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Division III
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No. 356418-III

COURT OF APPEALS, DIVISION III,
FOR THE STATE OF WASHINGTON

Judith Tulleners, Appellant

v.

Andre Tulleners, Respondent

**RESPONSIVE BRIEF OF
ANDRE TULLENERS**

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I. INTRODUCTION TO ANDRE TULLENERS' RESPONSE

Andre Tulleners, Respondent, notes that both parties ended in the decree with similar total resources, and that Judith Tulleners' appeal, of Judge Harold Clarke's property distribution, must show a "manifest of abuse of discretion" by Judge Clarke.

A. Standard of Review: Manifest Abuse of Discretion

Judith Tulleners can only prevail in her appeal if she can show that "no reasonable person" would have ordered the property distribution ordered by Judge Harold Clarke:

The trial court exercises broad discretionary powers, and an appellate court will overturn a property distribution only on a showing of manifest abuse of discretion. *In re Marriage of Washburn*, 101 Wash.2d 168, 179, 677 P.2d 152 (1984); *In re Marriage of Glorfield*, 27 Wash.App. 358, 360, 617 P.2d 1051, *review denied*, 94 Wash.2d 1025 (1980). Abuse of discretion does not exist unless it can be held that no reasonable person would have ruled as the trial court did on the facts before it. *In re Marriage of Young*, 18 Wash.App. 462, 465, 569 P.2d 70 (1977).

In re Marriage of Pilant, 42 Wash. App. 173, 176, 709 P.2d 1241, 1244 (1985).

B. Ms. Tulleners Challenges No Findings of Fact

On page 5 of her Opening Brief, Judith Tulleners lists her *Assignments of Error*. (Note: First names will be used for ease of reference, and no disrespect is intended.)

Judith's Alleged Error I: This formulation is simply an assertion that the trial court committed a manifest abuse of discretion, and while Judith writes “there are no facts which would warrant” the decision, this is not actually a challenge to any particular finding of fact.

On review, unchallenged findings of fact are considered verities. *In re Interest of J.F.*, 109 Wn. App. 718, 722, 37 P.3d 1227 (2001). Judith’s objection as to what the facts “would warrant” is not an objection to a finding; it is an objection to a discretionary decision of the trial court, based upon facts already established for the purposes of her appeal.

Judith's Alleged Error II: Judith alleges that “the court’s *apparent* expectation of a present value calculation is also in error” (emphasis added). No particular factual finding is identified by Judith that was actually relied upon by the court, and so this appears to be another lament about an exercise of discretion, parading as a vague assertion of error of law. See Section VI., *infra*, for more discussion of harmlessness of the court’s comment in its memorandum decision of 3/29/18. (CP: 180-83, at 182.)

Judith's Alleged Error III: This allegation of error by Judith -- that “the court found the interests to be community under the commingling doctrine” -- is an odd assertion by Judith in that the court characterized the property as Judith requested! Despite circumstantial and documentary

evidence to the contrary, the trial court found the property at issue to be community property. As it does not appear that Judith wants the court to find the property to be Andre's separate property, *there is no allegation of error of law!* The court found the only logical source of that co-mingled wealth was Andre Tulleners' separate property derived from 23.5 years of labor that preceded Andre's marriage to Judith, and from 8.5 years of community labor subsequent to his marriage to Judith.

Judith's dicta about the court's "hypothetical" reasoning is simply inapt. Admitted Exhibits R-125 through R-150, and related testimony, provide a substantial basis in evidence for the court's findings.

No finding of fact is explicitly challenged, and no conclusion of law is articulated. The assertion of error can only be a disagreement with the court. The appellate standard of review is manifest abuse of discretion.

Judith's Alleged Error IV: In this allegation of error, Judith simply laments the court's exercise of its discretion, without actually identifying any error. No specific finding of fact is identified, and no error of law is explicated. When Judith says she challenges the "finding" that the property award was "just and equitable," *her only possible legal meaning on appeal is that she asserts that the trial court manifestly abused its discretion.*

Conclusion on Assignments of Error: **Findings of Fact:** There are no specific challenges to findings of fact, and thus Judge Clarke's findings of fact are verities on appeal. **Alleged Errors of Law:** No error of law is specified to the degree to which Andre could respond. **Manifest Abuse of Discretion:** The only alleged error in her Opening Brief, specific enough to provide notice as to a needed response, is that *Judith believes that Judge Clarke made a distribution of property that no reasonable judge would have made.*

Judith's Assignments of Error attempt to miscast the exercise of discretion in distribution of assets as "findings" – e.g., Error IV reads: "The trial court erred in its finding that the award of property and liabilities was fair and equitable."

