

COA No. 30029-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

MELISSA G. MCCARTHY,

Respondent,

v.

SEAN P. MCCARTHY,

Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Respondent
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

COA No. 30029-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

MELISSA G. MCCARTHY,

Respondent,

v.

SEAN P. MCCARTHY,

Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Respondent
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR	
A: The trial court's findings of fact are verities on appeal as they are unchallenged and are supported by substantial evidence in any event.....	1
B. The trial did not err in concluding a committed intimate relationship existed and in making its property distribution, award of maintenance, and child support determination.....	1
II. COUNTER-STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	7
A. Because Mr. McCarthy did not challenge any of the court's findings of fact, they are verities on appeal.....	7
B. The trial court properly determined a committed intimate relationship existed.....	8
C. The trial court did not err in its property distribution.....	14
D. The court did not err by ordering maintenance for Ms. McCarthy.....	18
E. The court did not err in its child support determination.....	20
F. The court did not err by refusing to value Ms. McCarthy's inheritance, which is not to be considered for purposes of child support.....	22
G. On his motion for reconsideration, the court properly refused to consider evidence then sought to be raised by Mr. McCarthy that was known to him or his attorney or was available	

with due diligence.....	23
H. Mr. McCarthy’s assignment of error regarding post-secondary education is not before this court.....	25
I. Mr. McCarthy’s assignment of error to the trial court’s decision allowing Ms. McCarthy four months to move out of the Skipworth home is moot.....	25
J. Mr. McCarthy is not entitled to fees on appeal.....	26
K. Ms. McCarthy is entitled to an award of her attorney fees on appeal under RCW 26.09.140 and RAP 18.1.....	26
IV. CONCLUSION.....	27

TABLE OF AUTHORITIES

Table of Cases

<i>Bell v. Bell</i> , 101 Wn. App. 366, 4 P.3d 849 (2000).....	21
<i>Citizens for Financially Responsible Gov’t v. City of Spokane</i> , 99 Wn.2d 339, 662 P.2d 845 (1983).....	25
<i>Connell v. Francisco</i> , 127 Wn.2d 339, 898 P.2d 831 (1995).....	8, 9, 14
<i>Gormley v. Robertson</i> , 120 Wn. App. 31, 83 P.3d 1042 (2004).....	8
<i>Green River Comm. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.</i> , 107 Wn.2d 427, 730 P.2d 653 (1986).....	7
<i>In re Long and Fregeau</i> , 158 Wn. App. 919, 244 P.3d 26 (2010).....	13
<i>In re Marriage of Brewer</i> , 137 Wn.2d 756, 976 P.2d 102 (1999).....	16

<i>In re Marriage of Brown</i> , 159 Wn. App. 931, 247 P.3d 466 (2011).....	26
<i>In re Marriage of Foley</i> , 84 Wn. App. 839, 930 P.2d 929 (1997).....	17, 19, 20
<i>In re Marriage of Gainey</i> , 89 Wn. App. 269, 948 P.2d 865 (1997).....	23
<i>In re Marriage of Griswold</i> , 112 Wn. App. 333, 48 P.3d 1018 (2002), <i>review denied</i> , 148 Wn.2d 1023 (2003).....	15
<i>In re Marriage of Harris</i> , 107 Wn. App. 597, 27 P.3d 656 (2001).....	16
<i>In re Marriage of Holmes</i> , 128 Wn. App. 727, 117 P.3d 370 (2005).....	22
<i>In re Marriage of Hurd</i> , 69 Wn. App. 38, 88 P.2d 185, <i>review denied</i> , 122 Wn.2d 1020 (1993).....	23
<i>In re Marriage of King</i> , 66 Wn. App. 134, 831 P.2d 1094 (1992).....	27
<i>In re Marriage of Lindsey</i> , 101 Wn.2d 299, 678 P.2d 328 (1984).....	9, 13
<i>In re Marriage of Pennington</i> , 142 Wn.2d 592, 14 P.3d 764 (2000).....	9
<i>In re Marriage of Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984).....	17, 19
<i>In re Marriage of Zahm</i> , 138 Wn.2d 213, 978 P.2d 498 (1999).....	17
<i>Koher v. Morgan</i> , 93 Wn. App. 398, 968 P.2d 920 (1998), <i>review denied</i> , 137 Wn.2d 1035 (1999).....	14, 15
<i>McIntyre v. Fort Vancouver Plywood Co.</i> , 24 Wn. App. 120, 600 P.2d 619 (1979).....	8, 9, 13

<i>Morse v. Antonellis</i> , 149 Wn.2d 572, 70 P.3d 125 (2003).....	8
<i>Orwick v. City of Seattle</i> , 103 Wn.2d 249, 692 P.2d 793 (1984).....	25
<i>Soltero v. Wimer</i> , 159 Wn.2nd 428, 150 P.3d 552 (2005).....	13
<i>United Nursing Homes, Inc. v. McNutt</i> , 35 Wn. App. 632, 669 P.2d 476, <i>review denied</i> , 100 Wn.2d 1030 (1983)....	7
<i>Victoria Corp. Sole v. Corporate Bus. Park, L.L.C.</i> , 138 Wn. App. 443, 158 P.3d 1183 (2007), <i>review denied</i> , 163 Wn.2d 1013 (2008).....	26
<i>Wagner Dev., Inc. v. Fidelity & Dep. Co. of Maryland</i> , 95 Wn. App. 896, 977 P.2d 639, <i>review denied</i> , 139 Wn.2d 1005 (1999).....	25
<i>Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.</i> , 73 Wn. App. 293, 869 P.2d 404, <i>review denied</i> , 124 Wn.2d 1015 (1994).....	26

