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No. 35551-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EDITH LIEBRAND,
Respondent,

v.

FREDERICK D. LIEBRAND,
Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR WALLA WALLA COUNTY
THE HONORABLE M. SCOTT WOLFRAM

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION1

II. RESTATEMENT OF FACTS1

 A. The husband, as a tenured university professor, earns more than double what the wife earns as a community college adjunct professor. His retirement accounts were also nearly double the value of the wife’s retirement. 2

 B. The husband is the sole beneficiary of his mother’s estate and the beneficiary and trustee of his parents’ trusts, worth close to \$1.5 million. 3

 C. The trial court found the family home in Walla Walla and a townhome in Seattle to be community property. 4

 D. The trial court distributed slightly more than half the community property to the wife, left the husband with his significant separate property, and awarded the wife maintenance and fees. 8

III. ARGUMENT 9

 A. The trial court properly characterized real property purchased and maintained during the marriage with untraceable commingled funds as community property. 11

 1. The husband did not meet his burden of overcoming the presumption that property acquired during the marriage is community property. 11

 2. Substantial evidence supports the trial court’s finding that commingled funds were used to purchase and improve the real property acquired during the marriage.12

a.	The funds used to purchase, construct, and repair the Stateline Road home were commingled and not traceable.	16
b.	The Seattle townhome was purchased and maintained with gifts to the couple, community rental income, and other community funds.	19
B.	The trial court had authority to award the Seattle townhome to the wife.	23
1.	After the trial court properly granted the mother’s motion to intervene, it had authority over any interest she had in the townhome.	23
2.	Awarding the Stateline Road home to the husband and awarding the wife the Seattle townhome and its rental income was just and equitable under the circumstances.	28
C.	The husband’s unproven claims of “misconduct” were not a basis for denying the wife a just and equitable share of the marital estate.	30
D.	The trial court was required to consider the husband’s inherited separate property in assessing the parties’ financial circumstances.	31
E.	The trial court did not abuse its discretion in its maintenance award given the disparity in the parties’ incomes and the length of the marriage.	33
F.	The trial court did not abuse its discretion in awarding attorney fees to the wife.	36
G.	This Court should award the wife her fees on appeal.	39
IV.	CONCLUSION	39

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Angelo v. Angelo</i> , 142 Wn. App. 622, 175 P.3d 1096, <i>as amended</i> (Jan. 29, 2008), <i>rev denied</i> , 164 Wn.2d 1017 (2008).....	25
<i>Arneson v. Arneson</i> , 38 Wn.2d 99, 227 P.2d 1016 (1951)	24-25
<i>Beam v. Beam</i> , 18 Wn. App. 444, 569 P.2d 719 (1977), <i>rev. denied</i> , 90 Wn.2d 1001 (1978)	13
<i>Berol v. Berol</i> , 37 Wn.2d 380, 223 P.2d 1055 (1950)	13
<i>Cummings v. Anderson</i> , 94 Wn.2d 135, 614 P.2d 1283 (1980)	22
<i>Dumas v. Gagner</i> , 137 Wn.2d 268, 971 P.2d 17 (1999).....	24, 26
<i>Estate of Borghi</i> , 167 Wn.2d 480, 219 P.3d 932 (2009)	32
<i>Fairfield v. Binnian</i> , 13 Wash. 1, 42 P. 632 (1895)	26
<i>Fuqua v. Fuqua</i> , 88 Wn.2d 100, 558 P.2d 801 (1977)	24
<i>Marriage of Brewer</i> , 137 Wn.2d 756, 976 P.2d 102 (1999)	28
<i>Marriage of Croley</i> , 91 Wn.2d 288, 588 P.2d 738 (1978)	25

<i>Marriage of Doneen</i> , 197 Wn. App. 941, 391 P.3d 594, <i>rev. denied</i> , 188 Wn.2d 1018 (2017)	10
<i>Marriage of Fernau</i> , 39 Wn. App. 695, 694 P.2d 1092 (1984).....	36
<i>Marriage of Hurd</i> , 69 Wn. App. 38, 848 P.2d 185, <i>rev. denied</i> , 122 Wn.2d 1020 (1993).....	32
<i>Marriage of Larson & Calhoun</i> , 178 Wn. App. 133, 313 P.3d 1228 (2013), <i>rev. denied</i> , 180 Wn.2d 1011 (2014)	10
<i>Marriage of Luckey</i> , 73 Wn. App. 201, 868 P.2d 189 (1994)	10
<i>Marriage of Lutz</i> , 74 Wn. App. 356, 873 P.2d 566 (1994)	27
<i>Marriage of Martin</i> , 32 Wn. App. 92, 645 P.2d 1148 (1982)	12
<i>Marriage of Mathews</i> , 70 Wn. App. 116, 853 P.2d 462, <i>rev. denied</i> , 122 Wn.2d 1021 (1993).....	35-36
<i>Marriage of McKean</i> , 110 Wn. App. 191, 38 P.3d 1053 (2002).....	26-27
<i>Marriage of Mueller</i> , 140 Wn. App. 498, 167 P.3d 568 (2007), <i>rev. denied</i> , 163 Wn.2d 1043 (2008).....	12
<i>Marriage of Olson</i> , 69 Wn. App. 621, 850 P.2d 527 (1993)	14
<i>Marriage of Pearson-Maines</i> , 70 Wn. App. 860, 855 P.2d 1210 (1993)	15, 21-22
<i>Marriage of Schwarz</i> , 192 Wn. App. 180, 368 P.3d 173 (2016).....	13

<i>Marriage of Shui & Rose</i> , 132 Wn. App. 568, 125 P.3d 180 (2005), <i>rev. denied</i> , 158 Wn.2d 1017 (2006).....	13, 15
<i>Marriage of Soriano</i> , 44 Wn. App. 420, 722 P.2d 132 (1986).....	26-27
<i>Marriage of Tang</i> , 57 Wn. App. 648, 789 P.2d 118 (1990)	25
<i>Marriage of Van Camp</i> , 82 Wn. App. 339, 918 P.2d 509, <i>rev. denied</i> , 30 Wn.2d 1019 (1996).....	36
<i>Marriage of Washburn</i> , 101 Wn.2d 168, 677 P.2d 152 (1984).....	10, 33-34
<i>Marriage of Williams</i> , 84 Wn. App. 263, 927 P.2d 679 (1996), <i>rev. denied</i> , 131 Wn.2d 1025 (1997).....	30-31, 34
<i>Marriage of Wright</i> , 179 Wn. App. 257, 319 P.3d 45 (2013), <i>rev. denied</i> , 186 Wn.2d 1017 (2014).....	9, 33
<i>Org. to Pres. Agr. Lands v. Adams Cty.</i> , 128 Wn.2d 869, 913 P.2d 793 (1996).....	14, 18
<i>Recall Charges Against Seattle Sch. Dist. No. 1 Directors</i> , 162 Wn.2d 501, 173 P.3d 265 (2007)	23
<i>Walsh v. Reynolds</i> , 183 Wn. App. 830, 335 P.3d 984 (2014), <i>rev. denied</i> , 182 Wn.2d 1017 (2015)	36
<i>West v. Knowles</i> , 50 Wn.2d 311, 311 P.2d 689 (1957).....	22
<i>William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Tr. v. Port of Everett</i> , 159 Wn. App. 389, 245 P.3d 779, <i>rev. denied</i> , 171 Wn.2d 1024 (2011)	38

