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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 332659-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

In re the Marriage of
GARY WEIDINGER, Respondent,
and
KAREN IRONS-WEIDINGER, Appellant.

Respondent's Brief

Appeal from Walla Walla County Superior Court
The Honorable John Lohrmann
Superior Court Judge

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I. INTRODUCTION

Ms. Irons-Weidinger seeks review of a ruling from the Walla Walla County Superior Court following her dissolution trial despite the fact that she was awarded a disproportionate share of community property as well as a partial award for professional costs. Respondent Gary Weidinger respectfully requests that the appeal be denied and that he be awarded his costs on appeal.

II. ISSUES PRESENTED

The following issues are presented herein:

1.) Whether the lower court erred in awarding the SEP IRA to Mr. Weidinger, (a.) where it determined, based upon objective direct and circumstantial evidence in conjunction with Respondent's credible testimony that it was separate property; and (b.) where the lower court alternatively determined that it would still have awarded the SEP IRA to him based on a fair and equitable division of assets notwithstanding its character;

2.) Whether the lower court erred in rejecting Ms. Irons-Weidinger's claim that the marital estate owed a debt to her sister where it found the evidence insufficient;

3.) Whether the lower court erred in awarding \$7500 in attorney fees in favor of Ms. Irons-Weidinger; and

4.) Whether attorney fees should be awarded in favor of Mr. Weidinger on appeal?

III. COUNTER STATEMENT OF MATERIAL FACTS

Mr. Weidinger was 66 years of age when his dissolution trial proceeded in Walla Walla County. (RP Vol. II at 52.¹) He had been working for over 50 years. (RP Vol. II at 23; Respondent's Ex. 1 at trial.) He had been married to Ms. Irons-Weidinger for 15 years. (RP Vol. II at 9.) She was 52 years of age at the time of trial. (RP Vol. III at 146.)

Mr. Weidinger had previously been married for 27 years in Leeseburg, Virginia to Robin Weidinger. (RP Vol. II at 8, 10.) There were children of that marriage. (RP Vol. II at 8.) His dissolution was finalized on 4/3/98. (RP Vol. II at 9.) These parties married the next day. (RP Vol. II at 9.)

In Mr. Weidinger's Virginia dissolution, he was awarded a SEP IRA account which is at issue here. (RP Vol. II at 12; CP

¹ Herein, the Report of Proceedings shall be referenced by "RP" followed by the volume and page numbers. The Clerk's Papers shall be referenced as "CP".

556-57.) The SEP IRA was originally funded in 1987 when Mr. Weidinger had his own business. (RP Vol. II at 12.) He would have incurred a penalty had there been any funds that did not consist of self employment funds. (RP Vol. II at 12.) Mr. Weidinger continued to make contributions until approximately 1989, and never contributed to it again. (RP Vol. II at 13.)

This SEP IRA account was rolled into a Fidelity, and later into a Sun Trust, account. (RP Vol. II at 39, 40.) No community funds from the marriage with Ms. Irons-Weidinger were commingled with it. (RP Vol. II at 39, 40.) This account was referenced as number 131401501. (RP Vol. II at 39.) Mr. Weidinger maintained the SEP IRA as separate property. (RP Vol. II at 15, 40.)

In the Virginia dissolution, Mr. Weidinger was also awarded a portion of an IRA and a retirement investment account from his then-employer, NEGT. (RP Vol. II at 13.) These were rolled over into a different Sun Trust account. (RP Vol. II at 15, 27, 37, 123.)² That account remained active following Mr. Weidinger's marriage to Ms. Irons-Weidinger, and it was expended

² Mr. Weidinger testified about a 2003 form 5498 produced by the National Financial Services Company, LLC for Fidelity Investments. (RP Vol. II at 27; *See* Ex. 16.)

on community uses. (RP Vol. II at 14-15, 38, 40-41.) Mr. Weidinger never contended that this account was anything but community property. (RP Vol. II at 38.)

