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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31918-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

SANDRA LYNETTE GUNKEL,

Appellant/Cross-Respondent,

and

DANIEL GEORGE GUNKEL,

Respondent/Cross-Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KLICKITAT COUNTY
THE HONORABLE BRIAN ALTMAN

AMENDED BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

Largely due to opportunities provided by the husband's parents, whose farm the husband and his brother eventually took over, the parties accumulated a community estate of over \$2 million during 30 years of marriage. The trial court divided the community property equally, awarding the wife essentially all the parties' liquid assets and an "equalizing" cash payment of \$768,372, which she received within months of the decree. The husband had to finance this payment from his own award of largely illiquid business and real property interests, most of which he owns with his brother.

The wife now challenges this wholly discretionary decision, and the trial court's denial of her request for lifetime maintenance. Specifically, she asks this court to "modify" the decree and award her "indefinite maintenance" of \$3,500 per month and "Dry Creek," one of two homes the parties owned. But it is not this court's function to micromanage the trial court's decision-making in this manner. Instead, this court determines whether the trial court "manifestly abused" its broad discretion in dissolving the parties' marriage, by making decisions that fall "outside the range

of acceptable choices.” *Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

It clearly did not. If the trial court made any error, it was in characterizing as community property the husband’s half interest in an entity holding real property gifted to him by his parents. Although the wife complains that she should have been awarded more than half the community property, she in fact *was* awarded more, because this separate property asset, valued at \$270,495, was included in the community estate. But the trial court clearly did not abuse its discretion in leaving the wife with well over a million dollars in liquid assets, with which she can live comfortably for the rest of her life.

II. CONDITIONAL ASSIGNMENT OF ERROR

The trial court erred in finding that the husband’s 50% interest in Cherry Hill, LLC was community property. (Finding of Fact (FF 2.8), CP 147)

The husband assigns this error and raises the related issue in cross-appeal solely as a basis to affirm the trial court’s decision.

III. CROSS-APPEAL STATEMENT OF ISSUE

Cherry Hill, LLC owns real property acquired by the husband’s parents and then gifted to the husband and his brother,

as their “separate estate.” Did the trial court err in concluding that this entity was community property?

IV. RESTATEMENT OF FACTS

A. **Background.**

Respondent Daniel Gunkel, now age 58, and appellant Sandra Gunkel, now age 56, married on July 14, 1979. (RP 15; CP 1) They have three adult children, born in 1981, 1983, and 1987, none of whom is dependent on their parents. (RP 49-50, 611) The parties separated on March 16, 2010 (RP 8; FF 2.5, CP 146), and Sandra filed for divorce on July 27, 2010. (CP 1) The parties’ marriage was dissolved on August 6, 2013 after a 4-day trial. (CP 154)

B. **Daniel began working at his parents’ farm during the marriage. Sandra was paid for her services in the family farm. By the time of trial, Daniel owned the farm equally with his brother.**

1. **Gunkel Orchards, Inc.**

Daniel was born and raised in Klickitat County. (RP 612) His grandparents moved to the Maryhill area in the early 1900s and lived next door to the “little two-bedroom farmhouse” where Daniel was raised with his brother and two sisters. (RP 612) Daniel’s family lived “very meagerly” when he was a child. (RP 613)

Daniel's father worked in construction and his parents ran a small family farm with a fruit stand. (RP 41, 614)

Initially, the farm was "a very small operation" and Daniel's parents were "hands-on farmers," trying to do all the work themselves, only hiring labor when necessary to harvest the fruit. (RP 615) After Daniel graduated from high school, he did not work on the farm, but briefly attended community college and worked as a real estate agent. (RP 613) Sometime after the parties married, Daniel's father and brother Ron asked Daniel to return to the family farm. (RP 613) Because "real estate sales were getting far and farther apart," Daniel returned part-time at first but eventually began working for the farm full-time, receiving a salary from his parents. (RP 613)

The farm "grew slowly." (RP 42) When tillable land became available, Daniel's parents would acquire it and plant fruit trees, increasing their fruit production. (RP 42-44, 614-15) Eventually, they set up a warehouse and packing lines. (RP 42-43) In 1993, the family incorporated the farm as Gunkel Orchards, Inc., listing Daniel, his father, and brother Ron as directors. (RP 736-37; Exs. 39, 40)

The corporation issued 80 shares of stock to Daniel's father; 80 shares of stock to the estate of Daniel's mother, who had died the previous year; 120 shares of stock to Daniel; and 120 shares of stock to his brother Ron. (Exs. 40, 41, 42, 43) At trial for this action, Daniel agreed that his 120 shares in Gunkel Orchards were community property. (See RP 658; Ex. 230)