That is not a "finding." That is the just and equitable ruling and order distributing property under Judge Clarke's exercise of discretion.

In conclusion: Neither an error of fact, nor error of law, has been specifically pled on appeal. Judith's only specific allegation on appeal is that Judge Clarke engaged in a manifest abuse of discretion; that is the sole basis of her appeal of the Tulleners' decree of dissolution.

Andre responds that there was no manifest abuse of discretion, and multiple alternative bases of Judge Clarke's decision can be found in the record. Judith's appeal is frivolous.

C. The Decree Was Substantively Just, and There Was No Manifest Abuse of Discretion

As Judith's Opening Brief acknowledges (for example on page 15 through the top of page 16), the trial court has wide discretion in a property distribution:

A property distribution need not be equal to be "just and equitable". *In re Marriage of Nicholson*, 17 Wash.App. 110, 117, 561 P.2d 1116 (1977). "The key to an equitable distribution of property is not mathematical preciseness, but fairness." *In re Marriage of Clark*, 13 Wash.App. 805, 810, 538 P.2d 145 (1975). Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules. *Clark*, 13 Wash.App. at 810, 538 P.2d 145.

The trial court's considerable discretion in making a property division will not be disturbed on appeal absent a manifest abuse of that discretion. *E.g.*, *In re Marriage of Konzen*, 103 Wash.2d 470, 478, 693 P.2d 97, *cert. denied*, 473 U.S. 906, 105 S.Ct. 3530, 87 L.Ed.2d 654 (1985). A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons. It is one that no reasonable person would have made. *See, e.g.*, *In re Marriage of Rink*, 18 Wash.App. 549, 554, 571 P.2d 210 (1977).

In re Marriage of Tower, 55 Wash. App. 697, 700, 780 P.2d 863, 865 (1989). This wide discretion was not abused by the trial court in the Tulleners' decree of dissolution.

Judith Tulleners' Appeal Asserts that the Trial Court was

"Manifestly Unreasonable": At page 16 of her Opening Brief, Judith Tulleners presents the sole substantive basis of her appeal:

Ms. Tulleners asserts that the disproportionate split of property ordered by the court is manifestly unreasonable even in consideration of the substantial equity [sic, discretion?] afforded to a trial court as cited above.

To again apply the *Marriage of Tower*, supra, Judith Tulleners is arguing on appeal that Judge Harold Clarke's property distribution is one "that no reasonable person would have made." *In re Marriage of Tower*, 55 Wash. App. at 700, citing *In re Marriage of Rink*, 18 Wash.App. 549, 554, 571 P.2d 210 (1977).

However, in Judge Clarke's *Memorandum Decision of 3/29/18*, denying Ms. Tullener's motion to vacate the decree, at *CP: 182*, Judge Harold Clarke cited the *Nuss v. Nuss* case, as he further explained his discretionary distribution of property.

A holding in *Nuss v. Nuss* directly applicable to Tulleners is:

We hold that the origin of community property as one party's separate property may still be considered in appropriate cases as a reason for awarding all or a disparate share thereof to that party.

Nuss v. Nuss, 65 Wash. App. 334, 341, 828 P.2d 627, 631 (1992).

Under *Nuss* and other case law, cited above, Judith Tulleners' appeal is a frivolous expression of Judith's anger about not getting her preferred result after trial. Judith presents no serious argument that the trial court committed a manifest abuse of discretion.

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D. Conclusion to Andre Tulleners' Introduction of Argument

The *Rockwell* court summarized the standard of review:

Appellate courts apply the substantial evidence standard of review to findings of fact made by the trial judge. See Washington Family Law Deskbook, 2nd Ed. § 65.4(1) at 65–9. As long as the findings of fact are supported by substantial evidence, they will not be disturbed on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959). “Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Griswold*, 112 Wash.App. 333, 339, 48 P.3d 1018 (2002). Where the trial court has weighed the evidence, the reviewing court's role is to simply determine whether substantial evidence supports the findings of fact, and if so, whether the findings in turn support the trial court's conclusions of law. *In re Marriage of Greene*, 97 Wash.App. 708, 986 P.2d 144 (1999). A court should “not substitute [its] judgment for the trial court's, weigh the evidence, or adjudge witness credibility.” *Id.* at 714, 986 P.2d 144 (citing *In re Marriage of Rich*, 80 Wash.App. 252, 259, 907 P.2d 1234 (1996)).