Statutes

RCW 26.09.010..... 25
RCW 26.09.080 30
RCW 26.09.090 10, 33-35
RCW 26.09.140 36, 39
RCW 26.09.170 35

Rules and Regulations

CR 24..... 24, 26
RAP 2.5..... 24
RAP 18.1 39

I. INTRODUCTION

Appellant Frederic Liebrand, a tenured physics professor, challenges the trial court's decision dissolving the parties' 25-year marriage, which leaves respondent Edith Liebrand, an adjunct community college teacher, with a slightly disproportionate share of the community property, \$33,000 in attorney fees, and a modest maintenance award of \$2,000 a month for five years, which will not even begin to equalize the parties' financial positions after their long-term marriage. Appellant was awarded the remaining community property, including the \$470,000 family home in Walla Walla owned free and clear, almost \$160,000 in community retirement accounts, and all his separate property — \$1.5 million in trust and estate assets inherited from his parents. The trial court's decision was well within its discretion, and this Court should affirm and award respondent her fees on appeal.

II. RESTATEMENT OF FACTS

Frederic Liebrand, age 54, and Edith Liebrand, age 55, married on December 17, 1991 and separated on September 9, 2015. (Finding of Fact ("FF") 4-5, CP 978-79; RP 101, 207) Neither their adult daughter nor Edith's son from a previous marriage is dependent. (FF 18, CP 980) The primary issues at trial concerned

the characterization of real properties in Walla Walla and in Seattle. Underlying these disputes were gifts made over many years to the parties by Fred's parents, Esther and Clair Liebrand.

The statement of facts in the opening brief is in large part a litany of appellant's complaints about supposed transgressions and expenses that occurred either early in the parties' marriage or pre-date the parties' marriage a quarter century ago, and which in any event are irrelevant to the division of property and award of maintenance and fees at the end of this long-term marriage. The Court should rely on this restatement of facts, which fairly sets out the facts relevant to the trial court's discretionary decisions.

A. The husband, as a tenured university professor, earns more than double what the wife earns as a community college adjunct professor. His retirement accounts were also nearly double the value of the wife's retirement.

Fred, who has a Ph.D. in theoretical physics, is a tenured professor at Walla Walla University, earning employment income of over \$67,000 a year (as well as additional investment income). (RP 206; Ex. 24 at 2; *see also* CP 970) Fred's IRA account had a value of \$66,841 and his 401(k) had a value of \$144,750 at the time of trial. (RP 493-94; FF 9, CP 979, 982)

Edith is an adjunct professor at Walla Walla Community College. She is paid per class and is limited to teaching 3 classes per quarter. (RP 102, 107; *see also* CP 333, 477) In the summer, she can teach only one class, at a reduced rate, “but that is not guaranteed.” (RP 176; CP 335) Prior to the parties’ separation in 2015, Edith earned about \$19,000 annually on average. (CP 466; *see* RP 94-95; CP 653) With part-time seasonal work in Walla Walla wineries, her average annual income after separation was, at most, \$30,000. (Ex. 1 at 3, 14; RP 176-77; CP 333; *see* CP 461-62) Edith’s IRA had a value of \$74,194 and her TIAA/CREF retirement account had a value of \$40,788 at trial — a little more than half of Fred’s total retirement accounts. (FF 9, CP 979, 982-83)

B. The husband is the sole beneficiary of his mother’s estate and the beneficiary and trustee of his parents’ trusts, worth close to \$1.5 million.

Fred’s father Clair died in 2006; his mother Esther died in 2016 while this action was pending. (RP 217, 258; CP 500) Fred is the sole beneficiary of his mother’s estate, valued at \$916,237 (Ex. 1 at 41-42; FF 10, CP 979, 983), and is also the beneficiary and trustee of both his parents’ trusts, valued at over \$500,000 in January 2017. (Ex. 1 at 48-50; RP 139, 329; *see also* CP 2051-54) Fred had originally been the co-beneficiary of the trusts with his brother John,

each with a 49.99% share. (Ex. 3 at 12-1) After his brother died, Fred became the beneficiary of 99.98% of the trust. (RP 327, 484-85; Ex. 3 at 12-1, 12-5) The remaining .02% goes to any grandchildren of Fred's parents. (Ex. 3 at 12-1)

Although Fred claims that the "ultimate beneficiaries" of the elder Liebrands' trusts were their grandchildren (App. Br. 8), as trustee, Fred has "absolute discretion" to distribute to himself as much of the net income and principal of the trusts as he "deems advisable." (Ex. 3 at 12-5 to 12-6) The trusts direct Fred to "be liberal in exercising" his discretion in making distributions to himself. (Ex. 3 at 12-6) Thus, the trusts both authorize and anticipate exhaustion of trust assets for Fred's benefit, regardless that the grandchildren are remainder beneficiaries. (Ex. 3 at 12-6; RP 334-35)

C. The trial court found the family home in Walla Walla and a townhome in Seattle to be community property.

The parties disputed the character of the two parcels of real property in the marital estate. Fred claimed the family home on Stateline Road in Walla Walla, held in both parties' names since 1996, was his separate property. (App. Br. 27; Ex. 1 at 15) Edith claimed a townhome in Seattle, which was acquired in 2010 and

titled in the names of Edith and Fred's mother Esther, was her separate property. (CP 290, 593; Ex. 1 at 26)

To help the trial court characterize the properties, the parties each hired a CPA to review their financial records (provided by Fred) to trace the funds used to purchase or maintain the properties. (RP 390, 435-36) The CPAs issued a joint report reflecting their mutual conclusion that any separate funds used to purchase and maintain the properties were commingled with community funds and could not be traced. (Ex. 4)