Statutes

RCW 26.09.080.....	15
RCW 26.09. 090(a) - (f).....	17
RCW 26.09.140.....	26

Rules

CR 59.....	23
CR 59(a)(4).....	25
RAP 10.3(g).....	7
RAP 17.4(g).....	1

<i>Morse v. Antonellis</i> , 149 Wn.2d 572, 70 P.3d 125 (2003).....	8
<i>Orwick v. City of Seattle</i> , 103 Wn.2d 249, 692 P.2d 793 (1984).....	25
<i>Soltero v. Wimer</i> , 159 Wn.2nd 428, 150 P.3d 552 (2005).....	13
<i>United Nursing Homes, Inc. v. McNutt</i> , 35 Wn. App. 632, 669 P.2d 476, <i>review denied</i> , 100 Wn.2d 1030 (1983)....	7
<i>Victoria Corp. Sole v. Corporate Bus. Park, L.L.C.</i> , 138 Wn. App. 443, 158 P.3d 1183 (2007), <i>review denied</i> , 163 Wn.2d 1013 (2008).....	26
<i>Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland</i> , 95 Wn. App. 896, 977 P.2d 639, <i>review denied</i> , 139 Wn.2d 1005 (1999).....	25
<i>Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.</i> , 73 Wn. App. 293, 869 P.2d 404, <i>review denied</i> , 124 Wn.2d 1015 (1994).....	26

Statutes

RCW 26.09.080.....	15
RCW 26.09. 090(a) - (f).....	17
RCW 26.09.140.....	26

Rules

CR 59.....	23
CR 59(a)(4).....	25
RAP 10.3(g).....	7
RAP 17.4(g).....	1

RAP18.1.....27

RAP 18.1(b).....26

I. COUNTER-STATEMENT OF ASSIGNMENTS OF ERROR

A. The trial court's findings of fact are verities on appeal as they are unchallenged and are supported by substantial evidence in any event.

B. The trial court did not err in concluding a committed intimate relationship existed and in making its property distribution, award of maintenance, and child support determination.

II. COUNTER-STATEMENT OF THE CASE

Sean P. McCarthy, appellant, has not assigned error to the trial court's findings of fact, which thus become verities. (See RAP 17.4(g)). Rather, he challenges certain of the court's conclusions of law relating to the issues of maintenance, committed intimate relationship, property distribution, and child support.

The court's unchallenged findings state:

1. The petition for Legal Separation was filed on April 23, 2010.
2. The petition was amended to a Dissolution of Marriage on November 12, 2010.
3. The court held a bench trial on February 14, 15, and 16, 2011.
4. Ms. McCarthy alleged a meretricious relationship and the court finds a committed intimate relationship (meretricious relationship) existed.

5. The court finds the relationship (committed intimate) commenced on March 1, 2002, only seven or eight months before marriage.

6. On March 1, 2002, Ms. McCarthy resided in Lafayette, Louisiana. Mr. McCarthy left Louisiana around March 3, 2002, and commenced working for the Veterans Administration on March 11, 2002, in Silverdale, WA.

7. Mr. McCarthy purchased a home on Skipworth Ave., Spokane, Washington, using his VA certificate. The home was purchased in Mr. McCarthy's name alone and closed on June 19, 2002. The parties began residing together in the Skipworth home in mid-July 2002.

8. Ms. McCarthy provided no expert testimony that she is unable to work.

9. Ms. McCarthy has a bachelor's degree and testified that she has marketable skills, last worked in 2008 and her last wage was \$11 per hour.

10. Ms. McCarthy receives at least \$9,000 per year from trust income for oil and gas rights.

11. Ms. McCarthy (and her 2 sisters) are beneficiaries of a trust that is irrevocable and her mother's ½ of the trust was known to be valued at \$1,000,000. Ms. McCarthy's step-father currently controls the irrevocable trust and upon his death the remainder of the trust will be divided between Ms. McCarthy and her two sisters.

12. The court was unable to value the trust and was unable to value the trademark awarded to Ms. McCarthy, but the court finds there is an inheritance and that it is substantial.

13. All specific findings are taken from the Court's oral ruling. If they are not verbatim, the oral ruling supersedes those findings. The specific findings enumerated herein

are not to be given any greater weight than the oral ruling. (CP 68-69).

In its oral ruling, the court addressed the issues and made these findings of fact:

The parties have acquired property and debt both before and during the marriage and since separation. The most contested issue in this case is whether or not a committed intimate relationship, which is what our Supreme Court calls it, or an equity relationship, which is what our Court of Appeals most recently called it, whether that type of relationship existed between the parties before the marriage, and if so, when did the relationship begin?