Mr. Weidinger left his employment with NEGT in 2002. (RP Vol. II at 17.) Ms. Irons-Weidinger left her employment with NEGT in 2004. (RP Vol. II at 18.) At that time, the parties assessed their future and decided they wished to run a winery in their retirement. (RP Vol. II at 17.) They chose Walla Walla. (RP Vol. II at 18.)

Upon arrival, Ms. Irons-Weidinger enrolled in the wine program at the Walla Walla Community College. (RP Vol. II at 18.) Mr. Weidinger supported his wife while she received her degree and focused on the farming aspects of setting up a winery property. (RP Vol. II at 18-19.) The businesses were registered and licensed. (RP Vol. II at 19.) The parties noted that Ms. Irons-Weidinger's minority status was going to be a benefit. (RP Vol. II at 20.) She graduated in 2007 and began employment with various wineries. (RP Vol. II at 20; RP Vol. III at 114-16.)

Mr. Weidinger's efforts with the winery property were completed by the latter part of 2005. (RP Vol. II at 21.) He decided to return to more traditional employment. (RP Vol. II at

21.) He was employed at the National Utility Training and Education Center for approximately six months until it was closed. (RP Vol. II at 21.) He then began working in Boardman, Oregon, at Portland General Electric. (RP Vol. II at 21.) He eventually was promoted to the plant manager, where he remained employed at the time of trial. (RP Vol. II at 21.)

When the parties were first married, Ms. Irons-Weidinger had two young children whom Mr. Weidinger treated as his own. (RP Vol. II at 33.) They attended private schools in the Washington D.C. area. (RP Vol. II at 33-34.) One minor child moved with the parties to Walla Walla. (RP Vol. II at 34.)

Ms. Irons-Weidinger's sister, mother, and nieces lived with the parties at times during the marriage. (RP Vol. II at 34.) The marital estate made a car loan to the wife's sister for \$13,748.44. (RP Vol. II at 34-35.) At trial, Mr. Weidinger was unaware whether or not the loan had been repaid. (RP Vol. II at 36.) Ms. Irons-Weidinger asserted that it had. (RP Vol. III at 145-46.)³

By 2010, Ms. Irons-Weidinger's interest in the wine industry had diminished. (RP Vol. II at 30, 31.) At the time of

³ This testimony was offered over objection as the documents had not been produced in discovery. (RP Vol. III at 145-46.)

trial, she was employed twenty or fewer hours per week as a tasting room attendant at Peppers Bridge Winery. (RP Vol. III at 109.) Ms. Irons-Weidinger acknowledged that there was not any reason that would preclude her full-time employment, but explained she was having difficulty securing a position. (RP Vol. III at 122-23.)

The parties separated on 3/31/13. (RP Vol. II at 46.) A petition for dissolution of marriage was filed on 7/19/13. (CP 1-6.) During the pendency of the action, the parties shared the family home along with Ms. Irons-Weidinger's daughter. (RP Vol. II at 47-48.)

A three-day trial was held in November 2014 before the Hon. J. Lohrmann. (RP Vol. II at 1.) The significant issues involved whether there should be a disproportionate award of the community property, how certain alleged debts should be handled, whether attorney fees should be awarded in favor of the wife due to disparity of income, and whether Mr. Weidinger's SEP IRA was separate or community property. (RP Vol. II at 3.) Mr. Weidinger suggested a 60/40 division of community property in his favor. (RP Vol. II at 3.) Ms. Irons-Weidinger suggested a 60/40 split in her favor. (RP Vol. II at 5.) Mr. Weidinger made clear at trial that

his pending retirement or unemployment was going to be an issue. (RP Vol. II at 3.)

Mr. Weidinger testified that he had a number of health conditions relevant to his ability to remain employed. (RP Vol. II at 21.) These included hypertension, diabetes, heart irregularities, and sleep problems. (RP Vol. II at 21-22, 52-53.)