In re Marriage of Rockwell, 141 Wash. App. 235, 242, 170 P.3d 572, 576 (2007). As the *Marriage of Tower* stated, above, a decision about the just and equitable distribution of property will only be reversed for “manifest abuse of discretion.” To merit reversal, the distribution must be a property distribution that no reasonable person would have made.

“I don't like it,” is the insufficient essence of Judith Tulleners' appeal. At no point does Judith show that Judge Harold Clarke made the kind of decision that “no reasonable person” would have made.

Judith's appeal should be dismissed as frivolous, and Andre Tulleners requests his fees under RAP 18.9, under RCW 4.84.185 (via RAP 18.1), and other authority, cited below, as to Judith's frivolous appeal in this case.

II. Response in Defense of Judge Clarke's Reasonableness

Judge Clarke's discretionary property division was well within the reasonable exercise of the trial court's discretion.

A. Trial Court May Be Upheld on Any Basis in the Record, Even One Not Articulated by the Trial Court Judge

The appellate court may uphold Judge Clarke's ruling on any basis supported by the record (emphasis added):

It is well recognized that an appellate court may uphold the trial court's ruling on appeal on "any basis supported by the record." *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 493, 933 P.2d 1036 (1997) (quoting *Hadley v. Cowan*, 60 Wash.App. 433, 444, 804 P.2d 1271 (1991)). An appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *LaMon v. Butler*, 112 Wash.2d 193, 200-01, 770 P.2d 1027 (1989), *cert. denied*, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989); *see also Northwest Collectors, Inc. v. Enders*, 74 Wash.2d 585, 595, 446 P.2d 200 (1968) ("the trial court can be sustained on any ground within the proof"); *Kirkpatrick v. Dept. Of Labor and Indust.*, 48 Wash.2d 51, 53, 290 P.2d 979 (1955) ("[w]here a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition").

Stieneke v. Russi, 145 Wash. App. 544, 559-60, 190 P.3d 60, 68 (2008).

And see:

An appellate court can affirm a trial court judgment on any basis within the pleadings and proof. *Wendle v. Farrow*, 102 Wash.2d 380, 382, 686 P.2d 480 (1984).

Gosney v. Fireman's Fund Ins. Co., 419 P.3d 447, 475 (Wash. Ct. App. May 31, 2018).

There is more than enough evidence in the record to find Judge Harold Clarke's distribution of property to be within the bounds of reason.

B. Judith Tulleners' Math on Appeal: A 13% Difference in Property Awarded (Not Counting Judith Being Awarded 5/6ths of her Pension)

On page 17 of her Opening Brief, Judith Tulleners calculates that Andre Tulleners received \$718,172.00 of total award, while Judith "only" received \$301,742.51 of community property, and this disproportion of the community property is the basis of her appeal that the award was manifestly unreasonable.

However, on pages 16 to 17 of her brief, Judith had also acknowledged that she received \$251,730.00 of separate property. Judith omitted from her brief that her total award was \$553,442.51. (And Judith received the majority – five-sixths -- of her teacher's pension, not included in this calculation.)

In other words, the "disparity" of \$416,430.49 is actually a "disparity" of only **\$164,700.49** as to the property awarded to each,

exclusive of Judith's pension. This thirteen percent difference in a total estate of over 1.2 million dollars (\$1,271,614.51) cannot plausibly be construed as a distribution that "no reasonable judge" would make.

Judith's appeal is frivolous, given the manifest abuse of discretion standard of review, as the basis of this appeal is an alleged "inequality" of **13% difference** in total discretionary property award to Andre over Judith (164,700 divided by 1,271,614 = .129520436).

This 13% difference is reduced largely to zero once the equitable consideration is made that Judith kept the majority of her teacher's pension. (The court split 1/3 of her pension in half, and awarded it 50/50, which means only 1/6 of her pension went to Andre, and Judith retained 5/6ths of her pension.) Andre had converted his pension to cash value upon retirement, forming the basis of his accounts – see next section.