As I went through and started to write out my findings of fact, a lot of these findings are undisputed, and I'll try to identify the disputed issues, but both parties testified they met in 1992; Ms. McCarthy said it was in May of that year; and both parties agree that Mr. McCarthy moved into Ms. McCarthy's residence on Gerald Drive in Lafayette, Louisiana. When I say "her residence", I recognize it was owned by her stepfather, but the residence she was residing in. Ms. McCarthy characterized the relationship between the parties as "involved" as of October of 1992. Mr. McCarthy testified that he moved in with Ms. McCarthy within one year of beginning the relationship, which he said was after the summer of '92 after Hurricane Andrew. Their son Logan was conceived sometime around November of 1992, and he was born, as I mentioned before, August 20 of 1993.

It was not disputed between parties that until at least August of 1995, the parties maintained their cohabitation. According to Ms. McCarthy, she and Mr. McCarthy lived and behaved like husband and wife. She described their relationship before the marriage as intimate and committed. She testified they planned for the future

together, that when Mr. McCarthy suffered a work-related injury in 1994 Ms. McCarthy said she cared for him during that recuperation at the Gerald residence. Ms. McCarthy testified and Mr. McCarthy had acknowledged that at least three times between 1995 and 2002 that Mr. McCarthy would refer to her or hold her out as his wife.

It is also undisputed that starting as early as 1995 – August 2nd of '95, according to Mr. McCarthy, or '96 According to Mrs. McCarthy, -- Mr. McCarthy maintained another residence; first while attending a school for one semester in Hammond, Louisiana; then on 105 Country Lane, No. D, in Lafayette, Louisiana; then 100 Roguely (sp) Drive, No. 1221, Road, Apartment 1, in Lafayette, Louisiana.

According to Ms. McCarthy, Mr. McCarthy needed a quiet place to relax and study. She testified that he never spent significant time away from the Gerald Drive residence, that they had dinner each night and slept together at the Gerald residence. She asserts that there was never a discussion that Mr. McCarthy was moving out or that the relationship was over. She said he kept his possessions at the Gerald Drive residence.

Mr. McCarthy testified that he moved out the first time around August of 1995, although he couldn't recall the exact date. He said he moved out because of issues with her children, meaning Ms. McCarthy. He described their relationship as always strained and very complex because of her kids. Mr. McCarthy asserted that he spent the majority of the nights at his separate residences and that he lived with his daughter on Duhon in 2000 and that he moved from the Duhon residence to Washington state in 2002.

During this dispute period of time, '95 to '02, the parties never sought a parenting plan for Logan. Ms. McCarthy never requested child support through any court action. It's also undisputed Mr. McCarthy

continued to use the Gerald Drive address to receive mail from 1994 through 2002; and this isn't just mail, you know, junk mail or flyers, but for such things as a Department of Labor injury in 1994, applications for a Department of Labor injury; May of '95, references from the Insurance Commissioner; student aid in January of '97, August of '99; medical evaluations in January of '98; worker's compensation claims and other contacts with lawyers and for disability and Social Security claims.

Mr. McCarthy also testified that he broke off his relationship with Ms. McCarthy after he found out she had slept with another man. According to him, he told her it was over, speaking of the relationship. Ms. McCarthy acknowledged a one-night stand after the death of her daughter. No one testified as to when that occurred so I'm not sure where to put that in terms of the timeline. Mr. McCarthy also testified that the couple, quote, rekindled our relationship about six months after the breakup.

The parties agree that in 2002, Mr. McCarthy obtained a job with the Veterans Administration, and he was first assigned to Silverdale, Washington. According to Ms. McCarthy, Mr. McCarthy left around March the 3rd of '02, and his first day on the job was March 11 of '02. She testified that she stayed behind to get Gerald Drive possessions ready to move, to allow all the kids to finish school, and for her to finish cleaning up her mother's estate. Ms. McCarthy described their good-bye at the airport as Mr. McCarthy telling her that he was doing this for her, that he would be back to get her, and that they kissed good-bye.

In April 2002, Ms. McCarthy flew to the Northwest, and the McCarthys – again, Ms. Williams at the time but Ms. McCarthy now – went looking for a home together in the Spokane area where Mr. McCarthy was being transferred or was transitioning. Mr. McCarthy used a government credit card by mistake to pay for the airfare for what he

described as his wife, Ms. McCarthy, during that period of time. They both signed a buyer's agreement with Tomlinson Black, and that resulted in the purchase of the Skipworth residence. Ms. McCarthy had previously seen this residence online while researching homes. It was the last home they looked at while she was here in Spokane.

