001, began living together in 2002, and were married on July 19, 2003. CP 2413, CP Dec. of Mikayla Byers, dated 6/26/18; see also CP 760-66, 807-812. They separated fifteen years later on January 3, 2018, CP 2413, and their divorce case was filed on June 12, 2018, CP 693. They have one child, Hayley, who was 13 at the time of trial. CP 2412-18.

At the time of their divorce, Dr. Byers was 54, VRP 10 (Vol. 1), and worked as a self-employed chiropractor at the parties' community business, Byers Chiropractic and Massage (hereinafter "BCM"), held by the S-Corporation Paul B. Byers DC, Inc., VRP 142 (Vol. 2). Ms. Byers was 39 years old and for the length of their marriage, had not worked but for some limited assistance at BCM for which she was not paid. CP 2375.

Trial was held from October 15 through October 23, 2019, and then Honorable Judge Helen G. Whitener provided her oral decision on December 17, 2019. CP 2412. The Final Divorce Order, Findings of Fact, Final Parenting Plan, and Final Child Support Order were signed by the court on January 28, 2020. CP 2412-2418, 2419-25, CP Final Child Support Order, dated 1/28/20, CP Final Parenting Plan, dated 1/28/20.

In her oral decision, it was determined that the parties' assets consisted of the following:

- BCM, a community business valued at \$770,000;
- Centers of Health, a community business, valued at \$187,000;
- Real property located at 9003 Canyon Drive, Dr. Byers' separate property, valued at \$365,000;
- Several financial accounts at Charles Schwab and Vanguard with varying amounts;
- Ally Bank account x2977, valued at \$239,914;
- Several vehicles and miscellaneous other personal property; and,
- A tax refund of \$12,000.

CP 2376. The trial court allocated these assets as follows:

Property Distribution Chart			
	Asset	To Dr. Byers	To Ms. Byers
1	Centers of Health – Community	\$93,500	\$93,500
2	Byers Chiropractic – Community	\$385,000	\$385,000
3	Charles Schwab – Community		\$36,348
4	Vanguard – His – Community	\$88,439	
5	Vanguard – Hers – Community		\$46,657
6	VW Jetta – Community		\$3,440
7	Motorhome – Community	\$6,200	\$6,200
8	Trailer – Community	\$2,000	
9	Air miles – Community		\$18,088
10	Air miles – Community		\$59
11	Ally Bank funds - Community	\$80,000	\$239,914
12	Reimbursement for 50% of \$30,000 Ally Bank funds wife withdrew after divorce was filed	\$15,000	
13	Reimbursement for 50% IKEA furniture wife purchased post-sep.	\$1,000	
14	Reimbursement for 50% deposit wife made after separation	\$956.50	
15	Reimbursement for 50% interest accrued on Ally Bank funds	\$2,051	
16	Reimbursement for 50% of \$12,000 tax refund	\$6,000	
17	9003 Canyon Drive real property – characterized as Dr. Byers' separate property	\$365,000	

		To Husband	To Wife
	Total community assets:	\$680,146.50	\$829,206
	Total separate assets:	\$365,000	
	Total assets:	\$1,045,146.50	\$829,206

The first three Assignments of Error on appeal deal with this property distribution, and since these issues are rather specific, the following discusses the facts and evidence presented as related to each of the first three Assignments of Error above.

Assignment of Error #1: Ally Bank Funds \$80,000 Pre-Distribution to Dr. Byers

As indicated in the property distribution chart above, the trial court's oral decision was that Ms. Byers would receive \$239,914 from the Ally Bank account x2977. CP 2376. "The Ally Bank account ending in 2977, \$80,000 to Mr. Byers, \$239,914 to Ms. Byers." VRP 15 (Vol. 1). Dr. Byers had already received \$80,000 from this account before he filed for divorce, and at trial, Ms. Byers proposed that he should keep that \$80,000 as a pre-distribution of assets, while she would have the remaining \$239,914 awarded to her. VRP 686 (Vol. 8). Dr. Byers also proposed that she keep the entirety of the present value of the account, which he estimated to be somewhere over \$200,000. VRP 154-55 (Vol. 2).

However, when the trial court's oral decision was reduced to writing in the Final Divorce Order, instead of recognizing this pre-

distribution of \$80,000 to Dr. Byers, it included a second, future award of \$80,000 to Dr. Byers that was to be subtracted from the equalizing payment he owed to Ms. Byers for her share of assets. CP 2425.

Specifically, the Final Divorce Order states:

[Dr. Byers] is ordered to pay [Ms. Byers] \$385,000 representing her one-half interest in Paul B. Byers DC, Inc. In lieu of [Ms. Byers] making payments of sums owed to [Dr. Byers], part of this sum shall be offset. The \$80,000 payable by [Ms. Byers] to [Dr. Byers] and [sic] from the Ally Bank account shall be offset against this sum reducing it to \$305,000.

CP 2425. Via counsel, Ms. Byers objected to this language in the order, both before it was signed and after. CP 2402, 2426-29. After her reconsideration motion was denied, Ms. Byers timely filed this appeal on February 7, 2020, to correct the issue. CP 2463-80.

That the \$80,000 was a pre-distribution of assets was well established during the case and at trial. Trial Exhibits 193-195 show that Ally Bank account x2977 held roughly \$300,000-\$319,000+ for all of 2017. Trial Exhibits 193-195. As of December 20, 2017, just before the parties' separation on January 3, 2018, it held \$319,919.12. Trial Exhibit 195, p. 36.

Around the time of their separation and thereafter, Dr. Byers withdrew the following large amounts from this account: \$20,000, \$19,919.12, \$20,000, and \$17,000, totaling \$76,919.12 without including

small withdrawals. Trial Exhibit 197, p. 1-55. Dr. Byers admitted that even though these transfers were made in Ms. Byers' name, he was the one who made them. VRP 436 (Vol. 5). He claimed it was because they needed money to live on, VRP 436 (Vol. 5), but then admitted that he used the funds for business expenses, to settle a lawsuit against the business, to pay attorney fees for the lawsuit against the business, and as a donation to the Church of Scientology. VRP 436 (Vol. 5).

Trial Exhibits 59-72 show that the funds were transferred from Ally Bank to a Charles Schwab account x3178 shortly before being transferred to account x8377, where large sums were paid to Dr. Byers' credit cards, his student loans, and a \$25,000 check to someone. Trial Exhibits 59-72. That same year, he included a \$25,000 deduction on his tax return for legal and professional fees. VRP 439 (Vol. 5), Trial Exhibit 6. He then admitted that he wrote off what he paid for the attorney and for the lawsuit as a business expense on his 2018 tax return and Profit and Loss statements. VRP 439 (Vol. 5), Trial Exhibit 6. He then testified that he had overpaid his 2018 taxes by an estimated \$30,000. VRP 418, 464 (Vol. 5).

At trial, he was unable to prove that any of those funds went to Ms. Byers. VRP 436 (Vol. 5). Instead, when asked whether the funds he removed were kept in a bank account both parties could access equally, he

responded, “No . . . She had her money. . . . I had changed all of mine, and I was living independently on my account.” VRP 176-77 (Vol. 2).

Dr. Byers also admitted that the value of the account had decreased substantially from \$319,919.12 by the time he filed for divorce. On June 12, 2018, the same day he filed for divorce, Dr. Byers requested a unilateral financial restraint against Ms. Byers. CP 702. His explanation for this request is that he wanted to:

maintain the *status quo* of our marital property, including the approximately **\$244,000** that is on deposit in an account solely in [Ms. Byers’] name. These community assets must be preserved, and I ask that [she] be restrained from spending, transferring, or disposing of any of those monies on deposit, absent written agreement, or court order allowing disbursement.