Mr. Weidinger also testified as to changes occurring at his employer and that he had been notified by PGE that he needed to retire at the end of the first quarter 2015. (RP Vol. II at 54, 58.) He explained that due to his age and needs of the company, it was likely that he would not be employed for long. (RP Vol. II at 55-56.) Indeed, he testified that he had received training in this 're-engineering' process that protected a company from liability. (RP Vol. II at 55-57.) He was told that if he did not retire, he would be terminated for cause and that he would lose some benefits, despite positive performance evaluations. (RP Vol. II at 58-60.) It was evident that it would financially benefit him (as well as Ms. Irons-Weidinger) if he were to retire rather than to wait to be terminated. (RP Vol. II at 60.) He believed that his termination was imminent. (RP Vol. II at 108.)

Mr. Weidinger addressed Ms. Irons-Weidinger's contention that the marital estate owed money to her sister. (RP Vol. II at 64.) He indicated that he was "not aware that we were borrowing money from [Carol], Karen's sister." (RP Vol. II at 64:18-19.) Mr. Weidinger testified that Ms. Irons-Weidinger had only claimed the balance was \$32,000 in discovery. (RP Vol. II at 83.)

After a comprehensive review of the assets and liabilities of the parties, Mr. Weidinger explained that the only way he could meet the court-ordered obligations was to be awarded his SEP IRA. (RP Vol. II at 107.) Ms. Irons-Weidinger testified about the SEP IRA and denied having any knowledge of the account. (RP Vol. III at 125.) She acknowledged she had her own retirement account valued at \$157,029.11. (RP Vol. II at 131.)

At trial, Ms. Irons-Weidinger minimized her initial plans for involvement in the wine business upon moving to Walla Walla, even though she was named a principal on the business and licensing documents. (RP Vol. III at 113-18.) She denied knowing her 66-year-old husband was considering retirement. (RP Vol. III at 148.) She asserted she had been unable to find full-time work, despite her work history, education, and residency within a community active in the wine industry. (RP Vol. III at 109-14,

118.)⁴ She minimized her palate for wine tasting, saying, "It's all relative". (RP Vol. III at 114:1-2.) She minimized her skills despite her 3.91 GPA and her numerous positions at various notable wineries in the area. (RP Vol. III at 113-17.) Ms. Irons-Weidinger minimized her interest in Walla Walla, asserting that she and her husband "talked about a lot of things." (RP Vol. III at 127:24.) She testified that she "did not recall" if WorkSource had made suggestions to her to update her secretarial skills to assist her in finding work. (RP Vol. III at 126:20.)

Accountant Thomas Sawatzki testified on behalf of Ms. Irons-Weidinger at trial. (RP Vol. III at 45.) Mr. Sawatzki had reviewed and synthesized the financial data and prepared reports of the parties' financial information. (RP Vol. III at 47-108.)

The lower court's oral decision issued on 12/11/14. (RP Vol. IV at 39.) In ruling on the SEP IRA, it noted Mr. Weidinger's testimony was credible, and that there was direct and circumstantial evidence that this was separate property. (RP Vol. IV at 40.) It noted that Mr. Weidinger acknowledged commingling the other two accounts identified in the Virginia Decree, but not

⁴ Ms. Irons-Weidinger was asked whether there was any reason she did not have full-time employment. She answered "No." (RP Vol. III at 109.)

the SEP IRA. (RP Vol. IV at 40.) Combined with the Virginia Divorce Decree, the lower court found this persuasive. (RP Vol. IV at 40.) It indicated, "I do find that he was a credible witness in regard to these matters. Certainly if he wanted to stretch credulity, he could have claimed a lot more and said this is all my separate property." (RP Vol. IV at 41:6-12; *see also* RP Vol. IV at 66.) Moreover, the court ruled that even if the account had not been identified as separate property, it still would have awarded the SEP IRA to Mr. Weidinger as part of a fair and equitable award. (RP Vol. IV at 41:15-20.)

