

FILED

APR 28 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**STATE OF WASHINGTON
COURT OF APPEALS DIVISION III
COA NO. 319512-III**

JULIO FLORES,

APPELLANT,

and

FLORENTINA FLORES,

RESPONDENT.

RESPONDENT'S RESPONSE BRIEF

**HALSTEAD & COMINS RICK PS
JOANNE G COMINS RICK
P.O. BOX 511
PROSSER WA99350
(509)786-2200
ATTORNEY FOR RESPONDENT
FLORENTINA FLORES**

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iii
I. Introduction.....	1
II. Issues Presented on Appeal	4
III. Counter Statement of the Case	8
A. Overview of Procedure and Trial.....	8
B. Valuation of the Business	10
C. Father’s Wages Calculating Child Support.....	16
D. Value of the Motorcycles.....	18
E. Alleged \$34,000 Loan.....	20
F. RCW 26.09.090 Spousal Maintenance Factors.....	24
G. Attorneys’ Fees and Cost.....	24
IV. Argument	24
A. Standard of Review in Bench Trial.....	24
B. The Court's Valuation of the Business at \$82,500 is Supported by Substantial Evidence and Reasonable.....	26
C. Julio's Income at \$78,000 for Purposes of Calculating Support and Maintenance is Based upon Substantial Evidence.....	30
D. The Court Properly Determined the 2011 Harley Belonged to Julio, Awarded it to Julio and Properly Valued this Property at \$20,748.....	32
E. The Court Found the Testimony of Julio and his Mother, Yolanda Flores, to be Not Credible on the Issue of the \$34,000 Loan.....	34

TABLE OF CONTENTS

	Page
F. The Court's Valuation and Division of Property is Fair and Just.....	35
G. The Court Properly Awarded Spousal Maintenance to the Wife.....	38
H. The Court Properly Awarded Tina's Attorney Fees and Costs to be Paid by Julio.....	42
V. Respondent's Motion for Attorney Fees on Appeal.....	44
VI. Conclusion.....	45

TABLE OF AUTHORITIES

<u>Case Law:</u>	<u>Page(s)</u>
<i>Baker v. Baker</i> , 80 Wn.2d 736, 498 P.2d 315 (1972).....	25
<i>In re Marriage of Bulicek</i> , 59 Wn.App. 630, 800 P.2d 394 (1990).....	41
<i>In re Marriage of Foley</i> , 84 Wn.App. 839, 930 P.2d 929 (1997).....	43
<i>In re Marriage of Greenlee</i> , 65 Wn.App. 703, 829 P.2d 1120 (1992).....	43
<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).....	35
<i>In re Marriage of Hall</i> , 103 Wn.2d 236, 692 P.2d 175 (1984).....	27, 28, 36
<i>In re Marriage of Knight</i> , 75 Wn. App. 721, 880 P.2d 71 (1994), <i>review denied</i> , 126 Wn.2d 1011, 892 P.2d 1089 (1995).....	27
<i>In re Marriage of Konzen</i> , 103 Wn.2d 470, 693 P.2d 97 (1985).....	25
<i>In re Marriage of Kraft</i> , 119 Wn.2d 438, 832 P.2d 871 (1992).....	35
<i>In re Marriage of Landry</i> , 103 Wn.2d 807, 699 P.2d 214 (1985).....	25, 31
<i>In re Marriage of Mansour</i> , 126 Wn. App. 1, 106 P.3d 768 (2004).....	42
<i>In re Marriage of Mathews</i> , 70 Wn.App. 116, 853 P.2d 462 (1993).....	41

TABLE OF AUTHORITIES

Case Law Continued	Page
<i>In re Marriage of Monaghan</i> , 78 Wn. App. 918, 899 P.2d 841 (1995).....	26
<i>In re Marriage of Rockwell</i> , 141 Wn.App. 235, 250, 170 P.3d 572 (2007), review denied, 163 Wn.2d 1055 (2008).....	29, 35, 36
<i>In re Marriage of Spreen</i> , 107 Wn.App. 341, 28 P.3d 769 (2001).....	41
<i>In re Sedlock</i> , 69 Wn. App. 484, 849 P.2d 1243, review denied, 122 Wn .2d 1014 (1993).....	33
<i>In re Marriage of Stenshoel</i> , 72 Wn.App. 800, 866a P.2d 635 (1993).....	30
<i>In re Marriage of White</i> , 105 Wn .App. 545, 20 P.3d 481 (2001).....	35, 36
<i>Keene Valley Ventures v. Richland</i> , 174 Wn.App 219, 298 P.3d 121 (2013).....	33, 34, 35
<i>Quinn v. Cherry Lane Auto Plaza, Inc.</i> , 153 Wn.App. 710 225 P.3d 266 (2009).....	34
<i>In Re Rich</i> , 80 Wn. App. 252, 907 P .2d 1234(1996).....	32
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570 343 P.2d 183 (1959).....	34
 Statutes	
RCW 26.09.080.....	26
RCW 26.09.090.....	7, 24, 40
RCW 26.09.140.....	42, 44

TABLE OF AUTHORITIES

	Pages
Court Rules	
RAP 18.1.....	44

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iii
I. Introduction.....	1
II. Issues Presented on Appeal	4
III. Counter Statement of the Case	8
A. Overview of Procedure and Trial.....	8
B. Valuation of the Business	10
C. Father’s Wages Calculating Child Support.....	16
D. Value of the Motorcycles.....	18
E. Alleged \$34,000 Loan.....	20
F. RCW 26.09.090 Spousal Maintenance Factors.....	24
G. Attorneys’ Fees and Cost.....	24
IV. Argument	24
A. Standard of Review in Bench Trial.....	24
B. The Court's Valuation of the Business at \$82,500 is Supported by Substantial Evidence and Reasonable.....	26
C. Julio's Income at \$78,000 for Purposes of Calculating Support and Maintenance is Based upon Substantial Evidence.....	30
D. The Court Properly Determined the 2011 Harley Belonged to Julio, Awarded it to Julio and Properly Valued this Property at \$20,748.....	32
E. The Court Found the Testimony of Julio and his Mother, Yolanda Flores, to be Not Credible on the Issue of the \$34,000 Loan.....	34

TABLE OF CONTENTS

	Page
F. The Court's Valuation and Division of Property is Fair and Just.....	35
G. The Court Properly Awarded Spousal Maintenance to the Wife.....	38
H. The Court Properly Awarded Tina's Attorney Fees and Costs to be Paid by Julio.....	42
V. Respondent's Motion for Attorney Fees on Appeal.....	44
VI. Conclusion.....	45