CP 703 (emphasis added). His estimate of the account’s value reflected the roughly \$80,000 that he had withdrawn since separation. Trial Exhibits 59-72.

At trial, Dr. Byers proposed that Ms. Byers receive the cash in the Ally Bank account. VRP 154 (Vol. 2). When asked about how much was in the account that she should receive, he stated “like 200, 214, something like that.” VRP 154-55 (Vol. 2). Similarly, Ms. Byers also proposed that she be awarded the account at its present value of \$239,914, with the \$80,000 Dr. Byers had already withdrawn being awarded to him as a pre-distribution of assets. VRP 686 (Vol. 8).

After the parties filed for divorce but before any financial restraints were in place, Ms. Byers also withdrew funds from Ally Bank account x2977 in the amount of \$30,000. VRP 770 (Vol. 9); Trial Exhibits 197, p. 2, and 199, p. 1. In the trial court's decision, Ms. Byers was required to reimburse Dr. Byers for half of that amount, giving him \$15,000. CP 2376. This reimbursement is reflected in line item 12 in the property distribution chart listed above.

In the trial court's oral decision regarding the Ally Bank funds, the court adopted the same figures used by Ms. Byers in her testimony to account for the present balance of the account going to her and the pre-distribution of assets going to Dr. Byers: "The Ally Bank account ending in 2977, \$80,000 to Mr. Byers, \$239,914 to Ms. Byers." CP 2376.

At no point during trial was it asserted that the present value of the Ally Bank account x2977 was \$319,914, which is the sum of \$80,000 and \$239,914. Per Trial Exhibit 195, p. 19, the only time this account had around \$319,000 was between July and December of 2017 – before Dr. Byers withdrew the \$80,000. Trial Exhibit 195, p. 19.

At no point during the trial court's oral decision was an offset granted of \$80,000 against the funds Dr. Byers was to pay to Ms. Byers for her share of BCM. CP 2380. Toward the end of the trial court's oral decision, there was discussion about when and how the \$385,000 transfer

payment should be made to Ms. Byers for her share of BCM, and the trial court's decision was that "Mr. Byers has a year to figure out how he's going to pay Mrs. Byers; he has to do it on or before one year." CP 2381-82. There was no discussion of any offset to that amount. CP 2381-82.

Assignment of Error 2: Division of a \$12,000 Tax "Refund" that is actually a Tax Debt

As indicated in the property distribution chart above, line item number 16, the trial court awarded Dr. Byers 50% of a tax "refund" totaling \$12,000. A thorough review of the record, testimony, and evidence at trial shows no such refund exists, and it is instead an estimated tax debt to Ms. Byers. In her oral decision, the trial court stated:

2018 taxes – this was during the 2017 marriage - \$6,000 to Mr. Byers. That meant Mrs. Byers had . . . \$6,000.

CP 2377. During questions at the end of the trial court's oral decision, counsel for Ms. Byers asked:

With regard to the 2018 tax filing, Dr. Byers filed an extension and then filed married single, I believe, and he did not claim the Centers for Health income, so that resulted in a \$25,000-plus overpayment to him and left my client with a \$12,000 tax bill. We are asking if Your Honor is going to ask or require Dr. Byers to re-file? If so, what manner and if he's required to declare any of the Centers for Health income; or if my client is being stuck with the position of filing married separate, and then she'll owe \$12,000 approximately.

CP 2386. In response, counsel for Dr. Byers argued that Ms. Byers had received the income from Centers for Health, so "she should be

responsible for paying the taxes on that and filing her own return.” CP 2387-88. The trial court decided not to have Dr. Byers re-file his return and instead had Ms. Byers claim the Centers for Health income in 2018 and take on that debt. CP 2388-89. There was no discussion about the 2017 return or a tax refund in the trial court’s oral decision.

Despite this discussion and these orders, the Final Divorce Order requires Ms. Byers to pay \$6,000 to Dr. Byers “representing 2017 IRS funds.” CP 2423. It also awarded to her as an asset “2017 IRS monies of \$12,000 subject to pay [Dr. Byers] \$6,000.” CP 2422.

First, it appears that the year 2017 is a clerical error in the Final Divorce Order. The trial court’s oral decision specifically referenced the \$12,000 in regard to the 2018 tax return. CP 2377. The parties’ 2017 tax return, trial exhibit 39, had neither a refund nor a debt for \$12,000. Trial Exhibit 39. Instead, they owed \$2,904. Trial Exhibit 39, p. 2.

During trial, Dr. Byers briefly discussed the fact that a joint tax return was filed by the parties for 2017, but there was no discussion about a refund or debt still owing for 2017. VRP 484 (Vol. 5). Ms. Byers discussed the 2017 tax return briefly in reference to who was listed as the owner for Centers of Health, a community business, but there was no discussion of a tax refund or debt still owing for 2017. VRP 905 (Vol.

10). A search through all reports of proceedings shows no other references to the 2017 return.

After receiving the signed Final Divorce Order from the court, Ms. Byers filed a Motion for Reconsideration asserting that the \$12,000 was mischaracterized as an asset instead of a debt. CP 2427. After the Motion was denied, she timely filed this appeal to resolve the issue. CP 2463-80.

To be clear, the only reference to a figure of \$12,000 at trial was in regards to what Ms. Byers would owe for 2018 taxes. As of trial, the parties had not filed a joint 2018 tax return. CP 2386. Dr. Byers had filed for an extension and then filed a married-filing-separate return without claiming any income from the Centers of Health business – a community business. CP 2386. At trial, Dr. Byers acknowledged that his 2018 tax return did not include this income. VRP 147 (Vol. 2). He also admitted that he had overpaid his 2018 taxes by \$25,493. VRP 383 (Vol. 5). Ms. Byers testified that unless they filed a joint return, she would owe \$12,000 in taxes to the IRS for the Centers of Health income in 2018. VRP 678 (Vol. 8).

A search through all exhibits and reports of proceedings shows no other reference to a tax debt or tax refund other than the potential refund to Dr. Byers of the \$25,493 he overpaid on his tax return. VRP 383 (Vol. 5).

**Assignment of Error 3: Characterization of the Real Property
Located at 9003 Canyon Drive as Dr. Byers' Separate Property**

As indicated in the property distribution chart above, line item 17, Dr. Byers was awarded the real property located at 9003 Canyon Drive (hereinafter the “building”), where BCM is housed, as his separate property. In the trial court’s oral decision, she stated, “[i]n regards to the Canyon Road building, I am not finding that commingling has been proved; \$365,000 will be awarded to Mr. Byers. That brings his total assets to \$1,045,146.50.” CP 2377.

When Dr. Byers filed his first Motion for Temporary Orders just after filing for divorce, he declared to the court “I am self-employed at BYERS CHIROPRACTIC. **We own real estate** on which the business is located, but do not own either of our residences. CP 707 (emphasis added). Dr. Byers was represented by counsel at the time he wrote this statement. CP 707. Despite this claim, at trial, he asserted the property was separate because he signed a real estate contract to purchase it before marriage. Trial Exhibit 1.

A. Real Estate Contract

On July 31, 2000, Dr. Byers signed a contract with John S. Huber, then owner of the property located at 9003 Canyon Drive. Trial Exhibit 1, p. 17. The total purchase price was \$150,000 with \$90,000 paid down and

the remaining \$60,000 to be paid in monthly installments of \$590.86 with 8.5 percent annual interest and an expected payoff date of July 20, 2015. Trial Exhibit 1, p. 13-14. Until paid in full, title to the property was to remain in the seller's name until Dr. Byers received the Statutory Warranty Deed. Trial Exhibit 1, p. 19.