Fred claimed that the family home on Stateline Road was his separate property because it was purchased and built with the proceeds from the sale of a house at College Place he had owned before marriage and with wheat sales from his farm in Oklahoma, and the mortgage was paid off and repairs made to the house with gifts from his parents and an inheritance. (RP 214-15; Ex. 4 at 2-4; *see also* CP 604) After reviewing banking records provided by Fred, however, both parties' CPAs concluded in their joint report that any separate funds used to purchase the land, construct the house, pay the mortgage, or to make repairs were "commingled with community funds and are not traceable." (Ex. 4 at 2-4) Relying on the experts'

joint report, the trial court found that the Stateline Road house was a community asset. (RP 491-92; FF 8, CP 979, 982)

Although Edith claimed that the Seattle townhome was her separate property (CP 593), she accepts for purposes of this appeal the trial court's finding that it was community property. (FF 8, CP 979, 982) Obtaining financing for the Seattle townhome had been complicated because, years earlier, the parties had declared bankruptcy, and Fred had yet to satisfy a \$2,000 federal tax lien against him. (RP 125, 182, 221, 226; Ex. 16) After Fred executed a quit claim deed relinquishing any interest he had in the property to Edith, the mortgage and deed to the townhome was issued in the names of Edith and Fred's mother. (Ex. 1 at 26-27) Fred's mother had refinanced the townhome in 2013, placing the mortgage in her name alone, while Edith remained on the deed. (RP 183; Ex. 10)

In these proceedings, Fred initially acknowledged that Edith has a legitimate ownership interest in the townhome, that it was purchased as an investment, and the parties had financial obligations towards the mortgage. (RP 335-36, 339, 346-47; *see also* CP 44, 46, 52; Ex. 23 at 11) However, after his mother intervened — without any objection from Fred — to assert an interest in the property (CP 289, 323, 325), Fred claimed “the original purchase of the Seattle

townhome was completed entirely with separate source funds gifted from his mother,” and that his mother also paid the mortgage. (Ex. 4 at 3; RP 347; *see also* App. Br. 37) In fact, the rental proceeds from the Seattle townhome were deposited into the parties’ joint Bank of America account (RP 192-93, 398; Ex. 4 at 3), and the mortgage (which was less than the rent), was paid from the parties’ joint Chase Bank account — the same account where all Edith’s paychecks, at Fred’s insistence, were deposited. (Ex. 4 at 4; RP 192-93, 397; CP 29)

Attempting to trace the funds used to purchase and maintain the Seattle townhome, the CPAs once again reviewed thousands of pages of banking records and declarations from Fred and his mother. (RP 413; *see, e.g.*, Ex. 13; Ex. 14; Ex. 15) The CPAs concluded that they could not sufficiently trace any payments to the mother’s funds due to extensive commingling. (Ex. 4) Therefore, the trial court found that the Seattle townhome was a community asset, and ordered the intervenor Estate of Esther Liebrand (which again, without objection from Fred, had been substituted as a party after the death of Fred’s mother) to convey title of the Seattle townhome to Edith. (FF 8, CP 979, 982; CP 562-63, 984)

D. The trial court distributed slightly more than half the community property to the wife, left the husband with his significant separate property, and awarded the wife maintenance and fees.

The trial court divided the parties' retirement and 401(k) accounts, distributing \$168,732 to Edith and \$157,841 to Fred. (CP 985, 988-89) The trial court awarded the Walla Walla family home, valued at \$470,000, to Fred. (CP 985, 988) The court awarded the Seattle townhome, at an agreed value of \$600,000, plus \$3,190 in accrued rental proceeds from the property, to Edith, and ordered the parties to each pay half of the \$190,463 mortgage on the townhome. (CP 985, 988-89; RP 488) The trial court found that Edith had no separate property, and awarded Fred his separate property, including "those probate assets from the Esther Liebrand Estate totaling approximately \$916,237" and "all trust assets from the Clair Liebrand and/or Esther Liebrand trust." (FF 10, CP 979, 983; CP 985, 989; Ex. 1 at 48-50) The trial court ordered Fred to pay Edith \$2,000 a month in spousal maintenance for 5 years. (CP 986, 989) Finally, noting that Edith had already received \$10,000 for attorney fees, the trial court awarded her an additional \$33,805 for attorney fees. (CP 986, 989; RP 493)

Fred moved for reconsideration, submitting a declaration from his CPA backing away from his earlier testimony that any separate

interest in the parties' community property could not be traced. (CP 942-50; Ex. 4) In denying Fred's motion for reconsideration, the trial court relied on the CPAs' joint report and their testimony at trial. (CP 995; RP 491-92; see RP 428-29 (Fred's CPA advised that, if his testimony is somehow misunderstood, that the court should rely on what he said in the joint report)) Fred appeals. (CP 1004)

III. ARGUMENT

In his appeal, appellant asks this Court to reverse the trial court's property division in order to deprive his wife of 25 years of any interest in their real property and to leave her with nothing except her retirement accounts, worth a little over \$100,000. He argues the trial court abused its discretion in its modest maintenance award even though his income is more than twice that of the wife, and claims that he should not be required to pay fees even though he leaves the marriage with almost half the community property, plus separate assets worth almost \$1.5 million.

"[I]n a long-term marriage of 25 years or more, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives" and any maintenance award should equalize the parties' standard of living for an "appropriate period of time." *Marriage of Wright*, 179 Wn. App. 257, 262, ¶ 7,

269, ¶ 23, 319 P.3d 45 (2013) (quoting *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984)), *rev. denied*, 186 Wn.2d 1017 (2014). Trial courts have “wide” discretion in fashioning maintenance awards and “[t]he only limitation on [the] amount and duration of maintenance under RCW 26.09.090 is that . . . the award must be just.” *Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). “Although the property division must be ‘just and equitable,’ it does not need to be equal. . . . Rather, it simply needs to be fair, which the trial court attains by considering all circumstances of the marriage and by exercising its discretion — not by utilizing inflexible rules.” *Marriage of Doneen*, 197 Wn. App. 941, 949, ¶ 28, 391 P.3d 594, *rev. denied*, 188 Wn.2d 1018 (2017) (citations omitted). “[T]he status of property as community or separate is not controlling. . . [T]he ultimate question is whether, under the circumstances, the award is just.” *Marriage of Larson & Calhoun*, 178 Wn. App. 133, 142, ¶ 20, 313 P.3d 1228 (2013), *rev. denied*, 180 Wn.2d 1011 (2014) (quoting another source).

The trial court here considered all circumstances of the marriage and acted well within its discretion in dividing the marital estate and awarding modest short-term maintenance and fees to the

wife. This Court should affirm and award the wife her fees for having to respond to this appeal.