2. Cherry Hill, LLC

Before Daniel received his shares of stock in Gunkel Orchards, and before he was named a director, Daniel's parents acquired the "Sugarloaf" property – a bare piece of land with irrigation facilities on it – in the late 1980s. (RP 670) Daniel helped develop this property as an employee of the farm, for which he received a paycheck, but did not contribute any money to its acquisition or development. (RP 215, 671-72, 673-75, 679) In December 1997, Daniel's parents gifted a one-quarter undivided interest in Sugarloaf to both Daniel and his brother "as their separate estates," "for and in consideration of love and affection." (RP 673; Ex. 9) In September 1998, after his mother died, Daniel's father gifted an additional three-eighths undivided interest to Daniel and his brother, "married [men] as [their] separate estate,"

“for and in consideration of love and affection.” (RP 615, 674; Ex. 10)

In May 1998, Daniel, his brother Ron, and his father formed Cherry Hill, LLC (“Cherry Hill”), with all three as members. (RP 676-77; Exs. 3, 4) On January 5, 1999, Daniel and his brother contributed their gifted five-eighths interest in Sugarloaf to Cherry Hill. (RP 677; Ex. 12) On January 22, 1999, Daniel’s father gifted the final three-eighths undivided interest in Sugarloaf to Daniel and his brother, “married [men] as [their] separate estates,” “for and in consideration of love and affection.” (RP 675; Ex. 13) Daniel and his brother then conveyed this interest to Cherry Hill, which as a result now owned 100% of Sugarloaf. (RP 677; Ex. 14) Daniel’s father later contributed cash to Cherry Hill, with which the LLC acquired additional property in Maryhill. (RP 677, 690-92)

Since Cherry Hill’s formation, it was undisputed that Daniel has not contributed any money, nor made any other contribution other than the property gifted to him from his parents. (RP 215, 692) Cherry Hill is “purely a landholding company” (RP 915) that rents a portion of the Sugarloaf property to a third party for \$30,000 annually. (RP 668, 741-42) Gunkel Orchards uses the

Sugarloaf and Maryhill properties owned by Cherry Hill, but does not pay the LLC rent. (RP 741-42, 915-16)

3. Sandra was fairly compensated for her assistance to farm operations.

Sandra, a high school graduate, worked as a bank teller when the parties married. (RP 8, 14) She stayed home after their oldest daughter was born in 1981, but sometimes assisted at the farm, working at the farm stand during the summer months selling and sorting fruit. (RP 14, 20-21, 28-29) Sandra always kept track of her hours and submitted them to Daniel's mother for payment. (RP 21, 171, 745-46) Rather than issue a check directly to Sandra, Daniel's mother added Sandra's compensation to Daniel's paycheck. (RP 21-22, 171-73, 745) In addition to Daniel's paycheck, Sandra also received cash for her services. (RP 32, 745-46) If she needed additional money, Sandra requested and received a check from the farm, which was reported as wages. (RP 25-28, 176-78, 746; Ex. 168)

Sandra stopped working at the fruit stand in 1998, after the Goldendale School District hired her as a paraeducator – a job Sandra testified she “loves” and where she continued to work through trial. (RP 8, 23, 169) Sandra continued to occasionally

provide “clerical” services to the farm, at times making deposits at the bank during her lunch hour, typing, and sending out invoices. (RP 29, 46-47) But she admitted that these services did not take “very long. Maybe an hour or two.” (RP 46) For these “services,” the farm gave Sandra cash and paid her truck insurance, cell phone, and internet. (RP 745-48) In any event, the farm eventually hired a bookkeeper in 2000, who took over many of the services that Sandra had been providing the farm. (RP 47)

On appeal, Sandra complains that “she received no in kind compensation or benefits” from her work at the farm. (App. Br. 11) But it is undisputed that the cash she received and the amounts added to Daniel’s paycheck for her services were deposited into the parties’ joint account, which she used. (RP 172, 182-86) It is also undisputed that the parties were able to live entirely off the wages from the farm. In fact, Sandra testified that for the past five or six years, she had deposited her paychecks from the school district into a separate account: “I just thought I’m not using my paycheck. I just put it in there and thought we’d have it for the future.” (RP 150) Further, to the extent Sandra’s services benefited the farm, she too benefited, because by 1999 the parties together owned 120 of the 400 shares of Gunkel Orchards, Inc., which was valued at

\$600,000, and distributed as community property at the end of their marriage. (CP 152-53; Ex. 40)

Finally, Sandra complains that the farm's failure to issue her her own individual paycheck lost her social security credits for those years. (App. Br. 11) But she testified that during that same period, the parties were "putting away so much of our income that we brought home" into several different retirement plans, in each of their names. (RP 36) And regardless of the fact that she did not earn social security credits during this period, Sandra will be entitled to Daniel's benefits after divorce under the Code of Federal Regulations § 404.331.

4. Daniel's parents intended to maintain the farm and its properties within the Gunkel family. They planned their estates to achieve that purpose.