B. Statutory Warranty Deed

On May 6, 2005, a Statutory Warranty Deed was executed “for and in consideration of fulfillment of contract in hand paid” that conveyed and transferred the property to Dr. Byers. Trial Exhibit 346.

C. HELOC Payment for the Building

At trial, Dr. Byers testified that he paid the initial \$90,000 down payment with a Home Equity Line of Credit (hereinafter HELOC), which was paid off during the parties' marriage. VRP 55 (Vol. 1), 367 (Vol. 5). He testified that he paid the rent from the business to himself as a business expense. VRP 367 (Vol. 5). He specifically denied that he paid rents out of his wages and labor at the business. VRP 367 (Vol. 5). Instead, he used the business account to write checks from BCM to the building, although he never paid himself rent to a separate account until June of 2018, when he filed for divorce. VRP 372-7 (Vol. 5).

At trial, Ms. Byers spoke about the HELOC payments, saying they paid that loan off during the marriage. VRP 682 (Vol. 8). Dr. Byers

agreed, and when asked “[s]o how do you know whether or not you were making the home equity line of credit payment with the rent if you didn’t keep it separate?” VRP 377-78 (Vol. 5). His answer was “I guess I wouldn’t know that.” VRP 377-78 (Vol. 5).

D. Monthly Payments to Seller, American Express Payoff

For the remaining \$60,000 owed to the Seller, Dr. Byers made monthly payments of \$590.86 to the Seller until 2005, when he paid the remainder off using “an American Express card with a very high limit . . . and some cashier’s checks[.]” VRP 59 (Vol. 1). He then asserted that he paid off the American Express credit card with “rents collected” and not out of community funds. VRP 59-60 (Vol. 1). However, at trial, he acknowledged that the American Express card was a business card for BCM, VRP 83 (Vol. 1), and that he had never kept rent or building expenses separate, VRP 590-93 (Vol. 7).

E. Living Well Properties

During the marriage, Dr. Byers created Living Well Properties, a real estate holding company with the 9003 Canyon Drive building as its only asset. VRP 378-79 (Vol. 5). Until he filed for divorce, he did not have a separate bank account for the building or Living Well Properties, but in June of 2018, he created a bank account for Living Well Properties and stopped paying himself rent directly because “like I said before, you

get kind of sloppy when it's – no one's – when it comes to divorce proceedings, then it kind of matters.” VRP 379 (Vol. 1).

At trial, Dr. Byers produced one financial statement for Living Well Properties dated June 30, 2018. Trial Exhibit 5. The only asset included was the building and \$36,000 in rent, although the Living Well Properties bank account had no such funds. VRP 590-93 (Vol. 7); Trial Exhibits 191-92. Despite being a separate business entity from Living Well Properties, BCM paid attorney fees for “Living Well Properties” on 11/1/18 from the same business account that paid for business expenses such as payroll, licensing, insurance, and personal expenses, such as Dr. Byers’ car payment and haircuts. Trial Exhibit 169. Other building expenses and costs paid by BCM are outlined below under “Maintenance and Repairs.”

F. Lease Agreement

At trial, Dr. Byers provided a copy of one lease between BCM Massage and Living Well Properties that fixed the rent at \$6,000 per month. Trial Exhibit 4; VRP 65 (Vol. 1). During his deposition, he admitted that he pays himself the \$6,000 per month in rent per an “agreement that’s not finalized[.]” CP 1351. At trial, he then asserted that he had a lease between the building and the business for all 20 years it had

been in business, but could only produce one copy of a lease from 2017. VRP 613 (Vol. 7).

Trial Exhibit 4 contains the one commercial lease dated 9/5/2017 that was executed between Living Well Properties and BCM to pay \$6,000 per month for 10 years. Trial Exhibit 4. This lease broke down the responsibilities of the business versus the responsibilities of the building owner, requiring the building owner to pay real estate taxes, repairs, and property insurance. Trial Exhibit 4 p. 1-2. The Lease was signed by “Dr. Paul Byers.” Trial Exhibit 4 5.

Kevin Grambush, CPA, who testified regarding Dr. Byers’ annual income, also testified regarding the \$6,000 of monthly rent Dr. Byers was paying himself from BCM:

The rental income from the building is being paid from the practice to Dr. Byers in the amount that he decides what it is, so just like compensation, we needed to make that fair market value, as well. So we made an adjustment based on an appraisal that was done for the building which gave us the fair market value rental amount, and so we adjusted it so that what’s being deducted is the fair market value rent of the building.

VRP 299 (Vol. 4). Mr. Grambush testified that the fair market value of rent for the building was \$27,000 a year, roughly, and not the \$72,000 Dr. Byers was charging himself. VRP 301 (Vol. 4). The extra \$45,000, Mr. Grambush explained, was “really income that the practice is generating. Dr. Byers is simply taking it as excess rent.” VRP 301 (Vol. 4). Dr.

Byers acknowledged that the rent he charged himself was not reasonable given his assertion at trial that the building's value was only \$250,000. VRP 380 (Vol. 5).

G. Rent Payments

Dr. Byers testified that he was "sloppy" and that his process for paying himself rent had been "muddy for the last – well, for quite a while actually." VRP 375 (Vol. 5).

According to the lease Dr. Byers provided at trial, BCM was required to pay \$6,000 rent per month for 10 years from 9/5/2017. Trial Exhibit 4, p. 1.

Dr. Byers included the rent payments as a business expense each year, listing the following amounts on his Profit and Loss Statements:

2011 - \$36,000 deduction for rent;
2012 - \$36,000 deduction for rent;
2014 - \$36,000 deduction for rent;
2015 - \$36,000 deduction for rent;
2016 - \$28,000 deduction for rent;
2017 - \$72,000 deduction for rent;
2018 - \$72,000 deduction for rent.

Trial Exhibit 356. During trial, Dr. Byers admitted he had not actually been paying himself rent in 2017 and 2018. VRP 590-93 (Vol. 7). He was asked if he had "any evidence whatsoever that [he] kept a separate account and didn't commingle it with Byers Chiropractic" and his answer was "From – from 2000, no." VRP 374 (Vol. 5). He was asked "Do you

have any evidence at all prior to June of 2018 that you kept rent payments separate and apart from Byers Chiropractic,” and his answer was “I don’t think I have any evidence of that, no.” VRP 374 (Vol. 5).

Then, this exchange happened during Dr. Byers’ cross-examination by Ms. Byers’ counsel:

- Q: Dr. Byers, if I told you that I spent hours last night tabbing each transaction history for all of your bank accounts from 2015 to 2019 and I didn’t see a single rent payment, would that be possible?
- A: That would be possible because if they’re bulk payments (unintelligible) ten grand - \$10,000 deposit.
- Q: But to where?
- A: Into the personal account.
- Q: And what else was in your personal account? Wages, earnings, Centers for Health money, commingled ...
- A: Centers for Health money went to a different account.
- Q: Was it commingled in your personal account with other deposits?
- A: I think those are all business accounts. I think Centers for Health had its own account, Charles Schwab, I believe.
- Q: So in what account were you keeping rent separate and apart from other funds?
- A: Separate and apart. I don’t think there would be separate – I’m not sure on that, separate and apart.

VRP 572-79 (Vol. 7). After this exchange, counsel walked him through several bank accounts to see if Dr. Byers could identify any rent payments,

but he could not. VRP 573-83 (Vol. 7). After a break, during which Dr. Byers indicated he “researched the issue,” he was able to identify the account to which he paid rent in Exhibit 238, Key Bank account x4138, and the following exchange happened:

Q: And, Dr. Byers, you testified before we broke for Mr. Low’s testimony that you believe if you kept a segregated account for rental payments, it would be the 4-1-3-8 account for Key Bank?

