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IN THE COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

EDITH LIEBRAND,
Petitioner/Respondent/Cross-Appellant,

v.

FREDERICK D. LIEBRAND,
Respondent/Appellant/Cross-Respondent.

APPELLANT'S REPLY BRIEF

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III. ARGUMENT

A. The trial court failed to find the funds Dr. Liebrand used to purchase the State Line property were hopelessly commingled.

Respondent invokes the presumption that gifts to a married couple are presumed to be community property, citing *Marriage of Martin*, 32 Wn. App. 92, 96, 645 P. 2d 1148 (1982). BR 12. Respondent fails to mention in *Marriage of Martin*, the case was remanded to entry of a finding whether Mr. Martin's mother intended at the time the gift was given by transfer of the deed (1) to convey the land to him as his separate property or (2) to convey the land to both spouses, but on the unstated condition, expectation, or desire that the parties would remain married or (3) to convey the land to both as community property outright. 32 Wn. App. 96. No such finding was made in this case. Nor did Esther Liebrand ever convey real property to the parties by a deed. Moreover, the presumption in *Marriage of Martin* must be read in light of *Estate of Borghi*, 167 Wn. 2d. 480, 490, 219 P.3d 932 (2009), in which the Court held no presumption arises from the names on a deed or title.

Respondent argues appellant's burden is not met by his testimony regarding the separate character of the funds used to purchase the property, citing *Berol v. Berol*, 37 Wn. 2d 380, 382, 223 P. 2d 1055 (1950). BR 13. Respondent fails to address *Marriage of Schwarz*, 192 Wn. App. 180, 214, 368 P.3d 173 (2016), wherein the Court recognized

"[*o*]*rdinarily, the testimony of a single credible witness can qualify as clear and convincing evidence, even if the witness's testimony is contradicted by other witnesses.*(*citing Dalton v. State,* 130 Wn. App. 653, 667, 124 P.3d 305 (2005)).

Respondent takes issue with the requirement of demonstrating comingled funds are hopelessly commingled before a commingled mass of funds may be declared community property. Brief of Respondent (BR) at 14-15. Respondent maintains the "hopelessly commingled" standard for determining the extent to which funds in an account have been mixed is not the standard courts use to make that determination. BR at 14-15. To the contrary, the hopelessly commingled standard adopted by this Court in both *Marriage of Schwarz*, 192 Wn. App. 180, 368 P.3d 173 (2016) and *Marriage of Skarbeck,* 100 Wn. App. 444, 997 P. 2d 447 (2000) is the standard that must be met before a mass of funds in an account can be deemed community property.

Respondent fails to understand the importance of the hopelessly commingled standard. As explained in *Schwarz,* the hopelessly commingled standard is a necessary condition precedent to the conclusive presumption arising when the effort at tracing proves impossible. 192 Wn. App. 190. Further, as explained in *Schwarz*, the presumption arising from hopelessly commingled funds is not an evidentiary rule, but rather a rule of substantive law. 192 Wn. App. 190 n. 3 (*Citing Green's Estate*, 46

Wn. 2d 637, 642, 283 P. 2d 989 (1955) and *In re Witte's Estate*, 21 Wn. 2d 112, 125, 150 P. 595 (1944).

Changing the hopelessly commingled standard threatens to lessen or obscure the degree to which intermixed funds must be commingled, thereby allowing mixed funds to be more easily stamped with the conclusive community property presumption. Appellant therefore urges the Court to uphold the hopelessly commingled standard for characterizing intermixed funds in an account.

In re Marriage of Shui v. Rose, 132 Wn. App. 568, 125 P. 3d 180, *review denied,* 158 Wn. 2d 1017 (2006), cited by respondent, is distinguishable here. In *Shui*, the husband's attempt at tracing the separate character of Microsoft stock option proceeds held in four investment accounts failed where the options consisted of separate, community and mixed funds. The husband's attempt to trace the proceeds consisted of determining a cumulative percentage of the stock option shares that were separate in character versus community in character and applying that percentage to the residual balances of the four investment accounts. The court concluded the husband's effort at tracing was not a proper, as it failed to consider the exercise of each option segment yielded different amounts of cash depending on the strike price and the price of the stock when the husband sold it. 132 Wn. App. 584. No similar facts are present here. Nor does appellant's tracing of separate funds resemble the formula

used by the husband in *Shui.* Nor would the husband's efforts at tracing have escaped the hopelessly commingled standard in *Schwarz* and *Skarbeck.*

Marriage of Pearson-Maines, 70 Wn. App. 860, 855 P.2d 1210 (1993), also cited by respondent, does not support her position. *Pearson-Maines* was cited by this Court in *Marriage of Skarbeck,* in adopting the hopelessly commingled standard. 100 Wn. App. 448. *Pearson-Maines* thus supports the use of that standard.