Daniel's mother died on April 15, 1998. (RP 615) His father died on June 2, 2001. (RP 615) In anticipation of their deaths, Daniel's parents had an estate plan that "took a number of years to implement and complete." (RP 732) The gifting of the Sugarloaf property and the formation of Cherry Hill were part of this estate plan. (See RP 672-78) The "ultimate goal" of their estate plan was to "keep the family farm together and intact." (RP 732)

As a result of their parents' estate planning, Daniel and his brother Ron each received a half interest in three pieces of real property: Peach Beach, Maryhill Home Place, and bare land in Kitsap County. (See RP 709-10) Daniel and his brother also each received half of their parents' interest (160 shares) in Gunkel Orchards, Inc. The brothers then each owned equal shares (200 each) in the farm operation, including the shares they each previously owned. (See RP 657-58, 739) Finally, Daniel and his brother received their father's interest in Cherry Hill. (RP 721) With the exception of Cherry Hill, which the trial court found was community property, the trial court found that these assets, valued at \$846,025, were Daniel's separate property – a determination that Sandra does not challenge on appeal. (FF 2.9, CP 148)

In addition to gifting real property to Daniel as his separate estate, Daniel's parents also gifted real property to both Daniel and Sandra, including a fruit orchard in Maryhill. (RP 188-91; Ex. 178) The parties agreed that this was their community property. (RP 123, 653-54)

C. The parties lived modestly during the marriage, and amassed a community estate of over \$2 million without debt.

When the parties first married, they lived “fairly lean financially.” (RP 68) Their financial position started to improve in 1991, when in addition to his work for the farm, Daniel was elected to the Klickitat County PUD Board – a part-time paid position that provided the family with health insurance. (RP 68-69) Even so, the parties continued to live frugally, and they had no debt at the time of trial. (RP 86-87, 181-82)

In 1999, the parties purchased real property at Dry Creek as a second home. (RP 87) They were able to purchase Dry Creek outright without a loan. (RP 89) Dry Creek is a little over 120 acres. (RP 88) It had a house on it, which the parties remodeled. (RP 89) Both parties asked to be awarded Dry Creek, and both testified to the recreational activities that they enjoyed on and around the property. (RP 88, 91-92, 115, 148, 752-53)

While regularly visiting Dry Creek, the parties continued to reside in their first home in Goldendale, which they had built when they were first married. (RP 17, 91) When the parties separated in March 2010, Sandra stayed in the Goldendale home, and Daniel moved to Dry Creek – in part because Daniel needed to live in the

district where Dry Creek was located to maintain his position with the Klickitat PUD. (RP 7, 610, 754) Daniel could also handle the Dry Creek property's "high maintenance" on his own. (RP 753-54)

By the time of trial in October 2012, Daniel was earning approximately \$8,700 gross monthly income from all sources, including wages from the farm and the PUD, business income, and interest and dividend income. (RP 770-73; CP 139; Ex. 237) Sandra was earning monthly gross income of nearly \$1,500 from the school district, and was also receiving monthly support of \$1,578 from Daniel. (See CP 131-37; RP 1102; CP 182-85) Sandra claimed monthly expenses of \$2,652, as described in her pretrial financial statement presented at trial. (CP 131-37)

With the exception of Cherry Hill, the trial court found that all of the property gifted or bequeathed to Daniel by his parents were his separate property, and awarded it to him. (FF 2.9, CP 148; CP 156-57) The trial court found that the parties' community estate, including 120 shares in Gunkel Orchard valued at \$600,000, Cherry Hill valued at \$270,495, and Dry Creek valued at \$360,000, was worth \$2.489 million. (FF 2.8, CP 146-47; CP 152-53)

The vast majority of the parties' assets (both separate and community) were Daniel's business and real property interests with

his brother Ron. Both parties realized that Daniel would have to pay a significant money judgment to Sandra for her share of the community property. (See RP 159-60, 752) Daniel testified that he would have to take out a loan to pay the judgment, which would increase his monthly expenses by at least \$2,600, if not more, depending on the size of the “equalizing” judgment. (RP 752, 776-77; Ex. 238)

The trial court awarded Dry Creek to Daniel – in part so he could mortgage the property to pay Sandra an equalizing judgment. (CP 156; See RP 1094) The trial court ordered the Goldendale property sold, as neither party wished to be awarded it. (CP 159; See RP 1094, 1097) The trial court divided the value of the community estate equally, resulting in an award of a \$768,372 equalizing judgment to Sandra. (CP 152-53) Sandra also received \$278,277 in bank accounts, \$59,391 in retirement accounts, and personal property, for a total of \$1,244,757. (See CP 152-53; RP 1096)

The trial court found that the money judgment “will enable [Sandra] to live a comfortable life” (FF 2.12, CP 149), as there was evidence that a “very conservative” rate of return on the assets awarded to her was 5%. (RP 626; Ex. 226) The trial court ordered Daniel to continue to pay Sandra \$1,578 monthly maintenance until

he paid the first half of the judgment, which was due six months after entry of the decree. (CP 157-58) Daniel paid the first half of the judgment on August 6, 2013, the day the decree was entered (CP 158; 8/6 RP 3), and the remaining balance on January 22, 2014. (CP 228-30)

Sandra appeals.