Ms. McCarthy returned to Louisiana to finish readying for the move. The home on Skipworth was purchased in Mr. McCarthy's name only, using his veteran's status to obtain a VA loan. He made the small down payment. On May 26 of 2002, Mr. McCarthy filled out a student loan application to consolidate his student loans, and he listed Melissa Williams as his spouse and her stepdad, George Robertson, as his father-in-law. On June 19, 2002, the Skipworth home closed in Mr. McCarthy's name only. On July 4 of 2002, both of the McCarthys left Louisiana in two 26-foot trucks loaded with the children and all of their possessions and moved directly to the Skipworth home, and the parties then legally married three-and-a-half months later on October 14 of 2002. As I mentioned earlier, other than the intent of the parties when Mr. McCarthy had those separate residences, most of that factual timeline was not in dispute. (3/1/11RP 3-8).

From those findings, the court concluded a committed intimate relationship existed. (CP 68-29; 3/1/11 RP 11-13).

The court entered findings of fact and conclusions of law and a decree of dissolution. (CP 68-76, 78-84). Mr. McCarthy's motion for reconsideration was denied. (CP 232-237). He appealed.

III. ARGUMENT

A. Because Mr. McCarthy did not challenge any of the court's findings of fact, they are verities on appeal.

RAP 10.3(g) provides in relevant part:

. . . A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

As did the appellant in *United Nursing Homes, Inc. v. McNutt*, 35 Wn. App. 632, 669 P.2d 476, *review denied*, 100 Wn.2d 1030 (1983), Mr. McCarthy devotes a substantial portion of his brief arguing the facts. And just as the appellant failed to do in *McNutt*, he did not comply with RAP 10.3(g) and did not properly assign error to any of the court's findings of fact (written or oral), thus making them verities on appeal. 35 Wn. App. at 624. Moreover, his failure to comply is not otherwise cured because he did not set forth any challenged findings in his brief and the nature of his challenge to any specific finding is unclear. *Green River Comm. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986). Since no findings of fact are assigned as error and separately identified and set forth as required, the court's

findings are accepted as verities and the issues on review are limited to whether those findings of fact support the conclusions of law. *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wn. App. 120, 123, 600 P.2d 619 (1979).

In arguing the facts, Mr. McCarthy in essence attacks the credibility decisions made by the trial court. But credibility determinations are solely the province of the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

In these circumstances, the only issues on review are whether the court's findings support its conclusions. *McIntyre*, 24 Wn. App. at 123. They do.

B. The trial court properly determined a committed relationship existed.

The court's findings of fact are verities. Review of the court's conclusions of law is de novo. *Gormley v. Robertson*, 120 Wn. App. 31, 36, 83 P.3d 1042 (2004).

A committed intimate relationship is a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist. *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995) (citing *In re Marriage of*

Lindsey, 101 Wn.2d 299, 304, 678 P.2d 328 (1984)). The court considers several factors in determining the existence of such a relationship. 127 Wn.2d at 346. No one factor, however, is determinative. *In re Marriage of Pennington*, 142 Wn.2d 592, 605, 14 P.3d 764 (2000).

Relevant factors establishing a committed intimate relationship include continuous cohabitation, relationship duration, relationship purpose, pooling of resources and services for joint projects, and the parties' intent. *Connell*, 127 Wn.2d at 346. These factors are neither exclusive nor hypertechnical, but are a means to examine all relevant evidence. *Pennington*, 142 Wn.2d at 602.

The trial court's findings support its conclusion of law that a committed intimate relationship existed here since March 2002. *McIntyre*, 24 Wn. App. at 123. From those findings, the court analyzed in great detail the relevant factors in deciding there was such a relationship here:

The first factor that I want to address is the continuous cohabitation. As I mentioned before, the facts are undisputed the parties began living together in approximately 1992. They had a child together in 1993. They moved to Washington together in 2002, and they married later that same year in 2002. There is also no dispute that for some of the pre-marriage years, Mr. McCarthy maintained a separate residence. Whether it was for a quiet place to study and rest or whether it

was his separate residence is the most hotly contested issue in this case. Again, what is not contested is that Mr. McCarthy used the family residence on Gerald Drive as his mailing and contact address for significant purposes like student loans, disability claims, and legal and medical contacts. Even Mr. McCarthy acknowledges that he didn't reside exclusively at those apartments. He said he moved out the first time in 1995, suggesting that their relationship was back on and together at later times, so the parties had a continuous relationship – which I'm going to talk about in a few minutes – other than a period of separation, but there was more likely than not at least some period of living separate and apart, and I'm distinguishing that from studying at a separate residence.

I considered the relationship duration. Again, there's no dispute the relationship between these parties began in '92 and ended in 2010. They had a child together in '93, moved to Washington together; and other than that testimony of the one-night stand as described by Ms. McCarthy around the death of her daughter, there was no testimony from either party that either maintained any relationship with any other person, so they seemed to have a consistent relationship during that period.

The relationship purpose, that's another factor I considered. The evidence is uncontroverted that the parties maintained a marriage-like relationship. They shared a residence, provided each other mutual love, care, support, sex, friendship, and companionship. They referred to each other as husband and wife. They blended their families; and when Mr. McCarthy obtained employment in Washington, Ms. McCarthy and the children followed him here.