In short, while very unequal distributions may be made within the discretion of the trial court, in this instance, the Tulleners' total estate was split largely equally. There is no unequal split to defend or explain.

There was no manifest abuse of discretion.

III. *Marriage of Nuss Facts*

The trial court was very attentive to the facts. For example, when Judith's counsel was discussing one of Mr. Tulleners' funds (VRP: 84-86), her counsel asked Andre from whence came the \$114,000 gain in value

from 12/31/2008 through the end of 2009 (VRP: 85), and then Judge Clarke noted that the 2009 report showed earnings of twenty-five percent (25%) that year. (VRP: 86, lines 12 to 16.)

Judge Harold Clarke showed this attention to detail throughout the trial. (E.g., VRP: 86, 143-46, and 192, lines 13-19, among many examples.)

Andre Tulleners had a fixed benefit pension from his lifelong employer. (See Exhibit R-139, Williams 2006 Lump-sum Payout, admitted at VRP 247). Also, Andre had 401(k) from that company, and Mr. Tulleners had provided documents and testimony that he cashed out his 32-years of pension when he retired in 2006, as the more conservative option than hoping the company would stay in business to pay his fixed benefit pension (e.g., VRP: 88 & 259) The parties were married for eight-and-a-half years (8.5 yrs.) of this period – from the end of 1997 through retirement in May of 2006. (VRP: 88-90.) Judith's counsel accurately summarized the community contribution to this 32-year pension accumulation as "eight-and-a-half years." (VRP: 90, lines 22-23.)

Mr. Tulleners also had a Williams retirement 401(k) account, of which he received half in his 1997 divorce from his prior spouse. (VRP: 95; Andre's 5/9/97 Decree is Exhibit R-146, admitted at VRP: 101.)

In that 5/9/97 decree from Andre's prior divorce (Exhibit R-146), each spouse took one-half of \$395,000.00. Andre gave his prior spouse other assets, and Andre kept his full Williams defined benefit pension in that 5/9/97 decree. *Id.* Note: Andre's nearly \$197,500 in that account later sank in value to \$149,000, before rebounding. (VRP: 258-59.)

In short, among other assets Andre Tulleners brought into his marriage to Judith Tulleners on 11/29/1997, he had almost \$200,000.00 in Williams 401(k), and Andre had 23.5-of-32 years of working-years-credit toward the Williams defined benefit pension (which Andre rolled into a retirement fund that he "cashed out," as was already reviewed, above, when he retired in May of 2006).

Reviewing these specific facts is not an invitation to abandon the manifest-abuse of discretion standard, but these facts are presented to show that there was substantial evidence for Judge Clarke to rely upon the *Nuss* case and related precedents in exercising judicial discretion to make a just and equitable distribution of property.

The key *Nuss* holding, which has not been contradicted by any published Washington legal authority, is:

We hold that the origin of community property as one party's separate property may still be considered in appropriate cases as a reason for awarding all or a disparate share thereof to that party.

Nuss v. Nuss, 65 Wash. App. 334, 341, 828 P.2d 627, 631 (1992).

Application of Nuss: Judge Harold Clarke's decision was well-grounded in his discretion, and in the authority of *Nuss v. Nuss*, and other cases.

This would be true even if there had been a gross disparity in the final distribution of property (which there was not) under a discretionary determination of a just and equitable distribution. For stronger reasons still, here, where the final distribution of all property was approximately equal, there is no substantial basis for an appeal.

Judith's appeal is frivolous.

NOTE: While Judith keeps lamenting the disproportionate distribution of community property, as was noted above, the actual disparity of total property, was only a "disparity" of 13% of the total property (and she received the majority, 5/6ths, of her teacher's pension, in addition).

As the *Nuss* court ably re-stated the law:

all property, whether separate or community, is before the court in a divorce action for such disposition as is equitable. *Friedlander v. Friedlander*, 80 Wash.2d 293, 305, 494 P.2d 208 (1972); *In re Marriage of Parks*, 58 Wash.App. 511, 515, 794 P.2d 59 (1990), *review denied*, 116 Wash.2d 1009, 805 P.2d 813 (1991).