TABLE OF AUTHORITIES

<u>Case Law:</u>	<u>Page(s)</u>
<i>Baker v. Baker</i> , 80 Wn .2d 736, 498 P.2d 315 (1972).....	25
<i>In re Marriage of Bulicek</i> , 59 Wn.App. 630, 800 P.2d 394 (1990).....	41
<i>In re Marriage of Foley</i> , 84 Wn.App. 839, 930 P.2d 929 (1997).....	43
<i>In re Marriage of Greenlee</i> , 65 Wn.App. 703, 829 P.2d 1120 (1992).....	43
<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).....	35
<i>In re Marriage of Hall</i> , 103 Wn.2d 236, 692 P.2d 175 (1984).....	27, 28, 36
<i>In re Marriage of Knight</i> , 75 Wn. App. 721, 880 P.2d 71 (1994), <i>review denied</i> , 126 Wn.2d 1011, 892 P.2d 1089 (1995).....	27
<i>In re Marriage of Konzen</i> , 103 Wn.2d 470, 693 P .2d 97 (1985).....	25
<i>In re Marriage of Kraft</i> , 119 Wn.2d 438, 832 P.2d 871 (1992).....	35
<i>In re Marriage of Landry</i> , 103 Wn.2d 807, 699 P.2d 214 (1985).....	25, 31
<i>In re Marriage of Mansour</i> , 126 Wn. App. 1, 106 P.3d 768 (2004).....	42
<i>In re Marriage of Mathews</i> , 70 Wn.App. 116, 853 P.2d 462 (1993).....	41

TABLE OF AUTHORITIES

Case Law Continued	Page
<i>In re Marriage of Monaghan</i> , 78 Wn. App. 918, 899 P.2d 841 (1995).....	26
<i>In re Marriage of Rockwell</i> , 141 Wn.App. 235, 250, 170 P.3d 572 (2007), review denied, 163 Wn.2d 1055 (2008).....	29, 35, 36
<i>In re Marriage of Spreen</i> , 107 Wn.App. 341, 28 P.3d 769 (2001).....	41
<i>In re Sedlock</i> , 69 Wn. App. 484, 849 P.2d 1243, review denied, 122 Wn .2d 1014 (1993).....	33
<i>In re Marriage of Stenshoel</i> , 72 Wn.App. 800, 866a P.2d 635 (1993).....	30
<i>In re Marriage of White</i> , 105 Wn .App. 545, 20 P.3d 481 (2001).....	35, 36
<i>Keene Valley Ventures v. Richland</i> , 174 Wn.App 219, 298 P.3d 121 (2013).....	33, 34, 35
<i>Quinn v. Cherry Lane Auto Plaza, Inc.</i> , 153 Wn.App. 710 225 P.3d 266 (2009).....	34
<i>In Re Rich</i> , 80 Wn. App. 252, 907 P .2d 1234(1996).....	32
<i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn.2d 570 343 P.2d 183 (1959).....	34
Statutes	
RCW 26.09.080.....	26
RCW 26.09.090.....	7, 24, 40
RCW 26.09.140.....	42, 44

TABLE OF AUTHORITIES

	Pages
Court Rules	
RAP 18.1.....	44

I. INTRODUCTION

Julio (Herein “Julio”) Flores and Florentina (Herein “Tina”) Flores were married in April 1993 and separated on September 26, 2010. The date of marriage to the date of Decree is 20.4 years, making this a long-term marriage. Tina and Julio had four daughters, three of whom are still living at home with Tina, ages 17, 14 and 13. The three daughters are in need of child support. Tina is in need of spousal maintenance, since her income is substantially less. She needs to have her attorney fees and costs paid, because of the income disparity and the intransigent conduct of Julio.

The issues were division of property, including valuing real and personal property, business valuation, child support, spousal maintenance and attorneys’ fees and costs. Tina Flores presented documentation, expert testimony and lay testimony on the existence of community property, the value of the community business and on Julio Flores’ wages. In a three-day trial Julio presented neither proof as to the value of the community business nor his wages. Instead, Julio presented multiple versions of the alleged business records, claims that community property was either allegedly damaged or did

not exist, testimony that contradicted his prior loan applications regarding his wages; and testimony that contradicted prior public recorded documents.

Joe Reid, CPA valued the business and determined Julio's wages. Mr. Reid considered tax records from 2006 to 2011, business records from 2006 forward; onsite inspection of the business assets; interview with Julio about business operations, including Julio's product markup rate and what Julio stated he charged for his service; multiple sets of Quickbooks, receipts; invoices; number of hours worked; bank statements;; and Mr. Reid's knowledge and experiences. Based upon all of the foregoing Mr. Reid engaged in multiple recognized methods of analyzing the data that he was given to arrive at a business valuation and wages. The business valuation was amended based upon disclosure of under-reported income and the subsequent documentation of multiple discrepancies in Julio's business, tax and business records. On the other hand, Julio's witness Brian Newhouse testified he was unable to arrive at a calculation as to wages, and had no opinion as to the value of the business.

Rather than acknowledge his failure to put on proof of business valuation and wages, Julio engages in a specious and frivolous appeal. For example, arguing that Joe Reid, CPA's opinions on business valuation and wages were not based upon data, when there was extensive proof to the multiple sources of data considered in arriving at opinions. Here, Julio provided in ER 904s business records that showed substantially more income than previously reported and previously disclosed. In effect Julio impeached his own evidence when he submitted under ER 904 certification business records that highlighted major discrepancies in revenues. The fact that Julio impeached himself, does not render Mr. Reid's updated opinions either speculative or unfounded.

Appellant argues that a finding that his wages were \$78,000 based on the professional analysis of Joe Reid, CPA, was unfounded. Yet, the proof is that Appellant affirmatively represented to third parties in 2007 that his income was \$10,000 a month, e.g. \$120,000 a year, and in 2012 that his income was \$100,500 annually.

The trial of this case involved multiple instances where objective and third party documents impeached Julio's testimony

and arguments. For example, Julio claimed he paid his mother \$34,000 to pay off an alleged still owing community debt, *e.g.* a mortgage. The undisputed proof was that unrelated third parties had objective evidence showing that community debt had been paid in full, a satisfaction of lien had been recorded in 2003.

Appellant claimed he did not own certain property and that he allegedly sold other property at a tenth of its value. On the other hand, objective third party evidence showed Appellant had insured and renewed insurance as an owner of the property. Likewise, Appellant provided no proof of the titles being transferred on multiple vehicles or that sales taxes had ever been paid. Appellant continued to buy parts for and maintain the vehicles he claimed he had sold at a steep discount to his brothers.

II. ISSUES PRESENTED AT APPEAL

1. Do isolated points made in cross examination about potential professional assumptions made as to the underlying factual data of an opinion render an expert witness opinion that is otherwise legally competent speculative?

a. In evaluating the value of a business when a party provides certified by ER 904 business documentation that (a) results in significant discrepancies as to the previously provided business documentation and (b) the said ER 904 documents are contrary to the business representations made to third parties, *e.g.* IRS, banks, and (c) the party has engaged in creative unsupported tax deduction practices, can that party legitimately accuse the expert of engaging in “speculation and assumption”, when the expert witness, recognizing the unreliability of stated revenues based upon the documented multiple discrepancies in business, tax and business records, applied an alternative professional reasoned approach to determine revenues based upon expenses taken, where stated revenues are conflicting and under-stated?

b. Where the law provides for estimation of reasonable values as part of several methods to determine the intangible portion of a business, and the expert demonstrates reliance upon accepted national databases as well as reliance of factual evidence in determining said estimated values, can a party

sustain its challenge to the expert opinion as being based upon “speculation and assumption” rather than “fact”?