Respondent points out the CPAs concluded the funds used to purchase 1776 Stateline Road cannot be directly traced to the sale of Appellant's College Place property or the wheat sale proceeds from his Oklahoma farm, due to appellant's inability to supply documentation to the CPAs to support his claim of separate property. BR at 16-17. However, as noted in *Marriage of Schwarz,* in a longer-term marriage where relevant financial activity took place many years earlier, it is unrealistic to require exhaustive documentation. 192 Wn. App. 217.

Moreover, direct tracing is but one form tracing. See, 19 Washington Practice, Family And Community Property Law § 11:14. Washington courts also recognize a presumption if there are both separate and community funds and there are sufficient separate funds from which the payments can be made, then the payments will be presumed made from

such separate funds. *Marriage of Pearson-Maines*, 70 Wn. App. 867 (*Quoting Pollock v. Pollock*, 7 Wn. App. 394, 404, 499 P.2d 231 (1972)).

Appellant testified he used the $123,000 from his College Place home he owned prior to his marriage to respondent to purchase the land at 1776 Stateline Road in Walla Walla and to start construction on the house. RP 114; RP 215; RP 410. Neither appellant nor respondent had another source of income to make that large of a payment. RP 370. Appellant also testified he spent $16,000 in wheat sale proceeds from his Oklahoma farm for the purchase of the Stateline Road property. RP 215. Thus, under *Pearson-Maines* and *Pollock,* appellant is entitled to the presumption he purchased 1776 Stateline Road with his separate property funds. Appellant's testimony by itself constitutes clear and convincing evidence. *Marriage of Schwarz*, 192 Wn. App. 214; *Dalton v. State*, 130 Wn. App. 653, 667, 124 P. 3d 305 (2005). Respondent introduced no contrary evidence to rebut that presumption.

The trial court's findings do not specifically address commingling of the parties' separate and community assets. CP 978-983. In its oral ruling, the trial court stated, "*in review of the CPAs indicating they cannot trace the documentation and payments for that and everything has been commingled. I agree with that and find the 1776 Stateline Road Property is a community asset.*" RP III p. 492 l. 7-11. The trial court did not address whether the funds used to purchase 1776 Stateline Road were

hopelessly commingled. Without making such a finding on that issue, under *Schwarz* and *Skarbeck,* the trial court's Finding 8, that the 1776 Stateline Road property is community property, cannot be sustained.

Respondent repeats the same argument concerning the source of funds used to pay mortgage, construction and remodel costs on 1776 Stateline Road. BR 17-19. While those funds were placed in active joint accounts, commingling them and, as per the CPAs report, preventing a direct tracing to separate property contributions from appellant's parents, appellant is entitled to the presumption if there are both separate and community funds and there are sufficient separate funds from which the payments can be made, then the payments will be presumed made from such separate funds. *Marriage of Pearson-Maines*, 70 Wn. App. 867; *Pollock v. Pollock*, 7 Wn. App. 404. Appellant's Amended Brief at pages 9-11 sets forth in detail the amounts of money received by appellant from his parents and the use of those funds to pay for repairs, improvements and cancellation of mortgage debt on 1776 Stateline Road. Scott Martin identified two large deposits used to pay off the mortgage on 1776 Stateline Road. RP 412, 430.

If the trial court mischaracterizes property, remand for further consideration is appropriate when (1) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and (2) it is not clear that had the court properly characterized

the property, it would have divided it in the same way. *Marriage of Schwarz,* 192 Wn. App. 192 (*Quoting In re Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989)). The trial court valued 1776 Stateline Road at $470,000. CP 988. The trial court characterized 1776 Stateline Road as community property to provide an offset to the award to respondent of the Seattle townhome as community property. CP 988. Had the trial court characterized 1776 Stateline road as appellant's separate property, it is not clear it would have awarded the entire value of that property to him, in light of the trial court's award to appellant of Esther Liebrand's Estate, valued at $917,237, including the $600,000 Seattle property, as his separate property. CP 989.