V. ARGUMENT

A. Introduction and Standard of Review.

The trial court has “wide” discretion in denying an award of spousal maintenance. *Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). The trial court is also given “broad discretion” in dividing property, “because it is in the best position to determine what is fair, just, and equitable.” *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). “Appellate courts should not encourage appeals by tinkering with [marital dissolution decisions].” *Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). “The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.” *Landry*, 103 Wn.2d at 809. As a consequence, “trial

court decisions in marital dissolution proceedings are rarely changed on appeal.” *Marriage of Buchanan*, 150 Wn. App. 730, 735, ¶ 7, 207 P.3d 478 (2009) (citations omitted).

It is not this court’s function to “modify” the trial court’s decision and grant the wife the specific relief she demands - lifetime maintenance and the Dry Creek property. Even if this court “might have reached a different conclusion if it had been charged initially with the responsibility” of deciding the matter, it will not reverse unless the trial court “manifestly abuses its discretion.” *Kehus v. Euteneier*, 59 Wn.2d 188, 193, 367 P.2d 27 (1961). To prove a manifest abuse of discretion, the appellant must show that the trial court’s decision is manifestly unreasonable, meaning that its decision is outside the range of acceptable choices, or is based upon untenable grounds. *Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Here, awarding the wife half of the value of community property in liquid assets, and no maintenance was well within the trial court’s broad discretion. The wife received \$1.24 million in cash and retirement accounts, and “will be one of the tiny percentile of Americans and people in the world who is a millionaire, and that is nothing to scoff at. That gives her the power and control over her

life she's been lacking and desires, and allows her to have an extraordinarily rich set of options if she chooses to use that money wisely." (RP 1098) This court should affirm.

B. It was well within the trial court's broad discretion to divide the community property equally and award Dry Creek to Daniel.

The wife acknowledges that the trial court properly awarded the husband those properties that he owns with his brother – the vast majority of the assets awarded to the husband. (App. Br. 27) The wife complains, however, that she should have been awarded Dry Creek as part of a disproportionate award of the community property, as it was one of the few assets that the community owned alone. (App. Br. 27) This court must reject the wife's request on appeal that this court "modify" the trial court's decree and award her Dry Creek. Nor must the trial court always award a disproportionate share of community property to the spouse with the lower earning capacity. (See App. Br. 25-26)

1. The trial court properly awarded Daniel Dry Creek.

The trial court properly awarded Dry Creek to the husband because it was the only asset that he could look to in order to pay the wife a cash judgment for her share of the community property.

The husband testified, and the trial court recognized, that Dry Creek was likely the only property the husband could use as collateral for any loan to pay the wife's "equalizing" judgment, because it was one of the few properties that the parties owned without his brother. (RP 752, 1094) Dry Creek also had "enormous maintenance issues" that the husband was more capable of handling. (RP 1094) The husband described recent damage to the home due to a severe windstorm, the challenge of snow removal on the property's half-mile of private driveway, and a storm drain system that needs constant maintenance. (RP 753-54) Finally, the husband must live in the Dry Creek area to retain his job as an elected official for the Klickitat PUD. (RP 754) Under these circumstances, it was well within the trial court's discretion to award Dry Creek to the husband, not the wife.

2. Because the vast majority of Daniel's award was tied to business and real property interests with his brother, the trial court did not abuse its discretion in not awarding Sandra more than half the community property.

Faced with a marital estate that was largely composed of illiquid assets related to the husband's family farm, the trial properly awarded the wife half the value of the community estate,

including all the parties' cash and a large cash judgment against the husband. In dividing the community estate equally, the trial court acknowledged, as RCW 26.09.080 requires, the "nature" of the community and separate assets awarded to the husband – business and real property interests largely owned with his brother. (See RP 1097-98) RCW 26.09.080(1), (2). These interests were associated with farming operations that had been first started by his parents half a century ago as a "small family farm," which both the husband and his brother intended to hold to pass on to their children, so that they too can continue the family farm. (RP 749-50) The parties' oldest daughter was already very involved in the farming operation, as she was in charge of Canadian exports and shipping. (RP 611)

This situation, in which one spouse's share of the property is necessarily illiquid compared to the cash that the other spouse will receive as her share of the community property, is not unusual. And this Court has already held that it is well within the trial court's discretion to not award the wife more than half the value of the community estate under indistinguishable circumstances in *Marriage of Glorfield*, 27 Wn. App. 358, 617 P.2d 1051, *rev. denied*, 94 Wn.2d 1025 (1980).

This Court in *Glorfield* affirmed a property division awarding less than half the value of community property to the wife because the majority of the community property was land farmed by the husband and his family. In *Glorfield*, during their 29-year marriage the parties had acquired substantial interests in farmland that was owned and farmed jointly with the husband's siblings. The husband had also acquired other farm interests through a partial purchase and gift from his father. The trial court found that all of the parties' property was community property and awarded the husband all the farmland interests, skewing the property distribution in his favor by awarding him 57% of the community property.