Nuss v. Nuss, 65 Wash. App. 334, 342, 828 P.2d 627, 632 (1992). The trial court made a just and equitable distribution of all the property before it, and Judith's Opening Brief is misleading to only focus on the distribution of the community portion of the distribution, and Judith is

misleading not to present her being awarded 5/6ths of her pension as a substantial factor in the just and equitable determination of the court.

IV. Alternative Reasonable Basis for Judge Clark's Decision

In her campaign to misrepresent the trial court as unreasonable, Judith overlooks that Andre had a point of contention during the case that he was largely forced to divorce Judith Tulleners because she started to dissipate their assets, especially on travel. (See, e.g, VRP: 179 & 210.)

By itself, that could have been a sufficient, separate and independent, basis for a disparate award of property, under the court's discretion. The court, in *In re Clark's Marriage*, said that dissipation of assets was a proper equitable consideration, and that it did not contradict a no-fault approach to family law (emphasis added):

In 1958 the parties sold their radio station for a profit of \$40,000. Although the proceeds of the sale of the station were controlled by Mr. Clark, the court found that he could not account for at least \$10,000 of these proceeds. The court further found that since 1959 Mr. Clark had dissipated much of his earnings on expenditures of his own choosing, mainly alcoholic beverages.

The central issue is whether the court erred in considering the testimony regarding Mr. Clark's drinking habit which resulted in a dissipation of community assets.

Mr. Clark contends that evidence of his drinking habit was considered contrary to RCW 26.09.080⁴ which precludes consideration of marital misconduct, that he was punished economically because the trial court awarded Mrs. Clark twice as much of the dollar value of the community assets as it awarded to Mr. Clark, and that his marital misconduct rather than the economic condition of the parties at the time of the dissolution

was the paramount concern of the court in its division of the property.⁵

Mrs. Clark responds by stating that the trial court's distribution of property should not be overturned in the absence of its manifest abuse of discretion;⁶ and that evidence of Mr. Clark's drinking was not admitted to show marital misconduct or 'fault,' but to show the effect his drinking and consequent expenditure of funds had on the community assets. We agree.

RCW 26.09.080 requires the court to consider all relevant factors in arriving at a 'just and equitable' distribution of property without regard to 'marital misconduct.' The 'underlying purpose of the new Dissolution of Marriage Act is to replace the concept of 'fault' and substitute marriage failure or 'irretrievable breakdown' as the basis for a decree dissolving a marriage.⁷ However, the fact that 'fault' is no longer a relevant query does not preclude consideration of all factors relevant to the attainment of a just and equitable distribution of marital property. The dissipation of marital property is as relevant to its disposition in a dissolution proceeding as would be the services of a spouse tending to increase as opposed to decrease those same assets.⁸ It is apparent from the record that the testimony relating to Mr. Clark's profligate life style was admitted and considered by the court not for the purpose of establishing 'fault,' but for the purpose of determining whose labor or negatively productive conduct was responsible for creating or dissipating certain marital assets.⁹ This was not error.¹⁰

The next question is whether the division of property constituted a manifest abuse of discretion.

In re Clark's Marriage, 13 Wash. App. 805, 807-09, 538 P.2d 145, 146-47 (1975) (footnotes omitted) ("We find that no manifest abuse of discretion occurred," at 811).

In re Clark's Marriage Applied to Tulleners: Judith's dissipation of assets, in extravagant travel expenditures, is an alternative basis on which the trial court's decision could be upheld.

Indeed, there are many alternative bases on which the decision could be upheld, and these hypotheticals will not be explored (except in Section V, below), as there is no reason for Andre to do so. The burden is on Judith to show a manifest abuse of discretion by the trial court. Contrary to Judith's contentions on appeal, Judge Clarke properly exercised his discretion. The total awards were nearly equal, even though they did not need to be.

Legal authority rejects her contention that the distribution should be mathematically equal, and for his other reason as well, the trial court's distribution is not a manifest abuse of discretion.

The trial court is not, however, required to divide community property equally.

Matter of Marriage of Kaplan, No. 76306-7-I, 2018 WL 3526186, at *4 (Wash. Ct. App. July 23, 2018).

