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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 351432

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JENAE MILLER (now Ms. Pape),

vs.

WADE MILLER.

APPEAL FROM THE SUPERIOR COURT
FOR CHELAN COUNTY
THE HONORABLE ALICIA H. NAKATA

BRIEF OF RESPONDENT

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I. INTRODUCTION

Mr. Miller offers Respondent's Brief to help this Court make sense of Appellant's Brief. Appellant appears to ask this Court to review the entire case de novo and order a property division that is more favorable to her or, in the alternative, that the case be re-tried in a different venue.

The legal issues in this marital-dissolution case are routine. After carefully reviewing all evidence, the very experienced trial judge ordered a fair and equitable division of property: each party received half of the community property and all of his or her separate property.

II. COUNTER-STATEMENT OF ISSUES

- A. What standards of review apply?
- B. Was the trial court's division of property just and equitable? (*Appellant's Assignment of Error A*). Specifically,
 - 1) Did the court correctly admit evidence of Ms. Pape's separate property, two homes that she tried to conceal? (*Appellant's Assignment of Error B, Statement of Issues 2.*)
 - 2) Did the trial court correctly account for all of the parties' property including an alleged trust for Mr. Miller's benefit and any alleged "Indian Trust Money"? (*Appellant's Statement of Issues 1, 2*)
 - 3) Did the trial court achieve a just and equitable distribution of property when it awarded each party's separate property to the separate property owner and awarded half the value of community property to each spouse? (*Appellant's Statement of Issues 3*).

- 4) Did the trial court correctly find that it had no authority to award Appellant's dog to either party because Appellant gifted the dog to her son? (*Appellant's Statement of Issues 4*).
- 5) Did the trial court correctly make no finding and issue no decree regarding the house Ms. Pape bought for her sons? (*Appellant's Statement of Issues 5*).
- C. Did the trial court properly deny Ms. Pape's Motion to Change Venue and Cancel Trial? (*Appellant's Assignment of Error B, Statement of Issues 3*).
- D. Whether, on the first day of trial, the trial court correctly denied Ms. Pape's oral motion to compel discovery because the court did not have before it a certification that Court Rule 26(i) had been complied with? (*Appellant's Statement of Issues 3*).
- E. Did the trial court properly exercise its discretion when it ordered restraints against Ms. Pape but not Mr. Miller? (*Appellant's Statement of Issues 6*).
- F. Was the court correct to not address Appellant's concern of her relations with her adult children? (*Appellant's Statement of Issues 7*).
- G. Did the court conduct a fair trial? (*Appellant's Statement of Issues 8*).

III. COUNTER-STATEMENT OF THE CASE

Mr. Miller filed for separation of his 23-year marriage to Ms. Pape in 2015. *Clerk's Papers (CP)* (Petition) at 2-6. Since then, Ms. Pape made more than 10 pre-trial motions in this case, sometimes with the assistance

of attorneys, but mostly pro-se. See *CP* at 162-79, 975-76, 1119-21, (Mot. to quash subpoena) 1200-1231, (mot. for temporary order) 1373-81, (mot. for dog) 1383-85, (appeal to Div. III for discretionary review) 1556-1605, (mot. to compel) 1431-34, (mot. for wages) 1512-14. Ms. Pape moved three times to change venue. *CP* at 371,¹ 1624-30, 1682-83. On the eve of trial, Ms. Pape moved to cancel trial. *CP* at 1682-83. The court denied her motion, stating that Ms. Pape's health had been sufficient since her surgery² to litigate her criminal matter in District Court, participate in a settlement conference, come to court and file pleadings and present oral argument regarding her motion for change of venue. *Verbatim Report of Proceedings (VRP)* (Pretrial Mot.) at 12-14, *CP* at 1801-03.

The case dealt with the division of property; the children are adults and no longer dependent. *CP* at 1846 at Finding Nos. 18-21. The parties agreed that the community property should be divided 50/50³ and the court did so. *CP* at 1843-51 (Findings), 1852-1861 (Decree). Neither party disputed the other's claim to separate properties. See, e.g. *VRP* (opening statement) at 48. Appellant did not agree with the valuation of

¹ Accompanied by 527 pages of declaratory material at *CP* at 372-898.

² Ms. Pape's only offered proof of surgery was her oral statements. See *VRP* at 7-8.

³ *VRP* (Mr. Miller's Opening Statement) at 48, (Ms. Pape's answer to court's question) at 62, (Court's summary) at 368.

community property⁴ but did not put forth any evidence to counter Mr. Miller's evidence: stock certificates, business valuations, and real estate appraisals. Exhibits 1-27, 29-31, 33, 34. The court admitted only two of Appellant's exhibits: one to refute Ms. Pape's intransigence (Exhibit 51) and one email from Mr. Miller to Ms. Pape (Exhibit 59).

Ms. Pape's three witnesses gave almost no information about asset valuation. Mr. Sanchez testified about a retirement account that the Millers funded with \$1,500 in 1998. *VRP* at 232. He had no other information about that asset's value or any other asset's value. *VRP* at 232-33 (regarding IRA), 225-238 (entire testimony). Mr. Froman, an equipment vendor, testified that he had no recollection of telling Mr. Miller what his business should be worth. *VRP* at 270-71. Ms. Roberts testified about meeting Ms. Pape in 2002 and the friendship between their children. *VRP* at 274-275. Ms. Roberts also testified that Ms. Pape had worked for the family business. *VRP* at 276-279.

After hearing witness testimony and reviewing the exhibits, the court decided that most of the community property's value came from a business that was awarded to Mr. Miller. *CP* at 1847 (Findings at Exhibit A-1). Because Mr. Miller got to keep the business, the Court ordered Mr. Miller make an equalizing payment to Ms. Pape of \$387,997.50, which he

⁴ *CP* at 62.

promptly paid. *CP* at 1860 (Decree at Exhibit B-2), 2040 (Minutes of Hearing).

The trial court awarded each party's separate property to the party claiming ownership. *VRP* at 384-85.⁵ The value of Mr. Miller's separate property, \$333,750, was dwarfed by the value of Ms. Pape's separate property, \$1,189,593. *Id.*

The trial court found that Ms. Pape failed to demonstrate a need for spousal support and denied the request for spousal support. *VRP* at 385.

Ms. Pape vigorously litigated her case. The record shows that she had large amounts of money available during the case to pay for legal counsel. *VRP* at 375.⁶ Both of her attorneys withdrew. *CP* at 11-12, 365.

The court ordered that Ms. Pape be restrained from contacting Mr. Miller or appearing near his home or business for five years. *VRP* at 385, *CP* (Restraining Order) at 1842.⁷

⁵ THE COURT: Mr. Miller has \$333,750.00 in separate property; Ms. Pape has \$1,189,593.00 in separate property, based upon what the Court went through and its characterization of the various properties and bank accounts. The Court's awarding to Mr. Miller his separate property, and to Ms. Pape her separate property. *VRP* at 384-385.

⁶ Appellant admitted that she transferred \$242,000 to an undisclosed location, *VRP* at 86.

⁷ The restraining order is four pages, but the County Clerk's index shows the page count as only one.

IV. SUMMARY OF ARGUMENT

The Respondent, Wade Miller, has endured nearly three years of vexatious litigation by his now ex-wife, the Appellant, Jenae Pape. She had abundant funds and more than two years to prepare for trial but only managed to have two of her exhibits admitted, neither of which pertained to asset values.

Ms. Pape used court processes to continually shame and harass her husband. Washington is a no-fault divorce state and yet she continually made wild and explicit allegations of conduct by her husband. She filed voluminous⁸ declarations of alleged conduct by sheriff's deputies, her son's friends, Chelan County officials, and other non-parties to the case.

Her opening brief has the same character as her many and redundant motions: a list of grievances unsupported by evidence and mostly irrelevant to the issues before the Court.

Mr. Miller provided substantial, credible evidence of the value of the parties' separate and community property. Ms. Pape produced no evidence of any asset's value, except for a small IRA that may no longer exist.

The trial judge was a very experienced jurist who gave Ms. Pape every opportunity to present her evidence, make objections, and to fully

⁸ *Literally*. For example, see CP (Volumes 1-5 of declarations) at 372-898 supporting her first of several motions to change venue.

litigate her case. The patient judge explained the court's reasoning for each decision made. The court's findings were based on substantial evidence; its conclusions based on good law. The trial court's findings and orders should be upheld by this Court and the Appeal should be denied.

V. ARGUMENT

A. Standard of Review

I. Findings of fact are reviewed for abuse of discretion.

Under RCW 26.09.080 trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102, 109 (1999) (citation omitted). Distribution of property by the trial court should be disturbed only if there has been a manifest abuse of discretion. *Id.* The trial court is in the best position to assess the assets and liabilities of the parties and determine what is "fair, just and equitable under all the circumstances." *Id.* (citing *In re Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977) (further citation omitted).

If the trial court's findings of fact are supported with substantial evidence, they will be upheld on appeal. *Miles v. Miles*, 128 Wn. App. 64, 69, 114 P.3d 671 (2005). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *Miles*, 128 Wn. App. at 69 (citation omitted). In evaluating the "sufficiency of

evidence, an appellate court need only consider evidence favorable to the prevailing party.” *In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011) (citation omitted).

“So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it.” *In re Marriage of Burrill*, 113 Wn. App. 862, 868, 56 P.3d 993 (2002). An appellate court does not review the trial court's credibility determinations, nor can it weigh conflicting evidence. *In re Marriage of Meredith*, 148 Wn. App. 887, 891 n.1., 201 P.3d 1056 (2009).

2. Characterization of Property

In a dissolution action, all property, both community and separate, is before the court for distribution. *In re Marriage of Schwarz*, 192 Wn. App. 180, 188, 368 P.3d 173, 178 (Div. III, 2016) (citation omitted). In performing its obligation to make a just and equitable distribution of properties and liabilities in a marriage dissolution action, the trial court must characterize the property before it as either community or separate. *In re Marriage of Kile*, 186 Wn. App. 864, 875, 347 P.3d 894, 900 (Div. III, 2015) (citation omitted). The status of the property is determined “as of the date of its acquisition.” *Id.* (citation omitted).

Because Washington law favors community property, “all property acquired during marriage is presumptively community property, regardless

of how title is held.” *Kile* at 876 (citation omitted). “The burden of rebutting this presumption is on the party challenging the asset's community property status, and ‘can be overcome only by clear and convincing proof that the transaction falls within the scope of a separate property exception.’” *Id.* (citation omitted).

A trial court's characterization of property as separate or community presents a mixed question of law and fact. *Id.* (citation omitted).

“The time of acquisition, the method of acquisition, and the intent of the donor, for example, are questions for the trier of fact.” *Kile* at 876 (citation omitted). The Court of Appeals reviews the factual findings supporting the trial court's characterization for substantial evidence. *Id.* (citation omitted). The ultimate characterization of the property as community or separate is a question of law reviewed de novo. (citation omitted). *Id.*

3. Valuation of Property

Courts have broad discretion in valuing property and will only be overturned if there has been a manifest abuse of discretion. *Koher v. Morgan*, 93 Wn. App. 398, 404, 968 P.2d 920 (1998), *review denied*, 137 Wn.2d 1035 (1999); *In re Marriage of Gillespie*, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997). It is not a manifest abuse of discretion if the

valuation is within the scope of the evidence. *In re Marriage of Mathews*, 70 Wn. App. 116, 122, 853 P.2d 462, *review denied*, 122 Wn.2d 1021 (1993).

B. The court's property division was just and equitable
(*Appellant's Assignment of Error A*)

I. The court correctly admitted evidence of Ms. Pape's separate property including two homes and a bank account that she tried to conceal.

"[A]ll property, both community and separate, is before the court for distribution." *In re Marriage of Schwarz*, 192 Wn. App. 180, 188, 368 P.3d 173, 178 (Div. III, 2016) (citation omitted).

The Court admitted Exhibits 1-22 pursuant to Evidence Rule 904, *VRP* at 24. Rule 904 states that certain documents "shall be deemed admissible unless objection is made under section (c) of this rule." *ER 904*. Ms. Pape made no objection to the admissibility of Exhibits 1-22 within the required 14 days. *See CP* at 1621-35, 1639-76, 1682-1703, 1733-34, (documents filed in the case by Ms. Pape after the *ER 904* notice (at *CP* 1617-20) was filed at *CP* 1736-41). At trial, she did not object based on authentication as permitted by section (c)(1), nor did she object based on admissibility or relevancy, per section (c)(2). *See ER 904(c)*.

Ms. Pape objected to admission of exhibits that contained evidence of two homes she tried to hide. *VRP* at 20. While the divorce was

pending, she bought a beach cabin in Moclips, Washington. *See* Exhibit 7 (outgoing wire form dated 3/1/16). Two months later, she bought a condominium in Chelan, concealing her ownership by taking title in the name of an LLC registered in the State of Wyoming. *See* Exhibit 8 (tax affidavit dated 5/26/16), *see* also *CP* at 211 (showing the top of same tax affidavit).

Ms. Pape's objection was, "that was supposed to be all confidential, . . . [T]hey shouldn't have even known about it." *VRP* at 20-21 and *see CP* (Response explaining Address Confidentiality Program) at 207, 210, 213-15. The court blacked-out addresses to accommodate Ms. Pape's privacy concerns. *VRP* at 23. Before the court admitted Exhibits 1-22, Ms. Pape withdrew her objection stating, "there's no reason to seal it now because it's already in public records." *VRP* at 23.

Ms. Pape admitted that she moved money to an undisclosed bank:

MR. WESTON: Okay. Did you take and switch that [\$242,000] to another bank?

MS. PAPE: Yeah.

MR. WESTON: Okay.

MS. PAPE: Which is none of your business, either.

VRP at 86.

During the course of trial, Ms. Pape never denied that she owned the Moclips beach cabin or the Chelan condo. She confirmed ownership

by saying "they shouldn't have even known about it." Mr. Miller properly introduced evidence of Ms. Pape's homes because all property is before the court for distribution. The Court properly admitted Exhibits 1-22 according to Evidence Rule 904 because Ms. Pape made no objections to authentication, admissibility, or relevance. The court was correct to admit Exhibits 1-22.

Each of Mr. Miller's Exhibits admitted without resort to Rule 904 was supported by witness testimony. *See VRP* (Index) at 3. The court properly considered the weight of each Exhibit before making its Decree of Dissolution.

The court ruled that the Moclips cabin and the Chelan condo were Ms. Pape's separate property and awarded them to her.⁹

Ms. Pape had every opportunity to introduce evidence about the value of community property. At the end of Ms. Pape's closing argument the Court said, "[the Court is] going to give you a final opportunity to go through the witnesses and point out to the Court the testimony from those witnesses or the Exhibits that have been admitted into evidence that

⁹ It's odd that Ms. Pape bothered to argue about her separate property. The trial began with Mr. Miller's statement that he made no claim to her separate property and ended with a decree quieting title separate property in Ms. Pape's name. *VRP* at 48, *CP* at 1859-60 (Decree at Exhibit B). The Court provided a public service by quieting title in Ms. Pape's name. By decreeing the cabin and condo to be Ms. Pape's separate property, the Court eliminated any claim that Mr. Miller might have to partial ownership of those properties.

support any of the numbers that you've provided on your property matrix." *VRP* at 365. Ms. Pape declined, saying, "I'll let my closing argument speak for itself." *Id.*

2.a. The Court was correct to consider Ms. Pape's inheritances notwithstanding Ms. Pape's claims of "Indian Trust Money."

A vested inheritance is separate property, but must be considered in making a property division. *RCW 26.09.080(2)*, *In re Marriage of Hurd*, 69 Wn. App. 38, 49, 848 P.2d 185, *review denied*, 122 Wn.2d 1020 (1993) (overruled on other grounds, *In re Estate of Borghi*, 67 Wn.2d 480, 219 P.3d 932, (2009)).

Ms. Pape claimed that the money she had in Chase Bank and Wheatland Bank were "Indian Trust Money" and outside the purview of the trial court because "no white man shall have [] any information about Indian Trust."¹⁰ *VRP* at 21. Ms. Pape testified that bank records admitted into evidence were better than her recollection of how she spent her inheritances. *VRP* at 86-87.

Ms. Pape testified that her grandfather was Indian and part of his estate included Indian land. *VRP* at 87-89.

Ms. Pape also received money from her father's estate. She testified that the CR 2A agreement admitted as Exhibit 10 accurately

¹⁰ Judge Nakata took no offense. *See VRP* at 21.

showed that she was to receive \$400,000 in November of 2014 and \$781,771 over time from her father's estate. *VRP* at 65. She called this money "my dad's Indian trust money." *VRP* at 91.

Apparently, Ms. Pape believes her inheritances to be Indian trust money, but she presented no evidence regarding the existence of any Indian trust. She cited no admissible authority why the trial court should not consider all of her separate property, including any alleged Indian-trust property, when making a property division.

Ms. Pape's request for review on this issue is puzzling. The court awarded to Ms. Pape all of her separate property and Mr. Miller never contested that issue. Ms. Pape's grievance is that her "Indian trust money" should not be disclosed to any white man – a nonsensical position that is at odds with established Washington law.

2.b. The Court had no evidence of any trust made by or settled for Mr. Miller and was therefore correct in not awarding any "Miller trust money" to either party.

Ms. Pape believes that Mr. Miller's father, Leo Miller, put money in a trust for Mr. Miller's benefit. In her opening statement, Ms. Pape averred that Leo Miller intended to fund a trust for Wade Miller's benefit with the proceeds of the sale of Leo and Polly Miller's land in Republic, Washington. *VRP* at 25-26.