A. The trial court properly characterized real property purchased and maintained during the marriage with untraceable commingled funds as community property.

1. The husband did not meet his burden of overcoming the presumption that property acquired during the marriage is community property.

Despite receiving substantially more of the marital estate than the wife, including his substantial separate property, appellant seeks to leave the wife with even less property by challenging the trial court's characterization of assets, claiming that the character "clearly influenced its division of the parties' property." (App. Br. 38) There is no suggestion that when dividing the marital estate the trial court felt bound by the character of the property. In fact, the trial court stated its expectation that the husband would pay the wife approximately \$95,000 — half the mortgage of the townhome awarded to her — from his separate property. (*See* FF 11, CP 979, 982) In any event, the husband cannot show that the trial court erred in characterizing the Stateline Road house and the Seattle townhome, both of which were acquired during the marriage, as community property.

“Property acquired during marriage is presumed to be community property.” *Marriage of Mueller*, 140 Wn. App. 498, 504, ¶ 12, 167 P.3d 568 (2007), *rev. denied*, 163 Wn.2d 1043 (2008). “The law favors characterization of property as community property unless there is no question of its separate character.” *Mueller*, 140 Wn. App. at 504, ¶ 12. In asserting that the Stateline Road house and the Seattle townhome were his separate property, the husband had the burden of overcoming the “heavy presumption” that these properties were community property by “clear and convincing evidence.” *Mueller*, 140 Wn. App. at 504, ¶ 13. The husband failed to meet his burden, and the trial court properly concluded that both the Stateline Road house and Seattle townhome were community property.

2. Substantial evidence supports the trial court’s finding that commingled funds were used to purchase and improve the real property acquired during the marriage.

Appellant’s claims that both the Stateline Road house and the Seattle townhome were purchased and improved with separate property or gifts from his parents and, therefore, constitute his separate property is incorrect. First, gifts “to a married couple” are “presumed to be community property.” *Marriage of Martin*, 32 Wn. App. 92, 96, 645 P.2d 1148 (1982).

Second, even if the gifts were the husband's separate property, or if he had other separate property available, the husband has not produced the required "clear and satisfactory evidence" that is necessary to rebut the presumption of community property. This burden "is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose. Separate funds used for such a purpose should be traced with some degree of particularity." *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950); see e.g., *Marriage of Shui & Rose*, 132 Wn. App. 568, 587, ¶ 34, 125 P.3d 180 (2005), rev. denied, 158 Wn.2d 1017 (2006). Accordingly, a party fails to meet this burden where it is "impossible from the evidence to distinguish or apportion the relative amounts [of separate and community funds] that contributed to the" property. *Beam v. Beam*, 18 Wn. App. 444, 452, 569 P.2d 719 (1977), rev. denied, 90 Wn.2d 1001 (1978). "[W]hether or not a rebuttable presumption of community or separate character is overcome is a question of fact." *Marriage of Schwarz*, 192 Wn. App. 180, 192, ¶ 24, 368 P.3d 173 (2016).

Here, the trial court found as a matter of fact that the husband failed to meet his burden of overcoming the presumption that the

properties were community property because the funds used towards the down payments and mortgages were commingled and could not be traced. (RP 492) Substantial evidence, including the report and testimony of the CPAs, who were charged with tracing the properties, supports this finding. (See Ex. 4) “‘Substantial evidence’ exists when there is a sufficient quantum of proof to support the trial court’s findings of fact.” *Org. to Pres. Agr. Lands v. Adams Cty.*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996); see also *Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (“Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.”) (quoting another source).

Appellant argues that the trial court erred because its findings did not explicitly state that the funds were “hopelessly commingled” (App. Br. 30-31), but he offers no authority for the proposition that the trial court’s findings regarding tracing must contain the exact phrase “hopelessly commingled.” Although it did not use appellant’s preferred “buzz words,” the trial court clearly found that the funds used to acquire and improve both the Stateline Road home and Seattle townhome were more than merely commingled — they could not be sufficiently traced. (See FF 8, CP 979, 982; RP 492; Ex. 4) In the joint report, the CPAs repeatedly concluded that Fred’s claimed

separate funds were so commingled with community funds that they “cannot be traced,” “are not traceable,” and “cannot be directly traced.” (Ex. 4 at 2-4) In its oral ruling, the trial court stated that it had “relied on the joint statement of both [CPAs] . . . in terms of characterizing the property,” and found “everything has been commingled.” (RP 491-92)

Attempting to parse the phrases “hopelessly commingled” and “cannot be traced” sets up a distinction without a difference and does not prove error. *See Shui/Rose*, 132 Wn. App. at 586, ¶ 32 (not using the words “hopeless commingling,” the Court of Appeals held that the “separate property and community property have become so *intermixed* that it is *no longer possible* to determine whether the remainder is separate or community in character”) (emphasis added); *Marriage of Pearson-Maines*, 70 Wn. App. 860, 866, 855 P.2d 1210 (1993) (not using the words “hopeless commingling,” the court stated the standard as “[o]nly if community and separate funds are so commingled that they may not be *distinguished* or *apportioned* is the entire amount rendered community property”) (emphasis added). Substantial evidence supports the trial court’s finding of commingling; it is appellant’s challenge to these findings that is hopeless.

a. The funds used to purchase, construct, and repair the Stateline Road home were commingled and not traceable.

The Stateline Road home was community property because appellant was not able to trace with particularity any of the separate funds he claims were used to acquire it. Regarding the \$123,000 the husband claims came from the sale of the College Place property, the CPAs concluded that “these funds cannot be directly traced from a separate source into the purchase and construction of the Stateline home” because the husband “has not provided us with *any* statements to show what, if any[,] amounts existed in the account prior to the marriage.” (Ex. 4 at 2) (emphasis added) The husband also did not provide the CPAs “with any statements to support the claim that approximately \$125,000 was deposited into [his personal] account from the sale of a residence owned prior to their marriage.” (Ex. 4 at 2; *see also* Ex. 4 at 3 (husband “has not provided any bank statements to support the deposit of the net proceeds from the sale of the home he owned prior to the marriage into this or any other account”); RP 369-70 (husband admitted that he has no documentation showing that the proceeds of the College Place property were used to pay for the construction of the Stateline Road house))

The CPAs faced similar problems with respect to the \$16,000 the husband claims he contributed from the wheat proceeds from his farm in Oklahoma. Again, the husband did not provide the CPAs “with any documentation of that income or where it was deposited.” (Ex. 4 at 2) As a consequence, the CPAs concluded that “the funds cannot be traced to the initial purchase of the community home.” (Ex. 4 at 2)