I considered the pooling of resources and services for joint projects. The parties before they married pooled their resources by maintaining separate accounts but each sometimes transferring funds

between those accounts, and they both seemed to be sharing in their monthly living expenses. They also continued to maintain separate accounts after they married, but once Mr. McCarthy found solid employment in 2002, they settled into a pretty traditional marriage-like relationship where he was the primary breadwinner and Ms. McCarthy cared for the home and the children. Ms. McCarthy provided substantial details about the work she and Mr. McCarthy, when he wasn't working, did in improving and maintaining the Skipworth home.

I considered the parties' intent. Again, the relationship appeared to be marriage-like. Mr. McCarthy referred to her as his wife and held her out as so. There were no other relationships with other parties. The fact that they never pursued child support or a parenting plan suggests that they were likely co-parenting and thus likely to cohabiting and pooling their resources.

Another factor that I think is very relevant to this nonexclusive list is the parties did eventually marry. A lot of these meretricious/intimate relation/equity relation cases, the parties never married for various reasons; but when these parties eventually did marry as husband and wife, it's pretty clear that they had some sort of a significant relationship leading up to that marriage. As I mentioned before, Ms. McCarthy, Logan, and the rest of her family following Mr. McCarthy from Louisiana to Washington when he obtained employment in my mind was another significant factor; so the evidence in my mind is overwhelming that the parties had a committed intimate relationship that would create this equitable relationship no later than early 2001 Mr. McCarthy obtained employment here in Washington, moved to Washington, and Ms. McCarthy followed with the children and their possessions.

The two things that troubled me the most about trying to decide when that equity relationship started were those separate residences of Mr. McCarthy, Mr. McCarthy's testimony to the six-month gap in their relationship, and the fact that both parties have characterized the student loans that Mr. McCarthy obtained, at least partially during their relationship, they both characterized that as separate property. Now keeping a separate residence year in and out for maybe six or seven years when resources are limited is indication to me that things were not always rosy in this relationship. That may explain why the parties felt that his student loans were separate, and I can see Mr. McCarthy taking the position that the student loans were separate as being consistent with his position that they had no intimate committed relationship before the day they were married, but that's not consistent with Ms. McCarthy's position that it's separate.

It is Ms. McCarthy's burden to prove the existence and the beginning point of that equity relationship, and so while I have no question in my mind that by March of 2002 the parties were in a committed intimate relationship sufficient to justify an equitable interest in the property acquired from that point forward, exactly when that relationship rebounded from the separation and the affair and the living separate and apart and became committed becomes murky before that move. Since Ms. McCarthy has the burden to prove the beginning of the relationship, I am concluding that the parties had an equity Relationship pre-marriage as of March 1st of 2002 when Mr. McCarthy said good-bye at the airport, I'll be back to get you, and Ms. McCarthy began the process of packing up the house, looking for homes over the internet, coming to visit the home, and eventually moving the family.

With that conclusion in mind, I now am going to go back and identify the community and separate property and values. (3/1/11 RP 9-13).

The court's analysis of the relevant factors is clearly supported by the record. See *In re Long and Fregeau*, 158 Wn. App. 919, 927, 244 P.3d 26 (2010). Moreover, the facts found by the court support its conclusions. *McIntyre*, 24 Wn. App. at 123.

Mr. McCarthy contends there was no committed intimate relationship because they did not have joint financial accounts and the Skipworth home was not purchased jointly. But joint accounts are not an essential factor in finding such a relationship. *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 692 (2007). The court noted the parties transferred funds between their separate accounts and shared in their monthly living expenses. (3/1/11 RP 10).

Furthermore, the fact that title has been taken in the name of only one of the parties does not, in itself rebut the presumption of common ownership. See *Lindsey*. 101 Wn.2d at 306-07.

When the factors are taken as a whole, the trial court properly concluded a committed intimate relationship existed. *Fregeau*, 158 Wn. App. at 928.

C. The trial court did not err in its property distribution.

Once a committed intimate relationship is found, the court evaluates the interest each party has property acquired during the relationship and makes a just and equitable distribution of the property. *Lindsey*, 101 Wn.2d at 307. Review of the distribution is for abuse of discretion. *Koher v. Morgan*, 93 Wn. App. 398, 401, 968 P.2d 920 (1998), *review denied*, 137 Wn.2d 1035 (1999).

Mr. McCarthy first contends the court erred by ordering a \$15,000 equalization payment to Ms. McCarthy upon sale of the Skipworth home, the only item of property at issue that was acquired during the committed intimate relationship. But all property acquired during such a relationship is presumed to be owned by both parties, no matter if title is in the name of just one of the parties. *Connell*, 127 Wn.2d at 351. The court determined the home was thus acquired during the committed intimate relationship and characterized as community. (3/1/11 RP 13, 27-28). In these circumstances, the court did not abuse its discretion by making a \$15,000 equalization award to Ms. McCarthy. *Koher*, 93 Wn. App. at 401.

Mr. McCarthy also claims the court erred by improperly classifying his FERS and TSP retirement accounts as community.