Gifts are the separate property of the receiving spouse. *RCW* 26.16.010, .020; see *Enrich v. Barton*, 2 Wn. App. 954, 959, 471 P.2d 700 (1970); *Merkel v. Merkel*, 39 Wn.2d 102, 234 P.2d 857 (1951).

Leo Miller denied that he created any trust on direct examination. *VRP* at 116-117. He again denied the existence of any trust on cross-examination:

Q: Do you admit that you entrusted Peter [, attorney,] with some money for the [grand]kids and for your own children?

A: No trust.

...

Q: Did you give Peter any money - -

A: Never did give Peter any money. Just paid my bill.

Q: What did you pay your bill for?

A: For my wills.

Q: So, he just did a trust - -

A: No trust, just wills.

VRP at 123-24. There's no evidence that Leo Miller gave any funds from the Republic property to his son, Wade Miller, nor is there any evidence that Leo Miller created any trust for the benefit of anyone or anything.

Further, even if Leo Miller had given money to his son, Wade, indirectly through a trust or directly with an outright gift, that money would be Wade Miller's (Respondent's) separate property. See *RCW* 26.16.010. Any such gift has no significance relative to the division of

community property. The parties agreed that each party would keep his or her separate property and that is what the court decreed.

This was yet another meaningless argument put forth by Ms. Pape because either decision (i.e., Leo Miller did or did not give money to his son) would not change the property distribution in the decree of dissolution.

3. The court's distribution of property was just and equitable because it awarded to each spouse his or her separate property and half the value of community property.

Ms. Pape is confused about the court's award of property. She stated that the trial court determined that Ms. Pape's "Indian Trust Money" was community property and partly awarded to Mr. Miller. *Brief of Appellant* at 7. Not true. As discussed above, there is no "Indian Trust Money." Further, the court awarded all of Ms. Pape's separate property to her, including inheritances. *VRP* at 385. The court divided the community property 50/50. *VRP* at 383-84, and *see VRP* at 430.

Again, Mr. Miller requests attorney fees from this Court for having to correct Ms. Pape's erroneous statement.

4. The court correctly found that it had no authority to award Appellant's dog to either party because Appellant gifted the dog to her son.

Both spouses testified that Lucy¹¹ the dog was purchased for their son, Chad. *VRP* (re-cross examination of Mr. Miller) at 217. (Petitioner's rebuttal closing argument) at 367. The court found that "[t]he testimony regarding Lucy the dog supported that the dog had been given to Chad as a gift and that the dog is not before the Court as the community property or the separate property of either party." *VRP* (Court's oral decision Jan. 27, 2017) at 385. The trial court's finding of fact was supported with substantial evidence and should be upheld on appeal.

5. The trial court correctly made no finding and issued no decree regarding the house Ms. Pape bought for her sons.

Ms. Pape claimed that the court awarded a house that she bought "back to the Millers,"¹² but no such award was made. Using her inheritance money, Ms. Pape bought a house for the couple's children. *VRP* at 90 (*stating*, "when I got the \$400,000 down [from my inheritance], that's what helped me buy the house for the kids"). However, Ms. Pape claimed that the source of funds was her "dad's Indian trust money." *VRP* at 91. She said she "put [the house] in Chad's name so [Respondent] couldn't get it." *Id.* at 91.

¹¹ Ms. Pape spells the dog's name "Luci," but the court-reporter spelled it "Lucy."

¹² Brief of Appellant at 22 (Statement of Issues 5).

Ms. Pape testified that she knew that her son sold the house and that the proceeds were split between Ms. Pape's two sons. *VRP* at 91. The youngest son receives \$400 each month from his share of the net proceeds. *VRP* at 143-144. The older son intends to build a house on land that he bought. *VRP* at 141-142.

The court heard testimony from Ms. Pape, Mr. Miller and Mr. Miller's father about the sale-proceeds from the house that Ms. Pape bought for the parties' sons. The court had substantial evidence before it that Ms. Pape gave a gift to her sons. Although the court did not expressly rule that the house was a gift, the court did not include the sons' house (or the proceeds therefrom) as community or separate property of either spouse. There is no reason or basis for this Court to make a different finding. The trial court's work should be upheld.

C. The court properly denied Ms. Pape's Motion to Change Venue and Cancel Trial.

(Appellant's Assignment of Error B, Statement of Issues 3)

One court-day before trial, Ms. Pape's *Motion to Change Venue and Cancel Trial* was heard. *CP* at 1735, *VRP* (Pre-trial Mot.) at 4-16. She abandoned her written motion and instead made an oral motion for continuance of trial. *VRP* at 12-14 and *see VRP* at 11. After reviewing new documents put forth by Ms. Pape and hearing her arguments, the Court ruled:

THE COURT: The Court's going to treat the documents that [Ms. Pape] put forward this morning and [her] oral argument as a motion for a continuance of this upcoming trial. There was a letter sent out to the parties November 4th 2016 regarding the notice of the trial date setting the case for trial for five days, January 23rd through the 27th. There was also a settlement conference, which was scheduled in front of Judge Small, on January 4th, which the Court believes that both sides did participate in. Ms. Pape-Miller puts forward today that she's had a District Court trial on January 3rd 2017 regarding a criminal matter that she's assisting her attorney in appealing. She's also had a hearing in this case on a previous motion for change of venue on January 10th 2017.

She now puts forward that she wants to have a continuance because she believes that based upon her surgery on December 23rd that she needs more time to get her activities and life back in order, pursuant to this note from Dr. Witt.

However[], what that means is unclear to the Court, and it would appear that based upon the actions since the surgery on December 23rd that Ms. Pape-Miller's health has been sufficient to litigate her criminal District Court matter, participate in a settlement conference, come to Court and file pleadings and present oral argument regarding her motion for change of venue to Okanogan County, and consequently the Court's going to deny her motion asking for a continuance based upon being -- her health being such that she should not be required to participate in the trial and that, again, her subsequent activities would indicate that her health is such that she can participate --

MS. PAPE-MILLER; So being homeless is not--

THE COURT: Just a minute. So, as pointed out by the Petitioner, there is a great deal of preparation that goes into getting a matter ready to go to trial, and the Court believes that that should not go to waste.

VRP at 12-14. The court's order confirmed its oral ruling. *CP* at 1801-03.

Under either standard of review, abuse of discretion or de novo, the trial court's order should be upheld.

D. The court correctly denied Ms. Pape's oral motion to compel discovery because Ms. Pape did not produce a CR 26(i) certification.

(Appellant's Statement of Issues 3)

1. Purpose of Court Rules.

Court Rule 1 directs that the civil rules are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action.” CR 1. Likewise, our supreme court has stated that courts are to interpret the rules to advance their underlying purpose, which is to a just determination in every action. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Determining what is “speedy and inexpensive” for purposes of CR 1 in a particular case is a discretionary decision because it is based on the facts of that particular case. *Amy v. Kmart of Wash., LLC*, 153 Wn. App. 846, 855, 223 P.3d 1247, 1251, (Div. I, 2009) (published in part).

2. Standard of Review.

The proper standard of review to apply to a trial court's decision to hear a discovery motion in the absence of strict compliance with CR 26(i) is whether the decision is manifestly unreasonable or based on untenable grounds. *Amy v. Kmart of Wash., LLC*. at 856.

3. The record below

On the first day of trial, Ms. Pape moved the court to compel Mr. Miller to provide additional or revised answers to the interrogatories he completed "a year-and-a-half ago." *VRP* at 44.

After hearing argument, the court ruled:

THE COURT: All right. Pursuant to CR 26(i), which reads as follows, 'The Court will not entertain any motion or objection with respect to Rules 26 through 37, unless Counsel have conferred with respect to the motion or objection.' The Court does not have before it a motion to compel, nor does it have before it a certification that, in fact, 26(i) has been complied with. Consequently, [Ms. Pape's] motion to compel, well, oral motion this morning to compel is denied.

VRP at 47.

4. Argument

Ms. Pape had "a year-and-a-half" to review Mr. Miller's answers to interrogatories. *See VRP* at 44. Ms. Pape's *Motion to Compel* was heard and denied on July 12, 2016. *CP* at 1509-10. The Court found that "[Ms. Pape] has not produced credible evidence that Petitioner[']s answers to interrogatories are untruthful." *CP* at 1509 (emphasis in original). Ms. Pape did not depose Mr. Miller during the two years that the case was pending. *CP* at 1-2040 (no notice of deposition filed).

The trial court secured the just, speedy, and inexpensive determination of this action by denying Ms. Pape's last-second motion to

compel. Her morning-of-trial motion was merely another attempt to delay trial. The trial court properly, wisely, and in compliance with the rules denied Ms. Pape's motion. The trial court should be upheld.

E. The trial court properly restrained Ms. Pape and did not restrain Mr. Miller. (*Appellant's Statement of Issues 6*).

A trial court has broad discretion to grant a continuing restraining order where appropriate in a final decree of dissolution: "In entering a decree of dissolution of marriage ... the court shall ... make provision for any necessary continuing restraining orders." *RCW 26.09.050(1)*; 20 Kenneth W. Weber, *WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW* § 41.3, at 524 (1997). Therefore, the trial court's decision to issue a restraining order is reviewed for abuse of discretion. *In re Marriage of Underwood*, 181 Wn. App. 608, at ¶74, 326 P.3d 793, 796, (2014) Wash. App. LEXIS 1345, *35, 2014 WL 2481844; (published in part, *review denied* 181 Wn.2d 1029, 340 P.3d 228, (2014)).

Ms. Pape was restrained from Mr. Miller's residence and places of work during most of the pendency of this action. *CP* at 73-76, 305-307, 358-61. Mr. Miller requested a continuing restraining order in his Petition for Separation. *CP* at 4. Ms. Pape did not request a continuing restraining order against Mr. Miller in her Response to the Petition; instead, she asked that the issue be reserved. *CP* at 82. She did not request a continuing

restraining order in her trial brief. *CP* at 1742-94. At trial, she did not request a restraining order against Mr. Miller. *VRP* at 17-370.

Ms. Pape did not object to being restrained from certain locations:

THE COURT: Do you have any objection to Leo and Polly Miller's residence and businesses being included in the restraining order?

MS. PAPE: No. All I want is access to drive up and down Woodin Avenue....

VRP at 349.

Mr. Miller testified that Ms. Pape had been hanging around his house and work [on Woodin Avenue] against his will. *VRP* at 200. He testified further that she was in the habit of parking across the street from his work and shining her headlights into Mr. Miller's shop. *VRP* at 201.

The court observed her behavior in court, at one point stating through Ms. Pape's interruptions: "[T]he Court has put up with quite a few comments from you that are inappropriate...." *VRP* at 381.

The court had sufficient evidence before it to order the restraint of Ms. Pape. It did so stating, "[t]he Court's granting the Petitioner's request for the restraining order for a period of five years. Ms. Pape is not to be at the residence or property or businesses owned by the Petitioner or his parents. So -- And she may not be within 300 feet of any of these properties unless she's enclosed in a moving vehicle." *VRP* at 385.

Unlike Ms. Pape's behavior during trial, Mr. Miller's behavior gave the court no reason to restrain him. The court was well within its discretion to order continuing restraints against Ms. Pape, only, and this Court should uphold the trial court.

F. The trial court properly did not address Appellant's concern of her relations with her adult children.
(*Appellant's Statement of Issues 7*).

Ms. Pape opened the case by stating, "I'm not going to talk about the kids because they're over 18, so that's a moot point." VRP at 55. Yet, she devoted much of her brief to discussing her children.

With few exceptions, "the practice in civil action shall govern all proceedings under this chapter" *RCW 26.09.010*. An action for the dissolution of marriage has only two parties, the divorcing spouses. A marriage is between only two people. *RCW 26.04.010*. The spouses are the only parties as parties in the dissolution action. *See RCW 26.09.020*. Therefore, *a fortiori*, adult children cannot be not parties to a dissolution action.

Ms. Pape complains of alleged "parental alienation" throughout her brief but mentioned the word, "alienation" only once at trial. *Brief of Appellant, passim, VRP at 449*. The children are adults. *VRP at 141-142*. The children are self-supporting and not in need of "parenting functions" as described by *RCW 26.09.004*. *See VRP at 141-142*.

Appellant cites no authority that would require a trial court to address or decide any matters between a party to a dissolution action and her adult children. Accordingly, the trial court's actions and inactions were proper regarding Appellant's issues with her children.

G. The Appellant received a fair trial and the judicial officer correctly presided over the case. (*Appellant's Statement of Issues* 8).

1. Judge Nakata's impartiality cannot be reasonably questioned.

Due process, the appearance of fairness, and former Code of Judicial Conduct ("CJC") Canon 3(D)(1) require that a judge disqualify herself from hearing a case if that judge is biased against a party or her impartiality may be reasonably questioned. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009)(citing old code, now *CJC* 2.11). A judge shall disqualify herself in any proceeding in which the judge's impartiality might reasonably be questioned. *Wash. Code of Judicial Conduct (CJC) 2.11*. Judges are presumed to act without bias or prejudice. *State v. Franulovich*, 89 Wn.2d 521, 525, 573 P.2d 1298 (1978). The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Gamble*, 168 Wn.2d 161, 187-88, 225 P.3d 973 (2010). Recusal decisions are reviewed for an

abuse of discretion. *Wolkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 840, 14 P.3d 877 (2000).

Bald accusations are insufficient to show suspicion of partiality. See *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). The moving party must still demonstrate potential bias or prejudice. *State v. Davis*, 175 Wn.2d 287, 307-08, 290 P.3d 43 (2012). For example, in *Dominguez*, the judge hearing a case had represented and later prosecuted the defendant. *State v. Dominguez*, 81 Wn. App. 325, 327, 914 P.2d 141, 143 (1996). *Dominguez* had also allegedly sued the judge for malpractice (or perhaps filed a disciplinary complaint). *Id.* The judge denied *Dominguez's* motion to recuse because the judge remembered little about *Dominguez* and knew nothing about the present case. *Id.* The court of appeals held that the defendant's "bare oral assertion[s]" did not amount to a violation of the appearance of fairness doctrine. *Dominguez*, 81 Wn. App. at 329. Evidence that a judge "worked as a lawyer for or against a party in a previous, unrelated case," without a specific showing of bias, is not sufficient to establish grounds for disqualification under the appearance of fairness doctrine, CJC Canon 3(D)(1),¹³ or due process. *Id.* at 328-29.

¹³ The code was updated in 2011 but the author's subscription to Lexis Advance does not provide codes published before 2013.

2. Ms. Pape produced no evidence of bias

Ms. Pape's bald accusations are not credible. Her bare oral assertions do not amount to a violation of the appearance of fairness doctrine. She did not introduce any evidence of bias or unfairness: no witness testimony, no self-serving testimony, no exhibits. *VRP* at 6-93, 188-327.

Ms. Pape has not demonstrated any potential bias or prejudice. She merely insinuated that Judge Nakata, a prosecutor in the 1990s, must have professional knowledge of law enforcement officers who are Ms. Pape's husband's girlfriend's father, uncle, and brother (none of whom testified in this case), and therefore cannot be an impartial judge in this divorce. This is a much more attenuated connection than the one in *Dominguez* and cannot be a basis for suspicion of bias.

Judge Nakata's impartiality cannot be reasonably questioned in this case. The judge denied knowing the Mathena family except for hearing testimony from Josh Mathena in criminal cases. *CP* at 1681 (Minutes from Motion Hearing). "Knowing" means actual knowledge of a fact and knowledge can be inferred from the circumstances. *Wash. CJC Terminology*. It is not reasonable to infer that a judge must "know" and be partial to a person who is not a party or a witness to the case.

Ms. Pape claims that the following seek to harm her or her reputation: Mr. Miller, his attorneys, the Sheriff's office, prosecutors, school district, the Mathena family and family friends, and now the "judicial family." *Brief of Appellant* at p.3. It is not reasonable to claim such a conspiracy.

3. The court's procedures were fair to Ms. Pape.

The court went out of its way to ensure procedural fairness. The court solicited argument from Ms. Pape for each of Mr. Miller's objections. The court repeatedly explained that Ms. Pape's prior statements and documents have no bearing on the trial, for example:

THE COURT: Okay. I think that maybe the Court needs to clarify what it told you before,¹⁴ which is that the declarations or statements provided by the parties in previous hearings are not part of the record as to this dissolution proceeding. The Court's ruling will be based upon the evidence produced during the course of this trial and not other documents that the Court reviewed at previous hearings or statements that the parties made at previous hearings.

VRP at 247.

The court assisted Ms. Pape's attempt to admit evidence. When Mr. Miller's attorney objected to Ms. Pape's attempt to admit a document, the court searched for a reason to admit it, asking if Mr. Miller had raised the issue of Ms. Pape's intransigence. *VRP* at 257-258. When Mr. Miller's

¹⁴ *VRP* at 36, 37.

attorney agreed that Ms. Pape's intransigence might be an issue, the court admitted the document for purposes of refuting intransigence. *VRP* at 258. Ms. Pape had not raised the issue of refutation and did not know the meaning or significance of intransigence. *Id.* The court was more than fair to Ms. Pape because it provided a legal argument for Ms. Pape so her otherwise inadmissible document could become evidence. Mr. Miller's attorneys did not object to the court's intercession on Ms. Pape's behalf at trial and do not claim error now.