Appellant suffers the same problem with his claims that the mortgage, construction, and remodel costs were paid with separate funds he received from his parents by gift or inheritance between 1996 and 2008. (Ex. 4 at 2-3) The CPAs were only able to identify two gifts made during that time period — they were not able to trace or specifically identify any of the other “gifts” claimed by the husband:

First, the CPAs determined that both spouses had each received a \$20,000 gift from the husband’s parents in 1996, but “[n]either party [] provided any evidence to show where those funds were deposited.” (Ex. 4 at 3) Second, between 2006 and 2008, the husband’s mother had given the parties 10 checks totaling \$34,504.48. (Ex. 4 at 3) The husband claimed those funds had been used for construction and remodel costs, however, the CPAs concluded that the gifts had been “commingled with community funds” and “cannot be directly traced from a separate source.” (Ex. 4 at 3)

Finally, unable to clearly identify the other gifts that the husband alleged were made by his parents between 1998 and 2005, the CPAs disagreed with the husband's assertion that these "gifts" were traceable or were used to pay the mortgage on the Stateline Road property.¹ (Ex. 4 at 2) For instance, the joint Bank of America account where the alleged gifts were deposited "is the same bank account into which" the parties' "wages were deposited during all of those years, amongst other unidentified deposit amounts." (Ex. 4 at 2) The CPAs concluded that "[i]t is not possible to directly trace the amounts purported to be gifts to the husband to payments of the community monthly mortgage" and that the supposed gifts deposited into that account "have been commingled with community funds and are not traceable." (Ex. 4 at 2)

The CPAs' joint report provides the "substantial evidence" to support the trial court's finding that any separate funds used to purchase and construct the Stateline Road home, or pay its mortgage, had been commingled and could not be traced. *Org. to*

¹ To support his claims, the husband gave the CPAs "copies of what he purports to be his father's hand-written ledger showing the [gift] amounts for 1998-2001," and statements from the parties' joint Bank of America account from 2003-2006. (Ex. 4 at 2 (the joint Bank of America account was used to pay the mortgage)) But there were no records from 2002, and the copies of the father's ledger were illegible. (Ex. 4 at 2; CP 377, 1489-1555)

Pres. Agr. Lands, 128 Wn.2d at 882. The trial court therefore properly found the Stateline Road home was community property.

b. The Seattle townhome was purchased and maintained with gifts to the couple, community rental income, and other community funds.

The trial court also properly concluded that the Seattle townhome was community property — a position contrary to the one taken by the wife at trial, but which she does not challenge on appeal in light of the standard of review. In asserting that the community did not contribute any funds to the purchase of the Seattle townhome, the husband relies on his own self-serving testimony to contradict the CPAs' expert opinion. (*Compare* App. Br. 34, *with* Ex. 4 at 3-4, *and* RP 414) Using the records the husband provided (RP 390), the CPAs determined that in 2009, 2010, and 2011, his mother had made money gifts to both parties and to their daughter. (Ex. 4 at 3-4) However, the records did not make clear how much was intended to be given to each person. (Ex. 4 at 3-4; RP 396-97) Indeed, the unidentified gifts were deposited into one of the parties' three joint accounts, all containing community funds, and then various amounts of commingled funds were transferred multiple times among the other accounts. (Ex. 4 at 3-4; RP 396-97, 437).

As an example of this commingling, the CPAs tracked where gifted and community funds were deposited, commingled, and transferred between accounts in 2009-2011:

- **2009:** a \$36,000 gift to the parties and their daughter was initially deposited into Banner Bank; \$30,500 was transferred into Fidelity and “[t]hose funds were then invested and commingled with other funds in that Fidelity account”; \$15,000 of commingled money was then transferred back into Banner Bank. (Ex. 4 at 3);
- **2010:** a \$24,000 gift (recipient unknown) was deposited into Banner Bank; \$20,500 was transferred into Fidelity “further commingling those funds”; \$4,000 was transferred from Fidelity back into the Banner account; on three occasions, \$5,000 of “commingled funds” were transferred from Fidelity into the Bank of America account “further commingling those accounts.” (Ex. 4 at 3);
- **2011:** a \$39,000 gift to the parties and their daughter was deposited into Banner Bank; \$5,000 of commingled community money was transferred from Fidelity into Banner Bank; a \$9,400 check written from Bank of America was deposited into Banner Bank, this money was commingled; all of those commingled deposits were included in the \$59,337.84 that was used to purchase the townhome. (Ex. 4 at 4).

The CPAs concluded that funds used to purchase the property “included annual gifted funds to [the parties] *and* their daughter, . . . community wages,” and commingled funds transferred between the Fidelity, Banner, and Bank of America accounts. (Ex. 4 at 3-4) (emphasis added) Ultimately, the money used for the down payment could not be “traced as separate funds” and the thoroughly “commingled funds is what made the down payment [for] the

townhouse.” (Ex. 4 at 4; RP 416) The trial court reasonably relied on the CPAs’ joint report and found that the townhome was a community asset. (FF 8, CP 979, 982) “When money in a single account cannot be apportioned to separate and community sources, the community property presumption will render the entire fund community property.” *Pearson-Maines*, 70 Wn. App. at 866

Appellant relies on *Pearson-Maines* in arguing that if sufficient separate funds are deposited into a community account, it is presumed that payments were made with separate funds. (App. Br. 35) However, this presumption only applies if the separate funds were successfully “traced and apportioned.” 70 Wn. App. at 867. The presumption does not apply if, as in this case, the separate funds were indiscriminately commingled with community money.

Unlike here, the house at issue in *Pearson-Maines* “was undisputedly [the wife’s] separate property at acquisition because it was purchased prior to cohabitation and marriage from her separate funds.” 70 Wn. App. at 865. And unlike the husband here, the wife in *Pearson-Maines* successfully traced the deposits and expenditures of her separate funds, as well as the community deposits and expenditures from those accounts. 70 Wn. App. at 867-68. Because the wife had successfully traced the separate funds, the Court of

Appeals affirmed the trial court's recognition of her separate interest in the house.

But the Court of Appeals recognized that "a different result would occur" if the separate funds had been spent on something "unrelated to [the wife's] separate property. In such a case, the community property presumption would apply." *Pearson-Maines*, 70 Wn. App. at 868. Here, the husband failed in his tracing, therefore the community property presumption applies.