The remainder of the assets was to be divided equally between the parties. (RP Vol. IV at 41.)

The lower court rejected Ms. Irons-Weidinger's assertion that the marital community owed a debt to the wife's sister. (RP Vol. IV at 42; *see also* RP Vol. IV at 67.) Likewise, it rejected Mr. Weidinger's assertion that the sister owed a debt to the marital community. (RP Vol. IV at 42; *see also* RP Vol. IV at 67.)

For maintenance, the lower court assumed that, absent modification, Mr. Weidinger would continue to be employed and evaluated pertinent statutory factors. (RP Vol. IV at 47, 49, 51; *see also* RP Vol. IV at 69.) Four years of maintenance was awarded,

at decreasing rates, from \$5,000 per month to \$2,000 per month. (RP Vol. IV at 51.) The court invited Mr. Weidinger to petition for modification if he became unemployed. (RP Vol. IV at 47.)

Mr. Weidinger was ordered to pay Ms. Irons-Weidinger's attorney fees and one-half of Mr. Sawatzki's costs. (RP Vol. IV at 51-52.)

Following trial, the lower court was informed that Mr. Weidinger had lost his job. (RP Vol. IV at 62.) The parties had also each submitted various motions for reconsideration. (RP Vol. IV at 63-81.) The lower court addressed these matters together. Insodoing, it made clear that it would not require Mr. Weidinger to return to employment given his age and circumstances. (RP Vol. IV at 63.) No bad faith was found. (Id.; RP Vol. IV at 78.) As a result of Mr. Weidinger's unemployment, the Court modified its earlier verbal ruling, indicating,

I've given this a great deal of thought. It's a very challenging issue here. So what I've decided to do is to reallocate the assets and basically go a little bit more toward Mr. Mitchell's solution, which is an unequal division of the community assets. So I'm leaving the division of property and allocation just as it is, but I'm making an additional award of \$150,000 to Ms. Weidinger in lieu of maintenance payments.

(RP Vol. IV at 63.)

The lower court and attorneys then went through the issues in detail, and the lower court specified the reasoning for its findings and conclusions. (RP Vol. IV at 63-81.) Given the motions for reconsideration and the changes to the circumstances with regard to Mr. Weidinger's employment, some adjustments were made. With regard to the attorney fees, Mr. Weidinger was required to use one-half of the paid time off account toward his wife's attorney fees, totaling \$7500. (RP Vol. IV at 71.)

The Findings, Conclusions, and Decree were entered on 3/4/15. (CP 544-57; 558-68.) The orders awarded SEP IRA to Mr. Weidinger. (CP 549.) The orders reflected that the alleged outstanding debt to Ms. Irons-Weidinger's sister was unproven. (CP 549.) The trial court awarded Ms. Irons-Weidinger's an additional \$7500 toward her attorney fees. (CP 550.)

Her appeal followed.

IV. ARGUMENT & AUTHORITIES IN OPPOSITION TO APPEAL

A. Standard of Review

Appellate review of factual findings is well settled:

To withstand a challenge on appeal, a finding of fact must be supported by substantial evidence. *Henery v. Robinson*, 67 Wn. App. 277, 289, 834 P.2d 1091 (1992), *review denied*, 120 Wn.2d

1024, 844 P.2d 1018 (1993). Substantial evidence is evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.... Even though there may be conflicting evidence on the record, [a reviewing court] will not disturb findings based on substantial evidence. *Henery*, 67 Wn. App. at 289, 834 P.2d 1091.

In re Marriage of Lutz, 74 Wn. App. 356, 370, 873 P.2d 566 (1994).