The court explained to Ms. Pape:

THE COURT: ... [Y]our statements aren't evidence, and so to have these speaking questions where you're introducing evidence through your question is inappropriate. And the reason why I bring this up is because I don't want you to get confused that you've already testified to something when, in fact, it's really just in the form of these questions.

VRP at 169.

THE COURT: You may question the witness, but again, it's inappropriate to introduce evidence through your question.¹⁵

Id.

During Ms. Pape's closing argument, the court again instructed her:

¹⁵ See, e.g.: Q: [D]idn't you tell the principal . . . that I was going to blow up the school? *VRP* at 309. When the relevance of her question was objected to, Ms. Pape responded, "...I was going to put into the record that . . . one of Ty's teachers, was actually arrested at the FFA convention for hiring a prostitute, and that's the type of people my husband hangs around." *VRP* at 310.

THE COURT: The objection is sustained in that you need to take into account that you're not allowed to inject new evidence through your closing argument. These arguments, it's not testimony, it's really just to assist the Court in reviewing the evidence that has been submitted so far.

VRP at 348.

The court sought Ms. Pape's objection each time Mr. Miller asked to enter an Exhibit. Ms. Pape's objections to Exhibits 7, 8, 10, and 11 were not based in law: Ms. Pape objected to the admission of Exhibits 7 and 8 on the basis of privacy. *VRP* at 19-21. She objected to Exhibits 10 and 11 because those bank statements gave evidence of "Indian Trust Money." *VRP* at 21-24. Exhibits 1-22 were admitted according to Rule 904. *VRP* at 24. Exhibits 23, 24, and 25 were admitted without objection from Ms. Pape. *VRP* at 100, 105, 111. Ms. Pape objected to the admission of an updated appraisal prepared by a CPA because the accountant was not in the rental business. *VRP* at 148. The court admitted the appraisal as Exhibit 27, noting that it would consider the CPA's profession when it considered the weight of the evidence. *VRP* at 148.

Ms. Pape objected to the admission of a property matrix, and the court responded:

THE COURT: The objection's overruled in that you'll be given an opportunity to testify as to what you believe are the assets that the Court should be considering. Exhibit

28 is admitted for illustrative purposes because it is of assistance to the Court in reviewing the assets that are at issue.

VRP at 150. Exhibits 29 through 34 were admitted without objection from Ms. Pape. *VRP* at 193, 195, 197, 199, 313, 326. Ms. Pape offered no documentary evidence as to any asset's value. *See* Exhibits (all).¹⁶ The court said:

THE COURT: The Court has not prevented you from putting forward any evidence pertaining to the property acquired by yourself or Mr. Miller or the valuation of such property.

VRP at 318.

The court gave a reason each time it ruled on an objection, for example:

THE COURT: The objection is sustained because the answer is nonresponsive to the question.

VRP at 67.

THE COURT: The objection is sustained. Ms. Pape[], if you could just listen to the question and then answer that. You'll have an opportunity to supplement your testimony, if you see fit, after Mr. Weston has completed his direct examination.

VRP at 72.

THE COURT: ... The objection by [Mr. Miller] is sustained in that this statement [], is hearsay. [The declarant]'s not present and subject to cross examination. The

¹⁶ Note that only two of Ms. Pape's marked exhibits were admitted into Evidence: Exhibits 51 and 59. *VRP* at 258, 286. Appellant withdrew Exhibit 53. *VRP* at 254.

following [] is an unsigned document, and so there's no showing that either one of these were adopted by Mr. Miller, and it would appear to the Court that you're attempting to admit these as admissions, and without some adoption by Mr. Miller that these are his statements, the objection's sustained.

VRP at 206-207. The court went on to correct Ms. Pape's latent misunderstanding and explain why it had not admitted into evidence a document that Ms. Pape submitted to the court before trial:

THE COURT: We haven't had any discussion regarding the following CR 2A property settlement separation agreement, but because this is under your Exhibit 2 of your trial brief, the Court assumes that you're attempting to admit that, as well, and there's been no foundation laid again that -- well, as to an exception to a hearsay rule.

VRP at 207.

4. Textbook-Worthy Judicial Work.

Judge Nakata recently announced her retirement and should be lauded for the manner in which she presided over this trial. She was patient with a disrespectful pro-se party who threatened to sue the judge, personally. *CP* at 1795-1800, 1819-1824 (notice of lawsuit against Judge Nakata and others), *VRP* at 37, 462¹⁷ and *see* *VRP* 381. Judge Nakata showed a great deal of respect for a difficult, disruptive pro-se party. *VRP passim*. The judge explained the court's procedures and rulings, listened to

¹⁷ Appellant [to Judge Nakata]: "Thank you for your biasness. See you in court." *VRP* 462.

the pro-se party, detected and corrected latent misunderstandings, and kept control of the courtroom, all while conducting an efficient and fair trial. *Id.*

H. Mr. Miller is entitled to an award of attorneys' fees.

A party is entitled to a fee award on appeal if allowed by "applicable law." *RAP 18.1(a)*. The applicable law providing for an award of fees to Respondent is RCW 26.09.140. See *In re Marriage of Knight*, 75 Wn. App. 721, 732, 880 P.2d 71 (1994). That statute states:

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.

RCW 26.09.140.

The primary considerations in a fee award in dissolution actions are need and ability to pay as well as the "general equity of the fee given the disposition of the marital property." *In re Marriage of Davison*, 112 Wn. App. 251, 259, 48 P.3d 358 (2002). In *Davison*, the court held that it could also "consider the merit of the issues raised on appeal." *Id.* at 259.

Intransigence of one party on appeal is also a ground to award fees under the statute. *MacKenzie v. Barthol*, 142 Wn. App. 235, 242, 173 P.3d 980 (2007). The court defined intransigence as "the quality or state of being uncompromising." *Id.* at 242. Intransigence includes making unsubstantiated, false, and exaggerated allegations, or filing numerous

frivolous motions, or refusing to cooperate with court orders. *See, e.g., In re Marriage of Burrill*, 113 Wn. App 863,869, 873, 56 P.3d 993 (2002) (intransigence where wife made unsubstantiated, false, and exaggerated allegations about her husband's fitness as a parent, including that he had abused their child), *review denied*, 149 Wn.2d 1007 (2003); *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997) (intransigence where husband filed numerous frivolous motions, refused to show up for his own deposition, and refused to read correspondence from wife's attorney); *In re Marriage of Greenlee*, 65 Wn. App. 703, 708-09, 829 P.2d 1120, *review denied* 120 Wn.2d 1002 (1992) (intransigence where former husband refused to sign documents for allowing refinance of a home in violation of the divorce decree).

Appellate Procedure Rule 18.9 (a) provides for an award of attorney fees when the appeal is frivolous, i.e., it presents no issue upon which reasonable minds can differ. *Heigis v. Cepeda*, 71 Wn. App. 626, 862 P.2d 129 (1993). An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Ramirez v. Dimond*, 70 Wn. App. 729, 855 P.2d 338 (1993).

Mr. Miller is entitled to an award of reasonable attorneys' fees and costs on appeal contemplated by RCW 26.09.140, RAP 14.1, RAP 18.2, and RAP 18.9 for the following reasons:

1. Appellant demonstrated the quality or state of being uncompromising. For example, Appellant opened her case by stating the children are over 18 and not a part of this case; yet, she wasted judicial resources and caused Respondent to incur attorney fees responding to her complaints about the children. Also, she wasted about the court's time trying to get an attorney to testify to confidential information despite knowing that the attorney refused to divulge confidential information. *VRP* at 33-24.¹⁸

2. She was also intransigent when she refused to sign a quit-claim deed and tax affidavit as expressly required by the court order.¹⁹ Appellant avoided being in contempt by signing those documents in the courtroom during the hearing on Mr. Miller's motion for contempt. *See CP* (Minutes of Contempt Hearing) at 2040.

3. Ms. Pape used court-proceedings, both at trial and upon review, for improper purposes. Although she used to be a paralegal,²⁰ she

¹⁸ THE COURT: Well, you wasted about 15 minutes on something you already knew the answer to, but in any event - -

MS. PAPE-MILLER: [Interrupted the court (again)].

¹⁹ *See VRP* ("I'm not signing") at 461 and (Decree) at 1865.

²⁰ *See VRP* at 27.

flouted court rules by filing 500 pages of salacious allegations to support one motion. She filed more than 2,000 pages with this Court for the appeal, but she failed to cite a single one of them. Ms. Pape, who had plenty of money to pay for counsel, willfully disregarded court rules designed to get at the truth. Instead, she attempted to plant wild and salacious rumors in the court file.

4. Appellant's lack of citation to the record. No citation to Clerk's Papers or the Verbatim Report of Proceedings appears in Appellant's Statement of the Case, each omission a violation of RAP 10.3(a)(5).²¹

5. The difficulty in responding due to Ms. Pape's failure to assign error to any of the trial court's findings in violation of RAP 10.3(g).

6. Her lack of authority for the positions she advanced, e.g.: the court had no right to know about her separate property.

7. Her misrepresentation of the trial court's findings caused Respondent time and effort to correct Appellant's incorrect statements. For example, Appellant stated, errantly, that the trial court determined that Ms. Pape's "Indian Trust Money" was community property. Further in

²¹ "*Statement of the Case*. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." *RAP 10.3(a)(5)* (emphasis supplied).

error, Appellant stated that the court partly awarded her "Indian Trust Money" (correctly referred to as her inheritance) to Mr. Miller.

8. Appellant has the ability to pay²² and her vexatious appeal caused Respondent to incur reasonable attorney fees.

I. Sanctions are appropriate

The appellate court may impose sanctions for the failure to include accurate record references in the statement of the case and in the argument section of the brief. *See, e.g., Hurlbert v. Gordon*, 64 Wn. App. 386, 400-01, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992) (imposing \$750 in sanctions for "laissez-faire" record citations). Or, the court may simply refuse to address the issue:

Significantly, in the argument portion of his brief, appellant's counsel makes reference to only three of the trial court's findings of fact by number and he cites to relevant parts of the record in support of his argument against only two of the trial court's findings.... As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. See RAP 10.3.

²² Honoring the court's decree, Respondent paid \$387,997.50 to Ms. Pape via the court clerk on April 24, 2017. *See CP 2040*. Ms. Pape hid \$242,000 some time after May of 2016. *VRP* at 86. The court valued Appellant's separate property to be worth more than \$1,189,593 *CP 1849* (Findings, Exhibit B-1).

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

In re Estate of Lint, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998).

Ms. Pape's Brief of Appellant failed to cite a single record. No Clerk's Paper, Exhibit, or page from the Report of Proceedings was cited. Although she hid \$242,000 in 2016 and received \$387,997.50 in 2017, she did not hire a lawyer to assist in her appeal. Ms. Pape's list of grievances is difficult to interpret when viewed through applicable laws and court rules.

In an effort to assist this court, Respondent combed the record to construct arguments for Appellant as to which findings were objectionable to her and which evidence applied to those findings. This process was time-consuming and caused Respondent to incur reasonable attorney fees. It is simply not fair that one party be allowed to ignore court rules in an effort to air dirty laundry (all of her grievances being unsupported by any evidence except for self-serving testimony conjured by Appellant) while

the Respondent, who had to get a loan²³ to pay \$387,997.50 to pay Appellant, is saddled with the work and expense of responding to Appellant's frivolous and unfounded appeal.

VI. CONCLUSION

The trial court's findings of fact are supported by substantial evidence and those findings support its conclusions of law; therefore, its decree and restraining order should be affirmed. The trial court properly found that the parties agreed to a 50/50 division of community property and that each party would keep his or her separate property. The trial court should be affirmed and reasonable attorney fees should be awarded to Mr. Miller for the reasons listed above.

DATED November 3, 2017.

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²³ See *VRP* at 338 (court suggesting Mr. Miller get a loan to pay Ms. Pape immediately), and *see Id.* at 387 (court discussing Mr. Miller's need to get a loan to pay Ms. Pape in full) and *see CP* 2040 (Clerk's notes of hearing, attended by Ms. Pape, that note Mr. Miller's payment of \$387,997.50).

DATED November 3, 2017.

WESTON & ASSOCIATES, INC., P.S.

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per telephone authorization

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APPENDIX

Unpublished case – Marriage of Underwood

In re Marriage of Underwood

Court of Appeals of Washington, Division Two

February 25, 2014, Oral Argument; June 3, 2014, Filed

No. 44068-7-II

Reporter

181 Wn. App. 608 *; 326 P.3d 793 **; 2014 Wash. App. LEXIS 1345 ***; 2014 WL 2481844

In the Matter of the Marriage of KARA UNDERWOOD, Respondent, and ROBERT UNDERWOOD, Appellant.

Notice: PUBLISHED IN PART

Subsequent History: Review pending at In re Marriage of Underwood, 2014 Wash. LEXIS 1034 (Wash., Dec. 3, 2014)

Review denied by In re Marriage of Underwood, 181 Wn.2d 1029, 340 P.3d 228, 2014 Wash. LEXIS 1151 (2014)

Decision reached on appeal by, Costs and fees proceeding at, Request denied by In re Marriage of Underwood, 2016 Wash. App. LEXIS 2201 (Wash. Ct. App., Sept. 20, 2016)

Prior History: [***1] Appeal from Pierce County Superior Court. Docket No: 10-3-01083-1. Date filed: 09/14/2012. Judge signing: Honorable James R Orlando.

Core Terms

trial court, Marriage, parties, residential, argues, abused, properties, domestic violence, dissolution, factors, restraining order, retirement, military, relocation, firearm, emotional, earning, orders, property distribution, attorney's fees, awarding, separate property, abuse of discretion, dissolution action, property transaction, community interest, ability to pay, restrictions, proceedings, eliminated

Case Summary

Procedural Posture

Appellant father sought review of a provision of a parenting plan fashioned by the Pierce County Superior Court, Washington, in conjunction with a decree dissolving his marriage to respondent mother that allowed the parties' two teenage children to determine the amount of residential time they would spend with their father.

Overview

The father appealed multiple trial court orders entered in proceedings on the dissolution of his marriage, including a parenting plan provision that allowed the children to decide whether he would have residential time with them. The trial court did not expressly order the elimination of the father's residential time; however, it acknowledged that the children did not desire to have contact with their father at that time. In a partially published opinion, the appellate court held that the father's residential time with his children was improperly eliminated by the provision allowing the children to determine the amount of residential time they would spend with him because the trial court did not make any findings of harm or abuse to support a ruling under Wash. Rev. Code § 26.09.191(2)(m)(i) and erroneously failed to consider the policy directives of Wash. Rev. Code §§ 26.09.002 and 187(3)(a) and the father's fundamental liberty interest in the care, custody, and management of his children in support of a ruling to preclude residential time under Wash. Rev. Code § 26.09.191(3).

Outcome

The trial court's rulings and decisions were affirmed in part and reversed in part by the appellate court, which also remanded the case for further proceedings.

Counsel: *Emily J. Tsai* (of *Tsai Law Company PLLC*), for appellant.

Rebecca K. Reeder (of *Faubion Reeder Fraley & Cook PS*), for respondent.

Judges: AUTHOR: Bradley A. Maxa, J. We concur: J. Robin Hunt, P. J., Thomas R. Bjorgen, J.

Opinion by: Bradley A. Maxa

Opinion

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¶1 MAXA, J. — Robert Underwood appeals multiple trial court orders entered in proceedings related to the dissolution of his marriage to Kara Underwood. We hold that the trial court erred in allowing the parties' two teenage children to determine the amount of their residential time with Robert¹ without supporting that decision with appropriate findings. In the unpublished portion of this opinion we address the remainder of Robert's arguments. We affirm in part, reverse [*794] in part, and remand for further proceedings. We also award Kara her attorney fees on appeal.

FACTS

¶2 Kara and Robert Underwood married in Montana in 1991. They have two children. In 2010, Kara petitioned for [*610] dissolution of her marriage to Robert. At the [***2] time, their older child was 14 and their younger child was 12. After a bench trial, the trial court entered a final parenting plan that allowed the children to decide whether Robert would have residential time with them. The trial court stated:

[T]he [children] are mature and intelligent. Due to this, along with the age of the children, the residential time between [them] and their father in the future shall be based on the desires of the [children]. At present they have no desire to have contact with their father. The court will honor their wishes. They will be allowed to have contact with their father and residential time if they later cho[ose] to.

Clerk's Papers (CP) at 35. Robert appeals this ruling, as well as several other trial court orders addressed in the unpublished portion of this opinion.

ANALYSIS

[1] ¶3 We review a trial court's parenting plan for abuse of discretion. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), *cert. denied*, 133 S. Ct. 889 (2013). A trial court abuses its discretion if its

¹ The parties' first names are used for clarity. By using first names, we mean no disrespect.

decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Katara*, 175 Wn.2d at 35.

[2-4] ¶4 Robert argues that the trial court abused its discretion when [***3] it allowed the children to decide whether he would receive any residential time with them because this ruling effectively eliminated his residential time with them. We hold that although under certain circumstances and in its discretion the trial court may allow a child to determine the amount of residential time with the noncustodial parent, it may do so only based on appropriate findings. Because the trial court did not make adequate findings supporting its decision here, we must remand for reconsideration of this issue.

¶5 The trial court did not expressly order the elimination of Robert's residential time with the children. However, it [***611] acknowledged that the children did not desire to have contact with their father at that time. As a result, the trial court knew that its parenting plan likely would result in the elimination of Robert's residential time for the foreseeable future. The question here is whether the trial court had the discretion to allow the children to determine the amount of their residential time with Robert, knowing that this decision effectively would eliminate Robert's residential time with them.