Finally, appellant argues that an interest in the property is proportionate to contributions to the purchase price, citing *Cummings v. Anderson*, 94 Wn.2d 135, 140-41, 614 P.2d 1283 (1980) (App. Br. 35). But the *Cummings* Court explained that presumption only applies "where [the parties' contributions] can be traced, otherwise they share it equally." 94 Wn.2d at 141 (discussing *West v. Knowles*, 50 Wn.2d 311, 311 P.2d 689 (1957)). Because the husband did not successfully trace separate funds to the acquisition of the Seattle townhome, the *Cummings* presumption does not apply. Therefore, the trial court correctly found that the townhome was community property.

B. The trial court had authority to award the Seattle townhome to the wife.

1. After the trial court properly granted the mother’s motion to intervene, it had authority over any interest she had in the townhome.

Appellant argues that the trial court did not have jurisdiction over the Seattle townhome, which had been purportedly transferred to the mother’s trust upon her death, and thus had no authority to characterize and distribute its mortgage debt or rental income. (App. Br. 36-37) This argument, however, ignores the presumption that the Seattle townhome was community property because it was acquired with commingled funds during the marriage. (*Supra* Argument § A.2(b)) This argument also ignores concessions appellant made below regarding the mortgage and rental income, as well as the intervention of the mother’s estate into the dissolution action. (*Infra* Argument § B.2)

The trial court properly exercised its discretion in granting the CR 24 motion of the husband’s mother to intervene — a motion that appellant did not challenge below. (CP 289, 325) “A trial court’s decision to allow intervention under this rule is discretionary, and the question on review is whether that court has abused its discretion.” *Recall Charges Against Seattle Sch. Dist. No. 1 Directors*, 162 Wn.2d 501, 507, ¶ 7, 173 P.3d 265 (2007). Once a

party is allowed to intervene, the “intervenor is treated as an original party.” *Dumas v. Gagner*, 137 Wn.2d 268, 295, n.98, 971 P.2d 17 (1999) (quoting another source). The mother (and then her substituted Estate) became an “original party” when the motion to intervene was granted, giving the trial court authority to characterize and distribute any interest she had in the Seattle townhome.

Appellant waived his right to challenge his mother’s intervention on appeal because he did not object to her motion to intervene below. (CP 325); RAP 2.5(a); *Fuqua v. Fuqua*, 88 Wn.2d 100, 105, 558 P.2d 801 (1977) (appellant could not challenge prosecutor’s intervention in divorce action because he failed to object at trial). In any event, there is no bright-line rule prohibiting intervention in a dissolution proceeding, as the husband claims. (App. Br. 32) His reliance on *Arneson v. Arneson*, 38 Wn.2d 99, 101, 227 P.2d 1016 (1951), in particular is misplaced.

The dispute in *Arneson* centered on an order requiring the divorcing parties to sell community property and use the proceeds to pay back non-party creditors. 38 Wn.2d at 100. The *Arneson* Court held only that the trial court “has no power to compel a liquidation [of community property] for the benefit of creditors as an incident to

a divorce decree.” *Arneson*, 38 Wn.2d at 101. The non-party creditors did not try to intervene in the proceeding.

Further, since *Arneson* was decided the Legislature has affirmatively determined that intervention is permitted in dissolution proceedings by enacting RCW 26.09.010, which provides that the civil rules apply to dissolution actions. Since then, third parties have long been permitted to intervene in dissolution proceedings under this statute. *See, e.g., Marriage of Tang*, 57 Wn. App. 648, 650, 789 P.2d 118 (1990) (after entry of the dissolution decree, wife moved to vacate the decree and the “parties’ children were allowed to intervene [in wife’s CR 60 motion to vacate decree] to protect what they asserted were various property rights”); *see also Marriage of Croley*, 91 Wn.2d 288, 294, 588 P.2d 738 (1978) (affirming trial court’s denial of the grandmother’s motion to intervene because the mother adequately represented her interests, not because intervention is prohibited in dissolution proceedings).²

² In addition to its now erroneous statement that “[o]ther persons cannot . . . intervene” in a dissolution proceeding, the *Arneson* court also stated that no other “statutory proceedings” can “be consolidated with a divorce action for trial.” *Arneson v. Arneson*, 38 Wn.2d 99, 101, 227 P.2d 1016 (1951). The latter also is no longer true, due to enactment of RCW 26.09.010. *See Angelo v. Angelo*, 142 Wn. App. 622, 642, ¶ 35, 175 P.3d 1096 (trial court did not abuse its discretion in consolidating dissolution action with wife’s tort claims where trial court had jurisdiction over all parties), *as amended* (Jan. 29, 2008), *rev denied*, 164 Wn.2d 1017 (2008).

Here, the trial court properly exercised its discretion in allowing the mother's motion to intervene because the property was deeded to both the wife and the husband's mother and there was disagreement about whether the Seattle townhome was community property. *See* CR 24(b) (trial court "may" permit intervention if "an applicant's claim or defense and the main action have a question of law or fact in common"). When the mother intervened she became a party to the dissolution proceeding "with respect to . . . her ownership of real property in Seattle," and, in so doing, placed her property interest before the court for characterization and distribution. (CP 323)

Because the mother intervened, she became an "original party" to the action. *Dumas*, 137 Wn.2d at 295, n.98; *Fairfield v. Binnian*, 13 Wash. 1, 4, 42 P. 632 (1895) (intervenor "was as much a party to that action as the parties who had originally appeared in the action"). Therefore, appellant's argument that the trial court had no subject matter jurisdiction over his mother's ownership interest in the townhome because she was a "third party" is simply wrong. (App. Br. 33)

The husband's reliance on *Marriage of Soriano*, 44 Wn. App. 420, 722 P.2d 132 (1986) and *Marriage of McKean*, 110 Wn. App.

191, 38 P.3d 1053 (2002) is misplaced. (App. Br. 33) The Court of Appeals in both *Soriano* and *McKean* held that the trial courts had erred in adjudicating the rights of *non-intervenor* third parties, which is not the case here. *See Soriano*, 44 Wn. App. at 420 (vacating order requiring the bank to turn over the securities because “in a dissolution proceeding the superior court has jurisdiction only over the parties to the action” and “may not adjudicate the rights of third parties” who are not parties to the proceeding); *McKean*, 110 Wn. App. at 195-96 (“the trial court lacked in personam jurisdiction over the trustees” and “erred in adjudicating matters regarding the trust” because the “third part[y]” trustees, who held “legal title to the property[,] . . . were not parties to the proceeding”).