V. Characterization versus Distribution: No Change in Distribution

Andre Tulleners believes that his tracing of his pre-marital separate property, though requiring some circumstantial inferences, was sufficient to support an appeal on error of law as to characterization. Andre was able to show that his separate funds were not "hopelessly commingled." See, e.g., *Schwarz v. Schwarz*, 192 Wash. App. 180, 188–92, 368 P.3d 173, 178–80 (2016). Andre's proof was sufficient, in his view.

However, even if Andre's separate property -- that he traced to his Williams Company 401(k) and Williams Company pension buyout -- were characterized as separate property, Andre understood that *all property* was before the court for just and equitable distribution.

Hence, even if Andre won his appeal on characterization of his pre-marriage accumulations, the appellate court would have likely accepted Judge Harold Clarke's just and equitable distribution without remand. As the court summarized the law in *Byerley v. Cail*:

As *Byerley* points out, a trial court's mischaracterization of property does not necessarily require reversal if the overall distribution remains just and equitable. We have held that a trial court's mischaracterization of property as community or separate requires remand only "where (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." *In re Marriage of Shannon*, 55 Wash.App. 137, 142, 777 P.2d 8 (1989); accord *In re Marriage of Langham & Kolde*, 153 Wash.2d 553, 563 n. 7, 106 P.3d 212 (2005).

Byerley v. Cail, 183 Wash. App. 677, 690, 334 P.3d 108, 115 (2014).

In sum, Andre understood that even a correction of characterization of his pension funds and accumulations would be unlikely to keep the trial court from making the same distribution, under its discretion, on remand, if remand were even granted.

Although failure to properly characterize property may be reversible error, mischaracterization of property is not grounds for setting aside a trial court's property distribution if it is fair and

equitable. *In re Marriage of Shannon*, 55 Wash.App. 137, 140, 777 P.2d 8 (1989).

In re Marriage of Gillespie, 89 Wash. App. 390, 399, 948 P.2d 1338, 1343 (1997).

Here, in *Tulleners*, as all property was declared to be community property, and Judith thus can make no error of law challenge to the court's final orders. Only Andre had that legal possibility – to challenge the community characterization of his separate pension funds as an error of law -- and Andre forewent that appeal, in acceptance of the court's exercise of its discretion, and in the likelihood that the characterization error would have been found harmless under *In re Marriage of Gillespie, supra*. Judith has no error of law to allege, and she alleged none.

Judith simply challenges Judge Clarke's just and equitable distribution as a manifest abuse of discretion. However, there was no abuse of discretion in this case, and there certainly was no "manifest abuse of discretion" such that Judge Clarke's distribution of assets was one that "no reasonable person would make."

VI. Recent Authority Affirming Trial Court's Ability to Make Unequal Distributions

A recently decided appeal reiterated the trial court's discretion to make unequal distributions. On 7/23/18, the *Kaplan* court said:

We agree with the analysis in *Doneen*. An objective of placing the parties to a long-term marriage in “roughly equal” financial positions, is not a mandate for trial courts to predict the future, divide assets with mathematical precision, or guarantee future equality. The trial court must still exercise its discretion to consider all of the statutory factors set out in RCW 26.09.080 and RCW 26.09.090(1)(c) and reach a just and equitable distribution. We decline Heidi's request to hold that failure to place the parties in roughly the equivalent financial position for the rest of their lives constitutes an error of law. The objective stated in *Rockwell*, is just that, an objective, which is to be considered as the trial court determines the “fair, just, and equitable division of the property.”

Matter of Marriage of Kaplan, No. 76306-7-I, 2018 WL 3526186, at *3 (Wash. Ct. App. July 23, 2018).

The *Kaplan* court cited the 2017 Division Three case, *Doneen*, in which the unequal distribution of the trial court was affirmed, over the wife's objection and appeal:

The trial court has broad discretion to determine what is just and equitable based on the circumstances of each case. *Rockwell*, 141 Wash.App. at 242, 170 P.3d 572. Because the trial court is in the best position to determine what is fair, this court will reverse its decision only if there has been a manifest abuse of discretion. *Larson*, 178 Wash.App. at 138, 313 P.3d 1228. This discretion applies to determinations regarding division of property. *In re Marriage of Wright*, 179 Wash.App. 257, 262, 319 P.3d 45 (2013).