At the end of a marriage, both separate and community property and liabilities are before the court for such distribution as is equitable. RCW 26.09.080; *In re Marriage of Griswold*, 112 Wn. App. 333, 48 P.3d 1018, *review denied*, 148 Wn.2d 1023 (2002). The court found, and Mr. McCarthy acknowledged, that all the contributions to both accounts occurred during the course of the marriage. (RP 349; 3/1/11 RP 22-23). It properly characterized the accounts as community. The court did not abuse its discretion by awarding Ms. McCarthy ½ of the value of the FERS and TSP accounts as of April 23, 2010, the date of separation. See *Fregeau*, 158 Wn. App. at 929-30.

Mr. McCarthy contends the court's characterization and distribution of certain credit card liabilities and a Mercury Cougar and the valuation of a Playstation 3 and games was improper. Again, the standard of review is abuse of discretion. *Koher*, 93 Wn. App. at 401.

Ms. McCarthy was the only one who testified about the Cougar obtained by the parties, giving it a value of \$2200. (3/1/11 RP 22). Even if it were separate property, the court did not abuse its discretion in awarding it to her as its overall distribution was

nonetheless just and equitable. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

With respect to the Capital One card on which Ms. McCarthy was an authorized user although it belonged to her stepfather, she testified the card was used for family purposes. (RP 107-08). Characterizing the debt as community since it was used during the marriage, the court ordered Ms. McCarthy to pay it. (3/1/11 RP 27). The court did not manifestly abuse its discretion, which was exercised on tenable grounds and reasons. *In re Marriage of Harris*, 107 Wn. App. 597, 27 P.3d 656 (2001).

As for the \$2,000 valuation of the Playstation 3 and games, the trial court had substantial evidence before it to so value them. (3/1/11 RP 20-21). The games cost \$70-\$90 new and there were about 250 of them. (RP 158-59). In light of this evidence, the court did not abuse its discretion by placing a \$2000 value on the Playstation 3 and games.

D. The court did not err by ordering maintenance for Ms. McCarthy.

In finding 2.12, the court ordered maintenance because “[it] finds the wife has a need and the husband has some ability to pay maintenance.” (CP 73). The record supports the award.

The trial court's decision on spousal maintenance is reviewed for an abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). An abuse of discretion occurs when the court bases its decision on untenable grounds or for untenable reasons. *In re Marriage of Foley*, 84 Wn. App. 839, 845, 930 P.2d 929 (1997).

Some factors that the court must consider are the post-dissolution financial resources of the parties; their abilities to independently meet their needs; the time necessary for the party seeking maintenance to find employment; duration of the marriage; the standard of living during the marriage; the age, physical, and emotional condition, and financial obligations of the spouse seeking maintenance; and the ability of the spouse from whom maintenance is sought to meet his needs and financial obligations. RCW 26.09.090(a)-(f). The only limitation on the maintenance award is that the amount and duration be just in light of all the relevant factors. *In re Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984).

The court reasoned:

I'm going to talk about maintenance, though, but there's going to have to be some offsets.

In terms of need and ability to pay, Ms. McCarthy testified she pays zero currently in rent but that it will go up to 600. She lived many years in her stepfather's home in Louisiana and paid rent for a very minimal amount of time. I consider that a soft figure. I used zero for her rent. She testified utilities were 350, phone 100, electric 200, garbage 75, cable 90 to 100; I used 95; but she's splitting those costs with Mr. Divis. I used one-half of those amounts, \$410. . . .

410. \$500 for food, 100 for other supplies, \$100 for meals eaten out. That's \$700 for her and one child, pretty consistent with Mr. McCarthy for him and Logan. She paid 100 to 150 for Adalya's clothing. I put it in at 125. \$600 for gas, I reduced that to 300 'cause she won't be having to come into court into Spokane all the time. \$200 for uninsured medical, she has 100 for clothing, 50 hair care, 77 for Adalya's cell phone, \$60 for Adalya's lunches, which is \$2,022. If I deduct the \$750 in trust money I believe she is bringing in, I think she's established a need of \$1272, although She gets a little bit of money in Social Security for Adalya.

Again, the husband's net that I used was the 6,949/6,950. He had expenses of 4,564 for his household expenses; credit cards of 264; student loan of 265; another 5 or \$600 of other credit cards, some of which, according to his financial declaration, will be paid off after three or four or five payments, so there is an ability to pay for Mr. McCarthy.

I am mindful of the fact that I did not add in the Imputed income to Ms. McCarthy for maintenance, but at some point, Ms. McCarthy, you are going to need to become self-sufficient. Mr. McCarthy's not there for an extended period of time. I have found you've had about an 8-year relationship. That is a middle-term relationship in my mind, but she has been the homemaker for many years, has not

been a primary breadwinner. Mr. McCarthy's in a much better financial condition. I'm ordering \$1,200 a month in maintenance for two years to allow Ms. McCarthy enough time to get a bachelor's and employed. That will start March 1st of '11 and go through the end of February of 2013. It will terminate upon her remarriage, either party's death. Ms. McCarthy has an affirmative obligation to advise Mr. McCarthy in writing if she receives any large lump sum benefits from that trust if her stepfather dies or if she begins to be gainfully employed.