In light of the foregoing, Findings of Fact 8, 9, 10, 11 and Exhibit A thereto, paragraphs 2, 7, 9, 11 and Exhibit A to the Final Divorce Order, and the Order Denying Motion for Reconsideration must be reversed.

B. The trial court erred in finding the Seattle property to be community property.

Respondent mischaracterizes the transfers of funds by Esther Liebrand to appellant and respondent's joint account from 2009 to 2011 as gifts to their marital community. BR 19-21. Respondent had the burden of proving a gift. *Matter of Estate of Oney*, 31 Wn. App. 325, 329, 641 P. 2d 725 (1982).

The trial court is required to enter findings of fact on all material issues. CR 52 (a); *Bowman v. Webster,* 42 Wn. 2d 129, 253 P.2d 934

(1953). The absence of a finding on a material issue is presumptively a negative finding entered against the party bearing the burden of proof on that issue. *Smith v. King*, 106 Wn. 2d 443, 451 n. 12, 722 P. 2d 796 (1986); *In re Relationship of Eggers,* 30 Wn. App. 867, 873, 638 P. 2d 1267 (1982); *Batten v. Abrams,* 28 Wn. App. 737, 744, 626 P. 2d 984 (1981).

Respondent must prove by clear, cogent and convincing evidence Esther Liebrand's deposit of her funds in the parties' joint checking account constituted a gift. *Estate of Oney*, 31 Wn. App. 329. To establish a valid gift, respondent must also establish Esther Liebrand had donative intent. *Marriage of Kile and Kendall,* 186 Wn. App. 864, 877, 347 P. 3d 894 (2015); *Estate of Oney*, 31 Wn. App. 329.

The trial court made no finding of gift nor of donative intent. The trial court did not identify any specific transfer as a gift in its oral ruling. RP 492. Under *Smith v. King, Relationship of Eggers,* and *Batten v. Abrams,* the court may therefore presume respondents failed to meet their burden of proving Esther Liebrand's transfers of her money in 2010 and 2011 into the parties' joint checking account were gifts.

It is questionable whether respondent could have met her daunting burden of proving gift in any event. In searching for a rental in Seattle, Esther Liebrand was motivated by a desire to do something for her granddaughter, Miriam. RP 218. Esther's October 15, 2010 transfer of

$7,000 to appellant's and respondent's joint checking account and Esther's December 31, 2010 transfer of $5,000 to that account both contain the notation "Mimi," Miriam's nickname. EX 13 C1, C 2, D 20; EX 13 C9. Further, on January 11, 2011, Esther wrote a check directly to Golf Escrow, the agency where the Seattle property transaction closed. EX 13 C 11, C17. None of those transactions qualify as a gift to the parties' marital community.

Esther never had any intent of benefitting anyone other than appellant and her granddaughter. CP 309;

Esther Liebrand's relationship with appellant in 2010 and 2011 would not allow him to accept gifts from her without risking liability for undue influence. In 2010, Esther appointed appellant as her attorney in fact, and enlisted him to conduct a search for a rental property in Seattle. RP 217; EX 7. An *inter vivos* gift of funds from a principal to her attorney-in-fact is presumptively the result of undue influence. *Endicott v. Saul*, 142 Wn. App. 899, 923-24, 176 P.3d 560 (2008).

Nothing in appellant's conduct in 2010 and 2011 suggests he was acting in anyone's interest other than for Esther. Appellant flew to Seattle and met with a local realtor, Katherine Peterson, who escorted him to view various locations. RP 218, 295-96. It took appellant and Ms. Peterson two or three months to find a suitable property. RP 296. Ms. Peterson understood appellant was working for Esther and Esther was going to be

the purchaser of the property. RP 296. Appellant returned to Walla Walla with photographs of the property to show to Esther. RP 219. Appellant made an offer to purchase the property at 1127 A 18th Avenue in Seattle. CP 296. After the property had been selected, Esther came to Seattle to view it. RP 219.

Characterization of the funds transferred by Esther to the parties' joint checking account as community property cannot be reconciled with what the parties did with those funds. On March 17, 2011, appellant wired $59,337.84 from the parties' Banner Bank joint checking account to Golf Escrow to fund the purchase of the Seattle property. EX 14 (Banner Bank at 6-10). If those funds were community property, then title to the Seattle property should have been in the names of appellant and respondent. Instead, title to that property was taken in the names of respondent and Esther. Respondent's name on the title was simply an accommodation to the lender. RP 298-99, 307-08, 311-312; EX 1 at 27.