2. When one party declines to affirmatively present any proof as to the value of community business and the other party provides competent proof through an expert witness of the value of the business and there is objective third party data, *i.e.* party representation to banks that his “salary” from the business is a specific amount, which is consistent with the expert witness’ opinions about the value of the business, is it within the discretion of the trial court to accept the evidence offered to be the value of the business.

3. When party denies owning a vehicle, but that party provides no objective proof that another person owns that vehicle, *e.g.* vehicle title, and that same party renews insurance that provides that in the event of a loss that said party will be paid the value of the vehicle by the insurance company, is within the fact finding discretion of the trial court to find that party does own the said vehicle?

4. When objective third party proof establishes that a prior community debt has been paid in full during the marriage, is it within the trial court discretion to find there was no outstanding community debt owing, a party appropriated community funds before judicial distribution?

5. Is it an abuse of discretion when the trial court follows RCW 26.09.090 factors in making an award of spousal maintenance for a defined period of time?

6. When a party engages in repeated obstreperous conduct, fails to provide basic documents such as business bank records, fails to turn over records that are ordered to be turned over, and essentially forces the other party to incur additional attorney fees and expert witness fees due to the intransigent conduct is it within the trial court's discretion to award attorney fees and costs?

7. When the income difference between the husband and wife differ by six times, the lower earning wife has primary residential custody of multiple minor children, and the living expenses of the wife are well beyond the amount of her earnings and child support are the factors of RCW 26.09.090 satisfied so that an

award of spousal maintenance for a defined period of time is warranted irrespective of the property division?

8. When an allegedly aggrieved spouse declined to present proof of business valuation, wages and objective proof of property ownership and there is no showing as to why said proof was not submitted at trial is it within the trial court's discretion to deny a reconsideration?

III. COUNTER STATEMENT OF THE CASE

A. Overview of Procedure and Trial

This is a 20.4-year marriage. The separation occurred on September 26, 2010. Pre-trial extensive effort by Tina and repeated hearings were required to secure community property and to obtain business and banking records. Ex 3: Tab 21, 31, 36, 39, 53, 54. Julio repeatedly failed to comply with Court Orders, *e.g.* Ex 3: Tab 21, 36, 39, 54. The parties had years to prepare for trial.

In a three-day trial the trial court heard from six witnesses. RP 1-441. The Court had available for consideration three 3-inch-thick binders of trial exhibits admitted at the start of trial, plus 5 additional exhibits submitted during the course of the trial EX 1-9.

Joe Reid¹, CPA, testified on the valuation of the business of the marriage. RP 159-84, 206-10. Richard Burger, an expert on classic vehicles, testified to the value of trucks. RP 210-26. An accountant for Appellant, Brian Newhouse, CPA testified as to the prior incorrect accounting of business income by Julio. RP 83-120. Additionally, Yolanda Flores, the mother of Julio, testified on economic matters. RP 226-75.

Respondent Tina is submitting that this appeal is frivolous and proof of the on-going intransigence of Appellant Julio. What is purportedly appealed are “factual” findings that are contrary to Julio’s trial arguments. In trial, Julio failed to put on proof as to the value of his business and wages, *e.g.* RP 292:15–309:9. Documents produced by Julio pre-trial and with ER 904’s that Julio submitted are conflicting as monies received by Julio. Ex 3: Tab 29. In trial and now on appeal, Appellant Julio is claiming issue with Finding of Facts, on matters where there was “objective” and “verifiable” evidence that clearly contradicted Appellant Julio’s arguments at

¹ Joe Reid, CPA is an associate at Christensen, King & Associates.

trial and now on appeal². There are no true matters of law that have been appealed, *e.g.* Appellant's Opening Br. at pp. 2-8.

Respondent is asking for attorneys' fees for this appeal. See Section V, pp. 44-45 herein.

B. Valuation of the Business

In about 1996, Tina and Julio started JR's Heating and Air Conditioning (Herein "JR's" or "business") as a sole proprietorship. From 2010 to the trial in 2013, the income generated from that business was pertinent to the division of property and support.

In January 2011 at the first temporary hearing, the "court could not get a handle on how much money the business was generating". EX 3: Tab 33. Thereafter the parties stipulated to have Keith Sattler, CPA, do a business valuation; which he did not do. On September 29, 2011, an Order on Contempt was entered:

"...parties agreed to substitute CKA for Sattler & Associates to perform the business valuation; and the initial \$500 retainer would be paid out of the 2010 joint tax return refund, with the balance held in Mr. Everett's Trust Account..."

See EX 3, Tab 54.

² EX 3: Tab 31; RP 171:17-25, 172:1-20. EX 3:Tab 30; EX 3:Tab 31

A copy of the Order was sent to Mr. Sattler requesting all business documentation be transferred to Christenson, King & Associates (Herein "CKA"). EX 3 Tab 54.

Julio claimed to be a "poor records keeper". In 2011, he started using Quickbooks (Herein "QB"). RP 298:11-23. With the 2011 tax returns major discrepancies³ in income were discovered. That resulted in Julio bring all of his files and everything he could find to Sattler & Associates⁴. Julio testified "and to this day we're still trying to straighten everything out." RP 300:14-21.

Joe Reid, CPA ABV, prepared the business valuation report for JR's. Mr. Reid's evaluation was based upon reviewing tax returns 2006 to 2011; documents; and meeting with Julio on site to look over the business equipment, tools, vehicles, *etc.* and to interview Julio about the business. In that interview Julio gave Mr. Reid the business QB files for 2011 on a thumb-drive. RP 159:10-25,160-171. Mr. Reid analyzed the data using the different recognized accounting methods and concluded the business had a

³ The 2011 Schedule C reported gross profits of \$114,000 yet the 2011 business bank statements showed total deposits of \$191,000 for 2011.

⁴ Brian Newhouse, CPA purchased "Sattler & Associates" in 2011, continuing the business.

value of \$65,000. RP 170:3-4. His written report was completed in May 2012⁵. See Ex 1:Tab 7.

After Mr. Reid's May 2012 report, a "second set" of QB files were produced in Julio's ER 904 exhibits (EX 3:Tab 29). The ER 904s showed substantially higher income for the first and second quarters of 2011 than originally stated in the prior records. Joe Reid sent a letter expressing his concerns about how this new information affected his concluded business valuation. RP 171:17-25, 172:1-20. EX 3:Tab 30. On October 9, 2012, an Order was entered requiring Julio to (a) disclose all financial business records for 2011 through October 2012; (b) setting a deadline for completion of a new business valuation; (c) ordering a personal property appraisal; (d) striking the October trial date, and (e) setting a new trial date. EX 3:Tab 31. Despite more requests, Julio only produced another copy of the same original QB file he had provided. EX 3:Tab 31.