Unlike the third parties in *Soriano* and *McKean*, the mother here intervened, making her a party to the proceedings and giving the trial court jurisdiction to adjudicate her interest in the Seattle townhome. Indeed, had the mother not voluntarily intervened, the wife could have made her a party to the proceeding because the mother claimed an interest in the townhome, which was before the trial court as part of the marital estate. *See Marriage of Lutz*, 74 Wn. App. 356, 359, 873 P.2d 566 (1994) (wife named husband’s sister as

a party to the proceedings for dissolution and to quiet title because sister, husband, and wife all claimed title to “certain real property”).

2. Awarding the Stateline Road home to the husband and awarding the wife the Seattle townhome and its rental income was just and equitable under the circumstances.

Because the trial court properly granted the mother’s motion to intervene in the dissolution action, it had authority to adjudicate ownership of the Seattle townhome. Accordingly, the trial court properly awarded the Seattle townhome to the wife. Trial courts have “broad discretion” to determine what is just and equitable based on the circumstances of the case. *Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

Here, it was just and equitable for the trial court to award the Seattle townhome to the wife, considering the fact that the husband was awarded the Stateline Road house “free and clear.” Further, the husband surrendered any and all interest he may have had in the townhome when he executed the quit claim deed in favor of the wife. (Ex. 1 at 27; CP 985, 988) Awarding the townhome to his mother’s trust would in effect constitute an award to the husband, because he is both the beneficiary and trustee of the trust and has the authority to freely distribute all trust assets to himself. (Ex. 3 at 12-6; RP 334-35)

In addition to awarding the Seattle townhome to the wife, the trial court also properly awarded her its rental income, and determined that the community was liable on its mortgage. (CP 985-86, 88-89) Appellant's arguments to the contrary are inconsistent with the positions he had taken in the trial court. For instance, in this appeal, appellant argues that the mortgage was always his mother's obligation (App. Br. 37), but in the trial court he admitted that he and his wife were responsible for the townhome's mortgage. (RP 346-47; CP 46) Both CPAs concluded that "the funds used to pay the monthly mortgage on the Seattle townhome were community funds." (Ex. 4 at 4) Likewise, appellant now asserts that the rental proceeds belonged entirely to his mother (App. Br. 37), but below the husband claimed the wife "earns [rent] from the townhome in Seattle." (CP 52; RP 336) The rental proceeds were in fact deposited into the parties' joint Bank of America account, commingling with community funds. (Ex. 4 at 3; RP 192-93, 421, 437-38)

The trial court had authority to adjudicate the parties' rights to the Seattle townhome. And the trial court properly exercised its discretion in awarding it to the wife.

C. The husband's unproven claims of "misconduct" were not a basis for denying the wife a just and equitable share of the marital estate.

Appellant claims that the trial court should have considered events that he portrays as the wife's "negative" conduct and reduced her share of the marital estate, in particular from the parties' retirement accounts. (App. Br. 39-41) The "negative" conduct alleged includes that, in the beginning of the marriage, the husband and his parents provided some financial support to the wife in a custody fight with her previous husband; that the husband had given the wife money to start a business that failed, causing the parties to declare bankruptcy; and that the wife had accidentally damaged the family car. (App. Br. 39-40) Appellant also implies the wife poisoned him with mercury! (App. Br. 18) Not only are appellant's allegations baseless, his argument is contrary to the directive from RCW 26.09.080 that the trial court characterize and distribute property "without regard to misconduct."

Appellant relies on *Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.2d 679 (1996), *rev. denied*, 131 Wn.2d 1025 (1997), for the proposition that a trial court has discretion to consider a parties' "negatively productive conduct" that depletes community assets. (App. Br. 39) In *Williams* the husband argued that the trial court

should have characterized the wife's \$400-\$2,400 a month gambling habit as a "dissipation of the marital assets" and reduced the wife's property award or increased the amount of community debt assigned to her. 84 Wn. App. at 266. Instead, the trial court made a "roughly equal[]" property and debt division. *Williams*, 84 Wn. App. at 270. This Court held that the trial court did not abuse its discretion in refusing to alter its property and debt division because the wife did not engage in "negatively productive conduct." *Williams*, 84 Wn. App. at 271.

As in *Williams*, the trial court did not find that the wife engaged in any "negatively productive conduct" and appellant has provided no authority that requires the trial court to make such a finding. To the extent that *Williams* applies to this case, it favors the trial court's division of the marital estate in general, and of the parties' retirement accounts in particular.

D. The trial court was required to consider the husband's inherited separate property in assessing the parties' financial circumstances.

The trial court did not abuse its discretion in finding that the trust assets were appellant's separate property and in considering those assets when making its just and equitable division of the marital estate. (FF 10, CP 979, 983) Washington law requires the

trial court to consider a party's vested interest in an inheritance when ascertaining the financial circumstances of the parties. *Marriage of Hurd*, 69 Wn. App. 38, 49, 848 P.2d 185, *rev. denied*, 122 Wn.2d 1020 (1993), *disapproved of on other grounds by Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009).

In *Hurd*, the husband received an inheritance from his mother, who died 5 months before trial. 69 Wn. App. at 49. Conceding that the inheritance was the husband's separate property, the wife argued that the trial court erred when it did not "specifically recognize[]" the inheritance "because it impacted the economic circumstances of the parties at the time of dissolution." *Hurd*, 69 Wn. App. at 49. The Court of Appeals agreed, and held that the husband's separate property inheritance "must be considered [] in making a property division." *Hurd*, 69 Wn. App. at 49.

Like in *Hurd*, the husband's mother died 6 months before trial and, as the beneficiary of his parents' trusts and of his mother's estate, his interest in those assets were vested. (RP 258); *Hurd*, 69 Wn. App. at 49 ("when the testator has passed away and the will can no longer be changed, the bequest becomes a vested interest to the extent of its actual value"). The trial court properly considered the husband's interest in the assets of his mother's estate and the

parents' trusts in making its property division and awarding maintenance and attorney fees. (CP 985, 989) The husband's unfettered access to the assets of his parents' trusts and his mother's estate impacts his economic circumstances. Further, the trial court found his interest in these assets to be his separate property and awarded it to him.

E. The trial court did not abuse its discretion in its maintenance award given the disparity in the parties' incomes and the length of the marriage.

The trial court acted well within its discretion when it awarded the wife monthly maintenance of \$2,000 for 5 years. (CP 986, 989) In making this award, the trial court found that “[s]pousal support should be ordered because of the length of the marriage and the disparity in income between the parties as well as the court’s intent to use maintenance as part of the overall division of assets.” (FF 13, CP 980)

Trial courts enjoy broad discretion in awarding spousal maintenance, with the most important requirement being that the award is “just.” RCW 26.09.090; *Marriage of Washburn*, 101 Wn.2d 168, 177, 179, 677 P.2d 152 (1984). After a long-term marriage such as this one, any maintenance award should equalize the parties’ standard of living for an “appropriate period of time.” *Wright*, 179

Wn. App. at 269, ¶ 23 (quoting *Washburn*, 101 Wn.2d at 179). “The party who challenges a maintenance award or a property distribution must demonstrate that the trial court manifestly abused its discretion.” *Williams*, 84 Wn. App. at 267.