Nor does respondent offer any explanation how, if the Seattle property was community property, was Esther able to refinance it in her own name at a lower interest rate a week after purchasing it. RP 234, 236- 237, EX 10; CP 180-82. Nor can respondent explain, if the property was community property, how Esther reported the entire rental income and expenses for the Seattle property on Schedule E of her federal income tax forms for 2011 through 2014. CP 156-157; RP 245-246; EX 11. Nor can

respondent explain if the Seattle property is appellant's and respondent's community property, how could Esther have devised it to her trust. RP 284.

In view of respondent's atrocious behavior toward Esther, it is unlikely she would have been a beneficiary of Esther's gifting. Respondent appropriated Esther's car for her own use, and after the divorce action started, respondent kept the rent from the Seattle property and did not pay the mortgage on that property. CP 161; RP 337.

Respondent objects to appellant's reliance upon the presumption that payments were made with separate funds, if available. BR 21. Respondent maintains, without citation to authority, that the presumption does not apply if the separate funds are commingled with community property. Because respondent fails to support her argument with authority, it should not be considered. RAP 10.3 (a) (6); *Brownfield v. City of Yakima*, 178 Wn. App. 850, 875, 316 P. 3d 520 (2014). Further, as set forth at page 15 of Appellant's Amended Brief, Esther Liebrand's deposits into the parties' joint checking account that comprised the $59,337.84 down payment for the Seattle property made by appellant to Golf Escrow on March 17, 2011 have been clearly identified and apportioned. Thus, the facts here warrant application of the presumption recognized in *Marriage of Pearson-Maines,* 70 Wn. App. 860, 855 P.2d 1210 (1993) and *Pollock v. Pollock*, 7 Wn. App. 394, 404, 499 P.2d 231 (1972).

Respondent fails to address appellant's argument at page 35 of Appellant's Amended Brief, that under *Binge's Estate*, 5 Wn. 2d 446, 466, 105 P. 2d 689 (1940), the rule hopelessly commingled funds are presumed community is subject to the exception that when community property is inconsiderable in comparison with the separate property, the mass remains separate. Respondent provides no answer to Scott Martin testimony "*the account started with very little. It built up balances from these transfers in from Esther and then it was this $59,000 that went out for the down payment*." RP 417-18.

Respondent's attempt to distinguish *Cummings v. Anderson,* 94 Wn. 2d 135, 614 P. 2d 1283 (1980) fails. BR 22. Contrary to respondent's argument, appellant accurately traced the funds used to purchase the Seattle property. See Appellant's Amended Brief, p. 15. Further, appellant is entitled to the presumptions recognized in *Marriage of Pearson-Maines, Pollock v. Pollock*, and *Binge's Estate, supra.* Therefore, appellant is entitled to the rule in *Cummings v. Anderson,* that respondent's interest in the Seattle property is equal to her contribution to its purchase price, which was nothing.

The trial court compounded its error in characterizing the Seattle property as community property when it also declared the rent from the property to be community as well. CP 979, 982, 985, 988. As the Seattle property was property of the Esther Liebrand Trust, so too was the rent.

In light of the foregoing, Findings of Fact 8, 9, 10, 11 and paragraphs 2, 3 to Exhibit A thereto, paragraphs 2, 3 9, 11 and Exhibit A to the Final Divorce Order, and the Order Denying Motion for Reconsideration must be reversed.

C. The trial court erred in awarding the Seattle property and its rents to respondent.

Respondent attempts to avoid the rule in *In re: Marriage of McKean*, 110 Wn. App. 191, 38 P. 3d 1053 (2002) by arguing Esther Liebrand voluntarily intervened in this action. BR 27. Esther Liebrand was granted leave to intervene. CP 323-24. Esther Liebrand intervened in her individual capacity, and not as trustee of her trust. When Esther Liebrand died, appellant was substituted as personal representative of her estate. CP 562-63. Neither Esther Liebrand nor appellant has ever appeared in this action as trustee of Esther Liebrand' trust. Respondent never served the trustee with summons in this action. Consequently, as in *Marriage of McKean,* 110 Wn. App. 196, the trial court never gained jurisdiction over Esther Liebrand's trust or its assets, and consequently it erred in distributing trust assets to respondent.