Following the said Order, Mr. Reid conducted an in-depth detailed analysis of the records to track, verify and determine the

⁵ This report was admitted as Julio's trial exhibits; in the spreadsheets submitted to the Court re property division, Julio requested the business be awarded to him.

reliability of income data for preparing an amended valuation. RP 172:22-25, 173-180:1-24, 206:19-25, 207. Mr. Reid's follow up analysis showed that the original QB files showed total gross *annual* income of \$160,000 for 2011. The second set of QB files showed gross revenues of \$192,000 for the first and second quarters *alone*, which could result in gross annual revenues from \$270,049 to \$384,214. RP 172:1-6. EX 3:Tab 30. Mr. Reid traced the deposits from the 2011 business bank statements to the invoices from the first QB file. He identified \$46,161 of income reported in QB but not reported to (a) the Washington Department of Revenue (Herein "DOR") in the quarterlies or (b) on the 2011 Federal Tax return. Further, JR's Deposit Detail January thru December 2011 showed \$13,114 in collected sales tax that was not paid to DOR. The QB records of deposits to Bank of America show a total amount of \$191,000. EX 3:Tab 27. RP 173:8-25,174-176.

Julio testified that Exhibit 5 accurately summarized by spreadsheet that the business has reported a profit for most of its years. RP 438:12-16. He claimed only had two years of losses. RP 439:6-7. He testified that he was taking expenses against gross

revenues, and he maximized the deductions that he could take. RP 439:10-14. He, also, testified, as a sole-proprietor, he could deduct his business miles by driving for a part, even though he stopped for personal groceries along the way. RP 439:15-23. He claimed as a sole-proprietor that the kids' cell phones, all his tools, car maintenance, motorcycle parts, repairs, and the like were "all run through" and deducted by the business, so that what the returns showed to be net profit was after personal and business expenses had been maximized as deductions against the business. RP 440:1-7.

Appellant followed Mr. Reid's trial testimony about how he addressed the above deductions and discrepancies—2011 returns, two sets of QB, bank deposits, reports to taxing authorities, *etc.* In light of the multiple discrepancies Mr. Reid stepped back and took a different approach to determine the actual business revenues for 2011. Based upon his experience and knowledge Mr. Reid testified where a business may under-report its income to the IRS, the business's reported costs are more likely to be accurate so as to maximize deductions to reduce its tax burden. RP 176:14-16.

In expressing his opinions Mr. Reid started his analysis with Julio's reported business expenses, which were likely more reliable than the conflicting income data. Using Julio's stated 65% mark-up on parts and equipment sold through the business and Julio's labor rate of \$85 per hour, Mr. Reid was able to apply these factors to the QB data and "back into" what should be the gross revenues to the business. RP 176:11-25. Mr. Reid calculated the reasonable expenditures for purchasing parts was \$122,169.00, *e.g.* Schedule C Cost of Goods Sold (Herein "COGS")⁶. Mr. Reid used this "wholesale" cost multiplied by the 65% mark-up, which yielded gross revenue profits of \$201,579. Mr. Reid then took the 312 billable hours of labor that Julio reported on his invoices, and multiplied that by the hourly billing rate of \$85 to yield labor costs of \$26,520. From these two calculations he found thus, Julio's gross revenues ($\$201,579 + \$26,520$) for 2011 were \$228,099. Then, Mr. Reid compared these values to the national average mark-up for heating and air companies of 82%, as determined by the Risk Management Association (Herein "RMA") national data base.

⁶ This is higher than the \$99,000 COGS reported on the 2011 return.

Applying the 82% mark-up to the \$122,169 COGS yielded gross receipts of \$222,348. Mr. Reid then averaged these two profit values at 50% to determine that JR's had weighted gross receipts of \$225,224 for 2011. Thereafter he subtracted the \$122,169 COGS for a net gross profit of \$103,055 for 2011⁷.

After deducting the operating expenses reported in the QB files, and factoring in \$60,000 as salary for a general manager⁸, Mr. Reid determined the total operating expenses for 2011 are \$84,831. The summary is that \$103,055 - \$84,831 equals a net profit of \$18,224. EX 3:Tab 27:15. Mr. Reid determinations were consistent with Julio's accountant. Mr. Newhouse, CPA, anticipated Julio's amended 2011 return would show the business had a net profit of \$20,000 rather than the reported \$10,000 loss. RP 91:12-24.

C. Father's Wages for Calculating Child Support

Mr. Reid concluded that Julio's annual income for purposes of calculating child support and spousal maintenance was \$78,000.

⁷ EX 3:Tab 27:1-4. RP 176:11-25, 177-179:1-10.

⁸ This isn't a salary "based on speculation and assumption". Mr. Reid had done an onsite inspection of the business and testified in support of the \$60,000 figure: "But when I look through the business and we see the accumulation of assets, that to me indicated someone that's earning a good income." RP 192:1-7.

RP 183:11-25; EX 1:Tab 6; EX 3:Tab 27. On the other hand, due to the convoluted state of JR's books, Brian Newhouse, CPA testified that he could not determine what Julio's income was. Mr. Newhouse claimed he had no documentation to support what Julio's income would be. RP I:117:11-14.

In September 2012, Julio prepared a loan application for the purchase of the Mercedes work van and declared that he had been "employed for 16.5 years as the General Manager of JR's with an annual salary of \$100,150". EX 3 Tab 18; RP 436:20-25, 437:1-13. Julio initialed the salary amount on the loan application. *Id.* Earlier, in a 2007 loan application to refinance the home mortgage, Julio declared his monthly income at \$10,000 per month. RP 411:15-25, 412:1-12; EX 3:Tab 15, 16. In trial Julio testified:

"the business is me. And the business is what it is. I pay my bills out of the business. All my personal stuff is out of the business..." (Emphasis added)

See RP 438:2-3.

Julio testified Exhibit 5 was accurate. RP 386:18-25, 387:1-13. For purposes of simplifying the testimony the evidence on

wages is set forth in a table⁹.

Bank of America Deposits – Schedule C Expenses

Years	2011	2010	2009
Starting Balance	32,757	133,038	141,962
Plus Total Deposits	<u>191,485</u>	<u>134,561</u>	<u>177,371</u>
Subtotal	\$226,253	\$269,609	\$321,342
Less: COGS	<u>-99,736¹⁰</u>	<u>-68,791</u>	<u>-68,456</u>
Subtotal	\$126,517	\$200,818	\$252,866
Less: Bus Operating Expense	<u>-24,831</u>	<u>-46,775</u>	<u>-29,215</u>
= Subtotal	\$101,686	\$154,043	\$223,651
Less Ending Balance	<u>-4,858</u>	<u>-32,757</u>	<u>-133,038</u>
Retained Earnings	\$96,828	\$121,286	\$90,613

D. Value of the Motorcycles

Julio testified that after separation, he sold his Harley Fatboy and Ridgeback Big Dog motorcycles to his brother Luis Flores. Julio sold the motorcycles at less than their fair market values because they allegedly had mechanical problems and he needed the money for business expenses. RP 343:15-21,344:2-14, 345:5-11. He had handwritten paper receipts as his “proofs of sale”. EX 3:Tab 25. The titles were never transferred nor were sales taxes paid.