A: 4-1-3-8, Exhibit 238.

Q: Are there any other potential accounts that you utilized?

A: I’m sorry. Speak up, Jamie.

Q: Are there any other accounts that you might have paid yourself rent to?

A: **No. I think the 4-1-3-8 was the one we used. From 2015 up to August 2017, it was closed. During that time frame, there was no rents being paid until May 5th or until May of 2018.**

Q: **So you didn’t pay yourself any rent from what time period?**

A: **August 2017 until May 2018. . . .**

Q: Dr Byers, can you turn to Exhibit 238 And can you identify this account?

A: 4-1-3-8, KeyBank personal account.

Q: **And is this a personal account in both your name and in your wife’s name?**

A: **It looks like it is, yes.**

Q: Okay. So did you keep rental payments in an account that was separate from the community?

- A: For this one, no. There were multiple payments that went into that.
- Q: Okay. Can you tell me where the rental payments show up to both you and to Ms. Byers who were on this account?
- A: They're all – if it ends in 4-7-3-1, **they would be considered rent payments or distributions to ourselves, one of the two.**
- Q: **So how can you tell the difference between rent payments and distributions?**
- A: **You really can't but the – the accountant would reconcile that at the end of the year.**
- Q: **The accountant reconciles it or you tell him what the number is because you don't give him any underlying data; correct?'**¹
- A: **I would tell him what it was, yes.**
- Q: **So you just made transfers from your business account to an account named for both you and your wife –**
- A: **That's correct.**
- Q: **-- Paul Byers and Mikayla Byers, and you did not track the amount that was paid for rent and the amount that was paid for distributions; correct?**
- A: **No, it was not separated.**
- Q: So when you testified yesterday that you kept rental payments separate and apart, that was not correct, was it?
- A: That was not correct. It was – until we started in – until we could separate it, that's correct.

¹ Trial Exhibit 5, which is Living Well Properties financial statements, contains a letter from Dr. Byers' accountant with the following message: "Management has elected to omit the statement of cash flows and retained earnings and substantially all of the disclosures required by generally accepted accounting principles. If the omitted statements and disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters." See also Trial Exhibit 7 financial statements for Paul B. Byers DC, Inc. with the same message.

Q: Until June of 2018 when you filed for divorce; correct?

A: That's correct.

Q: **But prior to that, those rental payments were commingled in your community account with Ms. Byers; is that accurate?**

A: **I guess it would be – well, when we were married, yes.**

Q: Okay. Aside from your year-end taxes, which your accountant bases solely upon your word, **there is no other way to track how much was considered rent and how much was considered a distribution or wages or any other type of profit; correct?**

A: I gave them a set amount that we were paying for rents.

Q: **And you testified prior, that was just a number you picked, kind of, out of thin air; is that correct?**

A: **That's correct.**

Q: So are you asserting that you kept rental payments separate and apart in any manner?

A: Before we were married, yes; **when we were together, no.**

VRP 590-93 (Vol. 7). Trial Exhibit 238 contains Key Bank checking x4138 account statements for a personal account in the name of Paul and Mikayla Byers. Trial Exhibit 238. Deposits into the account include transfers from BCM Key Bank business checking x0236 as well as one of the parties' joint saving accounts, Key Bank x3399. Trial Exhibit 238. Deposits came from many other accounts as well as Groupon, for the parties' Centers of Health community business, and even ATM cash deposits. Trial Exhibit 238. Monthly deposits ranged from \$29,099.08

total to \$7,192.71 with varying amounts and payment sources each month.

Trial Exhibit 238.

Withdrawals from this account included credit card payments, student loan payments, transfers to the parties' other accounts, cash withdrawals, Paypal, USPS, and other miscellaneous payments. Trial Exhibit 238. Trial Exhibit 239 contains cancelled checks for this account with payments for park entrance fees, campground fees, BCM expenses, checks to the parties, speeding tickets, Montana Fish and Wildlife, Boy Scouts, a storage unit, library fees, etc. Trial Exhibit 239. Trial Exhibits 240-243 contain similar statements for additional years in the same account.

G. Property Taxes for the Building

The lease agreement Dr. Byers provided, dated 9/5/2017, specifically required the landlord/Living Well Properties to “pay all real estate taxes and assessments for the Premises.” Trial Exhibit 4, p. 2.

No proof of payments from Living Well Properties or a separate account holding collected rents for real estate taxes was provided. Instead, property tax invoices for the building were sent to “Byers Paul B DC INC.” Trial Exhibit 348. Dr. Byers paid these property taxes with a BCM business credit card, and he characterized them as a business expense.

VRP 379-80 (Vol. 5). His Profit and Loss Statements for BCM also reflect annual deductions for real estate taxes. Trial Exhibit 356.

I. Maintenance and Repairs

According to the one lease Dr. Byers provided at trial, the landlord was required to pay and be responsible for repairs to the Premises. Trial Exhibit 4, p. 2. However, Dr. Byers testified that he paid maintenance and repairs with the business credit card for BCM. VRP 379 (Vol. 5). At the time of trial, he indicated that he had not yet obtained a credit card for Living Well Properties and that he needed to get one. VRP 379-80 (Vol. 5).

Ms. Byers agreed with this testimony, saying that when expenses for the building came up over the years, they were typically paid by the business bank account. VRP 672-73 (Vol. 8). This same account was in her sole name for over ten years. VRP 673 (Vol. 8). Kevin Grambush, CPA, testified regarding BCM paying for building expenses:

[T]he building is owned personally and so the type of repairs, like parking lot repairs, that would be typically paid by the . . . building owner, not the business owner. If this was a fair market rental situation, the business would not be paying for these repairs.

VRP 301 (Vol. 4). Despite this, evidence presented at trial showed that BCM regularly paid for building expenses, maintenance, and repairs, including:

- 1) Parking lot repair, re-striping, and re-paving. Trial Exhibits 169, 403-04, 407-07, 410, 412;
- 2) Gutter repair in 12/2018 for \$3,602.50, Trial Exhibits 405-06;
- 3) Sewer Repair, Trial Exhibits 405-06
- 4) Carpet Cleaning on 12/20/18 for \$19,145.50, Trial Exhibit 169;
- 5) Landscaping and “outside maintenance” going back years before separation, Trial Exhibit 169;
- 6) Roof inspection and repair, Trial Exhibit 169;
- 7) Window cleaning, Trial Exhibit 167-69.

BCM paid these expenses even after Living Well Properties was created. Trial Exhibit 169. Further, the accounts from which these expenses were paid were also regularly used to pay for haircuts, BCM expenses, IRS payments, the parties’ daughter’s school tuition payments, personal attorney fees, employee bonuses, piano lessons, charges at Yellowstone National Park, magazine subscriptions, and even Dr. Byers’ speeding ticket. Trial Exhibits 156, 167, 169.

Nevertheless, BCM claimed these expenses as business expenses. Exhibit 356 contains Profit and Loss Statements for BCM from 2011-2012 and 2014-2018.