Although the property division must be “just and equitable,” it does not need to be equal. *Larson*, 178 Wash.App. at 138, 313 P.3d 1228; *Rockwell*, 141 Wash.App. at 243, 170 P.3d 572. Nor does it need to be mathematically precise. *Larson*, 178 Wash.App. at 138, 313 P.3d 1228. 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. *Id.*

In re Marriage of Doneen, 197 Wash. App. 941, 949, 391 P.3d 594, 598, *review denied*, 188 Wash. 2d 1018, 396 P.3d 337 (2017).

The idea that *Rockwell* required equal distribution was explicitly disavowed:

Ellen's reliance on *Rockwell* is misplaced. The *Rockwell* court affirmed the trial court; its holding was permissive in nature, not mandatory. *See also Sullivan v. Sullivan*, 52 Wash. 160, 162-64, 100 P. 321 (1909) (affirming trial court's award of \$92,500 to wife and \$129,000 to husband). *Rockwell* does not support Ellen's contention that trial courts are *required* to divide all the property equally in a long-term marriage and ignore the property's character.

In re Marriage of Doneen, 197 Wash. App. 941, 950, 391 P.3d 594, 599, *review denied*, 188 Wash. 2d 1018, 396 P.3d 337 (2017).

Application of Kaplan and Doneen to Tulleners: Judith Tulleners has no substantial argument in fact or law to challenge the trial court's distribution of property as a *manifest abuse of discretion*.

Her appeal is frivolous. Fees are requested.

VI. Judith's Bad Faith Arguments: E.g., *Marriage of Kraft*

There are many attempts by Judith to turn quibbles about discretion into misleading assertions of "error" without really specifying the assignment of error.

For example, on pp. 22-23 of her brief, Judith states that Division III had explicitly rejected reducing a pension to a present value calculation

in the 1991 *Marriage of Kraft* case, 61 Wn.App. 1991. However, the State Supreme Court explicitly disagreed with Division III's decision she cites precisely on this issue (emphasis added):

We do not agree with the Court of Appeals that the trial court should have wholly disregarded the nondisability portion of Mr. Kraft's military pension. Reducing a retirement pension to its present value is a recognized procedure in the valuation of divorce assets. See, e.g., *In re the Marriage of Pilant*, 42 Wash.App. 173, 179, 709 P.2d 1241 (1985). See generally B. Goldberg, *Valuation of Divorce Assets* § 9.5, at 251 (1984) (explaining how to determine the present value of a pension plan for purposes of a dissolution and describing the advantages of doing so); L. Golden, *Equitable Distribution of Property* § 7.12, at 227-28 (1983) (trial courts should be given broad discretion in valuing pension interests, and determining the present value of a pension is the most common method). The trial court did not err in reducing the nondisability portion of Mr. Kraft's military pension to its present value. Notably, the parties agree the trial court may reduce military pay to present value.

When the present value of just the disability benefits is disregarded, the net distribution of community property is roughly \$76,200 to Mr. Kraft and \$162,000 to Mrs. Kraft. A trial court has considerable discretion in making a property division and will not be reversed on appeal absent a showing of manifest abuse. *In re the Marriage of Tower*, 55 Wash.App. 697, 700, 780 P.2d 863 (1989), *rev. denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990). Therefore, on remand, the trial court may, if in its view equity so requires, distribute the Krafts' property in the same manner in which it did initially. What is required is that the trial court arrive at its decision as to what is just and equitable under all the circumstances after considering the military disability retirement pay in the manner we here explain.

In re Marriage of Kraft, 119 Wash. 2d 438, 450, 832 P.2d 871, 876-77 (1992) (Note: appellate court was generally affirmed).

The *Kraft* court clarified that the military disability payments may be considered *as an economic circumstance*, whether reduced to present value or not (emphasis added):

We hold the trial court in a marriage dissolution action may consider military disability retirement pay as a source of income in awarding spousal or child support, or generally as an economic circumstance of the parties justifying a disproportionate award of community property to the nonretiree spouse.

In re Marriage of Kraft, 119 Wash. 2d 438, 451, 832 P.2d 871, 877 (1992).

The *Kraft* court did say that the military pay should not be offset as an asset. *Id.* However, in *Tulleners*, Judith's receipt of a greater share of her pension was an "economic condition" considered by the court. That consideration was consistent with the court's ability to exercise its discretion under all governing law. *Kraft* was tortured by Judith, but it did not confess what she hoped it would confess.