¶6 Although the trial court did not explain the basis for its ruling on [***4] residential time, it apparently viewed its order as a limitation on residential time justified by its findings under RCW 26.09.191(2) and (3). RCW 26.09.191(2)(a) requires *limitation* of residential time if the parent has engaged in certain conduct. The trial court determined that Robert had engaged in two types of conduct referenced in the statute: a history of acts of domestic violence as defined in RCW 26.50.010(1) and emotional abuse of a child. But RCW 26.09.191(2)(a) does not give the trial court authority to *eliminate* residential time. That authority is granted by other subsections of RCW 26.09.191.

¶7 RCW 26.09.191(2)(m)(i), for example, provides:

If the court expressly finds based on the evidence that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the

parent requesting residential time from all contact with the child.

There is no question here that express findings regarding protecting the children from harm or abuse would have been required if the trial court had explicitly eliminated Robert's residential [***5] time under RCW 26.09.191(2)(m)(i), and that the trial court made no such findings.

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[5] ¶8 A different subsection, RCW 26.09.191(3), authorizes a trial court to completely preclude a parent's residential time if certain factors exist. The trial court found three [*612] of these factors present in this case: (1) a long-term emotional or physical impairment that interferes with the performance of parenting functions as defined in RCW 26.09.004, (2) the absence or substantial impairment of emotional ties between the parent and child, and (3) the abusive use of conflict by the parent that has damaged the children's psychological development. Based on these findings, the trial court had discretionary authority under RCW 26.09.191(3) to enter an order that effectively eliminated Robert's residential time with the children.

¶9 However, the trial court's exercise of discretion to essentially eliminate a parent's residential time must be exercised in the context of other important considerations. First, the legislature has expressed a policy favoring maintaining relationships between parents and children when setting a residential schedule in a dissolution action. RCW 26.09.002 provides that “[t]he state recognizes [***6] the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests.” Further, RCW 26.09.187(3)(a) provides that the trial court should make residential provisions for children that “encourage each parent to maintain a loving, stable, and nurturing relationship with the child.” The trial court must consider these policy directives before effectively eliminating residential time based solely on RCW 26.09.191(3) factors.

¶10 Second, parents have a fundamental liberty interest in the “care, custody and management of their children.” *In re Dependency of J.H.*, 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). A trial court also must consider this liberty interest before effectively eliminating a parent's residential

time with his or her children based solely on the RCW 26.09.191(3) factors.

¶11 Because of these compelling interests in protecting a parent's residential time with his or her children, we hold that (1) an order allowing a child to decide whether to have [*613] any residential time with the noncustodial parent based solely on the RCW 26.09.191(3) factors [***7] should be reserved for situations where the trial court articulates specific reasons for such an order and (2) before allowing a child to decide whether to have any residential time with the noncustodial parent based solely on the RCW 26.09.191(3) factors, the trial court must enter detailed findings supporting and providing the basis for its decision.

¶12 Here, the trial court's only finding was that the children were "mature and intelligent." The trial court also made a nonspecific reference to the ages of the children, 15 and 12. But the trial court did not explain why these children's maturity, intelligence, and ages supported its decision. The trial court also did not explain why the RCW 26.09.191(3) factors supported effectively eliminating Robert's residential time. Finally, despite their age difference, the trial court did not make specific findings regarding each child individually. The trial court's minimal statements on this issue were insufficient to support its decision to allow the children to decide whether to have any residential time with Robert.

¶13 We recognize that one of the children is now over the age of 18 and is no longer subject to the parenting plan, and that the [***8] second child is now 16. In addition, over 18 months have passed since the trial court entered its parenting plan and circumstances may have changed. Accordingly, we remand this matter to the trial court for reconsideration of this residential time issue and a determination of whether it is still appropriate to allow the remaining minor child to decide whether to have any residential time with Robert. If the trial court again allows the child to decide whether to have residential time with Robert, it must enter appropriate findings supporting and providing a basis for that determination.

¶14 We consider Robert's remaining arguments in the unpublished portion of this opinion. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

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¶15 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

¶16 In the unpublished portion of this opinion, we hold that

¶17 (1) Robert consented to jurisdiction over the division of his military pension under the Uniform Services Former Spouses' [***9] Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1), because he admitted jurisdiction in his answer to the dissolution petition and requested affirmative relief;

¶18 (2) any violation of the stay entered under the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. § 522, was harmless error;

¶19 (3) the trial court improperly found that Robert's acts of financial and emotional exploitation were domestic violence for purposes of RCW 26.09.191(2), but the record supported a finding that Robert engaged in domestic violence;

¶20 (4) the trial court erred in failing to make the required findings to waive relocation notice requirements under RCW 26.09.460(4)²;

¶21 (5) the provision in the restraining order restricting Robert's use of a firearm was proper under 18 U.S.C. § 922(g)(8) because he was subject to an order restraining him from harassing, stalking, or threatening an intimate partner;

¶22 (6) the trial court inappropriately relied on evidence of lost profits from a failed property transaction when awarding Kara a lien, but correctly determined that Kara had a community interest in [***10] the parties' real property on which the lien was placed;

¶23 (7) requiring Robert to name Kara as the beneficiary of the survivor benefit plan and to maintain life insurance did not amount to a double recovery of retirement benefits because the life insurance also secured

² We do not address other restrictions in the parenting plan because Robert failed to assign error to those portions of the plan.

child support and other community obligations;

¶24 (8) the trial court did not abuse its discretion in not considering Robert's cost of selling property and requiring him to pay Kara's separate credit card debt;

¶25 (9) sufficient evidence regarding the parties' needs and abilities to pay supported the trial court's maintenance award;

¶26 (10) the trial court erred in awarding Kara lifetime maintenance of \$1.00 per month as a placeholder to retain jurisdiction; and

¶27 (11) the evidence supporting the trial court's maintenance award regarding need and ability to pay supports the trial court's attorney fee award to Kara.

¶28 We also award Kara her attorney fees on appeal.

ADDITIONAL FACTS

¶29 Robert was a member of the military and was stationed in multiple locations during the marriage. Kara and the children frequently moved with him. The parties lived in Washington for certain portions of this time.

Property Acquisition

¶30 In 1995, Kara and Robert agreed [***11] to purchase property in Montana from Robert's grandparents and began making monthly payments. After Robert's grandparents died in 2005, the parties realized that the property was part of Robert's family trust and the parties sued the trust to gain access to the property. The result was that the trust was dissolved; the trust property, including the property the parties had supposedly purchased, was sold; the parties were refunded the money they had paid for the property; and Robert received a payment for his share of the trust.

¶31 Using Robert's payment from the trust and proceeds from the sale of a community property home in Steilacoom, the parties purchased two parcels of property in Cheney, Washington. One of the properties was secured by a mortgage that the parties paid with joint earnings during the

marriage. The parties completed an extensive remodel on the home on this property, which they paid for through a home equity line of credit that they repaid out of joint earnings. Although the parties rented out the other Cheney property, the rental income did not cover the property's expenses, and the uncovered expenses were paid out of community funds. Kara performed physical labor on [***12] this rented property and managed the property.

¶32 In 2008, the parties sold one of the Cheney properties and used the proceeds to purchase property in Montana. The parties took out a mortgage on the Montana property and made the payments out of joint earnings. The parties also paid all of the property's expenses out of joint earnings and made alterations and repairs to the property.

Dissolution Proceedings

¶33 In 2010, while the parties and the children were living in Naples, Italy, the parties decided to separate. Kara and the children planned to move to Tacoma in June, but they returned to the United States in February because, according to Kara, Robert had been emotionally abusing and exercising control over her and the children that had become "unbearable." Report of Proceedings (RP) at 35. Before Kara was able to leave, Robert reported all of her credit cards as stolen and took her passport. Kara said she was "basically being held prisoner there." RP at 36.

¶34 On March 25, 2010, Kara petitioned for dissolution in Pierce County Superior Court. On June 15, the trial court entered a temporary parenting plan under which the children would reside with Kara but would spend every other weekend and [***13] every Wednesday with Robert when he resided near the children. If Robert did not reside near the children, he would be entitled to reasonable residential time with them upon giving two weeks' notice to Kara. The trial court also entered orders for child support, maintenance, attorney fees, appointment of a guardian ad litem, tax exemptions, and disposition of the Montana property.

¶35 On September 10, Robert moved to vacate these June 15 orders. He made extensive arguments challenging the orders, including a claim that

the trial court did not have jurisdiction over him under the USFSPA because he was on active military duty in Italy at the time the orders were entered and was a resident of Montana. The trial court determined that it had jurisdiction over the dissolution.

¶36 In November, Robert was notified that he would be deployed to Afghanistan until August 2011. On December 27, he moved to stay the dissolution proceedings under the SCRA because his ability to defend the action was materially affected by his deployment. The trial court granted the motion and ordered that the proceedings be stayed until September 30, 2011. On July 27, Robert moved to lift the stay because he had retained an [***14] attorney in the United States. The trial court granted the motion and directed the clerk to issue a new case schedule.

Final Resolution

¶37 The trial court concluded that it had jurisdiction over Robert because the parties lived in Washington during their marriage and because Kara continued to reside in Washington. On September 14, after a bench trial, the trial court issued the following orders: (1) a permanent restraining order against Robert that also prohibited him from possessing a firearm, (2) a final parenting plan, (3) a final order of child support, (4) a decree of dissolution, and (5) findings of fact and conclusions of law. The trial court ordered Robert to pay Kara's costs and attorney fees, totaling \$30,000. Robert appeals.

ANALYSIS

A. JURISDICTION OVER MILITARY PENSION

¶38 Robert argues that the trial court did not have jurisdiction over the division of his military pension under the Uniform Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1), because as of the date of dissolution he neither resided nor was domiciled in Washington. We hold that Robert consented to jurisdiction in Washington, and therefore cannot argue otherwise on appeal.

1. Statutory Framework

¶39 When [***15] the underlying facts are undisputed, whether a trial

court has jurisdiction is a question of law, which we review de novo. *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005) (subject matter jurisdiction); *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992) (personal jurisdiction). We review Robert's jurisdictional challenge here under the specific terms of the USFSPA because the federal statute generally preempts state rules regarding jurisdiction when military pensions are concerned. U.S. CONST. art. VI, cl. 2; see also *In re Marriage of Booker*, 833 P.2d 734, 739 (Colo. 1992).

¶40 The trial court's authority to divide Robert's military pension derives from the USFSPA. *In re Marriage of Peck*, 82 Wn. App. 809, 813-14, 920 P.2d 236 (1996). Under the USFSPA, state courts may treat certain military retirement pay as community property subject to division in dissolution actions. 10 U.S.C. § 1408(c)(1); *In re Marriage of Jennings*, 138 Wn.2d 612, 622, 980 P.2d 1248 (1999). For military retirement pay to be before the court in a dissolution action, state courts must obtain jurisdiction over military members in one of the ways enumerated in 10 U.S.C. § 1408(c)(4). Under 10 U.S.C. § 1408(c)(4), [***16] a trial court has jurisdiction over the disposable retired or retainer pay of a service member by reason of: “(A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.”

2. Consent to Jurisdiction

¶41 Kara argues that Robert consented to the court's jurisdiction in Washington in his response to her petition for dissolution. Robert argues that he did not consent to jurisdiction because he objected to jurisdiction in his motion to vacate the trial court's temporary parenting plan and related orders. We agree with Kara that Robert consented to jurisdiction.

¶42 Consent to jurisdiction for the purposes of the USFSPA may be implied by a military service member's general appearance in court. *Peck*, 82 Wn. App. at 814. Even where the service member has objected to personal jurisdiction, “he may waive the defense of lack of jurisdiction by seeking affirmative relief, thereby invoking the jurisdiction of the court.” *Peck*, 82 Wn. App. at 814 (quoting *In re Marriage of Parks*, 48 Wn. App.

166, 170, 737 P.2d 1316 (1987)).³

¶43 Here, in paragraph 1.7 of Kara's petition for dissolution, she alleged that the trial court had jurisdiction over Robert because she and Robert "lived in Washington during their marriage and [she] continues to reside ... in this state." CP at 2. In his June 9, 2010 response to the petition, Robert *admitted* this assertion in paragraph 1.7. He also requested affirmative relief — that the trial court enter a dissolution decree, approve his parenting plan, determine support for the children under the child support schedule, dispose of his property and liabilities according to his proposal, and award him tax exemptions for the children. And Robert did not contest jurisdiction until over five months after Kara filed the petition for dissolution and almost three months after the trial court entered orders unfavorable to him. These actions constitute Robert's consent to jurisdiction in the Washington courts.

¶44 Robert argues that he did not consent to jurisdiction because he directed his attorney to contest jurisdiction [***18] and his attorney failed to comply with his request. But regardless of whether this assertion is true, unlike in *Peck* Robert also requested multiple forms of affirmative relief in his answer. He then failed to bring his jurisdictional challenge to the trial court's attention until three months after the trial court entered orders unfavorable to him. That Robert later claimed his attorney acted contrary to his wishes in failing to object to jurisdiction in his answer does not negate Robert's demonstrating consent to jurisdiction in Washington by requesting affirmative relief in the dissolution action and waiting until the court had entered substantive orders before contesting jurisdiction.⁴

B. STAY UNDER THE SCRA

¶45 Robert argues that the trial court violated his due process rights when it granted Kara's motion to limit his parental rights during a stay under the

³ In *Peck*, we found no [***17] consent when the service member asserted in his answer that the court did not have jurisdiction and continued to contest jurisdiction in later pleadings. 82 Wn. App. at 814-15.

⁴ Kara also argues that the trial court had jurisdiction over Robert under Washington's long-arm statute, RCW 4.28.185. Because we hold that Robert consented to jurisdiction, we need not address this issue. We also need not address whether Washington was Robert's residence or domicile under the USFSPA.

Servicemembers Civil Relief Act [***19] (SCRA), 50 U.S.C. App. § 522. We hold that to the extent the trial court did violate the stay, any violation was harmless.

¶46 Under the SCRA, a service member may obtain a stay “[a]t any stage before final judgment in a civil action or proceeding.” 50 U.S.C. App. § 522(b)(1). The purpose of the SCRA “is to suspend enforcement of civil liabilities of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation.” *In re Marriage of Herridge*, 169 Wn. App. 290, 297, 279 P.3d 956 (2012) (quoting *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir.1995)); see also 50 U.S.C. App. § 502(2) (purpose of SCRA is “to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service”). The provisions of the SCRA are to be liberally construed. *Herridge*, 169 Wn. App. at 297. But the SCRA “is not to be used as a sword against persons with legitimate claims,” and a court must give “equitable consideration of the rights of parties to the end that their respective interests may [***20] be properly conserved.” *Herridge*, 169 Wn. App. at 297 (quoting *Engstrom*, 47 F.3d at 1462).

¶47 Here, Robert moved for a stay of proceedings under the SCRA before he was deployed to Afghanistan. On January 6, 2011, the trial court granted the motion and ordered that proceedings be stayed until September 30, 2011. But on March 31, Kara moved for an order requiring Robert to undergo a mental health evaluation and requiring any residential time with Robert to take place in Pierce County until the mental health evaluation had been completed. On April 15, the trial court continued the motion for a mental health evaluation until Robert was available or when the stay was lifted, whichever was sooner. The trial court further ruled, “Prior to Robert ... exercising any residential time with the children of this marriage, [Kara]’s motion for a mental health evaluation shall be heard.” CP at 151.

¶48 Robert claims that the trial court violated the stay because it restricted his residential time with the children pending the hearing on whether a mental health evaluation should be ordered. However, Robert fails to show how this restriction on his residential time prejudiced him. The trial court restricted [***21] Robert’s residential time with the children on April 15

pending his availability for a hearing on the necessity of a mental health evaluation. But Robert was out of the country at that time. And even though Robert did not have a mental health evaluation, when Robert returned to Washington the trial court awarded him residential time with the children for four days beginning on June 24. The court further ordered that if the visits went well, Robert would have residential time with the children in Montana from June 28 until July 8, 2011. These visits took place. Robert does not allege that he planned or was available to see the children between the date the trial court restricted residential time, April 15, and the date his residential time was restored, June 23. Therefore, Robert has failed to show how the trial court's limitation on his residential time with the children between April 15 and June 23, pending the mental health hearing, prejudiced him.

¶49 We reverse only when an error prejudices a party. *Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 380, 292 P.3d 108 (2013). Because the trial court's temporary departure from the parenting plan during the stay did not prejudice Robert, [***22] we hold that any error was harmless.⁵

C. PARENTING PLAN

¶50 Robert challenges multiple provisions in the parenting plan, arguing that (1) there was insufficient evidence supporting restrictions on his residential time under RCW 26.09.191(2), (2) the trial court abused its discretion when it allowed Kara to relocate with the children and waived notice requirements under RCW 26.09.430-460 and RCW 26.09.520, and (3) the trial court abused its discretion when it restricted the children's contact with Robert's family members and restricted him from possessing pornographic material within the children's sight.