In the event Ms. McCarthy becomes employed – I want to motivate her to work, so I'm not going to give a dollar for dollar deduction, but she can give notice to Mr. McCarthy, and if she earns, let's say, 1,200 a month, I will deduct a third of that from the maintenance, giving her two-thirds of the income and giving Mr. McCarthy a one-third break of her earned income from maintenance. Whatever's owed under the temporary order, 16 or 1,700, there's a question whether it was paid or not, but whatever that order is in effect until February 28th of '11. (3/1/11 RP 30-32).

The parties' economic positions following the dissolution are of utmost importance. *Washburn*, 101 W.2d at 181. Maintenance may serve to equalize the parties' standard of living for an appropriate period of time. *Id.* at 179. The court's decision on maintenance "is governed strongly by the need of one party and the ability of the other party to pay an award." *Foley*, 84 Wn. App. at 845-46. The court observed those standards here.

The court's unchallenged findings support its determination that Ms. McCarthy is entitled to maintenance. The reasons for its decision were explained extensively by the court, which therefore did not abuse its discretion as its award was clearly based on tenable grounds and for tenable reasons. *Foley*, 84 Wn. App. at 845.

E. The court did not err in its child support determination

On child support, the court once again painstakingly detailed the reasons for its decision:

Child support and maintenance. Mr. McCarthy, his year-to-date income on his last pay stub in December of '10 showed \$79,330.24. That is \$6,611 per month. I deducted from that Social Security and Medicare and .0565, which is the current withholding for at least the next year, unless that is extended based on the tax congressional act in December. That's 374 a month. For the federal, I looked at what the parties withheld and paid based on the '09 tax return. They paid \$4,096 in tax on 77,186 in income. That's a 5.3 effective tax rate. I used 5.3 and deducted \$350 for federal, and then I added his FERS contributions and the TSP contributions during 2009; 621 for the FERS, 5,200 for the TSP. That averages 485 a month. That's \$1,209 in deductions. That gives me a net from his pay of 5,402, and Mr. McCarthy testified he receives Veterans disability of 1,298 a month and 249 a month in worker's comp, which is 57.48 a week. That's an additional 1,547 a month. I'm going to use an income for Mr. McCarthy of \$6,949 net. This is for child support purposes.

For Ms. McCarthy, the best evidence I have of separate income from the trust is about \$9,000 a year. That is 750 a month. I do not believe she will be paying taxes on that since she can claim Adalya and herself, and I don't think Social Security is deducted so I made no adjustments; and I have to, in my mind, impute some income for child support purposes to Ms. McCarthy because although she testified of her physical disabilities, there was no expert testimony that she's unable to work. She has a bachelor's degree, although she wants to seek a master's. She testified she last worked in '08 and made \$11 an hour working up to 28 hours a week. She admits she has marketable skills, used to run a fast computer, and I think it would be appropriate knowing that she's living out in a rural area to impute \$10 an hour for 20 hours a week. 52 weeks in a year, divide that by 12 months, I'm going to impute an additional \$850.

. . . Total 1,600 to Ms. McCarthy from trust and imputed income. You can calculate child support based on those numbers. However, I am deviating downwards to \$50 based on tax planning and maintenance. (3/1/11 RP 28-30).

Contrary to Mr. McCarthy's argument, the court did impute income to Ms. McCarthy. On the facts before it, the court properly did so. Furthermore, the court acted well within its discretion to deviate downward as the decision was again based on tenable grounds and for tenable reasons, *i.e.*, tax planning and maintenance. *Bell v. Bell*, 101 Wn. App. 366, 4 P.3d 849 (2000);

see also *In re Marriage of Holmes*, 128 Wn. App. 727, 737, 117 P.3d 370 (2005).

F. The court did not err by refusing to value Ms. McCarthy's inheritance, which is not to be considered for purposes of child support.

The court found that Ms. McCarthy and her two sisters were beneficiaries of an irrevocable trust and her mother's ½ of the trust was known to be valued at \$1,000,000. Her stepfather currently controlled the irrevocable trust and upon his death the trust remainder would be divided between the three sisters. (FF 11, CP 69). With the evidence available, the court was unable to value the trust. It did find, however, that there was an inheritance and it was substantial. (FF 12, CP 69). The court stated:

There is a trust that Ms. McCarthy has for oil and gas. She testified that the best estimate she had was that it could be worth a million dollars divided between her three sisters. I really had very little information to figure out what a true value would be. Ms. McCarthy testified that that million was under the sole control of her stepfather, that it was being used for his support, so again, without any better detail, I have awarded it to the wife as separate property, but I cannot just guess at a value, but I recognize that it's there. (3/1/11 RP 24).

The court properly took into account the substantial inheritance and made its property distribution with that in mind See *In re Marriage*

of Hurd, 69 Wn. App. 38, 49, 88 P.2d 185, *review denied*, 122 Wn.2d 1020 (1993). The court properly refused to speculate on whatever value, if any, the irrevocable trust may have upon distribution after her stepfather died. Had it done so, the assignment of an arbitrary value to what is basically a testamentary gift would be an abuse of discretion as no tenable grounds or reasons could support it. Indeed, with respect to child support, the corpus of an inheritance is not included in a parent's gross income. *In re Marriage of Gainey*, 89 Wn. App. 269, 276-77, 948 P.2d 865 (1997). As for maintenance, the inheritance was also taken into consideration by the court. (3/1/11 RP 32). It did not err.