Respondent argues appellant quitclaimed his interest in the Seattle property. BR 28. The quit claim deed was proposed by Esther's lender to circumvent appellant's tax lien in connection with the financing of the Seattle property. RP 298-99, 307-08, 311-312; EX 1 at 27. Respondent fails to support her argument with any authority, so it should not be

considered. RAP 10.3 (a) (6); *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 741, 119 P. 3d 926, *review denied,* 157 Wash.2d 1009, 139 P.3d 349 (2006).

Respondent argues, without citation to authority, that awarding the Seattle property to Esther Liebrand's trust would constitute an award to appellant because he is both beneficiary and trustee of the trust with discretionary power to distribute it to himself. Lacking citation to authority, respondent's argument should not be considered. RAP 10.3 (a) (6); *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 741.

The prevailing view is undistributed trust assets are property of a third party and are not subject to division in a marital dissolution action. *Lemke v. Lemke*, 929 S.W.2d 662, 664 (Tex. App. Fort Worth 1996), *writ denied*, (Apr. 10, 1997); *Marriage of Burns,* 573 S.W.2d 555, 557-58 (Tex. App. Texarkana 1978); *Nelson v. Nelson*, 206 So. 3d 818, 821 (Fla. App. 2016); *Loomis v. Loomis*, 158 S.W.3d 787, 790 (Mo. App. 2005); *In re: Chamberlin*, 918 A. 2d 1, 4-5 (N. H. 2007); *Jones v. Jones*, 158 Or. App. 41, 973 P. 2d 361, 365, *adhered to on reconsideration,* 159 Or. App. 377, 981 P.2d 338 (1999).

RCW 26.09.080 confers authority to "*make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable...*" Nothing in that statute confers authority

on the trial court to divide assets owned by a third party in a marital dissolution.

In light of the foregoing, respondent's claim to the Seattle property fails to state a claim upon which relief can be granted. RAP 2. 5 (a) (2) allows such a defense to be made for the first time on appeal.

Respondents' arguments at page 29 of her brief lack a single citation to authority, so they should not be considered. RAP 10.3 (a) (6); *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 741.

D. The trial court erred in awarding Edith part of his retirement.

Respondent argues under RCW 26.09.080 the trial court was required to characterize and distribute property without regard to misconduct. BR 30. Respondent overlooks *In re Marriage of Steadman*, 63 Wn. App. 523, 527, 821 P.2d 59 (1991). In *Steadman*, Division I of this Court interpreted the misconduct language in RCW 26.09.080: "*we find that the "marital misconduct" which a court may not consider under RCW 26.09.080 refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence, the squandering of marital assets or, as here, the deliberate and unnecessary incurring of tax liabilities.*"

Respondent's conduct in this case does not qualify as exempt misconduct under *Steadman's* interpretation of that term. In 1997, appellant took out a mortgage on the Stateline Road property to help

respondent with her new business. RP 224; EX 8. That business failed and appellant and respondent had to declare bankruptcy. RP 213. In 2000, appellant sold his family farm in Oklahoma for $250,000 to pay debts of respondent's business. RP 214; RP 318-19; EX 20. Appellant incurred a federal tax lien because of that business bankruptcy. RP 221; RP 314; EX 16. Appellant lost his credit card in the bankruptcy. RP 273. Respondent damaged their Toyota Camry. RP 321. Respondent ran the Camry into appellant's truck. RP 359. In 2012, respondent's spending increased dramatically and despite his efforts, appellant could not repay all of it. RP 276-77. All of the foregoing constitutes "*negatively productive conduct*" justifying a lower share of appellant's retirement. Unfortunately, the trial court ignored all of the foregoing evidence.

The parties' relative health, age, education and employability should also be considered. *Marriage of Mathews*, 70 Wn. App. 116, 121, 853 P. 2d 462, *review denied*, 122 Wash.2d 1021, 863 P.2d 1353 (1993). Appellant's sight in his right eye started to strongly deteriorate in the seven months preceding trial. RP 208. Appellant continues to undergo chelation therapy to address his toxicity with mercury and lead. RP 208-09. Appellant's tenure as a college professor is in jeopardy due to his absence for hearings related to this divorce action. RP 207; RP 316-17; EX 18. Again, nothing in the record suggests the trial court considered any of those factors.

Therefore, the Court should reverse paragraphs 7, 8, 9 and paragraph 2 of Separate Property in Exhibit A thereto, and Findings of Fact 8, 10 and paragraph 2 of Separate Property in Exhibit A thereto and remand the case for a redistribution of the parties' retirement accounts after a full consideration of all relevant factors.