⁹ The beginning balance is adding the total annual deposits to the starting balance. Then the balance is deducted from the COGS and business operating expenses, minus the ending balance equals retained earnings.

¹⁰ The Schedule C used for 2011 is the original filed, and not as amended.

During the marriage, Julio had purchased a Harley Fatboy and a Ridgeback Big Dog motorcycles. Julio upgraded both with new parts and took immaculate care of them. Neither motorcycle had mechanical issues because Julio was always riding them. RP 59-62. He continued to purchase parts for the Fatboy that he allegedly no longer owned. RP 390:1-17; EX 3 Tab 34

The Court determined the values and awarded the motorcycle to Julio: 2008 Ridgeback Big Dog motorcycle at \$20,000 (CP 2 ¶ 5, 6; EX 3:Tab 12); and 2004 Harley Fatboy motorcycle at \$12,000 (CP 2 ¶ 4, 6; EX 3:Tab 11).

Julio also had a 2011 Harley Street Glide. Tina saw him ride it to Court for the settlement conference. RP 388:4-17. Julio parked it in the Court's parking lot. Tina took photographs of the motorcycle and valued it at \$20,000. RP 64:1-24; EX 3:Tab 10.

Julio claimed he did not own the 2011 Harley Street Glide. He claimed that it belonged to his brother. Yet Julio purchased comprehensive insurance on the 2011 Harley Street Glide. RP 18-24. EX 6. Julio claimed that he had borrowed this vehicle. Julio paid \$361 for renewal of the comprehensive insurance—liability,

comprehensive, property damage—for the year from July 2012 to July 2013. He never cancelled the insurance. RP 389:1-20.

The Court’s written decision provided:

“I am setting the value of this bike at \$20,748 and placing it in Mr. Flores’ column. While Mr. Flores denies ownership of the bike, claiming it belongs to one of his brothers, the evidence establishes that Julio Flores insured the bike, see Exhibit 6. Accordingly, I am accepting the value of \$20,748 which is based on an average of these types of motorcycles sold in Cycle Trader NW, See Exhibit 1 [sic,3], Tab 10. CP 2 ¶6, 6, 58, 63.

In denying Reconsideration, the Court made additional findings about the Harley Street Glide:

“...Based upon the testimony of the parties, I found Ms. Flores more credible on the issue. Mr. Flores, at the time of trial, denied ownership of the motorcycle and claimed it was the property of his brother, Luis. Given the fact that Mr. Flores rode this motorcycle, had the motorcycle in his possession, and insured the motorcycle, I made the factual determination that the motorcycle belonged to Julio Flores.” CP 70 ¶1.

E. Alleged \$34,000 Loan

Julio’s mother, Yolanda Flores, testified that she acquired and owned ten acres of land in Prosser Washington, which she then subdivided into four (4) lots of 2.5 acres each. EX 3:Tab 15. Her house was located on one of the lots. When that house burned down,

Yolanda moved an old mobile home onto another lot where she resided while her new home was rebuilt. RP 250:19-25. Julio and his brothers helped Yolanda fix up the mobile home to make it more livable. RP 251:6-15. Periodically, Yolanda borrowed money from Paul Rupp under a Mortgage secured against the 10-acres EX 3:Tab 15. She still owed Paul Rupp \$34,000 at the time she moved back into her newly re-constructed home.

In 1998, Yolanda offered to sell the trailer and acreage to Julio and Tina in exchange for them repaying the Paul Rupp loan. RP 252:19-24, 253:1-17. Julio and Tina agreed and took over the loan payments. In November 1998, Yolanda prepared, executed and recorded a quit claim deed in favor of Julio for the land "with 1980 Titan Mobile Home". That deed cites consideration being a "gift." RP 254:9-16, 255-258. EX 3:Tab 15. The loan to Rupp was paid off and a Satisfaction of Mortgage recorded in 2003. EX 3:Tab 15.

In approximately 2006, Julio and Tina decided to build a home. Julio testified that he just gave away the mobile home because it would cost more to move it than it was worth. RP 350:6-17. Yolanda confirmed this. RP 274:6-11, and also RP 27:11-19.

Nevertheless Yolanda Flores testified that title to the mobile home was never transferred to Julio and there is no documentation to show that Julio ever owned it or agreed to pay for it. RP 274: 13-25. Julio made the same claim. RP 280:3-24. On the other hand, the construction loan application recites that Julio and Tina had owned the land since 1998. EX 3:Tab 15. The construction loan was refinanced in 2007 and again in 2009. Consistent with the recorded documents and Tina's testimony none of these refinancing documents reference any debt owed to Yolanda for the purchase of this real property. EX 3:Tab 16 and 17. Julio testified that the debt was never reduced to writing because that's not how he and his family "operated." RP 281:19-25.

Tina testified that the mobile home had been actually purchased by Julio (RP 25:5-8); that Julio had helped his mother move it onto the property and worked to fix it up for her. Tina understood their obligation to purchase the real property, including the mobile home that Julio moved into, was to pay off Yolanda's loan to Paul Rupp, which they did. RP 25:12-24.

After the September 26, 2010 date of separation, Julio withdrew \$130,000 from their joint savings account. EX 3:Tab 22. Julio filed a declaration dated January 11, 2011, purporting that he had spent some of that money on business expenses. EX 3:Tab 23. In the January 13, 2011 Temporary Order, Julio was ordered to deposit the remaining \$96,000 into a blocked account and to provide a full accounting of the \$34,000 he spent, including bank statements, cancelled checks and the like. EX 3:Tab 21. Julio did not produce any such documentation. Instead, in September 2011, Julio produced a hand-written "note" dated October 30, 2010 and signed by Yolanda Flores stating:

"Paid for 2 ½ acre lot and 1972 double wide mobile home at 150015 W Richards Rd Prosser WA 99350. Paid in full \$34,000 in cash by Julio Flores." EX 3:Tab 23

Yolanda first testified that she paid \$16,000 to purchase the mobile home originally, but then on cross examination clarified that she really paid \$12,000 but it was "worth" \$16,000. RP 272:13-19. No proof of the recording of a certificate of ownership was submitted. Yolanda testified she turned around and sold it to Julio for \$34,000 plus another \$30,000 for the land. Julio testified his

mother lived in the mobile home for a year before he and Tina purchased it; and that he agreed paying off Paul Rupp in exchange for buying the \$34,000 mobile home and that he still “owed” his mother \$30,000 to buy the land. RP 283:17-32.

Tina disagrees that there was any money still owing for the purchase of the mobile home and land beyond the repayment made to Rupp for \$34,000. RP 34.

F. RCW 26.09.090 Spousal Maintenance Factors

In the interest of judicial economy the facts supporting the trial court’s findings are presented with the discussion of the law.

G. Attorneys’ Fees and Cost

In the interest of judicial economy the facts supporting the trial court’s findings are presented with the discussion of the law.

IV. ARGUMENT

A. Standard of Review in Bench Trial

In presenting the appeal, Appellant makes multiple arguments that basically are taking issue with the trial court making findings on (a) matters that involve assessing the witnesses’ creditability and/or (b) topics where Appellant presented no evidence to contradict

Respondent's proof. The appellate decision in this matter is controlled by the Standard of Review as to bench trials.