1. Standard of Review

¶51 As noted above, we review a trial court's parenting plan for abuse of discretion. *Katire II*, 175 Wn.2d at 35. We review findings of fact for substantial evidence, which is evidence sufficient to persuade a fair-

⁵ Robert also argues that after the stay was lifted, he had "extreme difficulty" responding to motions to re-determine temporary orders, to compel discovery, and to gain access to property. But Robert fails to show how the trial court violated the SCRA by allowing the case to proceed *after* the stay was lifted.

mindful person of the finding's truth. *Katara II*, 175 Wn.2d at 35. [***23] We do not retry the facts on appeal. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). Therefore, we do not review the trial court's credibility determinations or weigh evidence. *In re Marriage of Meredith*, 148 Wn. App. 887, 891 n.1, 201 P.3d 1056 (2009). Unchallenged findings of fact are verities on appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 665, 50 P.3d 298 (2002).

2. Limitation on Residential Time under RCW 26.09.191

¶52 Robert argues that the trial court abused its discretion when it limited his residential time based on RCW 26.09.191. We disagree.

a. Legal Principles

¶53 Decisions on residential provisions are based on the child's best interests, as found at the time of trial. RCW 26.09.187(3)(a); *In re Marriage of Littlefield*, 133 Wn.2d 39, 52, 940 P.2d 1362 (1997). Because the trial court has a unique opportunity to observe the parties, we are "extremely reluctant to disturb child placement dispositions." *In re Parentage of Schroeder*, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001) (quoting *In re Marriage of Schneider*, 82 Wn. App. 471, 476, 918 P.2d 543 (1996)).

¶54 Generally, when creating a permanent parenting plan in a dissolution action, courts will set a residential [***24] schedule for the children based on certain statutory considerations. See RCW 26.09.187(3). But the statute also provides certain factors that, if present, either impose a mandatory duty on the court to limit residential time (RCW 26.09.191(2)) or permit the trial court to do so within its discretion (RCW 26.09.191(3)). *In re Marriage of Watson*, 132 Wn. App. 222, 232, 130 P.3d 915 (2006). "[A]ny limitations or restrictions imposed must be reasonably calculated to address the identified harm." *In re Marriage of Katara (Katara I)*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004).

¶55 If the trial court finds that one of the parents has engaged in certain conduct specified in RCW 26.09.191(2)(a), the trial court *must* limit that parent's residential time. *Watson*, 132 Wn. App. at 231-32; see also RCW 26.09.187(3). Two of those limiting criteria are that the parent has engaged in a history of acts of domestic violence as defined in RCW

26.50.010(1) and emotional abuse of a child. RCW 26.09.191(2)(a).

¶56 If the trial court finds the existence of certain other factors under RCW 26.09.191(3), the trial court *may* limit or preclude any provision in the parenting plan if the court finds that “[a] parent’s involvement [***25] or conduct may have an adverse effect on the child’s best interests.” *Watson*, 132 Wn. App. at 232. Three of these factors are:

- (b) A long-term emotional or physical impairment which interferes with the parent’s performance of parenting functions as defined in RCW 26.09.004;
- (d) The absence or substantial impairment of emotional ties between the parent and the child; [and]
- (e) The abusive use of conflict by the parent which creates the danger of serious damage to the child’s psychological development.

RCW 26.09.191(3).

b. Finding of Domestic Violence

¶57 The trial court concluded that Robert’s residential time with the children should be limited under RCW 26.09.191(2)(a) because he “engaged in acts of domestic violence by financial and emotional exploitation.” CP at 34. Robert argues that the trial court erred when it defined financial and emotional exploitation as domestic violence because it does not appear in the definition of domestic violence in RCW 26.50.010(1). We agree, but affirm the trial court’s finding because there was other sufficient evidence of domestic violence.

¶58 Whether financial and emotional exploitation falls under the definition of domestic violence in RCW 26.50.010(1) is [***26] a matter of statutory interpretation, a question of law that we review *de novo*. *Advanced Silicon Materials, LLC v. Grant County*, 156 Wn.2d 84, 89, 124 P.3d 294 (2005). The primary goal of statutory interpretation is to ascertain and give effect to the legislature’s intent. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Campbell & Gwinn*, 146 Wn.2d at 9-10. “[A]n unambiguous statute is not subject to judicial construction.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). “A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations

are conceivable.” *Kilian*, 147 Wn.2d at 20-21.

¶59 RCW 26.50.010(1) defines “domestic violence” as “[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.” RCW 26.50.010(1) is not ambiguous and therefore its meaning is to be derived from the plain language of the statute alone. *Neilson ex rel Crump v. Blanchette*, 149 Wn. App. 111, 116, 201 P.3d 1089 (2009). [***27] The plain language of this statute does not include “financial and emotional exploitation.” Moreover, there is no authority supporting such a reading. Accordingly, the trial court erred when it determined that Robert had engaged in domestic violence because he had engaged in financial and emotional exploitation.

¶60 Even though the trial court erred in this regard, we can affirm a trial court’s ruling on any basis supported by the record. *In re Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). Here, the record supports a finding that Robert engaged in domestic violence because he inflicted “fear of imminent physical harm, bodily injury or assault.” RCW 26.50.010(1). Kara testified that after Robert filed for divorce in 2006, he ran his truck into her moving van when she was trying to move her things out of the house and he threatened to kill a man, and she had a restraining order entered against him because of the incident. Kara also testified that during their marriage Robert “made me pay for a mistake that I made in the marriage, and that included an all night interrogation.” RP at 208. In response to a question about whether Robert was an intimidating person, Kara responded, [***28] “When someone is posturing over you, spitting in your face, keeping you up all night long, throwing t[h]ings through windows, has weapons, is a ranger trained in the military, yes, he’s a threatening person, intimidating person.” RP at 207-08.

¶61 In 2012, Robert was charged with felony harassment for allegedly hiring a hit man to kill Kara⁶. Kara testified that after hearing that Robert had threatened to have her killed, she feared for her safety and “absolutely was in fear of my life.” RP at 202-03. She further testified, “I had my concerns about what [Robert] was going to do when he came here, based on his threats to me via email, saying I would pay. That when he got there,

⁶This harassment charge ultimately was dismissed.

things were going to be different.” RP at 203. For two years during the parties' separation, Robert sent threatening communications to Kara. Kara testified that “[a]fter two years of hearing that I was going to pay when he returned, he was returning the following month and I was very concerned, still am, about his state of mind and what he will do.” RP at 206.

¶62 There is ample evidence in the record that Robert had engaged in a history of domestic violence by inflicting [***29] fear of imminent physical harm, bodily injury, or assault. RCW 26.50.010(1). Nevertheless, the trial court made no findings regarding Robert's infliction of fear of imminent harm. In *Katare I*, Division One of this court ruled that the trial court must make express findings under RCW 26.09.191 in order to impose limitations in a parenting plan. 125 Wn. App. at 826. However, our Supreme Court recently clarified that the holding in *Katare I* was that “restrictions entered in a parenting plan pursuant to RCW 26.09.191(3) must be supported by an express finding that the parent's conduct is adverse to the best interest of the child.” *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012), cert. denied 133 S. Ct. 889 (*Katare II*), 175 Wn.2d at 32 (emphasis added). The court in *Katare II* further stated that the court in *Katare I* remanded to the trial court to resolve an ambiguity created by the trial court's finding that RCW 26.09.191(3) did not apply. 175 Wn.2d at 32.

¶63 Here, the trial court's restriction on residential time due to domestic violence was a limiting factor under RCW 26.09.191(2)(a), not RCW 26.09.191(3). And here, unlike in *Katare I*, there is no ambiguity in the trial court's [***30] ruling. The trial court found that Robert had a history of domestic violence. That finding is supported by the record. Therefore, the rule in *Katare I* is inapplicable here and does not change the rule that we may affirm on any basis supported by the record.

¶64 Although the trial court erred in ruling that financial and emotional exploitation constituted domestic violence, we affirm the trial court's finding of domestic violence based on evidence that Robert inflicted fear of imminent physical harm, bodily injury, or assault.

c. Emotional Abuse of a Child

¶65 The trial court also stated that its decision to limit residential time was based on emotional abuse of a child, which is another mandatory limiting

factor under RCW 26.09.191 (2). The trial court found that Robert “has been abusive to his wife and children. He has bullied and interrogated them, resulting in their desire to have no contact with him.” CP at 34. Robert does not assign error to this finding. Accordingly, it is a verity on appeal. *Fiorito*, 112 Wn. App. at 665.

¶66 Because the trial court found that Robert emotionally abused the children, it was required to impose limitations on his residential time under RCW 26.09.191(2). Accordingly, [***31] even if the trial court erroneously defined “domestic violence,” any error the trial court made was harmless because the trial court nevertheless was required to limit Robert’s residential time based on emotional abuse of a child.

d. Factors under RCW 26.09.191(3)

¶67 The trial court concluded that Robert’s residential time could be limited because his involvement with the children may have an adverse effect on their best interests based on the existence of the following factors set forth in RCW 26.09.191(3): (1) a long-term emotional or physical impairment that interferes with the performance of parenting functions as defined in RCW 26.09.004, (2) the absence or substantial impairment of emotional ties between the parent and child, and (3) the abusive use of conflict by the parent that has damaged the children’s psychological development. Robert argues that these findings were unsupported, but he has failed to assign error to these findings.

¶68 Without including these challenges in his assignments of error, Robert’s challenges to these findings in his brief are insufficient. RAP 10.3(g) (“A separate assignment of error for each finding of fact a party contends was improperly made must be included [***32] with reference to the finding by number.”). Therefore, we treat them as verities on appeal. *Fiorito*, 112 Wn. App. at 665.⁷ These unchallenged findings support the trial court’s restrictions on residential time under RCW 26.09.191(3).

3. Relocation Notice

⁷ Regardless of Robert’s failure to assign error to the trial court’s findings, the record shows that these findings were supported by substantial evidence. In addition, even if these findings were erroneous, the trial court’s restriction of Robert’s residential time was mandated by the findings of domestic violence and emotional abuse of a child.

¶69 The trial court allowed Kara to relocate with the children without having to give Robert the required notice under RCW 26.09.430-460 and RCW 26.09.520. Robert argues that the trial court abused its discretion when it allowed Kara to relocate with the children and waived the notice requirements under RCW 26.09.430-460 and RCW 26.09.520 without making any findings to support its ruling. We agree.

¶70 RCW 26.09.520 provides that a party proposing to relocate with a child must provide reasons for the intended relocation. There is a rebuttable presumption that the intended relocation will be permitted, [***33] but the opposing party “may rebut the presumption by demonstrating that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person” based upon certain factors. RCW 26.09.520. The trial court must consider each factor in RCW 26.09.520 and must either enter written findings on each factor or make an oral ruling supported by substantial evidence on each factor. *In re Marriage of Horner*, 151 Wn.2d 884, 896, 93 P.3d 124 (2004). “[T]he trial court has discretion to grant or deny a relocation after considering the RCW 26.09.520 relocation factors and the interests of the children and their parents.” *In re Marriage of Fahey*, 164 Wn. App. 42, 56, 262 P.3d 128 (2011), *review denied*, 173 Wn.2d 1019 (2012).

¶71 Generally, the relocating party also must provide notice to the other parent of that party's intent to relocate. RCW 26.09.430. However, a party may request an order waiving notice requirements and the trial court will grant the motion if “the court finds that the health or safety of a person or a child would be unreasonably put at risk by notice or the disclosure of certain information in the notice.” RCW 26.09.460(4). Here, the trial [***34] court's only finding supporting its ruling that Kara did not need to give Robert notice provided: “[T]he present environment is detrimental to [Kara] and to [the] parties' children. They will benefit from a fresh start in a new community.” CP at 39. The trial court did not find that the “health or safety” of the children would have been put at risk by providing notice or disclosing the location of the relocation to Robert. RCW 26.09.460(4). Accordingly, we remand to the trial court to consider this factor and make the required findings if it finds that waiver of notice was appropriate.

4. Other Restrictions on Residential Time

¶72 Robert argues that the trial court abused its discretion when it restricted both parties from allowing the children to spend time with their cousin, paternal grandmother, and paternal aunt, and when it restricted him from possessing pornographic material within the children's sight. But Robert does not assign error to these portions of the parenting plan. Accordingly, we need not address these issues. RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining [***35] thereto.").

D. RESTRAINING ORDER

¶73 The trial court imposed a permanent restraining order against Robert because he "has been abusive to his wife and children" and because Kara's testimony established that she had a "very real fear of future acts of domestic violence." CP at 22, 69. Robert argues that the trial court abused its discretion when it entered the restraining order and that the trial court improperly precluded him from owning firearms. We disagree.

¶74 A trial court has broad discretion to grant a continuing restraining order where appropriate in a final decree of dissolution: "In entering a decree of dissolution of marriage ... the court shall ... make provision for *any necessary continuing restraining orders.*" RCW 26.09.050(1) (emphasis added); 20 Kenneth W. Weber, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 41.3, at 524 (1997). Therefore, we review the trial court's decision to issue a restraining order for abuse of discretion.

¶75 RCW 26.09.050(1) allows the trial court to include in its restraining order "the restraint provisions of a domestic violence protection order under chapter 26.50 RCW." The trial court also may include in its restraining order restrictions [***36] on firearm possession and use contained in RCW 9.41.800. RCW 26.09.050(1). RCW 9.41.800 provides that a trial court may prohibit the restrained party "from obtaining or possessing a firearm" if there is clear and convincing evidence that a party has "[u]sed, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040."

¶76 Here, the trial court entered a restraining order against Robert under RCW 26.09.050(1). In its findings and conclusions, the trial court stated: “A continuing restraining order against the husband is necessary. The court finds that [Robert] has been abusive to his wife and children. The testimony of Kara ... supports her very real fear of future acts of domestic violence.” CP at 69. The protection order also provided that if “the parties are intimate partners as defined under federal law ... the restrained person may not possess a firearm or ammunition.” CP at 23. This provision is contained in the mandatory forms for restraining orders issued under chapter 26.09 RCW. *See* 22A Scott Horenstein WASHINGTON PRACTICE: FAMILY [***37] AND COMMUNITY PROPERTY LAW HANDBOOK, WPF DR 04.0500, at 287 (2013).

¶77 Robert argues that the trial court violated his Second Amendment rights to keep and bear arms when it entered a restraining order restricting him from possessing a firearm. He first argues that there was no evidence of domestic violence supporting the order. However, as discussed above, there was ample evidence in the record to establish that Robert engaged in domestic violence by inflicting fear of imminent physical harm, bodily injury, or assault. *See* RCW 26.50.010(1).

¶78 Robert also argues that RCW 9.41.800 did not authorize a restriction on his possession of firearms because there was no evidence that he used, displayed, or threatened to use a firearm in the commission of a felony or that he committed an offense that made him ineligible to possess a firearm under RCW 9.41.040. Robert is correct. However, this was not the basis for the trial court's imposition of a firearm restriction. Rather, the restriction was based on 18 U.S.C. § 922(g)(8), which makes possessing a firearm unlawful for a person subject to a court order that “restrains such person from harassing, stalking, or threatening an intimate partner⁸ of such [***38] person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.” The order here prohibited Robert from “harassing or stalking” Kara, and Robert does not show why 18 U.S.C. § 922(g)(8) does not apply to him. Accordingly, we hold that the trial court did not abuse its discretion when it entered a

⁸ Former spouses are “intimate partners” under 18 U.S.C. § 921(a)(32).

restraining order preventing Robert from possessing a firearm.

E. PROPERTY DISTRIBUTION

¶79 The trial court awarded the Cheney and Montana properties to Robert but found that Kara had a community interest in those properties and awarded her an equitable lien of \$112,000 against the Cheney property to compensate her for that interest. The trial court implied that the lien included some amount for the parties' failed property transaction involving property owned by Robert's grandparents. The trial court also required that Robert maintain a life insurance policy payable to Kara until he retired and that he name Kara as the beneficiary under his survivor benefit plan for his military retirement. Robert challenges these provisions [***39] in the trial court's property distribution order as well as the fairness of the property distribution.

¶80 We hold that the trial court abused its discretion when it imposed the lien in Kara's favor based in part on evidence of the projected lost profits from the parties' failed property transaction. We reverse and remand to the trial court to vacate this lien, and to recalculate the value of the lien against Robert's property without considering projected lost profits from the failed property transaction. We affirm on all other property distribution issues.

1. Legal Principles

¶81 “In a marriage dissolution proceeding, the trial court must ‘dispos[e] of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors.’” *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005) (quoting RCW 26.09.080). Those factors include (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the property distribution is to become effective. RCW 26.09.080. These factors [***40] are not exclusive. *In re Marriage of Larson and Calhoun*, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013). All property is before the court for distribution. *In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011).

The court has “broad discretion” to determine what is just and

equitable based on the circumstances of each case. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). A just and equitable division “does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties.” *In re Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996). “Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.” *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). “Just and equitable distribution does not mean that the court must make an equal distribution.” *In re Marriage of DewBerry*, 115 Wn. App. 351, 366, 62 P.3d 525 (2003). “Under appropriate circumstances ... [the trial court] need not award separate property to its owner.” *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).

Larson, 178 Wn. App. at 138.

¶82 Because [***41] the trial court is in the best position to decide issues of fairness, we review a trial court's property division made during a dissolution of marriage for manifest abuse of discretion. *Muhammad*, 153 Wn.2d at 803; *Larson*, 178 Wn. App. at 138. “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *Muhammad*, 153 Wn.2d at 803 (quoting *Littlefield*, 133 Wn.2d at 46-47). “Trial court decisions in dissolution proceedings will seldom be changed on appeal.” *In re Marriage of Stenshoel*, 72 Wn. App. 800, 803, 866 P.2d 635 (1993).