E. The trial court erred in distributing Esther Liebrand's trust assets to respondent.

Respondent argues the trial court did not err in distributing assets of Esther Liebrand's trust to her. BR 31-33. Respondent misplaces reliance upon *In re Marriage of Hurd*, 69 Wn. App. 38, 49, 848 P. 2d 185, *review denied,* 122 Wn. 2d 1020 (1993), *disapproved of on other grounds, Estate of Borghi,* 167 Wn. 2d 480, 219 P. 3d 932 (2009). Unlike the facts here, the inheritance at issue in *Hurd* was not a trust. As indicated in paragraph C above, the prevailing rule does not allow division of property of third parties in a marriage dissolution. Property held in trust is held by a third party. Respondent's argument therefore fails.

F. The trial court erred in awarding spousal support for respondent.

Respondent apparently has no answer to the requirement the trial court must make findings of fact to establish whether the factors in RCW 26.09.090 were considered, and, if so, upon what facts the court based its conclusions. BR 33-36. Respondent also fails to address *Marriage of Monkowski*, 17 Wn. App. 816, 819, 565 P. 2d 1210 (1977). The trial

court's findings do not indicate whether it considered the factors in RCW 26.09.090. Nor do the findings state upon which facts the court based its conclusions. As in *Monkowski*, remand for entry of adequate findings is required.

Nor does respondent address *In re: Marriage of Estes*, 84 Wn. App. 586, 594, 929 P. 2d 500 (1997). Under *Estes,* in making its award of 60 months of maintenance, the trial court was required to, but failed, to enter an express finding as to whether that was an appropriate length of time in view of the disparate earnings of the parties. Therefore, the case should be remanded to the trial court for such a finding.

Nor does respondent address Washington decisions which have considered a spouse's dissipation of community assets in awarding maintenance. *Marriage of Mathews*, 70 Wn. App. 116, 124, 853 P. 2d 462, *review denied*, 122 Wash.2d 1021, 863 P.2d 1353 (1993); *Marriage of Morrow*, 53 Wn. App. 579, 584, 770 P. 2d 197 (1989). As set forth in paragraph D, *supra*, respondent's "negatively productive" conduct over the course of the parties' marriage has resulted in the loss to their community of hundreds of thousands of dollars. Such conduct militates against the trial court's award of $2,000 per month for 60 months.

Most importantly, the trial court's Finding of Fact 13, regarding "*the disparity in income between the parties*" demands scrutiny. In Section A of respondent's brief, the statement is made that "[*w*]*ith part-time*

seasonal work in Walla Walla wineries, her average annual income after separation was, at most, $30,000."

Respondent testified her part-time teaching earnings were $32,500 in the 12 months prior to trial, and that that figure included a reduced rate for summer work. RP 116-117. Respondent also testified that she worked part-time at a winery for 18 hours per week from April to October of each year at a rate of $12 per hour. RP 120. If October is excluded from this period, respondent earns minimum earnings (26 weeks x 18 hours per week x $12 per hour) of $5616 per year. Respondent's earnings per year prior to the judgment come to over $38,100, a value 27% higher than the $30,000 claimed at page 3 of her brief.

Respondent claimed expenses of $3240 per month, or $38,800 per year RP 149 . Respondent's expenses thus match her income before any maintenance is included. Respondent's expenses include her 28-year old son's cell phone bill. RP 151.

In paragraph 7 and paragraph 2 and 3 of Exhibit A to the Final Divorce Order, respondent was awarded the townhome and its rental income of about $700 per month over expenses, or $8,400 per year. CP 985, 988. Respondent was also awarded $2500 per year in income from Fred's personal community solar investment. RP 493. This brings respondent's annual income under the Final Divorce Order to a minimum of $49,000. Respondent also receives $2000 per month in maintenance.

CP 986. This brings her yearly income to over $73,000 per year. Respondent's current income under the Final Divorce Order thus exceeds her expenses by 88%.

Respondent does not assist in daughter Mimi's tuition and college expenses including room and board. RP 169-170. Appellant pays the entirety of Mimi's tuition, food and dorm for the 9 months plus that Mimi is in college at over $25,000 per year. RP 96, 169-70.