<u>2011 deductions:</u> a. Landscaping/cleaning, \$1,777.19; b. Windows, \$200; c. Building insurance, \$346.49; d. Fence, \$1,193.69.	<u>2016 deductions:</u> a. Landscaping/cleaning, \$140.55; b. Windows, \$450, c. New sign, \$13,749.36.
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<u>2012 deductions:</u> a. "Outside" expenses, \$391.21; b. Landscaping/cleaning, \$806.77; c. Windows, \$325; d. Supplies to build shed, \$7,608.63; e. Insurance, \$1,558.69.	<u>2017 deductions:</u> a. Landscaping/cleaning, \$315.36; b. Windows, \$302; c. Security System, \$1,832.95; d. Insurance, \$1,572.52; e. Intercom, \$330; f. New Sign, \$8,602; g. "Repair," \$709.
<u>2014 deductions:</u> a. Landscaping/cleaning: \$121.23; b. Windows, \$325; c. LED Sign Repair, \$1,050; d. Insurance, \$1,847.13.	<u>2018 deductions:</u> a. Landscaping/cleaning, \$3,356.69; b. Windows, \$409; c. Sewer repair, \$12,642.10; d. "Legal work," \$24,336.44; e. Parking lot repair, \$31,428.97; f. Roof repair, \$800; g. Paint, \$1,119.95; h. Home Depot, \$4,739.60; i. New gutter installation, \$3,602.50; j. Lunas Construction, \$19,145; k. Striping/cement blocks for parking lot, \$1,411.19; l. Molding/supplies, \$19.
<u>2015 deductions:</u> a. Landscaping/cleaning, \$95.02; b. Windows, \$400; c. "Repairs," \$3,245.95; d. LED sign repair, \$506.33; e. Insurance, \$1,371.13.	

Trial Exhibits 356. Regarding the LED sign on the building, Ms. Byers testified that it was purchased with a credit card in her name. VRP 661 (Vol. 8).

J. Shed

At trial, Dr. Byers testified that in 2010, he let the parties' home go into foreclosure, after which they rented an apartment before he suggested they move into the building at 9003 Canyon Drive. VRP 62-63 (Vol. 1). They built a shed behind the building with an electrical extension cord

running to it, and it contained a couch and refrigerator. VRP 62-63 (Vol. 1). They slept inside the building, not the shed. VRP 62-63 (Vol. 1). Ms. Byers and the parties' daughter used the shed as a daytime living space to homeschool and cook food for several years. VRP 381 (Vol. 5). Dr. Byers admitted that the money to build the shed came from BCM, and since separation, it has become storage for BCM and personal belongings. VRP 380-81 (Vol. 5).

The following sections address the remaining two assignments of error: #4, Spousal Maintenance, and #5, Trial Court Fees.

Assignment of Error 4: Spousal Maintenance

The parties were married for 16 years and cohabited for 17 years, during which time Ms. Byers did not work. In June 2018, Dr. Byers acknowledged Ms. Byers' limited work history, stating she "most recently has worked part time (10 to 15 hours per week or so) from home, for my chiropractic practice. The practice did not provide her a paycheck; she shared in income which was distributed to me." CP 709. She had no set schedule, CP 709, and during the day, she cooked and homeschooled the parties' daughter, VRP 381 (Vol. 5).

Dr. Byers described himself as the "sole breadwinner[.]" CP 707-08, and described her tasks for the business as "neither routine, nor her own idea. Mikayla implemented my ideas, as owner and director of the

practice . . . She would fill in for the front desk person five to seven times per year,” CP 768-69. At trial, he admitted that she had described plans for going back to school to train for a new job. VRP 157 (Vol. 2).

Ms. Byers requested spousal support on the basis that she had been entirely reliant on Dr. Byers’ income throughout their 17-year relationship. CP 707. While she had two college degrees – a Bachelors of Science in Biology and a Bachelors of Science in Aquatic and Fishery Sciences, she had never worked in either of those industries. VRP 887 (Vol. 9). When she graduated from college, she had “an offer from Washington State to do an internship with the Fisheries Department in Alaska,” but she declined it because Dr. Byers wanted her to help him in his practice. VRP 887 (Vol. 9).

After the parties separated in January of 2018, Dr. Byers agreed to give Ms. Byers \$6,000 per month for her expenses. CP 1328.

At the Temporary Orders hearing, Dr. Byers was ordered to pay Ms. Byers monthly spousal support of \$4,500, beginning July 1, 2018. CP 831. These payments continued for eighteen months until the Final Divorce Order went into effect on December 31, 2019. CP 2425.

At trial, Ms. Byers requested spousal maintenance of \$6,000 per month for 72 months. VRP 675 (Vol. 8). She provided her Financial Declaration, Trial Exhibit 126, based on her current income and expenses.

VRP 675 (Vol. 8); Trial Exhibit 126. In her Financial Declaration, she included a monthly income of \$2,080, which represented earnings from her current position at a full-time rate. VRP 675 (Vol. 8). She testified that she had taken on substantial credit card debt for legal fees, expert fees, and appraisal fees. VRP 679 (Vol. 8). She did not have any relatives available to loan her money for these costs. VRP 679 (Vol. 8).

Ms. Byers also described her efforts to find employment, stating that it was very important to her to continue to be available to the parties' daughter when not in school. VRP 783 (Vol. 9). She testified that her experience at BCM was specific to a chiropractic business, which did not help her much when applying for other jobs. VRP 783 (Vol. 9). She did apply for a job in forestry in light of her decree, but she did not have any experience working in that field and did not get the position. VRP 784 (Vol. 9). She applied for many other jobs, including a position at the library, which fit into her schedule with her daughter, and at the time of trial, she was still in the pool for a position there. VRP 887 (Vol. 9). She testified that she is not qualified for any jobs that pay anywhere near what Dr. Byers makes at BCM. VRP 888 (Vol. 9). By trial, she did find employment at Harbor Montessori and used that income at a full-time rate to calculate her need for support and child support. VRP 675 (Vol. 8).

At trial, it was determined that her actual monthly income was \$2,087 with an additional \$2,340 imputed to her for child support calculation purposes. CP Final Child Support Order, dated 1/28/20, p. 9.

Dr. Byers provided his Financial Declaration as Exhibit 89, although at trial, he admitted that many of the expenses were incorrect. VRP 464-71 (Vol. 5). He acknowledged that he had overpaid taxes and that the monthly tax expense on his Financial Declaration of \$3,562 per month is “not a current expense, no.” VRP 464 (Vol. 5). He also included expenses for a telephone, but admitted that the business pays that expense and it should be zero. VRP 464-65 (Vol. 5). He included the full tuition amount for the parties’ daughter even though it was to be split in the Child Support Order. VRP 465 (Vol. 5). He included \$168 for health insurance premiums, but then admitted that the business pays for his health insurance and it is not a personal expense. VRP 466 (Vol. 5). He also admitted that the business paid his transportation expenses, so that also was not a personal expense. VRP 467 (Vol. 5).

Then he was questioned about the student loan payments on his Financial Declaration, which stated the loans totaled \$170,000. VRP 469 (Vol. 5). He admitted it was \$140,000, saying his attorney made an error, and then when he was referred to Exhibit 52, he admitted that it showed his student loans had been consolidated to \$120,516 in 2001. VRP 469

(Vol. 5); Trial Exhibit 52. He then claimed he had been making interest-only payments to explain for the discrepancy, VRP 469 (Vol. 5), but then admitted that he had paid about \$12,000 to his student loans in 2018 and \$24,000 in 2017, totaling \$36,000 in just two years. VRP 471 (Vol. 5). When he was asked if those payments meant the court could presume he had paid well over \$100,000 toward his student loans since 2001, he stated “That – that could be potential.” VRP 471 (Vol. 5).

At trial, it was determined that Dr. Byers’ gross monthly income was \$28,920.33 with \$22,597.77 net (excluding the trial court’s maintenance awards). CP Final Child Support Order, dated 1/28/20, p. 9. The trial court determined that Ms. Byers should receive \$2,500 in support for 2020 and \$1,500 per month in 2021. CP 2424.

Assignment of Error 5: Trial Court Fees

At trial, Ms. Byers requested attorney fees on two bases: 1) need versus ability to pay, and 2) Dr. Byers’ intransigence. CP 1247, 2361-91. Her request for fees was denied. CP 2381, 2424.