The State Supreme Court stated in *Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) held:

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. 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. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985); *Baker v. Baker*, 80 Wn.2d 736, 747, 498 P.2d 315 (1972). The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

...The distribution that we might have made collectively or individually is not relevant. The trial court carefully analyzed the respective positions of the parties, exercised its discretion and rendered a thoughtful decision. That ends the matter.

Here after carefully weighing the evidence and making determinations as to credibility of the witnesses and documentary evidence, the trial court rendered its decision. Respondent submits any reasonable judge would reach the same conclusions.

B. The Court's Valuation of the Business at \$82,500 Is Supported by Substantial Evidence and Reasonable.

Appellant is claiming the trial court's finding was speculative.

For context the trial court's May 2013 written decision provided:

"...I am valuing the business at \$82,500. This is the median value between the initial valuation of \$65,000 and the subsequent valuation of \$100,000. Essentially, I am accepting the testimony of Joe Reid. I am doing so as there was no other expert testimony in this area. I questioned the second or subsequent valuation of \$100,000 as I didn't fully understand how he came up with this number. I also recognize that part of the difficulty with valuating the business is the concern with how the business books were kept. Additionally, I recognize that the books/taxes for 2011 are being redone or reworked. It seems fair to me to accept the value between the above two numbers." CP 3 ¶8.

Respondent submits there was ample evidence under the applicable law to support the above finding.

In reviewing this finding the factual determination is viewed in light of the law. It is a given rule that *goodwill* is an intangible asset of a business representing the expectation of a continued public patronage. *Goodwill* "cannot be disposed of apart from the business as a whole." *In re Marriage of Monaghan*, 78 Wn. App. 918, 926, 899 P.2d 841 (1995). Here, the court was tasked with valuing the business, including JRs' *goodwill*. The value of the hard assets and

goodwill are considered together in setting a value of the business to be divided. *In re Marriage of Knight*, 75 Wn. App. 721, 726, 880 P.2d 71 (1994), *review denied*, 126 Wash.2d 1011, 892 P.2d 1089 (1995). The asset at issue was a well-established business that had supported the family since 1996.

Joe Reid understood in presenting his evidence and expressing his opinion that looking to determine the *goodwill* of a business requires a determination of excess value over hard expenses. This is another approach taken in the process of valuing a business. RP 178:16-25,179-180; EX 3:Tab 27:5-7. Mr. Reid determined that the capitalization rate for heating and air conditioning businesses was 14.96%, and when applied to the excess value or the net operating profit of \$18,224, which is “the *goodwill*” of the business, the value of the business using this approach is \$96,000. EX 3:Tab 27:5. Mr. Reid presented an extensive reference to the facts of this case that supported his opinions. He used the records, provided by Appellant as a factual basis.

The several approaches taken by Mr. Reid are consistent what the Court identified in *In re Marriage of Hall*, 103 Wn.2d 236, 692

P.2d 175 (1984), for determining business value. *Hall* identified:

“In valuing goodwill five major formulas have been articulated. ... There are three accounting formulas. Under the straight capitalization accounting method the average net profits of the practitioner are determined and this figure is capitalized at a definite rate, as, for example, 20 percent. This result is considered to be the total value of the business including both tangible and intangible assets. To determine the value of goodwill the book value of the business' assets are subtracted from the total value figure. (Footnote omitted). The second accounting formula is the capitalization of excess earnings method. Under the pure capitalization of excess earnings the average net income is determined. From this figure **an annual salary of average employee practitioner with like experience is subtracted**. The remaining amount is multiplied by a fixed capitalization rate to determine the goodwill. [footnote omitted] The IRS variation of capitalized excess earnings method takes the average net income of the business for the last 5 years and subtracts a reasonable rate of return based on the business' average net tangible assets. From this amount a comparable net salary is subtracted. Finally, this remaining amount is capitalized at a definite rate. The resulting amount is goodwill. (Emphasis added)

See 103 Wn.2d at 243-244

Here, as the law allows Mr. Reid used RMA data to establish this value for what someone who had Julio's experience would be paid to run the business. The *Hall* decision provides that the capitalization of excess earnings approach requires the determination

of “a salary from an annual salary of an average employee practitioner of like experience”. This evidence was not “speculation and assumption”, as Julio contends.

Based upon the foregoing analysis, it was Mr. Reid’s opinion, that the business value for JR’s Heating and Air was \$100,000; which is \$48,000 of assets and \$52,000 of goodwill. RP 179:18-25; EX 3:Tab 27:1-4. Mr. Reid prepared an extensive Amended Valuation Report which incorporated his processes and findings. “When parties offer conflicting evidence in valuation of property, a trial court considering a property division may adopt the value asserted by either party or any value in between the two.” *In re Marriage of Rockwell*, 141 Wn.App. 235, 250, 170 P.3d 572 (2007), review denied, 163 Wn.2d 1055 (2008).

After the trial the September 2013 written decision denying Reconsideration provides:

“...I heard from one expert on this issue and that was Joe Reid. I accepted the testimony of Joe Reid. I listened as well to the cross-examination of Mr. Reid. While the cross-examination pointed out some potential deficiencies in Mr. Reid’s valuation, I ultimately determined to accept Mr. Reid’s testimony. Mr. Reid’s testimony was undisputed by any other expert...” CP 70 ¶2.

The record shows that the trial court considered all the evidence presented on the issue of the valuation of JR's. The court properly accepted the testimony of Joe Reid and his business valuation reports. Since there were two valuation reports admitted into evidence¹¹, the trial court determined the value of the business to be the median between the two, and properly concluded the value to be \$82,500. This is rational fact find. There is no error.

C. Julio's Income at \$78,000 For Purposes of Calculating Support and Maintenance Is Based Upon Substantial Evidence.

Appellant Julio challenges the trial court's findings as his wages for purposes of calculating child support. Respondent Tina put on extensive evidence as to his income. On the other hand, Appellate presented no affirmative testimony as to what his wages were. He merely argued whatever Respondent's proof was that it was wrong. It is within the law for the trial court to consider the retained earnings kept in the business bank account in addition to the profit reported on Julio's business tax returns. *In re Marriage of Stenshoel*, 72 Wn.App. 800, 866 ap.2d 635 (1993), the court agreed

¹¹ The original valuation report was admitted as Julio's exhibits at EX 1: The amended valuation report by Tina's exhibits at EX 3.

with the holding of two Pennsylvania courts that a business's retained earnings should be considered income to the business's sole owner, absent a legitimate business need to retain the earnings.

By all the evidence presented Julio has consistently had about \$100,000 each year available to him at his discretion, after paying his costs of goods sold and deducting his business operating expenses. See table summarizing evidence at p. 18, *infra*. Likewise, Julio repeatedly represented to lenders that his income was \$100,000 or more a year. It is within the trial court's purview to weigh the evidence and determine the credibility of witnesses. *Marriage of Landry*, 103 Wn.2d at pp, 809-10. Clearly, the Court's acceptance of Joe Reid's opinion to set Julio's income at \$78,000 for purposes of calculating child support and maintenance is based upon substantial evidence. Based upon all the evidence, the amount of \$78,000 is fair and reasonable.