Appellant's income is $67,000 per year, with investment income of $8900 from Esther's inheritance. CP 548. Appellant's yearly income after maintenance is $51,900. CP 986. Thus, respondent enjoys an income exceeding appellant's income by over 40%. Twenty percent of respondent's gross pay gets put into her retirement account every pay period. CP 165. In contrast, five percent of appellant's pretax income goes to his 401K plan. RP 380-81. Respondent's rate of accumulation into retirement savings is four time greater than appellant's rate. RP 381.

Respondent also grossly misstates the value of assets appellant has inherited from his parents. Respondent misrepresents that value at $1.5 million. BR 1. That amount needs to be reduced by the following amounts:

-$600,000 for the town home ($505,000 net of debt) awarded to respondent. CP 988.

-the entire indebtedness of the couple at the time of separation and lawyer's fees ($43,000 to Mitchell and $1400 to Sawatzki and similar amounts to appellant's experts). RP 493; CP 980, 983, 986, 989.

-$200,000 in repairs necessary for the house on the State Line property. RP 376.

-$75,000 in tuition and living expenses for the parties' dependent child. RP 96.

leaving a total award to appellant of $625,000 in separate assets rather than $1.5 million.

The trial court also failed to adequately address the ability of respondent as the party seeking maintenance to meet her needs independently, as required by RCW 26.09.090 (1) (a). In view of her superior academic accomplishments and her work experience, respondent demonstrates capacity for self-support and her request for maintenance should have therefore have been denied. *Marriage of Wright*, 78 Wn. App. 230, 238, 896 P. 2d 735 (1995). Alternatively, remand is an appropriate remedy here, as the trial court did not adequately consider relevant factors concerning spousal support. *Marriage of Sheffer*, 60 Wn. App. 51, 57-58, 802 P. 2d 817 (1990).

Respondent argues no evidence was presented whether appellant would retire within five years. BR 35. To the contrary, appellant introduced evidence his employer, Walla Walla University, voted to

postpone the decision whether to fire him until January 2018. RP 358; EX 18.

Respondent argues the rule against requiring an obligor spouse to pay maintenance out of his remaining retirement, as discussed in *Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462, *review denied*, 122 Wn. 2d 1021 (1993), should not apply here. BR 35. Respondent attempts to distinguish *Mathews* based on the alleged disparity between income and separate property assets in this case. Respondent fails to support her argument with a citation to the record to establish that disparity. Respondent's argument should therefore not be considered. RAP 10.3 (a) (6). As indicated above, the evidence reveals the disparity in income between the parties favors respondent. Further, respondent grossly overstates the disparity in separate assets. Respondent's attempt to distinguish *Mathews* therefore fails.

In light of the foregoing, the court should reverse paragraph 13 of the Final Divorce Order and the Spousal Maintenance paragraph in Exhibit A thereto and Finding of Fact 13 and the Spousal Maintenance paragraph in Exhibit A thereto and remand the case for consideration of the above discussed factors.

G. The trial court erred in awarding attorney fees to respondent.

The trial court's cursory treatment of respondent's attorney fees request fails to satisfy *In re Marriage of Swaka*, 179 Wn. App. 549, 319 P.

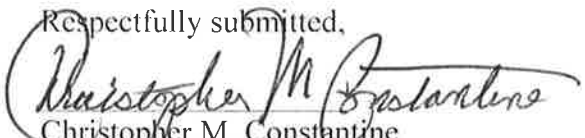
3d 69 (2014), *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415, 157 P.3d 431 (2007), and *Mahler v. Szucs*, 135 Wash.2d 398, 435, 957 P.2d 632(1998), *overruled in part on other grounds* by *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wash.2d 643, 272 P.3d 802 (2012).

Therefore, the trial court's award of attorney fees should be reversed, and the case remanded to the trial court for entry of adequate findings of fact and conclusions of law supporting its attorney fee award. *Svendsen v. Stock*, 143 Wn. 2d 546, 560, 23 P. 3d 455 (2001).

III. CONCLUSION

The trial court's findings of fact and conclusions of law and its order challenged above should be reversed and the case remanded to the trial court for further proceedings consistent with the decision of this Court.

Respectfully submitted,



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X. CERTIFICATE OF SERVICE

The undersigned does hereby certify that on June 18, 2018, he served a copy of the Appellant's Reply Brief upon Respondent, by delivering the same through the Washington Appellate Court's e-filing portal, addressed to the following:

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Dated this 18th day of June 2018 at Tacoma, WA.

OF COUNSEL INC PS

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