The wife appealed, claiming she was entitled to half the marital estate. In affirming the disproportionate division of the illiquid marital estate to the husband, this Court recognized that it would be impractical for the husband to sell or divide the land, as it would disrupt the farm operations. *Glorfield*, 27 Wn. App. at 361. This Court reasoned that while the husband may have received more property, the wife "can invest the property awarded to her and obtain substantial income in light of current interest rates." *Glorfield*, 27 Wn. App. at 361.

Likewise here, it would be impractical for the husband to sell the properties he owns with his brother. And like the wife in *Glorfield*, the wife here can invest the property awarded to her and obtain a “substantial income.” There was evidence that, “conservatively,” the wife could receive an annual return of 5% on her property award, leaving her with an annual income from her equalizing judgment alone of over \$38,000, or \$3,201 monthly. (See RP 624, 626) As the trial court acknowledged, its property distribution “will leave both parties in very good condition financially. One of the parties will have more cash; the other will have more real estate.” (RP 1092)

3. An award to Sandra of a disproportionate share of community property was not necessary to place the parties in “roughly equal” financial positions.

Because of the nature of the assets before the court in this case, and the significant liquid award she enjoys as a result of the trial court’s property division, the wife misplaces her reliance on *Rockwell* in arguing that the trial court erred because it did not place the parties in “roughly equal financial positions for the rest of their lives.” (App. Br. 25-26, citing *Marriage of Rockwell*, 141 Wn. App. 235, ¶ 11, 170 P.3d 572 (2007), rev. denied, 163 Wn.2d 1055

(2008); *Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321 (1909); and the Washington Family Law Deskbook, § 32.3(3) at 17 (2d ed. 2000)).

First, nothing in RCW 26.09.080 requires that the parties be placed in “roughly equal financial positions.” Even were that true, that does not mean the court *must* “make a disproportionate distribution of the community property” in order to achieve an “equitable conclusion.” (App. Br. 25); *see Sullivan*, 52 Wash. At 164 (affirming the trial court’s award to the wife, who had the lower earning capacity, of slightly less than half of the community property). The trial court has broad discretion in dividing community property. (*supra* § V.A)

For instance, in *Marriage of Wright*, ___ Wn. App. ___, 319 P.3d 45 (Dec. 16, 2013), Division One affirmed a property distribution when it determined that the husband would earn \$10 million in the 2.5 years after the decree was entered, putting him “ahead” of the wife by nearly \$2.7 million in the long run. ___ Wn. ___, ¶ 8. Under those circumstances, Division One held that an unequal property distribution to the wife was warranted to place the parties in “roughly equal” financial positions. *Wright*, ___ Wn. ___, ¶ 7. But the *Wright* decision also makes clear that the trial

court need not achieve some level of mathematical precision in the parties' circumstances. Just as the trial court is not required to divide community property equally, it is also not *required* to divide it disproportionately. *See Marriage of Hadley*, 88 Wn.2d 649, 652, 656, 565 P.2d 790 (1977) (affirming an award of \$545,000 to the wife and \$8.885 million to the husband as necessary to protect the husband's business interests in light of the fact that the wife's award was income-producing).

Second, considering the size of the marital estate, the award to the wife of the cash and much of the retirement (thus providing her with income in addition to her wages), and the fact that the husband will incur debt and mortgage property awarded to him to pay the equalizing judgment, the parties *were* placed in "roughly equal" financial positions. In fact, the wife will in fact be better situated than the husband.

The husband testified that he would have to mortgage Dry Creek to pay off the equalizing judgment to the wife, increasing his monthly expenses to at least \$5,747.39 and leaving him with net income of \$1,201.28. (*See* RP 752, 774-78; Ex. 238) Meanwhile, the wife will have monthly income of \$1,491 from her employment, plus monthly income of at least \$3,201 from her property distribution.

After the wife's monthly expenses of \$2,652.45 are paid, she will have more than \$2,000 in excess income each month – more than the husband until he pays off the mortgage in 15 years. (*See e.g.* Ex. 238; RP 778)¹ An equal division of the community property was thus warranted, because while the husband may have greater income from his award of the income producing assets, nearly 30% of that income will be used to pay off the wife's property award.

Finally, *Rockwell* does not support the wife's claim that because the husband was awarded his separate property the wife should have received a "larger portion" of the community property. (App. Br. 27) In *Rockwell*, the court affirmed the trial court's award to the wife of all of her separate property *and* a disproportionate share of the community property, because the wife was "retired, older, and in poor health." 141 Wn. App. at 249, ¶ 24. Here, by contrast, the wife is younger, is employed in a position that she "loves" and hopes to continue, and while she had high blood pressure and anxiety during the dissolution action, her health was

¹ Exhibit 238 in fact underestimates the amount by which the wife's excess income will exceed the husband's income, because it assumed that the husband would only have to borrow to pay a \$360,000 equalizing judgment (RP 777), instead of the \$768,372 he was ordered to pay. It also assumed that the wife would receive a total property award of \$700,000 with which to invest and not the \$1.24 million she actually received.

still “pretty good.” (RP 10, 167-68) As the trial court recognized, “both of these parties will be in very, very good condition for the balances of their lives, and they’re both relatively young to enjoy that.” (RP 1092) The husband “ends up being land and business rich in a sense, and in this dissolution action comes out with relatively little cash. Wife gets none of the real property, including the Dry Creek residence she wanted. However, my calculations suggest that after the judgment is paid she will be a millionaire.” (RP 1098) An award to the wife of a disproportionate share of community property was not necessary to place the parties in “roughly equal” financial positions.