G. On his motion for reconsideration, the court properly refused to consider evidence then sought to be raised by Mr. McCarthy that was known to him or his attorney or was available with due diligence.

Mr. McCarthy raised no grounds for the court to reconsider its decision under CR 59. In its order denying reconsideration, the court stated:

Initially Mr. McCarthy has raised a significant amount of evidence that was not presented to the court during trial. There is nothing to suggest that this evidence was unknown to him or his attorney, or was not available with due diligence. This court is not considering any

new evidence Mr. McCarthy presented that could have been presented at trial.

Additionally, Mr. McCarthy has raised several times in his pleadings a lack of discovery or disclosure of information by Ms. McCarthy. As noted [by Ms. McCarthy's attorney] in her response, it was represented by Mr. McCarthy's attorney that all discovery had been completed and the case was ready for trial when Mr. McCarthy objected to a continuance request before the trial began. . . .

Mr. McCarthy also alleges that the court's order regarding spousal maintenance is a financial hardship upon him based on a new financial declaration that he filed on April 29, 2011. As mentioned earlier, this court is not considering new evidence that could have been presented and instead is basing its decision upon the testimony at trial and the exhibits admitted at that time. . . . [T]he fact that Mr. McCarthy has incurred a significant amount of debt post-separation and continues to voluntarily place money into his deferred compensation (Thrift Savings Plan) supports this court's conclusion that Mr. McCarthy has an ability to pay spousal maintenance.

Additionally, based on the testimony at trial, this court is satisfied that Ms. McCarthy has a need for assistance. The court considered the fact that Ms. McCarthy has her housing provided at no cost and the undisputed evidence at trial of her current trust income. Ms. McCarthy still is not able to meet her monthly expenses and 24 months of spousal maintenance for a committed intimate/equity relationship and marriage that lasted eight-plus years is not inappropriate based upon the evidence at trial and the circumstances with which the parties are left upon the dissolution. (CP 235-36).

The court based the denial on tenable grounds and for tenable reasons that were legally correct. There was no newly discovered evidence. CR 59(a)(4). The court did not abuse its discretion. *Wagner Dev., Inc. v. Fidelity & Dep. Co. of Maryland*, 95 Wn. App. 896, 977 P.2d 639, *review denied*, 150 P.3d 552 (1999).

H. Mr. McCarthy's assignment of error regarding post-secondary education is not before this court.

The record reflects no decision by the trial court on Mr. McCarthy's request to address the issue of post-secondary education. This request was filed after the motion for reconsideration was denied. (CP 242-45). Accordingly, there is nothing for this court to review.

I. Mr. McCarthy's assignment of error to the trial court's decision allowing Ms. McCarthy four months to move out of the Skipworth home is moot.

Ms. McCarthy moved out of the Skipworth home on December 31, 2010. The issue is moot as this court cannot provide effective relief. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). The court will not consider a moot question and should not here. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983).

J. Mr. McCarthy is not entitled to fees on appeal.

RAP 18.1(b) provides in part that the party seeking fees on appeal “must devote a section of its opening brief to the request for the fees.” In the brief’s conclusion, he simply requested “credit or reimbursement for his legal fees for having to defend himself against this meretricious claim and or for successfully prevailing in this case.” (Appellant’s brief at 42). This is inadequate as he did not provide argument and citation to authority as required to advise the court of the appropriate grounds for the fee award. *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, L.L.C.*, 138 Wn. App. 443, 462, 158 P.3d 1183 (2007), *review denied*, 163 Wn.2d 1013 (2008). The failure to comply with RAP 18.1 is fatal to his claim for fees. *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 73 Wn. App. 293, 313, 869 P.2d 404, *review denied*, 124 Wn.2d 1015 (1994). Moreover, pro se litigants generally cannot be awarded attorney fees in any event for their work representing themselves. *In re Marriage of Brown*, 159 Wn. App. 931, 938-39, 247 P.3d 466 (2011).

K. Ms. McCarthy is entitled to an award of her attorney fees on appeal under RCW 26.09.140 and RAP 18.1.

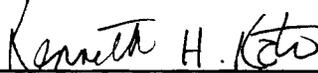
Ms. McCarthy should be awarded her fees for defending against this appeal because she has the need and Mr. McCarthy has the ability to pay. *In re Marriage of King*, 66 Wn. App. 134, 139, 831 P.2d 1094 (1992). As required by RAP 18.1(c), Ms. McCarthy will timely submit an affidavit of financial need.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. McCarthy respectfully urges this Court to affirm the decision of the trial court and award her attorney fees on appeal.

DATED this 24th day of February, 2012.

Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Respondent
1020 N. Washington
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on February 24, 2012, I served a true and correct copy of the Brief of Respondent by first class mail, postage prepaid, on Sean P. McCarthy, PO Box 10830, Spokane, WA 99209.