There is by policy a reluctance to second guess a trial court in divorce cases. See *In re Marriage of Neumiller*, 183 Wn. App. 914, 920, 335 P.3d 1019 (2014) (“trial courts are accorded great discretion in family law matters due to the need for finality and certainty”); see also *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999) (applying a deferential standard of review because the trial court is “in the best position to assess the assets and liabilities of the parties in order to determine what constitutes an equitable outcome”); see also *Taylor v. Shigaki*, 84 Wn. App. 723, 731, 930 P.2d 340 (1997) (“It is also the trial court, not the appellate court, that is in the better position to weigh the credibility of the parties.”)

Accordingly, a trial court has broad discretion in determining the division of property in a marriage dissolution action. *In re Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007). A trial court abuses its discretion when the trial court's decision is manifestly unreasonable or made on untenable grounds or for untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997).

Although all property is before the court for distribution, characterization of the property as community or separate is a necessary step to take before making a distribution. *Id.* at 766; *Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972). Appellate courts review property characterization rulings de novo. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003).

B. Lower Court Properly Deemed SEP IRA Respondent's Separate Property

The lower court properly deemed the SEP IRA Mr. Weidinger's separate property.

Notably, the account was acquired prior to these parties' marriage. The well established rule is that the character of property, whether separate or community, is determined at its acquisition. *Marriage of Pearson-Maines*, 70 Wn. App. 860, 855 P.2d 1210 (1993). "If the property was separate property at the time of acquisition, it will retain that character as long as it can be traced and identified." *Id.* at 865. "Moreover, the character of this separate property continues through changes and transitions if it can be traced and identified. Only if community and separate funds are so commingled that they may not be distinguished or apportioned is the entire amount rendered community property." *Pearson-Maines*, 70 Wn. App. at 866 (citing Cross, *The Community Property Law*

in Washington, 61 Wash.L.Rev. 17, 62 (1986), which explains that the mere commingling of funds in an account does not destroy separate funds if their amount can be apportioned.).

Of course, property acquired by one spouse before marriage is his or her separate property. *In re Marriage of Skarbek*, 100 Wn. App. 444, 447-48, 997 P.2d 447 (2000). "Once established, separate property retains its separate character unless changed by deed, agreement of the parties, operation of law, or some other direct and positive evidence to the contrary." Separate property will remain separate property "through all of its changes and transitions" so long as it can be traced and identified. *Id.* (citing *In re Estate of Witte*, 21 Wn.2d 112, 125, 150 P.2d 595 (2000).) The burden is on the spouse asserting that separate property has transferred to the community to prove the transfer by clear and convincing evidence, usually a writing evidencing mutual intent. *In re Marriage of Shannon*, 55 Wn. App. 137, 140, 777 P.2d 8 (1989).

Where tracing is involved, "[i]t is the burden of a spouse claiming that property is separate to trace property to a separate source clearly and convincingly." *Skarbek*, 100 Wn. App. at 448. Even if commingled, if a party can trace and apportion separate property and identify separate and community purposes, the commingling will not result in the conversion of separate to community property. *Pearson-Maines*, 780 Wn. App. at 860.

Self-serving testimony of a party alone will not be sufficient to trace and apportion separate property. *Berol v. Berol*, 37 Wn.2d 380, 223 P.2d 1055 (1950). However, the testimony of a party coupled with documents such as bank statements and a tracking of deposits and expenditures has been found to be a sufficient level of tracing of separate property. *Pearson-Maines*, 780 Wn. App. at 867. Whether the evidence submit is direct or circumstantial is immaterial, as such evidence is treated the same. *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975) ("In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.")

Here, the analysis of the SEP IRA must begin with its inception. It was completely funded prior to the parties' marriage and maintained only in Mr. Weidinger's name. As such, it has retained its separate nature. Thus, as a matter of law, tracing is not required.

Even assuming *arguendo* that the Court deems tracing necessary given the roll-over into the Sun Trust account between 2003 and 2005, Mr. Weidinger has more than aptly demonstrated this. Contrary to Ms. Irons-Weidinger's arguments, he has provided far more than self-serving testimony in support of this position.