Our role or function is not to substitute our judgment for that of the trial court or to weigh the evidence or credibility of witnesses. *In re Sedlock*, 69 Wn. App. 484, 491, 849 P.2d 1243, *review denied*, 122 Wn.2d 1014 (1993).

Here, it is inappropriate to contend the trial court's weighing of the evidence and witness creditability is in of itself an error of law.

The trial court properly denied Julio's request to reopen the case just to allow Luis Flores to provide additional testimony. Julio neither demonstrated that Luis Flores was unavailable for trial nor that Luis Flores testimony was expected to be favorable to Julio nor that it would be persuasive to the Court. CP 70 ¶1.

“...The bottom line is I did not believe Mr. Flores on this issue, and accepted the testimony of Mrs Flores and the documentation that Julio insured the motorcycle to conclude the motorcycle was Julio Flores' property.” CP 70 ¶1.

The Court also considered and rejected that any possible error in characterizing the Street Glide as community rather than separate would change the court's rulings on this issue. CP 70 ¶ 1.

Most recently in *Keene Valley Ventures v. Richland*, 174 Wn. App. 219, 224, 298 P.3d 121 (2013) the exclusivity of the benching determining creditability:

We defer to the trial court's credibility determinations; we will not reweigh evidence even if we would have resolved conflicting evidence differently. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Stated another way, an appellate court is not in a position to find persuasive evidence that the trier of fact found unpersuasive. *Quinn*, 153 Wn. App. at 717.

Despite Appellant's argument, in a bench trial it is for the trial court to determine witness creditability. There is no error.

E. The Court Found the Testimony of Julio and His Mother, Yolanda Flores, to be Not Credible on the Issue of the \$34,000 Loan.

The Court found that Julio had taken the \$34,000 from the blocked account for his own purposes and awarded it to him; the remaining \$96,000 held in the blocked account was awarded to Tina. CP 4 ¶20, 8.

There was a dispute about an alleged \$34,000 loan. The trial court had to make factual finding as to the matter. After hearing all the evidence and looking at the documentary evidence, *inter alia* recorded satisfaction of lien, loan documents, the trial court assessed the credibility of the witnesses and decided that Julio and his mother, Yolanda Flores, were not credible. The trial court accepted Tina's

testimony. The trial court gave more weight to the recorded deeds, satisfactions of liens and refinancing documents than the handwritten un-notarized “note” from Yolanda Flores. There is no error. See *Keene Valley Ventures*, 224.

F. The Court’s Valuation and Division of Property Is Fair and Just.

In making a division of property, the trial Court considered the list of non-exclusive statutory factors set forth in RCW 26.09.080¹². As the Court in *In re Marriage of Rockwell*, 141 Wn.App. 235, 242 170 P.3d 572, (2007) observed:

In weighing these factors, the court must make a "just and equitable" distribution of the marital property. RCW 26.09.080. In doing so, the trial court has broad discretion in distributing the marital property, and its [Page 243] decision will be reversed only if there is a manifest abuse of discretion. *In re Griswold*, 112 Wash.App. at 339, 48 P.3d 1018 (citing *In re Marriage of Kraft*, 119 Wash.2d 438, 450, 832 P.2d 871 (1992))...

However, the court is not required to divide community property equally. *In re Marriage of White*,

¹² “(1) The nature and extent of the community property; (2) The nature and extent of the separate property; (3) The duration of the marriage or domestic partnership; and (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.”

105 Wn.App. 545, 549, 20 P.3d 481 (2001). In a long term marriage of 25 years or more, the trial court's objective is to place the parties in roughly equal financial positions for the rest of their lives. ... The longer the marriage, the more likely a court will make a disproportionate distribution of the community property.

During the marriage, Julio and Tina acquired household goods and furnishing, tools and equipment, guns, vehicles, classic trucks, boats and motorcycles. Booker & Associates prepared a valuation report of these assets, including some that were "business" assets, and parties agreed to those values for much of the marital property listed before the Court for division at trial. EX 3:Tab 13. Booker's fee for the property valuation was \$2275. EX 3:Tab 42.

Parties provided spreadsheets listing assets and liabilities, proposed values and agreed values, and the agreed distribution between them. EX 3:Tab 1,2. The Court was asked to and made a decision on values where parties did not agree. CP 56-66.

Future earning potential "is a substantial factor to be considered by the trial court in making a just and equitable property distribution." *In re Marriage of Hall*, 103 Wn.2d 236, 248, 692 P.2d 175 (1984). The Court found that Julio "had the ability to earn

income far in excess” of Tina, and therefore made a disproportionate property distribution of 55% to Tina and 45% to Julio. This 55/45 split, following a long term marriage, results in Tina having \$45,000 more in total distribution values than Julio. Part of Tina’s distribution, includes her PERS III Pension of \$28,700, which she has no access to until she retires some 20 years from now (Tina is 43 years of age); another \$18,000 is equity in the family residence, as the Court concluded the fair market value to be \$227,000 rather than the \$209,000 determined by Tina’s market analysis; and Tina is charged with paying the mortgage balance of \$158,000, of which \$20,000 is attributed to the payoff the business van as part of the 2009 refinancing (when Julio wrecked that van in 2012, he took the insurance money and bought himself the Mercedes van to use as a work van instead) Ex.3.

The Court found that Julio had been able to “continually purchase non-essential items”. The Court determined that Tina’s economic circumstances for future earning capacity would not likely change for the immediate future. Meanwhile, Julio’s amended tax returns showed his profits doubling from a loss of \$3000 for 2010 to

a profit of \$20,000 for 2011 and a profit of \$49,000 for 2012. This is in addition to the residual earnings maintained in the business bank accounts which remained constant at \$100,000 year-to-year for the past three years, not to mention the nearly \$20,000 overpayment Julio made to Thrifty in 2011, a parts' supplier. In contrast, Tina is a salaried school district employee whose income will never increase at the exponential proportions as Julio's.

The Court considered the statutory factors in making its award of property division. It is fair and just, and there is no error.

G. The Court Properly Awarded Spousal Maintenance To The Wife

RCW 26.09.090 provides the criteria by which the Court can consider an award of spousal maintenance.

Tina's net monthly income is approximately \$1000. Her trial financial declaration established that her total **expense** for the four girls and herself is approximately **\$4600** per month. EX 3:Tab 55. Tina had a difficult time "making ends meet" since separation with this amount of income, and that the girls and she had to "do without" at times, in order to survive. RP 80:5-22, RP 126:18-127:18. Julio cancelled the garbage collection, he tried to have the power shut off;

he cancelled the cable and had the propane tank providing heat to the shop removed; he was ordered to pay for medical expenses and for school expenses, but he - never paid anything towards these costs. RP 52:15-57:21.