2. Characterization of the Cheney and Montana Properties

¶83 In exercising its discretion to distribute property in a marriage dissolution, the trial court must characterize property as either separate or community. RCW 26.09.080; *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). The law favors characterization of property as community property “unless there is clearly no question of its separate character.” *Brewer*, 137 Wn.2d at 766-67.

¶84 Property acquired during marriage is presumed to be community property. RCW 26.16.010-.030; see *In re Marriage of Short*, 125 Wn. 2d 865, 870, 890 P.2d 12 (1995). [***42] A party asserting that an asset

acquired during marriage is separate property must overcome the community presumption by clear and convincing evidence. *In re Marriage of Marzetta*, 129 Wn. App. 607, 621, 120 P.3d 75 (2005), *overruled on other grounds by In re Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

¶85 Property acquired during marriage by inheritance is separate property and property acquired during marriage with traceable proceeds of separate property is separate property. *White*, 105 Wn. App. at 550. There is a presumption that any increase in value of separate property is also presumed to be separate property, but the presumption can be rebutted by evidence that the increase is attributable to community funds or labor. *In re Marriage of Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982). Property that is “purchased with both community funds and clearly traceable separate funds will be divided according to the contribution of each.” *In re Marriage of Chumbley*, 150 Wn.2d 1, 8, 74 P.3d 129 (2003).

¶86 The trial court determined that Kara had a community interest in the Cheney and Montana properties because community resources had been used to purchase or improve them. The trial [***43] court stated that “[t]he community contributed funds, sweat equity and incurred liabilities for those properties.” CP at 20. Robert argues that the two properties were his separate property because they were purchased using his separate property funds from the dissolution of his family trust and there was no evidence that community efforts increased the value of the properties. Robert’s assertion that the properties were his separate property is without merit. There was evidence that the two Cheney properties were purchased with not only the funds from the trust dissolution but also the funds received from the sale of the Steilacoom property, a community property asset. Further, there was evidence that community funds were used to pay the mortgage on one of the properties and that community efforts and funds were used to improve both properties. Because community funds were used to purchase the properties and because community efforts and funds were used to maintain the properties, we hold that Kara had a community interest in these properties.

¶87 Further, the proceeds from the Cheney property the parties sold were used to purchase the Montana property. Because Kara had a community interest [***44] in the Cheney property, she had a similar interest in the

Montana property because it was purchased with proceeds from property in which she had a community interest. In addition, the parties paid the mortgage and made improvements to the Montana property with joint earnings. Accordingly, we hold that the trial court did not abuse its discretion when it decided that Kara was entitled to a lien in some amount on property awarded to Robert to account for her community interest in properties that were purchased, maintained, and financed in part with community funds.

3. Lien against Robert's Property

¶88 Robert argues that the trial court abused its discretion by imposing a \$112,000 lien against property awarded to him in favor of Kara. He claims that in awarding Kara the lien, the trial court improperly relied on evidence that involved lost profits on a failed property transaction.⁹ We agree.

¶89 In 1995, Kara and Robert agreed to purchase the [***45] Montana property from Robert's grandparents for \$27,000. The parties agreed to pay Robert's grandparents \$275 per month based on the cost of Robert's grandmother's medication. In 2005, after Robert's grandparents died, the parties realized that the property was part of a trust and they sued the trust to gain access to the property. The result was that the trust was dissolved; the trust property, including the property the parties had supposedly purchased, was sold; the parties were refunded the \$14,350 they had paid for the property; and Robert received a payment for his portion of the trust. Kara testified that she objected to dissolving the trust and losing the property because a realtor in the area provided her with a list of similar properties that sold for between \$85,000 and \$130,000. The trial court may have considered evidence of the failed property transaction in determining the amount of the lien.

¶90 Whether the trial court properly could consider the lost profit on this Montana real estate transaction is controlled by *In re Marriage of Kaseburg*, 126 Wn. App. 546, 108 P.3d 1278 (2005). In *Kaseburg*, the parties in a dissolution action purchased a home and executed an

⁹ Robert argues that the failed transaction was the only identifiable basis for such a significant lien. But the trial court did not explicitly state that the \$112,000 lien was based in part on the failed property transaction. Kara does not address this issue.

\$850,000 [***46] promissory note and deed of trust in favor of the husband's parents in recognition of loans they had given the parties in the past. 126 Wn. App. at 549. After the parties filed for dissolution but before trial, the husband's parents foreclosed on the property. *Kaseburg*, 126 Wn. App. at 550. At trial, the wife contested the value of the promissory note, stating that it was fraudulent and inflated, and requested a \$500,000 judgment against the husband for concealing the value of the property. *Kaseburg*, 126 Wn. App. at 551-52. The trial court determined that the debt underlying the promissory note was actually \$300,000, not \$850,000, and determined that the wife had a \$150,000 interest in the property. *Kaseburg*, 126 Wn. App. at 555. We reversed, holding that because the community's interest in the property was "legally extinguished in the foreclosure sale, the amount of the debt and the value of the real property were not before the trial court for valuation or distribution in the dissolution proceeding." *Kaseburg*, 126 Wn. App. at 559.

¶91 Applying *Kaseburg* here, it was improper for the trial court to award Kara a lien on Robert's property based on the projected value of the parties' failed [***47] real estate transaction. As in *Kaseburg*, we hold that Kara's opportunity to contest the resolution of her claim to the property was during the 2005 litigation and that she lost that opportunity when the litigation was resolved. *See White*, 105 Wn. App. at 549 ("If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial."). Accordingly, we hold that the trial court abused its discretion when it admitted and considered evidence of the lost value of the incomplete real estate transaction.

¶92 We vacate the \$112,000 lien because it was based in part on the trial court's incorrect reliance on the failed Montana property deal. We also direct the trial court to remove this lien from the property records. Because it is unclear what portion (if any) of the lien related to the failed property transaction and because the trial court also based its decision to award the lien on the community nature of the properties and the community efforts used to finance and maintain the properties, we remand to the trial court to recalculate the amount of Kara's lien without consideration of the projected lost profits from the failed Montana property [***48] deal.

4. Life Insurance Policy and Survivor Benefit Plan

¶93 Robert argues that the trial court abused its discretion when it required

him to maintain both a life insurance policy of \$400,000 and to name Kara as a beneficiary under his survivor benefit plan for his military retirement. We disagree.

¶94 In *In re Marriage of Donovan*, 25 Wn. App. 691, 697-98, 612 P.2d 387 (1980), the trial court entered an award of child support secured by a lien on the husband's estate. The trial court also ordered the husband to maintain a life insurance policy naming his children as primary beneficiaries. *Donovan*, 25 Wn. App. at 698. Division One of this court held that the award was inequitable because it provided his children with a double recovery of child support — from both the lien against the estate and the life insurance — should the father die before they reached the age of majority. *Donovan*, 25 Wn. App. at 698.

¶95 Here, if the life insurance policy was solely to secure Kara's interest in Robert's retirement benefits, then there might be an issue of double recovery because of the survivor benefit plan. *See Donovan*, 25 Wn. App. at 698. But the trial court also stated that the purpose of the life insurance [***49] policy was to pay Kara for any outstanding community obligations. These obligations could include child support and any other unpaid obligations from the decree owing to Kara in the event of Robert's untimely death, which are not secured by any other source. Accordingly, we hold that the trial court did not abuse its discretion when it ordered that Robert name Kara on his survivor benefit plan and required him to maintain life insurance.

5. Fairness of Property Distribution

¶96 Robert also argues that the trial court's overall property distribution was inequitable because it failed to consider the cost to him of selling his property to extinguish the lien and because the trial court required him to pay the balance of a credit card held in Kara's name with debt she incurred after the parties separated. We disagree.

¶97 First, Robert argues that because the only way for him to extinguish the \$112,000 lien against him would be to sell his properties and because their sale will lead to “significant tax liability,” the trial court should have considered the cost of their sale when distributing the parties' properties. Br. of Appellant at 40-41. In making this argument, Robert asks us first to presume [***50] that the only way for him to extinguish the lien would

be to sell the properties when there was no evidence that he would be otherwise unable to make payments from his income, and second to reconsider the evidence before the trial court. Because we do not re-weigh the evidence and because the trial court is in the best position to determine fairness in light of the evidence before it, we decline to address Robert's contention further. *Larson*, 178 Wn. App. at 138; *Meredith*, 148 Wn. App. at 891 n.1.

¶98 Second, Robert argues that the property distribution was unfair because the trial court ordered him to pay the balance of a credit card in Kara's name for debt she had incurred after the couple had separated. When the parties separated, they had an American Express card in Kara's name with a balance of \$8,908.60. By the date of trial, the balance on the card was \$22,465.00. Because liabilities incurred after separation are presumed to be the separate debt of the incurring spouse, Robert argues that the trial court abused its discretion when it ordered him to pay the entire balance of the credit card. *See Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn. App. 351, 354, 613 P.2d 169 (1980).

¶99 But [***51] the court is not required to make an equal distribution of assets and liabilities and need not award separate debt to its owner. *DewBerry*, 115 Wn. App. at 366; *White*, 105 Wn. App. at 549. The fact that one of the debts assigned to Robert may have been Kara's separate debt did not require the trial court to specifically assign that particular debt to her, and Robert fails to show that it was not accounted for elsewhere in the property distribution. The trial court had all of the parties' assets and liabilities before it, and we hold that it made an equitable distribution of the property based on the facts of this case.

F. MAINTENANCE

¶100 The trial court ordered that Robert pay spousal maintenance to Kara in the amount of \$1,500 per month beginning on September 1, 2012, and \$2,400 per month beginning on July 1, 2013. The trial court ruled that maintenance would continue until Robert retired and Kara began to receive her share of his retirement, and at that time maintenance would be reduced to \$1.00 per month for life and would not terminate upon Kara's remarriage. Robert argues that the trial court abused its discretion in its order awarding maintenance to Kara. We hold that the evidence supported [***52] the maintenance award except for the award of \$1.00

per month for Kara's life.

1. Legal Principles

¶101 The trial court has statutory authority to order maintenance “in such amounts and for such periods of time as the court deems just, without regard to misconduct” after taking into consideration relevant factors. RCW 26.09.090(1); *In re Marriage of Drlik*, 121 Wn. App. 269, 276, 87 P.3d 1192 (2004). Maintenance is “a flexible tool to more nearly equalize the post-dissolution standard of living of the parties, where the marriage is long term and the superior earning capacity of one spouse is one of the few assets of the community.” *In re Marriage of Sheffer*, 60 Wn. App. 51, 57, 802 P.2d 817 (1990). In awarding maintenance, the trial court's main concern must be the parties' economic situations after the dissolution. *In re Marriage of Williams*, 84 Wn. App. 263, 268, 927 P.2d 679 (1996).

¶102 An award of maintenance is within the broad discretion of the trial court. *In re Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *In re Marriage of Foley*, 84 Wn. App. 839, 845, 930 P.2d 929 (1997). “An [***53] award of maintenance that is not based upon a fair consideration of the statutory factors constitutes an abuse of discretion.” *Crosetto*, 82 Wn. App. at 558. However, the trial court is not required to make specific factual findings on all of the factors. *In re Marriage of Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004). Rather, the statute merely requires the trial court to consider the listed factors. *Mansour*, 126 Wn. App. at 16. “[T]he only limitation placed upon the trial court's ability to award maintenance is that the amount and duration, considering all relevant factors, be just.” *In re Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984).

2. Future Earning Capacity

¶103 Robert argues that the trial court abused its discretion in setting the maintenance amount because there was no evidence at trial regarding the parties' future earning capacities and therefore the trial court's award was speculative and not supported by the evidence. We disagree.

¶104 In setting the maintenance award, the trial court reasoned that Robert “will be in a substantially better financial position than [Kara] after the

dissolution.” CP at 68. The trial court further reasoned that Robert had earned a masters [***54] degree during the marriage and would have good employment prospects after his military retirement. By contrast, the trial court found that Kara had “limited and interrupted work experience and is not likely to catch up to [Robert] in earning potential.” CP at 69. The trial court further noted that she had to leave jobs and follow Robert during his military career.

¶105 These findings are supported by the evidence. The court heard testimony on Kara's work history from which it could reasonably determine her likely future earning capacity. Kara has a bachelor's degree in physical education and has taken courses for a master's degree in guidance counseling. She testified that she wanted to finish her degree but that her primary goal was to obtain employment to support her children. She is not a certified teacher and is generally eligible to work as a teacher in local school districts only in an emergency situation, Kara worked as an X-ray technician when the parties were first married, earning \$10 per hour. She also worked for an orthopedic surgeon in Gig Harbor, earning approximately \$12 per hour. She worked at a winery in Spokane, earning \$9.50 per hour. She worked as a substitute teacher [***55] in Italy, earning \$95 per day. After the parties separated, Kara had a job at Fort Lewis as an education counselor, earning \$20 per hour. The company for which she worked as a counselor lost its contract with Fort Lewis and Kara was laid off; but she was offered and accepted her former position with a new company for \$12.75 per hour. In March 2012, Kara was laid off after her employer stated that it had received information that Kara's life and the lives of her children were in immediate danger. Kara then received unemployment at \$406 per week and was receiving that amount at the time of trial, despite her efforts to find employment.

¶106 The trial court also heard testimony regarding the numerous positions Robert held while in the military and knew that his gross monthly income at the time of trial was \$10,930.16. Robert had a bachelor's degree in business and had also obtained a masters degree in business administration during the marriage. We hold that Robert's challenge to the trial court's findings regarding the parties' future earning capacities fails because the trial court heard ample evidence about the parties' education, work experience, and income.

3. [***56] Duration of Maintenance Award

¶107 Robert argues that the trial court abused its discretion when it awarded Kara spousal maintenance of \$1.00 per month for life once Robert retired. The trial court stated that it was making this award in order to preserve jurisdiction over the parties in the future. We hold that the trial court abused its discretion in making a placeholder award simply to extend jurisdiction over the parties.

¶108 Division One of this court recently addressed a similar issue in *In re Marriage of Valente*, 179 Wn. App. 817, 320 P.3d 115 (2014). In *Valente*, the wife in a dissolution action received a maintenance award to help with her future medical costs for multiple sclerosis and rheumatoid arthritis. 320 P.3d at 116-17. The trial court awarded her \$10,000 per month for seven years, then \$1,000 per month until she turned 72 years old, then \$100 per month until either the husband's or wife's death or the wife's remarriage, whichever occurred first. *Valente*, 320 P.3d at 117. The husband challenged the \$1,000 and \$100 per month maintenance awards, claiming that they were merely a vehicle for the court to retain jurisdiction over the parties. *Valente*, 320 P.3d at 118. The trial court [***57] stated that the reason for the \$100 lifetime maintenance award was to allow the court to revisit the award and would allow the wife to have an “ongoing maintenance adjustment.” *Valente*, 320 P.3d at 118.

¶109 The court noted that permanent maintenance awards generally are disfavored but that a lifetime award may be proper “when it is clear the party seeking maintenance will not be able to contribute significantly to ... her own livelihood.” *Valente*, 320 P.3d at 117 (quoting *In re Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P.2d 462 (1993)). The court then examined two Washington cases dealing with lifetime maintenance awards based on anticipation of future medical needs. *Valente*, 320 P.3d at 118-19. Those cases found the awards to be an abuse of discretion because they were conjectural and therefore lacked the finding of necessity required for maintenance awards. *Valente*, 320 P.3d at 118-19.

¶110 Although the trial court in *Valente* found that the wife may incur future medical expenses, it did not make any findings as to the likelihood or degree to which her condition might worsen. *Valente*, 320 P.3d at 119. The court held that the trial court's findings were insufficient to establish a

foundation [***58] for retaining jurisdiction and therefore it abused its discretion in awarding the maintenance:

A dissolution is supposed to finalize the parties' obligations to one another. By reserving jurisdiction to modify maintenance for the duration of [the wife]'s lifetime, or until her remarriage, [the husband]'s obligations under the decree remain unsettled. While maintenance is a flexible tool, there is no showing that the legislature intended to grant broad authority for open ended maintenance as urged by [the wife]. Maintenance cannot be used as an insurance policy against potential hardship in the absence of specific findings regarding the certainty that those hardships are likely to occur.

Valente, 320 P.3d at 119-20 (footnotes omitted).

¶111 Here, the trial court awarded lifetime maintenance that terminated only upon the parties' deaths. The trial court further stated that the award was non-modifiable unless Robert did “anything resulting in the loss of [Kara]'s retirement benefits outlined above at any time after maintenance is reduced to \$1.00 per month.” CP at 81. The court explicitly stated that “[t]he amount is intended to allow the court to reserve jurisdiction in the future.” CP at 81. [***59] The award was based on speculation that Robert might do something in the future to prevent Kara from receiving his retirement benefits. This is the type of conjectural basis that *Valente* and the cases on which it relied were rejected. The trial court here did not enter any specific findings regarding Robert's likelihood of preventing Kara from receiving benefits in the future. Accordingly, we hold that it was an abuse of discretion to award lifetime spousal maintenance for the purpose of retaining jurisdiction alone, and we vacate that portion of the maintenance order. We remand for the trial court to consider the award of maintenance after Robert retires. If the trial court on remand wishes to impose lifetime maintenance, it must enter specific findings supporting that decision.

G. ATTORNEY FEES

1. Fees at Trial

¶112 Robert argues that the trial court's decision to award Kara \$30,000 in attorney fees was an abuse of discretion based on Robert's ability to pay and Kara's need. We disagree.