4. Sandra received more of the community estate because the trial court erroneously characterized Cherry Hill as community property. (Argument of Conditional Cross-Appeal)

The husband raises this cross-appeal solely as a basis to affirm the trial court’s property distribution as fair and equitable. Even if the wife should have received more than half of the community estate, she in fact did, because the trial court improperly included Cherry Hill, an asset valued at \$270,495, as part of the “community property” division. Excluding this separate

asset from the community property division, the wife received 56% of the community property.²

The trial court's characterization of property as separate or community is a question of law that this court reviews *de novo*. *Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Separate property is property owned by a spouse prior to marriage and property acquired by a spouse afterwards by "gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof." RCW 26.16.010-.020. The presumption that property acquired during marriage is community is rebutted when the spouse asserting its separate character can clearly and convincingly trace that asset to a separate source. *Chumbley*, 150 Wn.2d at 5-6.

Here, Cherry Hill was the husband's separate property because there was no dispute that the properties owned by Cherry Hill were acquired by the husband through gifts and bequests from his parents. (RP 193-94; Exs. 9, 10, 11, 12, 13) The wife conceded that the community never used any of its "personal funds" to acquire the properties and that the husband's parents were the

² The community estate was worth \$2,219,019, excluding Cherry Hill. (See CP 153) Thus, the wife's award of \$1,244,757, leaves her with 56% of the community property estate.

purchasers under the Sugarloaf real estate contract. (RP 215) And while the wife claimed that the community's efforts helped "generate the profits" that allowed the husband's parents to acquire the property (RP 131-32), the community was in fact compensated through Daniel's paycheck and additional cash paid to Sandra, and later when they acquired 120 shares in Gunkel Orchards.

The trial court erred in characterizing Cherry Hill as community property. Remand is not necessary, however, because the property division is nevertheless fair and equitable. (CL 3.4, CP 150) *See Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989) (an error in characterizing property does not require remand if the property division is nevertheless fair and equitable).

C. It was well within the trial court's wide discretion to deny Sandra's request for lifetime maintenance in light of the substantial cash award to her.

As with her misguided notion that it is this Court's function to "modify" the trial court's property award, this Court must also reject the wife's request on appeal that this Court provide her a "remedy" by awarding "maintenance indefinitely in the amount of \$3,500." (App. Br. 25) The trial court did not abuse its discretion in denying either "larger and longer maintenance" or "indefinite spousal maintenance" to the wife. (App. Br. 17, 28) By the time the

decree was entered, the wife had already received nearly three years of maintenance over the period of their separation. (*See* RP 309-10, 947; CP 182-85) The trial court did not abuse its discretion in finding that additional maintenance was not warranted given the property division. (FF 2.12, CP 148-49)

Maintenance is not a matter of right, and courts may not grant a perpetual lien on the future earnings of a maintenance obligor. *Marriage of Morgan*, 59 Wn.2d 639, 642, 369 P.2d 516 (1962). Lifetime maintenance is generally disfavored. *Cleaver v. Cleaver*, 10 Wn. App. 14, 21, 516 P.2d 508 (1973). Given that post-decree earnings are separate property, maintenance awards that attempt to fully equalize the parties' income for long periods of time cannot be justified. *See Cleaver*, 10 Wn. App. at 21 (reversing award of permanent maintenance and limiting maintenance to seven years, when youngest child is emancipated, where wife received slightly more than half the property after a 20-year marriage); *see also Marriage of Mathews*, 70 Wn. App. 116, 124-25, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993) (reversing an award of lifetime spousal maintenance as "clear error" in part because it required the husband to pay maintenance from retirement income and would in effect cause him to distribute

property to the wife that he had been previously awarded in the dissolution).

1. Further maintenance was not warranted because Sandra's property award makes her self-supporting.

“The purpose of spousal maintenance is to support a spouse, typically the wife, until she is able to support earn her own living or otherwise become self-supporting.” *Marriage of Luckey*, 73 Wn. App. 201, 209, 868, P.2d 189 (1994); RCW 26.09.090(1)(e)(in deciding whether to award maintenance, the court must consider the financial obligations of the spouse seeking maintenance). The trial court properly found that the wife's property award of more than \$1.24 million would allow her to be “self-supporting,” and provide her with a “comfortable life,” and that additional spousal maintenance beyond what the wife had received during the parties' separation was not necessary. (See FF 2.12, CP 148-49) RCW 26.09.090(1)(a) (before awarding maintenance, court must consider “separate or community property apportioned” to the party seeking maintenance); see also *Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797, rev. denied, 119 Wn.2d 1009 (1992).