In support of her request for fees based on need and ability to pay, she noted that she had limited income as well as over \$200,000 in credit card debt while Dr. Byers’ income was extraordinarily higher than hers and he had no debt other than a loan from his parents with undetermined limits and undetermined repayment terms. CP 2305.

In support of her request for a finding of intransigence, she argued to the court that Dr. Byers had failed to follow court orders, failed to cooperate with discovery requests, made false statements under oath that required additional work, dragged out trial by committing perjury and refusing to acknowledge commingling of 9003 Canyon Drive for days of testimony until confronted with five years of bank statements. CP 2305.

Specifically, Dr. Byers had filed an emergency motion claiming she was “stealing from the business” by continuing to access community business accounts, and that she had forgotten to take the child’s cell phone charger on a recent trip. CP 721-26. The court denied his motion on the basis there was no emergency and only an agreed order was entered. CP 755-59, CP Memorandum, dated 6/26/18, p. 1. No attorney fees were awarded to Ms. Byers for that motion. CP 755-59.

On July 24, 2018, temporary financial restraints were ordered with a specific requirement that Dr. Byers not dissipate funds and give notice to Ms. Byers of expenditures or distributions. CP 832-33. On March 29, 2019, Dr. Byers was held in contempt for violating these restraints by taking \$116,879.80 in distributions from the business between October and January of 2018 without giving notice. CP 1029-32. As a result, the court appointed a Special Master, Susan Caulkins, to determine what

expenses could be paid from the business and supervise Mr. Byers. CP 1033.

Just after Ms. Byers filed for contempt, Dr. Byers filed a motion to modify temporary orders requiring her to pay 50% of extracurricular and school expenses and cut her spousal maintenance in half when trial was only three months away. CP Motion for Temporary Order, dated 3/1/19, Order Amending Case Schedule, dated 12/3/18. The basis for his requests was that he had incurred additional business expenses – the distributions he had been held in contempt for making – and his income was lower. CP 864. The court denied his motion since it was so close to trial. CP 1025-27.

On March 20, 2019, Ms. Byers was forced to file a Motion to Compel because Dr. Byers had refused to sign his discovery responses as required by CR 33 for six months despite repeat requests. CP 939-40. After she filed the motion, he then provided the signatures. She never received attorney fees for this motion. At trial, the Special Master testified that it was not “normal” to have to file a Motion to Compel a party to sign his discovery responses. VRP 532 (Vol. 6).

On May 15, 2019, Ms. Byers was forced to file a second Motion to Compel after Dr. Byers refused to provide complete and signed discovery responses to a second discovery request. CP 1037. After many requests

and discovery conferences as well as a final deadline before a motion would be filed, he still had not provided the information. CP 1037. On June 21, 2019, the trial court ordered the Special Master to review the discovery and determine if it was deficient. CP 1237. Dr. Byers did not provide his full responses until July 12, 2019 – two months after the Motion to Compel was filed. VRP 530 (Vol. 6); Trial Exhibit 455. The Special Master testified that there was “suspicion that Dr. Byers is exerting less than due diligence in his responses to the propounded discovery request[.]” VRP 533 (Vol. 6). Ms. Byers was not reimbursed any attorney fees for that matter.

Then, just after the Special Master released her report regarding his discovery responses, Dr. Byers filed a last-minute motion to change the child’s school from her current school. CP Motion, dated 8/13/19. This motion was denied, and the child remained in her current school. CP Order on Motion, dated 8/23/19. Ms. Byers was not reimbursed any attorney fees for responding to that matter.

Even after being held in contempt and being court-ordered to get approval from the Special Master for any expenses beyond recurring expenses, the Special Master testified at trial that Dr. Byers continued to pay for extraordinary expenses without her notice or approval, including

hiring a vacation doctor for 12 days the month before trial for \$5,400.

VRP 525-26 (Vol. 6).

Overall, the only fee award Ms. Byers received was \$7,677 for her contempt motion, CP 1196-98, and Dr. Byers was awarded temporary attorney fees of \$10,000. CP 832.

STANDARD OF REVIEW

Distribution of assets and debts are reviewed for manifest abuse of discretion. *In re Marriage of Neumiller*, 183 Wn. App. 914, 920, 335 P.3d 1019 (2014) (citing *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005)). Similarly, whether it is appropriate to award a party maintenance or attorney fees is also reviewed for abuse of discretion. *In re Marriage of Neumiller*, 183 Wn. App. at 920 (citing *In re Marriage of Terry*, 79 Wn. App. 866, 869-71, 905 P.2d 935 (1995)). A trial court's discretion is abused when it "is exercised on untenable grounds or for untenable reasons." *In re Marriage of Neumiller*, 183 Wn. App. at 920 (citing *State v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). To avoid a finding of abuse of discretion, a trial court's findings of fact must be supported by "substantial evidence," which exists "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-43, 170 P.3d 572 (2007).

In contrast, trial court decisions regarding the characterization of property are reviewed *de novo*. *In re Marriage of Neumiller*, 803 Wn. App. at 921 (citing *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003)).

ARGUMENT

RCW 26.09.080 requires the court to make a “just and equitable” division of assets and debts after considering the extent of those assets and debts, the extent of the community and separate property, the length of the marriage, and the parties’ economic circumstances. Overall, when it comes to the final distribution of property as well as the final award of maintenance, a “trial court’s paramount concern when distributing property in a dissolution action is the economic condition in which the decree leaves the parties. *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997); *see also In re Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.2d 679 (1996); *In re Marriage of Terry*, 79 Wn. App. 866, 905 P.2d 935 (1995). In this case, the net effect of the first three assignments of error create an extraordinarily disparate division of assets and debts in favor of Dr. Byers, and when combined with the maintenance and attorney fee decisions, puts Ms. Byers in a much worse position post-dissolution than Dr. Byers despite the length of their marriage, the extent of community work that went into development of the

community, and the fact Dr. Byers' post-dissolution income is at least 14 times that of Ms. Byers' post-dissolution income.

A. It was an error to award a second payment of \$80,000 to Dr. Byers from Ally Bank account x2977 when he had already received \$80,000 from that account, when both parties testified the present, total value of \$200k+ was what should be awarded to Ms. Byers at trial, and when giving him a second payment of \$80,000 would significantly diminish Ms. Byers' award at trial below the trial court's stated award amount.

Awarding Dr. Byers a post-trial payment of \$80,000 from the Ally Bank account x2977 is not supported by substantial evidence and is based on untenable grounds not only legally, but also mathematically.

First, it is appropriate to characterize post-separation dissipation of marital assets as a pre-distribution of those marital assets. *In re Marriage of Angelo*, 142 Wn. App. 622, 646, 175 P.3d 1096 (2008); *In re Marriage of Clark*, 13 Wn. App. 805, 808, 538 P.2d 145 (1975). At trial, the Ally Bank account was determined to be community property, and there was no dispute that Dr. Byers withdrew \$80,000 from that account before filing for divorce. Just before the parties separated, the account had a value of \$319,919.12, and when Dr. Byers filed for divorce six months later, he declared that its value at that time was around \$244,000, which reflects a decrease of \$75,000-\$80,000. At trial, Dr. Byers admitted that he was the one who made those large withdrawals from this account, and that he transferred the funds to an account to which Ms. Byers had no access.

Therefore, there was no dispute that Dr. Byers removed community funds after separation for his own use, which constitutes a dissipation of that marital asset and a pre-distribution of it to him.