¶113 The trial court in a dissolution action may award reasonable attorney fees to one of the parties after considering the financial resources of both parties. RCW 26.09.140. In determining whether it should [***60] award fees, “the court considers the parties' relative need versus ability to pay.” *In re Marriage of Spreen*, 107 Wn. App. 341, 351, 28 P.3d 769 (2001). We review an attorney fee award for abuse of discretion and will reverse if the decision is untenable or manifestly unreasonable. *Spreen*, 107 Wn. App. at 351. “In calculating a fee award a court should consider: (1) the factual and legal questions involved; (2) the time necessary for preparation and presentation of the case; and (3) the amount and character of the property involved.” *In re Marriage of Knight*, 75 Wn. App. 721, 730, 880 P.2d 71 (1994). The trial court must indicate on the record the method it used to calculate the award. *Knight*, 75 Wn. App. at 729.

¶114 Here, the trial court found that Kara had the need for an award to cover her attorney fees and that Robert had the ability to pay, based on the same reasons supporting its maintenance award. It found that Robert would be in a better financial position than Kara after the dissolution because he had earned a master's degree during the marriage, was expecting a military retirement, and had good employment prospects thereafter. By contrast, the trial court found that Kara had limited [***61] and interrupted work experience because she moved with Robert for his military career and that she was “not likely to catch up to him in earning potential.” CP at 69. As discussed above, the trial court had ample evidence before it supporting these findings.

¶115 In his challenge to the fee award here, Robert argues that because Kara would be in a better position following the dissolution based on the trial court's property distribution, the trial court abused its discretion when it ordered him to pay an additional \$30,000 for Kara's attorney fees. Because of this, Robert argues that the trial court “failed to determine the financial resources of each party when deciding to impose a substantial fee award against Robert.” Br. of Appellant at 47. However, Robert fails to cite any authority requiring the trial court to specifically consider the property distribution in the dissolution action when determining financial need. Accordingly, we hold that the trial court did not abuse its discretion when it determined that Robert had the ability to pay attorney fees and that Kara had a financial need.

2. Fees on Appeal

¶116 Kara requests her fees on appeal under RAP 18.1(a) and RCW 26.09.140. RCW 26.09.140 [***62] gives us discretion to “order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs.” “In exercising our discretion, we consider the issues' arguable merit on appeal and the parties' financial resources, balancing the financial need of the requesting party against the other party's ability to pay.” *In re Marriage of Kim*, 179 Wn. App. 232, 317 P.3d 555, 567 (2014).

¶117 Kara filed a financial declaration stating that her net monthly income is \$2,417.35 and her total monthly expenses are \$7,019.41. Her financial declaration estimates Robert's net monthly income at \$7,433.62.

¶118 Based on Kara's financial declaration, it appears that she has a financial need and that Robert has the ability to pay. Accordingly, we order Robert to pay Kara's attorney fees on appeal.

CONCLUSION

¶119 We remand to the trial court to consider whether the waiver of relocation notice requirements was proper under RCW 26.09.460(4) and to make the required findings, if appropriate. We also reverse the trial court's lien in Kara's favor on property awarded to Robert insofar as the lien amount relates to evidence of the failed 2005 Montana property deal, and we remand for recalculation [***63] of the lien, if any, without consideration of this evidence. Finally, we vacate the trial court's order of \$1.00 per month in spousal maintenance and remand for consideration of spousal maintenance for the period after Robert retires. We affirm on all other issues.

BJORGEN, A.C.J., and HUNT, J., concur.

Reconsideration denied July 9, 2014

Review denied at 181 Wn.2d 1029 (2014).

References

Annotated Revised Code of Washington by LexisNexis

Code of Judicial Conduct (CJC) Rule 2.11

Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.
- (2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

...

(d) likely to be a material witness in the proceeding.

...

- (6) The judge:
 - (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer or a material witness in the matter during such association;
 - (b) served in governmental employment, and in such capacity participated personally and substantially as a public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
 - (c) was a material witness concerning the matter; or
 - (d) previously presided as a judge over the matter in another court.

Canon 2.11(a) Comment [5]: A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

Wash. CJC 2.11

Code of Judicial Conduct (CJC) Terminology

The first time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk (*).

...

"Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.11, 2.13, 2.15, 2.16, 3.6, and 4.1.

...

Order Denying Motion to Cancel Trial

(CP at 1801-1803)

AD
3

FILED
JAN 23 2017
Kim Morrison
Chelan County Clerk

**Superior Court of Washington
County of CHELAN**

In re the Marriage of:

WADE AUSTIN MILLER

Petitioner,

and

JENAE PAPE MILLER

Respondent.

No. 15-3-00016-9

**ORDER on Respondent's
MOTION TO CHANGE VENUE
AND CANCEL TRIAL JAN. 23 IN
CHELAN COUNTY**

THIS MATTER having been heard before the honorable Judge Alicia H. Nakata upon Respondent's *Motion for Change of Venue and Cancel Trial Jan. 23 in Chelan County*; and Respondent's *Motion to Continue Trial* and the Court having heard the arguments of the parties after reviewing relevant pleadings and papers on file in this case, the Court hereby enters the following:

FINDINGS OF FACT:

1. Respondent did not prosecute her motion for change of venue.
2. The Court mailed a *Notice of Trial Date* to all parties on November 4, 2016.
3. Respondent's actions in this case demonstrate health sufficient to litigate. She has

filed pleadings, assisted her attorney in another matter, appeared in court and prosecuted motions on her behalf. Specifically, since the date of surgery that Respondent claimed she had on December

23, 2016: *the Respondent represented herself in a Chelan Co. District Court criminal trial on January 31, 2017. The Respondent's motion to continue such trial was denied by the District Court.* Respondent reports that she has been assisting her attorney this month in

appealing a criminal matter;

ORDER on Respondent's MOTION TO
CHANGE VENUE AND CANCEL TRIAL
JAN. 23 IN CHELAN COUNTY

Overcast Law Offices, PS
23 S Wenatchee Ave Suite 320
Wenatchee WA 98801
509-663-5588

3.2 Respondent prosecuted her motion for change of venue on January 10, 2017: she filed pleadings and appeared in court on January 10;

3.3 Respondent was scheduled to participate in a settlement conference with Judge Small on January 11, 2017, and as neither party objected to the presumption that Respondent attended, the Court finds that Respondent participated in a settlement conference in this case on January 11, 2017;

3.4 on January 12, Respondent filed four documents with the Clerk and served those documents on opposing counsel John Weston; and

3.5 on January 20, the last court-day before trial is set to begin, Respondent appeared in court and argued for a continuance of trial.

4. The Court orally informed both parties that on January 23, 2017, which is the first day of trial in this case, Petitioner's attorney would present an order to the Court for the Court's final decisions on the motions heard January 20, 2017.

CONCLUSIONS OF LAW:

1. Respondent moved the Court to continue the trial date by presenting two documents, a victim impact statement filed at Sub # 207 and a note from a doctor filed at # 208.

ORDER:

1. Respondent's *Motion to Change Venue and Cancel Trial Jan. 23 in Chelan County* is denied.

ORDER on Respondent's MOTION TO CHANGE VENUE AND CANCEL TRIAL JAN. 23 IN CHELAN COUNTY 2

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Wenatchee WA 98801
509-663-5588

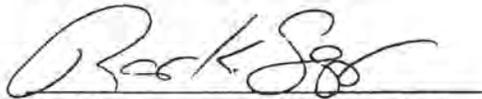
2. Respondent's *Motion to Continue Trial* is denied.
3. Petitioner's motion for CR 11 sanction is ___ granted AM denied. Respondent is ordered to pay Petitioner for _____ hours of attorney Sampson's time at \$200 per hour.

DONE IN OPEN COURT January 23, 2017.



JUDGE ALICIA H. NAKATA

Presented by
OVERCAST LAW OFFICES



Rani K. Sampson, WSBA #37486

Accepted,
Notice of Presentation waived:



Jenae Pape, *Pro Se*
Respondent

Findings and Conclusions

(CP at 1843-1851)

FILED *Um 9*

MAR 24 2017

Kim Morrison
Chelan County Clerk

Superior Court of Washington, County of Chelan

In re the marriage of:

Petitioner:

WADE AUSTIN MILLER,

And Respondent:

JENAE PAPE MILLER,

No. 15-3-00016-9

Findings and Conclusions about a Marriage
(FNFCL)

Findings and Conclusions about a Marriage

1. Basis for findings and conclusions (check all that apply):

Court hearing on: 23rd through the 25th of January, 2017, where the following people were present:

- John I. Weston, Jr., Petitioner's lawyer
- Other: Rani Sampson, co-counsel for Petitioner.
- Petitioner
- Respondent

AM

in addition to the parties, the court heard the testimony of Leo Miller, Amedec Sanchez, Matt Freeman, and Doug Engle.

➤ The Court makes the following findings of fact and conclusions of law:

2. Notice:

The Respondent was served on: *January 15, 2015 (service accepted by Respondent's attorney, Douglas Takasugi).*

3. Jurisdiction over the marriage and the spouses (check all that apply):

At the time the *Petition* was filed,

The Petitioner lived in Washington State.

The Respondent lived in Washington State.

The Petitioner and Respondent lived in this state while they were married, and the Petitioner still lives in this state.

The Petitioner and Respondent may have conceived a child together in this state.

ORIGINAL

Conclusion: The court **has** jurisdiction over the marriage.
The court **has** jurisdiction over the Respondent.

4. Information about the marriage

The spouses were married on October 24, 1992 at Kona, Hawaii.

5. Separation Date

The marital community ended on ^{AM} Oct. 28, 2014. The parties stopped acquiring community property and incurring community debt on this date.

6. Status of the marriage

Divorce – This marriage is irretrievably broken, and it has been 90 days or longer since the *Petition* was filed and the *Summons* was served or the Respondent joined the *Petition*.

Conclusion:

The Petition for divorce, legal separation or invalidity (annulment) should be approved.

7. Separation Contract

There is no separation contract.

8. Real Property (land or home)

The spouses' real property is listed in Exhibit A. This Exhibit is attached and made part of these Findings.

Conclusion:

The division of real property described in the final order is fair (just and equitable).

9. Community Personal Property (possessions, assets or business interests of any kind)

The spouses' community personal property is listed in Exhibit A. This Exhibit is attached and made part of these Findings.

Conclusion:

The division of community personal property described in the final order is fair (just and equitable).

10. Separate Personal Property (possessions, assets or business interests of any kind)

The **Petitioner's** separate personal property is listed in Exhibit B. This Exhibit is attached and made part of these Findings.

The **Respondent's** separate personal property is listed in Exhibit B. This Exhibit is attached and made part of these Findings.

Conclusion:

The division of separate personal property described in the final order is fair (just and equitable).

11. Community Debt

The spouses' community debt is listed in Exhibit C. This Exhibit is attached and made part of these Findings.

Conclusion:

The division of community debt described in the final order is fair (just and equitable).

12. Separate Debt

The Petitioner's separate debt is listed in Exhibit C. This Exhibit is attached and made part of these Findings.

The Respondent's separate debt is listed in Exhibit C. This Exhibit is attached and made part of these Findings.

Conclusion:

The division of separate debt described in the final order is fair (just and equitable).

13. Spousal Support (maintenance/alimony)

Spousal support was requested.

Conclusion: Spousal support should **not** be ordered because:

The respondent has failed to demonstrate a need for spousal support.

14. Fees and Costs

Each party should pay his/her own fees or costs.

15. Protection Order

No one requested an *Order for Protection* in this case.

16. Restraining Order

The Petitioner requested a *Restraining Order*.

Conclusion: The court should approve a *Restraining Order* because:

AM the Respondent, Jenae Pape repeatedly appeared uninvited at the Petitioner's residence and entered the residence disturbing the Petitioner, Wade Miller's peace. The Respondent also parked across from the Petitioner's business shining her headlights directly into the business harassing the Petitioner.

17. Pregnancy

Neither spouse is pregnant.

18. Children of the marriage

The spouses have **no** children together who are still dependent.

19. Jurisdiction over the children (RCW 26.27.201 – .221, .231, .261, .271)

Does not apply. The spouses have **no** children together who are still dependent.

20. Parenting Plan

The spouses have **no** children together who are still dependent.

21. Child Support

The spouses have **no** children together who are still dependent.

22. Other findings or conclusions (if any)

A. The Court finds that the dog, Luci, was a gift to the son, Chad Miller, by his Mother and therefore is not an asset to be distributed by this Court.

March 24, 2017
Date

Allen V. DeLoach
Judge or Commissioner

Petitioner and Respondent or their lawyers fill out below.

This document (check any that apply):

- is an agreement of the parties
- is presented by me
- may be signed by the court without notice to me

This document (check any that apply):

- is an agreement of the parties
- is presented by me
- may be signed by the court without notice to me

John I. Weston, Jr.
John I. Weston, Jr., WSBA #2316
Petitioner's Attorney

Wade Austin Miller
Wade Austin Miller
Petitioner

Rani K. Sampson
Rani K. Sampson, WSBA #
Petitioner's Attorney

Present, but refused to sign. *AM*
Jenae Pape Miller
Respondent, Pro Se

**IN THE SUPERIOR COURT OF WASHINGTON
FOR CHELAN COUNTY**

In re the marriage of:

WADE AUSTIN MILLER,
Petitioner,

and

JENAE PAPE MILLER,
Respondent.

No. 15-3-00016-9

EXHIBIT A

EXHIBIT A

Real Property Distribution

The Court finds the following is the community real and personal property of the parties, which the parties have agreed is their community property and the parties further agreed to an equal split of said community property. ^{The Court also} ~~found~~ that the net values of the property, after deducting encumbrances, are as listed below:

The Court will honor the agreements of the parties.

- A. The family residence located at 315 S Washington Street, Chelan, Washington 98816, legally described as: T 27N R 23EWM S 18 PARCEL 2 SS#2657 0.5000 ACRES, the net value of which is \$179,502.00.
- B. The real property located at 618 E Johnson Street, Chelan, Washington 98816, legally described as: CHELAN BLOCK 25, LOT 6 L5&6 B25 & TX3 STILLWELLS 1st ACRES 0.2000, which the court values at \$74,000.00
- C. The real property located at 620 E Johnson Street, Chelan, Washington 98816, legally described as: STILLWELLS BLOCK 4 0.1000 ACRES, which the court values at minus (-\$12,421.00).
- D. The residence located at 3932 Chemehuevi Blvd, Lake Havasu City, Arizona, assessor's parcel #110-08-156, which the Court values at \$220,000.00.
- E. One half of Town Tub, Inc., including real estate which the Court values at minus (-\$160,440.00).
- F. 90% of Blue Water Inc., DBA All Seasons Storage and Rentals and Miller Auto Sales. The gross value of which the court finds is \$1,443,000.00. The Court further finds that Mr. Miller's separate property interest in that corporation is \$320,666.00 leaving a community interest value in the property of \$1,122,333.00.

-
- G. Wells Fargo Rental Account for 3932 Chemehuevi Blvd, Lake Havasu City, Arizona which the court values at \$1,046.00
 - H. 2013 Volkswagen Jetta which the court values at \$12,092.00.
 - I. 2005 Ford pickup which the court values at \$10,000.00.
 - J. 2013 Nissan Versa which the court values at \$7,523.00.
 - K. The Prudential Life Insurance policy insuring the life of the petitioner, Wade Miller, which the court finds with a cash value of \$20,061.00.
 - L. The Charles Schwab stock account which the court values at \$1,325.49.
 - M. The Voya Brokerage account which the court values at \$8,833.53.
 - N. The respondent/wife's MFS IRA account, which the court values at \$16,729.00.

**IN THE SUPERIOR COURT OF WASHINGTON
FOR CHELAN COUNTY**

In re the marriage of:

WADE AUSTIN MILLER,
Petitioner,

and

JENAE PAPE MILLER,
Respondent.

No. 15-3-00016-9

EXHIBIT B

EXHIBIT B

Separate Property Distribution

The Court finds the following properties are the separate properties of the parties, and further finds that these properties have the values as set forth for each property:

The Court further finds that the parties are in agreement that these properties are the separate property of the parties to which they are awarded:

The Court finds the following properties are the separate properties of the respondent, Jenae Pape Miller, and finds the value of each property as follows:

- A. One lot of real property located at 3928 Chemehuevi Blvd, Lake Havasu City, Arizona, which the Court values at \$45,199.00.
- B. The MoClips cabin, located in MoClips, Washington, which the court values at \$210,000.00.
- C. A Chelan condominium, located in Chelan, Washington which the court values at \$160,000.00.
- D. A Wheatland Bank Account, #1461, which the Court values at \$474,823.00
- E. A Chase Bank Account # 9790, which the Court values as of June 6, 2016, at \$242,846.00
- F. A 2010 KeyStone Raptor travel trailer, which the Court values at \$56,725.00.

The Court finds that the total value of separate property awarded to the respondent, Jenae Pape Miller, is \$1,189,593.

The Court finds the following properties are the separate properties of the petitioner, Wade Austin Miller, and finds the value of each property as follows:

- G. Sixteen (16) shares of Blue Water Enterprises, Inc., the transfer gifted to the petitioner/husband, Wade Miller, prior to marriage which the Court values at \$320,666.72.
- H. A Cashmere Valley Bank account, #5085, which the Court values at \$5,000.00
- I. A Wells Fargo Bank Account, #8879, which the Court values at \$8,084.02.