Mr. Weidinger provided documentation of the Virginia Divorce Decree, which gave information as to the account itself and the fact that it

was awarded to Mr. Weidinger. These parties were married the next day. The relevant tax laws prevented him from depositing any funds into the SEP that did not consist of self-employment income. This was objective evidence and documentation akin to the bank statements referenced in the *Pearson-Maines* case. Further, Mr. Weidinger testified that the documents were destroyed at the time of the move from Maryland. That move and the resulting loss and destruction of documents is not challenged by Ms. Irons-Weidinger. This is more than merely self-serving testimony. More importantly, Mr. Weidinger provided documentation of the account into which the funds were 'rolled over'.

Critically, Mr. Weidinger also provided testimony on this point that the lower court specifically found to be credible. Indeed, the lower court noted that had Mr. Weidinger wished to strain credulity, he could have claimed as separate property the other two accounts. He did not do that. Rather, he acknowledged to his detriment where there had been commingling. As such, the finding that this testimony was credible in conjunction with the objective evidence, the marriage the day following entry of the Virginia order, the reasonable explanation for the missing documentation, and the circumstantial evidence, the lower court's determination was not erroneous.

C. Lower Court's Alternative Basis for Award of SEP IRA Was Within Its Discretion.

The lower court specified that even if it had not found the SEP IRA to be the separate property of Mr. Weidinger, it still would have awarded it to him as part of an equitable division of assets. Accordingly, Ms. Irons-Weidinger's argument regarding the SEP IRA lacks merit no matter whether the account is labeled separate or community property. Even if this is community property, the lower court acted within its discretion in dividing this asset.

After all, fairness is decided by the exercise of wise and sound discretion not by set or inflexible rules. *In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145 (1975), *review denied*, 86 Wn.2d 1001 (1975). The property division need not be mathematically precise: "Thus, in making a division of the property the law does not impel an equal or exact division of the community property of the parties. The disposition only need be just and equitable, and wide latitude and discretionary powers are vested in the trial court in order to accomplish this division." *Rogstad v. Rogstad*, 74 Wn.2d 736, 738, 446 P.2d 340 (1968).

While Ms. Irons-Weidinger may not agree with the judge's findings and rulings on the SEP IRA, the reality is that there is sufficient testimony to support the discretionary award of the SEP IRA to Mr.

Weidinger notwithstanding its identification as separate or community property.

D. Rejection of Alleged Debts Was Not an Abuse of Discretion.

Ms. Irons-Weidinger asserts that the trial court should have been persuaded that there existed a debt owed to Ms. Irons-Weidinger's sister. However, the finding will be upheld where there exists substantial evidence. *See Henery*, 67 Wn. App. at 289. Substantial evidence is evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* Such evidence exists here.

Notably, the trial court also rejected Mr. Weidinger's claim that there existed a debt owed to the marital estate for a car loan. The trial court found both allegations lacked evidentiary support, as follows:

As to this account as well as to the issue of whether or not Karen's sister paid for the \$15,000 car loan or whatever it was, I just find there is inadequate evidence of either. And I'm not going to find or allocate debts or credits on either the loan to her for the car, or this loan from her for the sister for \$40,000. I just see inadequate evidence of either this amount or the \$32,000 amount. There is all sorts of issues. Is this an oral thing? Where is the sister? I didn't hear her testifying. There is no indication from her that this was an obligation, that this wasn't a gift; issues like that. So I'm disregarding it.

(RP Vol. IV at 42.)

This ruling was consistent with Mr. Weidinger's testimony at trial wherein he indicated that he was "not aware that we were borrowing

money from [Carol], Karen's sister." (RP Vol. II at 64:18-19.) The ruling also recognized the discrepancy in amounts, given that Mr. Weidinger testified that his wife's discovery responses initially only asserted the balance was \$32,000. (RP Vol. II at 83.) Of course, Mr. Weidinger was not receiving preferential treatment as his claim for repayment on the car loan was similarly rejected.