Second, granting Dr. Byers a second distribution of \$80,000 instead of acknowledging his pre-distribution does not fit mathematically with the trial court's award to Ms. Byers of \$239,914 from that account. At trial, both parties testified that the account only held \$200,000+, with Dr. Byers estimating it was "like 200, 214" and Ms. Byers specifically stating its value was \$239,914. Neither party asserted the present account value was over \$300,000 or even close to that amount. Both parties proposed that Ms. Byers receive the full present value of the account, and at no time did Dr. Byers propose that he should receive an additional \$80,000 from the account.

Therefore, in order to give Ms. Byers \$239,914 from the Ally Bank account, Dr. Byers could not also be awarded \$80,000 from that account. To do so would give Ms. Byers only \$159,914, which, according to the property distribution chart above, would only give her \$669,292 of the assets instead of the \$829,206 the trial court specifically stated she was to receive. With Dr. Byers' share of the assets being \$680,146.50, this would mean the final award was disproportionate in his favor by \$10,854.50 despite the fact that he is the economically advantaged spouse.

Mathematically, the only way it would make sense for Dr. Byers to get a post-trial award of \$80,000 without altering the trial court's specific final numbers described above would be if the Ally Bank account's value at trial was \$319,914, which would allow Ms. Byers to receive \$239,914 and Dr. Byers to receive \$80,000. However, as described above, that account has not had that value since just before the date of separation, and neither party asserted it had anything near that value at any time after the case was filed and through trial.

Moreover, the fact that Ms. Byers was required by the trial court to reimburse to Dr. Byers 50% of the \$30,000 she withdrew from that account after the divorce was filed makes a second distribution of \$80,000 without any recognition of the first \$80,000 Dr. Byers withdrew patently unfair. Therefore, substantial evidence does not support an award to Dr. Byers of a second \$80,000 distribution, and the Decree should be amended to reflect that the award is a pre-distribution of assets that he already received.

B. It was error to allocate and divide a 2017 tax "refund" of \$12,000 when there was no 2017 tax refund, there was no discussion of any issues regarding the 2017 tax refund, and the only discussion of a \$12,000 tax amount was with respect to a debt that Ms. Byers would owe to the IRS.

Substantial evidence requires "evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared

premise.” *In re Marriage of Rockwell*, 141 Wn. App. 235, 242-43, 170 P.3d 572 (2007). In this case, there is zero evidence of a \$12,000 tax refund. As described above, the parties owed \$2,904 on their 2017 tax return and did not receive a refund. No issue was raised at any point in the case about a refund for 2017. Instead, there was discussion about the 2018 return, but only with respect to a \$12,000 debt Ms. Byers would owe if she had to file a separate return and claim the Centers of Health income. It was undisputed that her 2018 tax debt would be about \$12,000, and there was no assertion by either party at any time in the case that she had received a refund or that Dr. Byers was owed a share of a tax refund.

Despite this, Ms. Byers was ordered to pay \$6,000 to Dr. Byers for a refund that did not exist, and the \$12,000 debt she would incur was omitted. This had the effect of giving Dr. Byers an extra \$6,000.

Therefore, there is no evidence to persuade a fair-minded, rational person that there is a 2017 tax refund to be divided between the parties, and this provision should be determined to be an abuse of discretion with the \$6,000 to Dr. Byers stricken from the Decree.

C. It was error to characterize the 9003 Canyon Drive property as Dr. Byers' separate property when he admitted it was the parties' property, admitted it had been extensively commingled with community property/community income, and admitted that it was paid for by community assets.

Under RCW 26.09.080, the court must dispose of both community and separate property as is just and equitable. As part of this disposition, the court must characterize the property as community or separate. *In re Marriage of Kile*, 186 Wn. App. 864, 875, 347 P.3d 894 (2015). The law favors characterization of property as community property “unless there is clearly no question of its [separate] character.” *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Property is not characterized by title or the name under which it is held. *In re Marriage of Skarbek*, 100 Wn. App. 444, 448, 997 P.2d 447 (2000); *In re Marriage of Hurd*, 69 Wn. App. 38, 848 P.2d 184 (1993).

When the character of property is in dispute, “the question of whether property is community or separate is retrospectively determined by its character at the date the property was acquired.” *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999) (citing *Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972)). “Where direct and positive evidence is proffered to the contrary, however, this presumption can be rebutted.” *In re Marriage of Zahm*, 138 Wn.2d at 223 (citing *In re Marriage of Olivares*, 69 Wn. App. 324, 326, 848 P.2d 1281 (1993)).

Ultimately, the “test of character is ‘whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof.’” *In re Marriage of Sedlock*, 69 Wn. App. 484, 506, 849 P.2d 1243 (1993) (citations omitted).

When the property to be characterized is real estate, our Supreme Court has adopted the mortgage rule, which is a “legal tool used to characterize property acquired, using both community and separate funds, over a period of time,” which analyzes the community’s obligation and funds contributed toward the asset. *In re Marriage of Zahm*, 138 Wn.2d 213, 224, 978 P.2d 498 (1999). When the real estate (or business) has been combined with personal services belonging to the community, “the rule is that all the income or increase will be considered as community property *in the absence of a contemporaneous segregation of the income between the community and the separate estates.*” *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954) (citing *Salisbury v. Meeker*, 152 Wn. 146, 277 P. 376 (1929)).

For example, in *Buchanan*, stock acquired by the husband before marriage with separate funds was characterized as community property. *In re Buchanan’s Estate*, 89 Wn. 172, 154 P. 129 (1916). There, before marriage, the husband and another man created a lumber company, from which the husband purchased six shares of its capital stock. *Id.* at 174.

After marriage, additional shares of stock were purchased, and the husband continued to work for the company in exchange for a small salary. *Id.* at 174-75. Community credit and funds paid to that credit were used to expand, repair, and rebuild the company. *Id.* As the company's value increased, dividends were paid to the husband, which he deposited into the same bank account as his salary, which was an account used by both spouses for community expenses. *Id.* For these reasons, our Supreme Court held that the company was entirely community property even though the husband had purchased some stock before marriage because his separate contribution was insignificant compared to the community contribution. *Id.*

In this case, the property located at 9003 Canyon Drive should also be characterized as community property for the same reasons as *Buchanan*. First, the property at 9003 Canyon Drive was largely obtained and improved with community credit and funds. Dr. Byers signed the real estate contract before marriage, but it was undisputed that he paid the \$90,000 down payment with a HELOC the parties paid during the marriage. It was also undisputed that he paid the monthly amounts due to the seller with community business funds from BCM, and when he paid off the last amount owed to the seller, it was with a community business credit card that the community business paid during the marriage. Further,

the Statement of Facts above contains a laundry list of expenses paid from community funds, community credit, and the community business accounts, including: property taxes every year, which Dr. Byers characterized as a “business expense,” maintenance and repairs, which Dr. Byers paid with a community business credit card and the community business bank accounts, including: parking lot repair, gutter repair, sewer repair, carpet cleaning, landscaping, roof inspection and repair, window cleaning, fencing, property insurance, building a shed for the parties’ and now the business’ use, outside signage, security system, intercom system, and construction work. Dr. Byers was even held in contempt for some of these expenses as they violated the financial restraints in place, and he later used those same expenses to justify his request to lower child support and maintenance on the basis that his income was lower because of these additional “business expenses.”

Second, there was no separation between the community and the property until Dr. Byers filed for divorce in June of 2018. Before that time, Dr. Byers admitted there was no separate bank account used to collect rent and pay building expenses. Even after he created Living Well Properties, the community BCM continued to pay expenses for the building without reimbursement, and even after he created a separate bank account to collect rent for Living Well Properties, BCM continued to pay

thousands in building and property repairs from BCM accounts as a BCM business expense.