The Court finds that the total value of separate property awarded to the petitioner, Wade Austin Miller, is \$333,750.

IN THE SUPERIOR COURT OF WASHINGTON
FOR CHELAN COUNTY

In re the marriage of:

WADE AUSTIN MILLER,
Petitioner,

and

JENAE PAPE MILLER,
Respondent.

No. 15-3-00016-9

EXHIBIT C

EXHIBIT C

Distribution of Debt

The Petitioner must pay all debts listed below:

- A. Any and all debts that are encumbrances on real property awarded to the petitioner herein.
- B. Any and all debts incurred by the petitioner since the separation of the parties on *AM* Oct 28, 2014.
- C. The Hawaiian Airlines Visa in the amount of \$85,000.00 provided however that amount shall be offset against the respondent's final equalizing share of the money judgment awarded to her because this is her debt.

The Respondent must pay all debts listed below:

- A. Any and all debts that are encumbrances including mortgages and taxes against any real properties awarded to her.
- AM* B. Any and all debts incurred by the respondent since the separation of the parties on Oct 28, 2014.

AM The Petitioner was given a credit of \$ 9,904 pursuant to an agreement of the parties for Petitioner paying to the pawn business \$ 9,904 to redeem the VW vehicle owned by the Respondent.

Decree of Dissolution

(CP at 1852-1861)

FILED Cm 10
 MAR 24 2017
 Kim Morrison
 Chelan County Clerk

Superior Court of Washington, County of Chelan

In re the marriage of:
 Petitioner: WADE AUSTIN MILLER,
 Respondent: JENAE PAPE MILLER,

No. 15-3-00016-9
 Final Divorce Order (Dissolution Decree) (DCD)
 Clerk's action required: **1, 2, 6, 13, 14, 16**

16-9-00290-1

Final Divorce Order

1. Money Judgment Summary

Summarize any money judgments from sections **6** or **14** in the table below.

Judgment for	Debtor's name <i>(person who must pay money)</i>	Creditor's name <i>(person who must be paid)</i>	Amount	Interest
Money Judgment (section 6)	Wade Austin Miller	Jenae Marie Pape	\$387,997.50	\$-0-
Fees and Costs (section 14)			\$-0-	\$-0-
Other amounts <i>(describe)</i> :			\$-0-	\$-0-
Lawyer: John I. Weston/Rani K. Sampson represents: Wade Austin Miller				
Name (Pro Se): Jenae Pape				

2. Summary of Real Property Judgment (land or home)

Summarize any real property judgment from section **7** in the table below.

Grantor's name <i>(person giving property)</i>	Grantee's name <i>(person getting property)</i>	Real Property <i>(fill in at least one)</i>	
Jenae Pape Miller	Wade Miller	315 S Washington Street, Chelan, Washington 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
		272318240555	T 27N R 23EWM SECTION 18 PARCEL 2 SS#2657 0.5000 ACRES.
Lawyer: John I. Weston/Rani K. Sampson represents: Wade Austin Miller			
Name (Pro Se): Jenae Marie Pape			

ORIGINAL

Grantor's name <i>(person giving property)</i>	Grantee's name <i>(person getting property)</i>	Real Property (fill in at least one) 618 E. Johnson, Chelan, Washington 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Jenae Pape Miller	Wade Miller	272213512354	CHELAN BLOCK 25 LOT 6 LR&6 B25 & TX3 STILLWELLS 1 ST ACRES 0.2000

Lawyer: John I. Weston/Rani K. Sampson represents: **Wade Austin Miller**

Name (Pro Se): Jenae Marie Pape

Grantor's name <i>(person giving property)</i>	Grantee's name <i>(person getting property)</i>	Real Property (fill in at least one) 620 E. Johnson, Chelan, Washington 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Jenae Pape Miller	Wade Miller	272318865070	STILLWELLS BLOCK 4 0.1000 ACRES

Lawyer: John I. Weston/Rani K. Sampson represents: **Wade Austin Miller**

Name (Pro Se): Jenae Marie Pape

Grantor's name <i>(person giving property)</i>	Grantee's name <i>(person getting property)</i>	Real Property (fill in at least one) 315 S Washington Street, Chelan, Washington 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Jenae Pape Miller	Wade Miller	272318240555	TOWNSHIP 27N RANGE 23EWM SECTION 18 PARCEL 2 SS#2657 ACRES 0.5000

Lawyer: John I. Weston/Rani K. Sampson represents: **Wade Austin Miller**

Name (Pro Se): Jenae Marie Pape

Grantor's name <i>(person giving property)</i>	Grantee's name <i>(person getting property)</i>	Real Property (fill in at least one) 616/618 E. Woodin Ave., Chelan, WA 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Jenae Pape Miller	Wade Miller	272213512547	CHELAN LOT 6 B BA#2004-06 0.1900 ACRES

Lawyer: John I. Weston/Rani K. Sampson represents: **Wade Austin Miller**

Name (Pro Se): Jenae Marie Pape

Grantor's name <i>(person giving property)</i>	Grantee's name <i>(person getting property)</i>	Real Property (fill in at least one) 3932 Chemehuevi Blvd., Lake Havasu City, Arizona 86406	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Wade Miller	Jenae Pape Miller	110-08-156	LOT 4, BLOCK 12, TRACT 2219 LAKE HAVASU CITY

Lawyer: John I. Weston/Rani K. Sampson represents: **Wade Austin Miller**

Name (Pro Se): Jenae Marie Pape

The court has made Findings and Conclusions in this case and now Orders:

3. Marriage

This marriage is dissolved. The Petitioner and Respondent are divorced.

4. Name Changes

The Respondent's name is changed to: Jenae Marie Pape

5. Separation Contract There is no enforceable separation contract.

6. Money Judgment (summarized in section 1 above)

The Petitioner must pay the other party ~~6387,901.50~~ ^{387,997.50 AM}. The court grants a judgment for this amount. This judgment shall be paid within **30 days of entry** of this order.

7. Real Property (land or home) (summarized in section 2 above)

The real property is divided as explained below:

Grantor's name (person giving property)	Grantee's name (person getting property)	Real Property (fill in at least one)	
		618 E. Johnson, Chelan, Washington 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Jenae Pape Miller	Wade Miller	272213512354	CHELAN BLOCK 25 LOT 6 LR&6 B25 & TX3 STILLWELLS 1 ST ACRES 0.2000
Lawyer: John I. Weston/Rani K. Sampson		represents: Wade Austin Miller	
Name (Pro Se): Jenae Marie Pape			
Grantor's name (person giving property)	Grantee's name (person getting property)	Real Property (fill in at least one)	
		620 E. Johnson, Chelan, Washington 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Jenae Pape Miller	Wade Miller	272318865070	STILLWELLS BLOCK 4 0.1000 ACRES
Lawyer: John I. Weston/Rani K. Sampson		represents: Wade Austin Miller	
Name (Pro Se): Jenae Marie Pape			
Grantor's name (person giving property)	Grantee's name (person getting property)	Real Property (fill in at least one)	
		315 S Washington Street, Chelan, Washington 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Jenae Pape Miller	Wade Miller	272318240555	TOWNSHIP 27N RANGE 23EWM SECTION 18 PARCEL 2 SS#2657 ACRES 0.5000
Lawyer: John I. Weston/Rani K. Sampson		represents: Wade Austin Miller	
Name (Pro Se): Jenae Marie Pape			

Grantor's name <i>(person giving property)</i>	Grantee's name <i>(person getting property)</i>	Real Property <i>(fill in at least one)</i> 616/618 E. Woodin Ave., Chelan, WA 98816	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Jenae Pape Miller	Wade Miller	272213512547	CHELAN LOT 6 B BA#2004-06 0.1900 ACRES
Lawyer: John I. Weston/Rani K. Sampson		represents: Wade Austin Miller	
Name (Pro Se): Jenae Marie Pape			
Grantor's name <i>(person giving property)</i>	Grantee's name <i>(person getting property)</i>	Real Property <i>(fill in at least one)</i> 3932 Chemehuevi Blvd., Lake Havasu City, Arizona 86406	
		Assessor's property tax parcel or account number:	Legal description of property awarded (lot/block/plat/section, township, range, county, state)
Wade Miller	Jenae Pape Miller	110-08-156	LOT 4, BLOCK 12, TRACT 2219 LAKE HAVASU CITY
Lawyer: John I. Weston/Rani K. Sampson		represents: Wade Austin Miller	
Name (Pro Se): Jenae Marie Pape			

8. Petitioner's Personal Property (possessions, assets or business interests of any kind)

The personal property listed in Exhibit A is given to Petitioner as his separate property. This Exhibit is attached and made part of this Order.

9. Respondent's Personal Property (possessions, assets or business interests of any kind)

The personal property listed in Exhibit B is given to Respondent as her separate property. This Exhibit is attached and made part of this Order.

10. Petitioner's Debt

The Petitioner must pay all debts he has incurred since the date of separation, November 1, 2014, unless the court makes a different order about a specific debt below.

The Petitioner must pay the debts listed in Exhibit C. This Exhibit is attached and made part of this Order.

11. Respondent's Debt

The Respondent must pay all debts she has incurred since the date of separation, November 1, 2014, unless the court makes a different order about a specific debt below.

The Respondent must pay the debts listed in Exhibit C. This Exhibit is attached and made part of this Order.

12. Debt Collection (hold harmless)

If one spouse fails to pay a debt as ordered above and the creditor tries to collect the debt from the other spouse, the spouse who was ordered to pay the debt must hold the other spouse harmless from any collection action about the debt. This includes reimbursing the other spouse for any of the debt he/she paid and for attorney fees or costs related to defending against the collection action.

13. Spousal Support (maintenance/alimony)

No spousal support is ordered.

14. Fees and Costs (Summarize any money judgment in section 1 above.)

Each spouse will pay his/her own fees and costs.

15. Protection Order

No one requested an *Order for Protection*.

16. Restraining Order

Approved – The request for a *Restraining Order* is approved. The *Restraining Order* is filed separately.

17. Children of the marriage

The spouses have **no** children together who are still dependent.

18. Parenting Plan

Does not apply. The spouses have no dependent children together, or the court does not have jurisdiction over the children.

19. Child Support

Does not apply. The spouses have no dependent children together, or the court does not have jurisdiction over child support.

20. Other Orders (if any): The parties shall sign within 2 weeks all quit claim deeds and tax affidavits necessary to effectuate the distribution of the property as decreed by the Court. All

Ordered.

March 24, 2017
Date


Judge Nakata

Petitioner and Respondent or their lawyers fill out below.

This document (check any that apply):

- is an agreement of the parties
- is presented by me
- may be signed by the court without notice to me

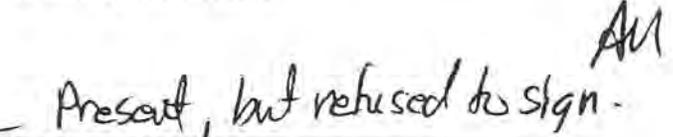
This document (check any that apply):

- is an agreement of the parties
- is presented by me
- may be signed by the court without notice to me


JOHN I. WESTON, JR., WSBA #2136
Of Attorney's for Petitioner


RANI K. SAMPSON, WSBA #37486
Of Attorney's for Petitioner


WADE AUSTIN MILLER
Date
3/24/17

 Present, but refused to sign - AM
JENAE PAPE MILLER
Date

**IN THE SUPERIOR COURT OF WASHINGTON
FOR CHELAN COUNTY**

In re the marriage of:

WADE AUSTIN MILLER,
Petitioner,

and

JENAE PAPE MILLER,
Respondent.

No. 15-3-00016-9

EXHIBIT A

EXHIBIT A

Personal Property Distribution

The Community/Personal Property as found in this exhibit is awarded to the petitioner, Wade Austin Miller, as his separate property:

1. All interest the parties have in Blue Water Enterprises, Inc., dba All Seasons Storage & Rentals and Miller's Auto Sales, including all stock in the names of the parties, and all assets of the corporation subject to all encumbrances thereon.
2. A one-half interest in Town Tub, Inc., including all stock in the petitioner's name and all assets of said corporation, subject to all encumbrances thereon.
3. A Prudential Life Insurance policy insuring the life of the petitioner, Wade Austin Miller, which has a cash value of \$20,061.00.
4. Any and all interest the parties have in the Charles Schwab Stock Account.
5. Any and all interest the parties have in the VOYA Brokerage Account which the Court has valued at \$8,833.00.
6. Any and all personal property in the possession of the petitioner including but not limited to household furniture, fixtures, furnishings, appliances, and utensils and any and all jewelry and wearing apparel.

The Court also awards the following property to the petitioner, which is agreed to be his separate personal property:

- A. Sixteen (16) shares of Blue Water Enterprises, Inc., the transfer gifted to the Petitioner, Wade Austin Miller, prior to marriage.
- C. Any and all interest the petitioner has in Cashmere Valley Bank Account #5085.
- D. Any and all interest the petitioner has in Wells Fargo Bank Account #8879.

IN THE SUPERIOR COURT OF WASHINGTON
FOR CHELAN COUNTY

In re the marriage of:

WADE AUSTIN MILLER,
Petitioner,

and

JENAE PAPE MILLER,
Respondent.

No. 15-3-00016-9

EXHIBIT B

EXHIBIT B

Community Personal Property Distribution

The Court finds the following properties which the Court awards to the Respondent, Jenae Pape Miller

The Court awards the following community properties to the respondent, Jenae Pape Miller:

1. One Wells Fargo Rental Account for 3932 Chemehuevi Blvd, Lake Havasu City, Arizona.
 2. One 2013 Volkswagen Jetta.
 3. One 2010 F350 Ford pickup truck.
 4. One 2013 Nissan Versa.
 5. One MFS IRA Account, standing in the respondent's name.
 6. Any and all personal property including but not limited to furniture, fixtures, furnishings, appliances, and utensils and property personal to the respondent including but not limited to jewelry and wearing apparel, which is currently in the possession of the respondent.
 7. One cargo van full of furniture, clothing and other personal property requested by the respondent and placed into the van by the petitioner that the respondent has failed to pick up but which is immediately available to her. *The van shall be delivered on March 27, 2017 to a location within Chelan Co. designated by the Respondent. The van will be retrieved on March 31, 2017 at 1pm, or before as agreed by the parties.* AM
- Decree Exhibit B-1 the parties.

\$ 387,997.50 AM

- 8. A money judgment in the amount of ~~\$997,901.80~~, which is awarded to the respondent/wife against the petitioner/husband to equalize the community property awarded to both parties. Said money judgment is more fully set forth in subsection 1 and subsection 6 of this decree on pages 1 and 2.

The Court also awards to the respondent the following personal property, which is agreed to be her separate property:

- A. Any and all interest the respondent may have in 3928 Chemehuevi Bld., Lake Havasu City, Arizona.
- B. Any and all interest the respondent may have in the Moclips cabin, located in Moclips, Washington.
- C. Any and all interest the respondent may have in her Chelan condominium, located at 1902 West Prospect, Unit 203, Chelan, Washington.
- D. Any and all funds the respondent has in a Wheatland Bank Account standing in her name, Account #1461.
- E. Any and all funds the respondent has in a Chase Bank Account, standing in her name, Account # 9790.
- F. One 2010 KeyStone Raptor travel trailer.

IN THE SUPERIOR COURT OF WASHINGTON
FOR CHELAN COUNTY

In re the marriage of:

WADE AUSTIN MILLER,
Petitioner,

and

JENAE PAPE MILLER,
Respondent.

No. 15-3-00016-9

EXHIBIT C

EXHIBIT C

Distribution of Debt

The Petitioner must pay all debts listed below:

- A. Any and all debts that are encumbrances on real property awarded to the petitioner herein.
- B. Any and all debts incurred by the petitioner since the separation of the parties on November 1, 2014.
- C. The Hawaiian Airlines Visa in the amount of \$85,000.00 provided however that amount shall be offset against the respondent's final equalizing share of the money judgment awarded to her because this is her debt.

The Respondent must pay all debts listed below:

- A. Any and all debts that are encumbrances including mortgages and taxes against any real properties awarded to her.
- B. Any and all debts incurred by the respondent since the separation of the parties on November 1, 2014.

The Petitioner was given a credit of \$9,904 pursuant to an agreement of the parties for Petitioner paying to the pawn business \$9,904 to redeem the VW vehicle owned by the Respondent. AM

FILED

NOV 06 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

JENAE PAPE MILLER (now Jenae
Pape),

Appellant,

v.

WADE AUSTIN MILLER,

Respondent.

Case No.: 351432

**Proof of Service of Brief of
Respondent**

I, Rani K. Sampson, am one of Respondent Wade Austin Miller's attorneys and declare that on November 3, 2017 before 5:00 pm, I emailed a copy of this *Proof of Service of Brief of Respondent* and the *Brief of Respondent* (in two segments, a 46-page brief including cover sheet and tables, and the 63-page Appendix), (hereafter, the "Served Documents") on Jenae Pape by emailing the Served Documents as PDF-format attachments to emails addressed to jenaem@msn.com and also to Respondent's co-counsel, John Weston, by emailing them to westonassociates@msn.com.

Declared and signed under penalty of perjury of the laws of
Washington at Wenatchee, Washington on November 3, 2017.

OVERCAST LAW OFFICES, PS

A handwritten signature in black ink, appearing to read "Rani K. Sampson", written in a cursive style.

Rani K. Sampson, WSBA No. 37486