Later, when addressing the wife's motion for reconsideration, the lower court indicated,

I'm sticking with that original ruling. This is a denial of Mr. Mitchell's motion for reconsideration. I reviewed the evidence. I reviewed those checks, and I've interlineated here while there are checks that add up to that amount, Exhibit 114, none are marked as loans, and the Petitioner had no knowledge of them, nor of any terms of repayment. I have no idea what those checks were written for. The sister certainly didn't testify that they were loans with the intent to be repaid or what the proceeds were used for. There was testimony that the sister and mother lived with them for about five years. So I don't know what these checks were for and I don't think that there was enough to logically support a loan for \$40,000.

(RP Vol. IV. at 67.) This was well within the trial court's discretion.

In her briefing, Ms. Irons-Weidinger points to conflicting evidence in the record. This is not sufficient. After all, "**[e]ven though there may be conflicting evidence on the record**, [a reviewing court] will not disturb findings based on substantial evidence. *Henery*, 67 Wn. App. at 289 (emphasis added). Accordingly, the trial court's ruling was premised upon substantial evidence and should not be altered on appeal.

E. Ruling on Attorney Fees Was Not Erroneous.

Ms. Irons-Weidinger asserts that Mr. Weidinger should have been required to pay more than \$7,500 in attorney fees. Of course, RCW 26.09.140 provides that the court may order a party to pay a reasonable amount of the cost to the other party of maintaining or defending a dissolution proceeding based upon one party's financial need and the ability of the other party to pay. A party to a dissolution action is not entitled to attorney fees as a matter of right. *In re Marriage of Harrington*, 85 Wn. App. 613, 935 P.2d 1357 (1997); *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1994). An award of attorney fees under RCW 26.09.140 rests within the sound discretion of the trial court, which must balance the financial needs of the spouse requesting them with the ability of the other spouse to pay. *Kruger v. Kruger*, 37 Wn. App. 329, 333, 679 P.2d 961 (1984); *In re Marriage of Melville*, 11 Wn. App. 879, 882, 526 P.2d 1228 (1974). Ms. Irons-Weidinger's assertion that the lower court abused its discretion is untenable.

She overlooks that when that ruling was made, Mr. Weidinger was unemployed. Thus, Ms. Irons-Weidinger was earning more than her husband. Moreover, the lower court had already made a disproportionate award in her favor - including significant cash. Thus, she was on better financial footing than Mr. Weidinger based on the financial division.

As a result, under RCW 26.09.140 there was no basis for Ms. Irons-Weidinger to receive an award of attorney fees at all. Here, the lower court has offered a thorough record as to the totality of its considerations in the final financial package that was ordered. It discussed Mr. Weidinger's employment status (*see* VRP II at 58-61, 108, 148, 150-153; VRP III at 15-16, 21-23) and the reasons it was ruling the way it was with regard to maintenance and the greater financial division. (VRP IV at 47-51.) There was testimony about Mr. Weidinger's historic and then present earnings. (*See* VRP II at 21, 49; VRP III at 19, 49, 51-53.) There was likewise testimony about Ms. Irons-Weidinger's historic and present earnings. (*See* VRP III at 108-110, 114-115, 126.) This is also true of both parties' health issues. (*See* VRP II at 21-22, 52-53, 153; VRP III at 29, 141.) Mr. Weidinger also testified that once retired it would take six to nine months to find work again. (VRP II at 108.) Likewise, at the hearing on the motion for contempt heard on January 27, 2015, the Court again discussed the financial issues in detail, including the reasoning behind its decision to change the original maintenance award. (VRP IV at 62-64, 69-71.) There was lengthy discussion about the paid time account.