In *Irwin*, the trial court divided the marital estate, including the wife's separate property, equally - thus awarding the wife less

than half the community property. Like here, the trial court awarded maintenance to the wife only until the husband made the first payment of an equalizing judgment. The appellate court affirmed the trial court's decree, declining to award further spousal maintenance to the wife "given the extent of the property awarded to [the wife], some of which is income producing." *Irwin*, 64 Wn. App. at 55.

In *Luckey*, the wife was awarded 52% of the property - a little less than \$10,000 more than the husband. 73 Wn. App. at 210, fn. 7. She had already received spousal maintenance for a year before the dissolution decree was entered. This Court affirmed the trial court's decision denying the wife's request for further spousal maintenance. *Luckey*, 73 Wn. App. at 210.

Like the wives in *Irwin* and *Luckey*, the wife here was given a substantial property award, and had already received significant support when the parties divorced. The wife's \$1.24 million property award was entirely liquid, which she received within six months of the decree. Even if she uses some of that cash "to secure housing," (App. Br. 21) similar in value to the Dry Creek home valued at \$360,000 awarded to the husband, she would still have over \$884,000 available to invest. The size and liquidity of the

wife's property award in this case thus distinguishes her situation from the one presented in *Marriage of Sheffer*, 60 Wn. App. 51, 802 P.2d 817 (1990) (App. Br. 30).

In *Sheffer*, the wife's community property award largely consisted of equity in the family residence, where she lived. The wife, who had health problems and limited income, was awarded three years of maintenance after 30 years of marriage. The appellate court remanded after expressing concern that the end of the wife's maintenance award coincided with when she would be required to pay the husband for his lien on the family residence – something that could only be accomplished by refinancing or selling the residence. Thus, the wife's income would decrease at the same time that her housing costs would increase. *See Sheffer*, 60 Wn. App. at 56. *Sheffer* is simply not analogous to the situation here.

This case is also distinguishable from *Marriage of Estes*, 84 Wn. App. 586, 929 P.2d 500 (1997) (App. Br. 19). In *Estes*, the trial court found that the wife had limited income with which to meet her expenses and was in need of maintenance, but only awarded maintenance until the husband made a \$73,361 cash payment to equalize the property distribution. The appellate court described the maintenance award as “illusory” because the husband paid the

property distribution on the day the decree was entered. *Estes*, 84 Wn. App. at 593. This Court held that the “property division and maintenance may not constitute an abuse of discretion,” but remanded for the trial court to make express findings because it was not clear whether the trial court believed that the wife could meet her monthly expenses even when her earnings were supplemented with income from property awarded to her. *Estes*, 84 Wn. App. at 594.

Here, in contrast, the trial court made express findings that maintenance was only necessary to provide the wife with “sufficient income until she receives half of the principal of the equalizing judgment,” which was awarded to her in an amount that was “sufficient to allow her to be self-sufficient.” (FF 2.12, CP 87) The wife’s stated monthly expenses were \$2,652.42, her monthly net employment income was \$1,178, and her monthly return on her judgment alone was \$3,200. (CP 131-37; RP 624, 626) Unlike in *Estes*, the wife’s income was more than adequate to meet her monthly expenses and allow her to save and further invest.

Significantly, neither the *Sheffer* nor *Estes* courts did what the wife demands here – decree an amount of maintenance to be awarded for life. Instead, these courts merely remanded for the

trial court to consider facts that do not exist and would not support an award of maintenance in this case.

Further, in deciding whether to award maintenance, the trial court was required to consider the husband's ability to pay spousal maintenance. RCW 26.09.090(1)(f) (the court must consider the ability of the spouse from whom maintenance is sought to pay maintenance). The "flip side" to the wife receiving over \$1 million in liquid assets is the husband would incur debt (and debt payments) to pay the wife the substantial equalizing judgment. (RP 1094; Ex. 238) After paying the wife her property award and his monthly expenses, the husband would have little over a \$1,000 to provide maintenance to the wife, never mind the \$3,500 that she demands. (Ex. 238) Meanwhile, even without maintenance, the wife's income will exceed her expenses by over \$2,000 monthly.

2. There is no need to "compensate" Sandra for her earlier efforts on the farm.

There is no need to further "compensate" the wife with maintenance for the support she provided to the husband and his family's business during the marriage. (See App. Br. 22-24) While the wife supported the family's business, which was largely found to be community property, she was compensated for her efforts both

by receiving funds for the hours she worked and by benefitting in general from the business during the marriage and in the division of the significant marital estate. The wife thus misplaces her reliance on *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984) (App. Br. 22-24) and *Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989) (App. Br. 21-22) as requiring an “indefinite” or “larger and longer” maintenance award.

In *Washburn*, the Court held that where a marriage “endures for some time [] the supporting spouse may already have benefitted financially from the spouse’s increased earning capacity to an extent that would make extra compensation [in the form of spousal maintenance] inappropriate. For example, he or she may have enjoyed a high standard of living for several years. Or perhaps the [support] made possible the accumulation of substantial community assets, which may be equitably divided.” *Washburn*, 101 Wn.2d at 181.