At trial, Dr. Byers tried to establish the building as separate with a lease agreement he also claimed was not “finalized” dated 9/5/17, but even that lease was not followed. That lease required BCM to pay Living Well Properties \$6,000 per month, but at trial, Dr. Byers testified that he had not been paying rent in 2017 and 2018, and that any rent that was paid was not for a \$6,000 monthly amount and was indistinguishable from dividends and his salary in the parties’ joint personal account.

The lease also required the landlord to pay property taxes, repairs, and property insurance, but as described above, BCM paid for all of those things. Dr. Byers testified that he basically gave his accountant the numbers to reconcile at the end of the year so he could file two separate tax returns, but otherwise, there was no separation between BCM, the parties, and the property.

Finally, and on many of the same bases as outlined above, the parties treated the property as theirs. Ms. Byers testified about how they purchased a sign with her personal credit card. Any rent paid was deposited into their joint account along with deposits from BCM far exceeding any rent as well as funds from their Groupon business, and they

used that account for personal expenses. Even after Dr. Byers filed for divorce, he described the property as their property.

Overall, the property was obtained and improved with community funds and community effort, and any contribution Dr. Byers made before marriage is insignificant considering the extensive contributions made by the community. Therefore, it should be determined that it was an abuse of discretion to determine the property is separate because there was no commingling, especially since Dr. Byers specifically admitted the funds were commingled. VRP 590-93.

D. It was error to award the wife only two years of decreasing spousal maintenance when the parties were together for 17 years, it was undisputed that the wife assisted only part time in the business with no other employment throughout that time, the wife had never worked in the field of her education, the husband makes over 14 times her earnings each month with less expenses and debt to pay, and when the husband admitted that she had relied upon him for income the entire marriage.

RCW 26.09.090(1) sets forth the list of non-exclusive factors to be considered when awarding maintenance, including: 1) the parties' financial resources, 2) the time needed for the party seeking maintenance to obtain education and training for employment "appropriate to his or her skill, interests, style of life, and other attendant circumstances, 3) the standard of living during the marriage, 4) the duration of the marriage, 5) the age, physical/ emotional condition, and financial obligations of the

spouse seeking maintenance, and 6) the ability of the other spouse to pay maintenance. The only limitation on a maintenance award is that it be “just.” *In re Marriage of Wright*, 179 Wn. App. 257, 269, 319 P.3d 45 (2013).

Further, the court is not limited to awarding maintenance based only on monthly expenses, for need is just one factor in determining what maintenance is appropriate. *In re Marriage of Barnett*, 63 Wn. App. 385, 388, 818 P.2d 1382 (1991); *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). Rather, the court is to consider all factors in the statute and such other factors necessary to make the award “just.” *Id.*

In this case, Ms. Byers was essentially a stay-at-home mom who homeschooled the parties’ daughter and helped part-time with their business. While she was educated, her education was for a very specific industry in which she had never worked in the 15+ years since she graduated. In fact, she had no work history since graduation other than her assistance at BCM, which was specific to chiropractic work, and the job she was able to find after separation. What work she did do was to help Dr. Byers grow his practice, and while the present value of the practice was shared between the parties, Dr. Byers will go forward reaping the rewards each month from that community effort. At trial, it was determined this would give him at least \$28,920 per month while the

business paid the bulk of his expenses separately and he had no debt. Therefore, he has the ability to pay the \$6,000 per month in maintenance, which is still only a fraction of what he earns, and that is only for working a few days a week. As to Ms. Byers, her monthly income was barely over \$2,000, and in addition to her share of child expenses, she also incurred over \$200,000 in debt just to defend herself in court. This does not seem just, especially for an 18-year relationship during which the parties traveled all over the world extensively.

Ms. Byers needs support, and it will take time to build some work experience, go through re-training and education, and get back on her feet, and even then, she will not make anything near to what Dr. Byers earns each month as a result of their community business. What Ms. Byers has proposed is reasonable and would permit her to support herself until she can get back on her feet and her daughter until she graduates high school, giving Ms. Byers some additional time and opportunities to expand her employment efforts.

E. It was error for the trial court to deny an award of attorney fees to Ms. Byers when she has over \$200,000 in fees and costs from the litigation, when Dr. Byers has a significantly higher income and no debt, and when it was Dr. Byers' actions that dramatically increased her costs.

RCW 26.09.140 allows a court to award reasonable attorney fees in a dissolution action when there is a need for assistance with paying fees and the other party has the ability to assist in their payment.

In this case, Ms. Byers requested attorney fees due to the significant disparity between her income and Dr. Byers' income as well as Dr. Byers' ability to pay. Ms. Byers testified that she had incurred extensive fees and costs to defend herself in this case, which she put on a credit card as she was unable to borrow funds from any friends or family. In contrast, Dr. Byers paid attorney fees from the business, and other than an unproven, indeterminate loan he claimed his parents gave him, he has no debt as he contributed significantly to his personal credit cards before and after filing for divorce. Going forward, without assistance from Dr. Byers, it will take a significant amount of time to pay off her credit card debt, and even at a low interest rate, the interest will still be substantial on \$200,000. If she is forced to use assets to pay off the fees, then she does not have the benefit of those assets to help get her on her feet, meaning maintenance is even more important than otherwise, and she has further lost her interest in community property as a spouse. In contrast, Dr.

Byers' high monthly income and low monthly expenses allows him to pay fees without impacting his ability to pay other expenses. Therefore, an award of attorney fees based on RCW 26.09.140 is appropriate here.

Further, Ms. Byers requested an award of attorney fees based on Dr. Byers' intransigence. Intransigent behavior is case-specific, but it includes "foot-dragging, obstructing, filing unnecessary or frivolous motions, refusing to cooperate with the opposing party, noncompliance with discovery requests, and any other conduct that makes the proceeding unduly difficult or costly." *In re Marriage of Wixom*, 190 Wn. App. 719, 725, 360 P.3d 960 (2015). "When intransigence is established, the financial resources of the spouse seeking the award are irrelevant." *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

In this case, Dr. Byers intentionally refused to follow court orders, even up to the time of trial when it was discovered he was still making large purchases in violation of court order, and refused to comply with basic discovery requests (even to the point of taking six months to simply provide his signature), necessitating multiple Motions to Compel and the appointment of a Special Master. He filed three frivolous motions, one as an emergency that was not an emergency, and two others just before trial when trial would decide those issues. He also dragged out trial by contradicting his own testimony, committing perjury, and even refusing to

acknowledge commingling regarding the Canyon Drive property until confronted with five years of bank statements. All of these things made the case more expensive, and Dr. Byers should be found to be intransigent.

CONCLUSION AND REQUEST FOR FEES ON APPEAL

For the reasons set forth above, Ms. Byers respectfully requests that this Court reverse the trial court's decisions on these five issues and awards her attorney fees for the necessity of filing this appeal. RAP 18.1 grants this Court the ability to order that a party's fees and costs be reimbursed for the appeal. An affidavit of financial need will be provided in accordance with RAP 18.1(c) prior to the date set for oral argument.

DATED: August 11, 2020

CARLSEN LAW OFFICES, PLLC

A handwritten signature in black ink, appearing to read "Laura A. Carlsen". The signature is written in a cursive style with a horizontal line underneath it.

Laura A. Carlsen, WSBA No. 41000

PROOF OF SERVICE

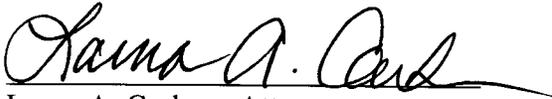
Laura A. Carlsen certifies as follows:

On August 11, 2020, I served upon the following persons a true and correct copy of this Brief via electronic service to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED AND DATED this 11th day of August, 2020, at Tacoma, WA.


Laura A. Carlsen, Attorney

CARLSEN LAW OFFICES

August 11, 2020 - 11:29 PM

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