In January 2011, Julio was ordered to pay the mortgage and to pay an additional \$1500 to Tina for “family support”. December 2011, the payment was clarified by Order that the mortgage payment of \$1237 plus the \$1500 together comprised “family support” in the total amount of \$2737. EX 3:Tab 39.

At the time of trial Julio testified that his **expenses** were actually around **\$1590** per month because he did not have to pay a mortgage or rent to his mother or girlfriend, and he did not have to pay utilities. RP 434:8-440:24. EX 3:TAB 50. Mainly, Julio was responsible for paying his meals and for his personal necessities, including transportation costs, although these are ultimately written off as a business expense. He maintained and insured his motorcycles, enjoying leisure, travel and socializing with his motorcycle club. RP 376:15-17; 394:24-395:3. Julio has also demonstrated the ability to readily obtain commercial financing as

he needs it, for purchasing vehicles and motorcycles. In a two year period, he refinanced the mortgage on the home twice. RP 411:8-412:14.

Julio's ability for earning capacity is significantly greater in comparison to Tina, Julio testified at trial that he had no objection to Tina asking the Court for an award of maintenance, as long as it was reasonable. When asked about what amount would be reasonable, Julio said: "That's not up to me to decide. That's the Court's decision." RP 440:19-24. Julio earns upwards of 6 times more than Tina earns. Julio has the ability to pay, and Tina has a need.

The Court considered that Tina has no plans for future schooling and will likely continue her current work at the school district and cherry harvest. The Court found that her future earning capacity will not likely change for the immediate future. Also, Tina was primary residential parent, so she would be receiving child support in the approximate amount of \$1800-2000 per month. Based upon evidence and RCW 26.09.090 factors, the court awarded Tina spousal maintenance for 84 months (7 years) at the rate of \$1500 per

month, which allowed her two years after the youngest graduates in 2018 to pursue additional education for herself if she wanted.

Child support was calculated to be \$640 per child or \$1920 per month. As each child turns 18 or graduates from high school, Tina's child support will decrease by \$640 for that child. This would concurrently reduce Julio's support obligation by the same amount. The youngest child graduates in 2018.

Appellant ignores that the only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, "the award must be just." *In re Marriage of Bulicek*, 59 Wn.App. 630, 633, 800 P.2d 394 (1990). Appellant ignores that the "primary importance in the maintenance award is the parties' economic positions following the dissolution". *In re Marriage of Spreen*, 107 Wn.App. 341, 349, 28 P.3d 769 (2001). Appellant ignores that it is his burden to show an abuse of discretion by showing that the "award of maintenance that does not evidence a fair consideration of the statutory factors". *E.g. In re Marriage of Mathews*, 70 Wn.App. 116, 123, 853 P.2d 462 (1993). Likewise, Appellant over looks that nothing in RCW 26.09.090 requires the

trial court to make explicit factual findings in its order on the given factors. *In re Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004).

In summary based upon the totality of the record here, and the well established law, the Court properly awarded spousal maintenance to Tina for 84 months at \$1500 per month.

H. The Court Properly Awarded Tina's Attorney Fees And Costs To Be Paid By Julio:

Under RCW 26.09.140, the Court can award attorney fees and other professional fees and costs based upon one party's need and the other party's ability to pay. As addressed above as to need, the court properly awarded Tina her attorney fees of \$39,786 and costs of expert and professional fees, *i.e.* Joe Reid at \$7576 and Booker at \$2275. Julio has the ability to pay, and Tina has the need to have her attorney fees, accountant fees and appraisal fees paid.

Julio argues that the property division "really" only left him with \$100,000, because the value of the business was wrong, he did not own the Harley Street Glide, and he had paid the \$34,000 to his mother. This is specious: Julio demonstrated that "possession" and "ownership" of vehicles, tools, guns, and cash between himself and

his brothers and mother was a “fluid” situation. It is of note that while he claims he does not own the Street Glide, he does not object to being awarded the Fatboy, Big Dog and Chevy. which he told the Court were “sold” to his brothers. The Court found Julio and his mother’s testimony on the \$34,000 loan to not be credible. Julio testified to his mother “loaning” him money during the pending dissolution, none of which he had “paid back”. In taking this appeal Julio avoids mentioning the \$100,000, plus, as retained earnings in the business bank accounts.

In addition or in the alternative, the Court can award these fees and costs without consideration of each party’s income, if the Court finds that one party has engaged in intransigence by unduly delaying or obstructing the process of litigation. See *In re Marriage of Foley*, 84 Wn.App. 839, 846, 930 P.2d 929 (1997); and also *In re Marriage of Greenlee*, 65 Wn.App. 703, 708, 829 P.2d 1120 (1992)(Intransigent conduct includes obstructionist behavior, repetitive or unnecessary motions, and attempts to make the proceeding unduly difficult with increased legal cost.)

There is substantial evidence for the Court to award attorney fees and costs based upon Julio's intransigence, which increased the costs of attorney fees and professional/expert fees. Here, the proof was that Julio allegedly "sold" assets to his brothers at a tenth of their value. He claimed having to "paying" his mother for land that was quit claimed to him by a 1998 recorded deed. For years he refused or delayed in disclosing his financial records. These obstreperous conduct resulted in having to undertake an amended business valuation; under-reporting his income and over-reporting his expenses, both to the IRS and to this Court. All of Julio's repeated and unnecessary obstruction contributed to the delay and increased professional, attorney fees and costs.

V. RESPONDENT'S MOTION FOR ATTORNEY FEES ON APPEAL

Tina also should be awarded her attorney fees incurred in having to appear and defend against this appeal pursuant to RAP 18.1; as well as pursuant to RCW 26.09.140 which permits an award of fees and costs based upon the wife's financial need and the husband's ability to pay.

This appeal is blatantly frivolous. All of the trial court's

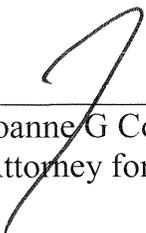
findings were supported by substantial evidence. The Appellant obviously knows that there is substantial evidence to support the Findings of Fact and Conclusions of law, *e.g.* Appellant left out pertinent evidence and twisted around what was given.

VI. CONCLUSION

The decision of the trial court should be affirmed. The Respondent should be awarded attorneys' fees and cost for responding to this frivolous appeal.

Respectfully Submitted this 28th Day of April 2014.

HALSTEAD & COMINS RICK PS



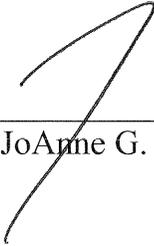
Joanne G Comins Rick #11589
Attorney for Respondent Florentina Flores

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day April, 2014, I caused a true and correct copy of the Brief of the Respondent to be served in the manner indicated below.

Rickey C. Kimbrough	<input checked="" type="checkbox"/>	U.S. Mail
P. O. Box 518	<input type="checkbox"/>	Overnight Mail
Grandview WA 98930	<input type="checkbox"/>	Hand Delivery
	<input type="checkbox"/>	And Supplemental Fax 509.786.1128

I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on this 28th day of April, 2014, at Prosser, Washington.



JoAnne G. Comins Rick, WSBA #11589