Here, the wife has already “benefitted financially” from her support making additional spousal maintenance unnecessary. As a result of her support, the parties “amassed more than 2 million dollars in business and income producing assets.” (App. Br. 24) The wife enjoyed the increased (yet still fairly modest) standard of

living that the parties had in the last ten years of marriage. Even if the wife's lifestyle will change due to the dissolution (and the math suggests it will not), she is "not entitled to her former standard of living as a matter of right." *Cleaver v. Cleaver*, 10 Wn. App. at 20.

The wife also financially benefitted by receiving half the value of the parties' "amassed assets" at the end of the marriage. Thus, this is unlike the situation described in *Washburn*, where one spouse supports the other spouse during the marriage to enable the other spouse to earn higher income, but the marriage ends before the parties are able to amass the benefits of that higher income in the form of accumulated assets.

The wife also misplaces her reliance on *Morrow*, in which the appellate court affirmed an award of lifetime maintenance after a 24-year marriage. The award was based on evidence that the wife supported the husband through college and professional school, that she suffered a condition that occasionally rendered her legally blind, and that the husband's misconduct had placed assets that could otherwise have been distributed equally to the wife beyond the reach of distribution, which left him with more than five times the assets awarded the wife. *Morrow*, 53 Wn. App. at 584-89.

Here, there was no “misconduct” by the husband, as all of the community property was available for distribution. The additional assets awarded to the husband were his separate property – a characterization that the wife does not challenge on appeal – received as part of his parents’ careful estate planning. While the husband received more assets overall, because he was awarded his separate property, it was not even twice, much less five times the amount of the wife’s award.

Further, none of the wife’s alleged “health problems” in this case impacted her ability to work. (RP 167; FF 2.12, CP 149) The wife acknowledged that except for the period during the dissolution proceeding, in which she described having “high blood pressure” and “anxiety and fear,” her health has been “pretty good.” (RP 10, 167-68) While the wife described a previous “bout of skin cancer” in 2010, she also acknowledged that all of the lesions had been removed and she was now “okay.” (RP 10, 167-68)

Neither the remand in *Washburn* nor the affirmance of a longer maintenance award in *Morrow*, nor any other case, support the wife’s demand that this Court “remedy” the trial court’s maintenance award by awarding her \$3,500 a month in maintenance for life. The trial court did not abuse its discretion in

rejecting the wife's request for both "indefinite" and "larger and longer" maintenance.

D. The trial court did not abuse its discretion in denying attorney fees to Sandra, and this court should deny her attorney fees on appeal.

The trial court's decision to deny or limit an award of attorney fees is within the trial court's discretion. *Marriage of Stenshoel*, 72 Wn. App. 800, 814, 866 P.2d 635 (1993). The party challenging a trial court's decision on attorney fees "bears the burden of proving that the trial court exercised this discretion in a way that was clearly untenable or manifestly unreasonable." *Marriage of Knight*, 75 Wn. App. 721, 729, 880 P.2d 71, 76 (1994), *rev. denied*, 126 Wn.2d 1011 (1995).

In *Stenshoel*, the appellate court affirmed an order denying the wife's request for attorney fees because "the trial court did not abuse its discretion in refusing to award either party attorney fees. The property distribution was roughly equal and, in view of the totality of the circumstances presented, the parties should be equally able to pay their own attorney fees." *Stenshoel*, 72 Wn. App. at 814.

Likewise here, the trial court did not abuse its discretion in denying the wife attorney fees when the wife was awarded half the

community property, including all the liquid assets, and did not have the need to have her attorney fees paid. By the time of trial, the wife had already paid nearly all of her attorney fees from an account holding her income from her school district job, which she testified she never “used.” (RP 149-50) The wife was also awarded over \$200,000 in bank accounts, as well as the \$768,372 judgment, from which to pay any additional attorney fees. The trial court properly concluded that an award of attorney fees to the wife was not warranted.

For the same reasons that the trial court denied the wife’s request for attorney fees at trial, this court should deny her request for attorney fees on appeal. *Stenshoel*, 72 Wn. App. at 814 (denying attorney fees on appeal on the same basis that they were denied in the trial court – both parties had the ability to pay their own attorney fees).

VI. CONCLUSION

The appellant has failed to show a manifest abuse of the trial court’s broad discretion in dividing the community estate and denying the wife additional spousal maintenance, and she inappropriately asks this Court to micromanage the trial court’s decision by changing those discretionary decisions on appeal. This

court should affirm and deny the wife's request for attorney fees on appeal.

Dated this 23rd day of June, 2014.

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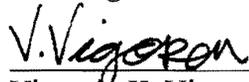
DECLARATION OF SERVICE

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

That on June 23, 2014, I arranged for service of the foregoing Amended Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 23rd day of June, 2014.



Victoria K. Vigoren