Appellant claims that the trial court did not consider the factors from RCW 26.09.090 (App. Br. 42), but it is clear that the trial court had considered these factors — including the length of the marriage, the wife’s financial resources, the husband’s income, and the parties’ debts — in making its discretionary maintenance award. (*Compare*, FF 13, CP 980, and CP 983, with RCW 26.09.090(a), (d), (e)) The trial court heard evidence of the parties’ standard of living and the wife’s ability to meet her own needs. *See* RCW 26.09.090(a), (c). While the husband lives in the parties’ 4,000 square foot family house, unencumbered by a mortgage, the wife pays \$895/month to live in an 800 square foot duplex. (RP 196, 352; CP 1040) Working full time as an adjunct community college professor, the wife earns no more than \$30,000 a year, and frequently receives no paycheck for months on end unless she is allowed to teach a summer class at a reduced rate. (RP 116-18; CP 333-35) Without spousal maintenance, the wife testified that she could not “make ends meet.” (RP 115)

The husband, on the other hand, has income more than twice his wife's, (CP 970), no house payment, and is the beneficiary of his parents' significant estate; he clearly has the ability to meet his own financial obligations "while meeting those of the spouse . . . seeking maintenance." RCW 26.09.090(f). Considering the length of the marriage and large disparity in the parties' incomes, it was just for the trial court to award the wife monthly maintenance.

Finally, the husband argues that the trial court erred because it did not take into consideration the possibility that he could retire within 5 years, and the court's award would effectively require him to pay maintenance out of his retirement. (App. Br. 42-43) First, no evidence was presented to the trial court about the possibility of the husband retiring. Second, should there be a substantial change in circumstances, the husband can move for modification of the maintenance award under RCW 26.09.170. Third, the husband misplaces his reliance on *Marriage of Mathews*, 70 Wn. App. 116, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993), in making this argument. (App. Br. 43)

In *Mathews*, the Court of Appeals held that it was "clear error" to require the husband to pay maintenance out of his remaining retirement or disability income. 70 Wn. App. at 125. In that case, it

was likely that the husband would have to dip into his retirement funds to satisfy his monthly support obligations because the court's permanent maintenance award left him with much less monthly income than the wife and because the husband's personal property award was "not significant." *Mathews*, 70 Wn. App. at 122-23. Appellant's financial circumstances here do not raise similar concerns. Taking into consideration the circumstances of this 25-year marriage, the large disparity in income and separate property assets, the trial court's discretionary award of spousal maintenance was just and equitable.

F. The trial court did not abuse its discretion in awarding attorney fees to the wife.

RCW 26.09.140 authorizes trial courts to award attorney fees based on need and ability to pay. *See Marriage of Van Camp*, 82 Wn. App. 339, 342, 918 P.2d 509, *rev. denied*, 130 Wn.2d 1019 (1996). "In a dissolution action, the trial court's award of attorney's fees will not be reversed on appeal unless it is untenable or manifestly unreasonable." *Marriage of Fernau*, 39 Wn. App. 695, 708, 694 P.2d 1092 (1984) (citations omitted). Appellant cannot meet his "high burden" of establishing that the trial abused its discretion in awarding the wife attorney fees. *Walsh v. Reynolds*,

183 Wn. App. 830, 857, ¶ 57, 335 P.3d 984 (2014), *rev. denied*, 182 Wn.2d 1017 (2015).

Ample evidence and argument was presented to the trial court regarding the relative resources of the parties, that the wife did not have the funds to pay her attorney fees, and that the husband had the funds to pay. (*See* RP 10-12, 82, 102, 107, 142, 207; CP 333, 335, 355-57, 360-61) The trial court found that the wife “incurred fees and costs, and needs help to pay those fees and costs” and that the husband “has the ability to help pay [her] fees and costs.” (FF 14, CP 980) The trial court also found that the \$33,805 fee award was “reasonable.” (FF 14, CP 980)

The husband did not dispute the reasonableness of the wife’s attorney fees in his motion for reconsideration or on appeal. (CP 945; App. Br. 45-46; *see* Ex. 1 at 53-63) Appellant claims that the trial court did not give a “meaningful review” to the wife’s fee request before awarding her fees (App. Br. 46), but in its oral ruling the trial court stated that it had reviewed the documentation of her attorney fees. (RP 493; *see* Ex. 1 at 53-63)

The trial court also heard evidence justifying the amount of fees incurred — the wife testified that much of her fees were incurred because the husband had submitted “thousands” of pages that her

attorney was forced to review. (RP 141-42; *see also* RP 392, 418, 442) This was confirmed by her attorney's statement that he had been "inundated with paperwork" from the husband (RP 252), which the trial court agreed was not relevant to the issues it needed to resolve in the dissolution proceeding. (*See, e.g.*, RP 252-58 (colloquy where the trial court stated that it did not know why the husband had submitted so many bank statements that did not show who made which charges, what the charges were for, and that it had "no idea what the relevance of [the documents] is"); *see also* RP 245, 271, 274-76, 281, 466)

The trial court was not required to provide "an explicit hour-by-hour analysis of each lawyer's time sheets." *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Tr. v. Port of Everett*, 159 Wn. App. 389, 409, ¶ 37, 245 P.3d 779, *rev. denied*, 171 Wn.2d 1024 (2011). In making the fee award, all the information the trial court needed to consider was before it and the court did not abuse its discretion in awarding the wife fees. For these reasons, this Court should affirm the fee award.

G. This Court should award the wife her fees on appeal.

This Court should award respondent her attorney fees incurred on appeal under RCW 26.09.140. She should not be required to use her maintenance and property awards to defend against this meritless appeal. The wife will comply with RAP 18.1(c).

IV. CONCLUSION

This Court should affirm the trial court's discretionary rulings and award respondent attorney fees on appeal.

Dated this 17th day of May, 2018.

SMITH GOODFRIEND, P.S.

By: _____


Catherine W. Smith
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Attorneys for Respondent

DECLARATION OF SERVICE

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

That on May 17, 2018, I arranged for service of the foregoing Brief of Respondent, to the Court and to the parties to this action as follows:

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Tara D. Friesen

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