In sum, there is no question that the record demonstrates the Court's reasoning. There is therefore no appealable error with regard to any alleged lack of support for the Court's process. Ultimately, the lower

court's discretionary award was proper and within its discretion. *See In re Marriage of Rink*, 18 Wn. App. 549, 571 P.2d 210 (1977). (upholding disproportionate award of marital property to the wife in lieu of granting more maintenance). The key to rulings in these matters is not mathematical preciseness, but fairness. *Clark*, 13 Wn. App. at 810.

Based on a review of the applicable case law, as discussed above, combined with a review of the complete trial record, the trial court acted within its discretion by considering its maintenance award in connection with the totality of the marital estate. The record provides adequate support to sustain the trial court's findings on appeal. As such, Ms. Irons-Weidinger's arguments to the contrary should be rejected.

G. Respondent Should Be Reimbursed His Costs on Appeal.

Mr. Weidinger should be reimbursed for his costs on appeal. Such an award would be permissible on the alternate bases of intransigence or via RCW 26.09.140 and RAP 18.1.

Where one party causes the other additional attorney fees by intransigence, attorney fees may be awarded. *Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969). 'When intransigence is established, the

financial resources of the spouse seeking the award are irrelevant.’ *Matter of Marriage of Greenlee*, 65 Wn. App. 703, 829 P.2d 1120 (1992).⁵

Alternatively, attorney fees are appropriately awarded under RCW 26.09.140. This statute provides that, in an appeal of a trial court's order in a dissolution proceeding, “the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney fees in addition to statutory costs.” In determining whether attorney fees should be awarded, the needs of the requesting party must be balanced with the other party's ability to pay. Thus, the appellate court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. *In re Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *review denied*, 137 Wn.2d 1003, 972 P.2d 466 (1999); *In re Marriage of Dalthorp*, 23 Wn. App. 904, 598 P.2d 788 (1979); RAP 18.1.

Here, Ms. Irons-Weidinger has a stronger financial situation than does Mr. Weidinger. The large marital estate was divided in her favor,

⁵ (citing *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989)). Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in ‘foot-dragging’ and ‘obstruction’, as in *Eide*, 1 Wn. App. at 445; when a party filed repeated motions which were unnecessary, as in *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985); or simply when one party made the trial unduly difficult and increased legal costs by his or her actions, as in *Morrow, supra*, at 591.

57/43. An affidavit setting forth such needs, fees, and expenses will be timely submitted ten days prior to oral argument pursuant to RAP 18.1. Given the circumstances, it is appropriate to award him these costs.

V. CONCLUSION

The lower court's rulings should be upheld in light of the applicable standards of review. Its finding that the SEP IRA should be awarded to Mr. Weidinger as separate property was supported by the record and governing case law. Also, the court did not abuse its discretion in its alternative ruling that the SEP IRA should be awarded the husband as part of a fair property division. Similarly, the court acted within its discretion in rejecting the alleged debts and in setting the amount of attorney fees to be paid at \$7500. Given the foregoing arguments and authorities, Mr. Weidinger respectfully requests that this appeal be DENIED and that he be reimbursed his attorney fees in defending against this appeal.

Respectfully submitted this 31st day of May, 2016 by:



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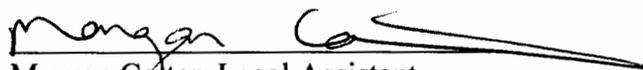
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this **Respondent's Brief** to be delivered to the following individual(s) via U.S Postal Mail first class, postage prepaid, addressed as follows:

Christopher Martin Constantine, of Counsel Inc., by U.S. Mail, Postage Prepaid,
to: Of Counsel, Inc., P.S., P. O. Box 7125, Tacoma, WA 98417-0125;

Additionally, I personally delivered a copy of these documents to the law office of
Michael S. Mitchell, Attorney at Law, 129 W. Main Street, Walla Walla, WA
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DATED this 31st Day of May, 2016 in Walla Walla, Washington by:



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