Judge Clarke's Memorandum Decision of 3/29/18 (CP: 182) clarifies the division of Judith's pension:

As noted above, the Petitioner [Judith] has a pension benefit from her work through the TRS III program. About a third of the benefit was characterized as a community asset and ordered split on an equal basis. It was not valued and included in the above community awards, but it was not necessary [to value it] given the equal split.

Judith got 2/3 of her pension as separate property, and 1/6th as a split of community property. In total: Judith received 5/6ths of her pension.

Note: Judith's brief also tries to turn this comment by the trial court into an assertion the court was "seeking" an impermissible present value – see Opening Brief at the bottom of p. 22 and top of p.23, but (a) the comment is harmless dicta, as this hypothetical rumination never became a fact, or a basis of decision, (b) there is no factual basis on which to assert error; and (c) analogies to general pensions from military disability pay must respect differences between the two.

In no way does the appellate *Marriage of Kraft* limit Judge Clarke's discretion in this case to exercise his discretion as he has done. This misleading assertion of "error" is exemplary of the legally insufficient (frivolous) arguments advanced by Judith in this appeal.

These legal sleights of hand by Judith are taxing to trace out and to correct in the briefing. Such cleverness by Judith cannot mask that her appeal is frivolous.

VII. Basis for Fee Request: No Reasonable Basis for Judith to Allege a Manifest Abuse of Discretion

Judith's appeal required her to show that Judge Clarke's distribution was "one that no reasonable person would have made," as was

quoted, above, from *Marriage of Tower*. *In re Marriage of Tower*, 55 Wash. App. 697, 700, 780 P.2d 863, 865 (1989), citing *In re Marriage of Rink*, 18 Wash.App. 549, 554, 571 P.2d 210 (1977).

In awarding fees in *Chapman v. Perera*, the court defined a frivolous appeal:

Next, we find this appeal to be frivolous. An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists. *Gall Landau Young Constr. Co., Inc. v. Hurlen Constr. Co., Inc.*, 39 Wash.App. 420, 432, 693 P.2d 207, *rev. denied*, 103 Wash.2d 1026 (1985); *Streater v. White*, 26 Wash.App. 430, 435, 613 P.2d 187, *rev. denied*, 94 Wash.2d 1014 (1980). Here even if all doubts are resolved in the appellants' favor, *Streater, supra*, no debatable issues are presented upon which reasonable minds might differ, and no reasonable possibility of reversal exists.

Chapman v. Perera, 41 Wash. App. 444, 455–56, 704 P.2d 1224, 1232 (1985).

Applying *Chapman v. Perera* to Tulleners: No plausible basis exists for Judith Tulleners' "I don't like it" appeal to show a manifest abuse of discretion. No reasonable appellate court will conclude that Judge Harold Clarke had made a decision that no reasonable judge would have made.

No reasonable possibility of reversal exists, nor was one even plausibly posed by Judith, no matter how one stretches her arguments.

The court's inherent power and RAP 18.9 allow for the sanction of fees to be paid by the party filing a frivolous appeal, as does RCW

4.84.185 (via RAP 18.1) for any action advanced without reasonable cause. See for example, *Foisy v. Conroy*:

The respondents request their attorney fees on appeal under RAP 18.1⁷ and RCW 4.84.185. RCW 4.84.185 provides that attorney fees may be awarded to the prevailing party if the opposing party's action was frivolous. RAP 18.9(a) allows this court to order the losing party to pay the prevailing party its attorney fees on appeal if the appeal was frivolous. “[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.”⁸

We agree with the respondents that Foisy's appeal is frivolous. It presents no debatable issues and is so totally devoid of merit that there was no reasonable possibility of reversal. The respondents, therefore, are entitled to their attorney fees on appeal.

The decision of the trial court is affirmed. The respondents are entitled to their attorney fees on appeal.

Foisy v. Conroy, 101 Wash. App. 36, 42–43, 4 P.3d 140, 144 (2000) (footnotes omitted).

VIII. Judith's Conclusion to Her Opening Brief

Judith's Conclusion is at p. 26 and top of p. 27 of her Opening Brief. A review of Judith's conclusion to her brief allows Andre to make another effort to locate Judith's assignments of error with specificity.

Judith's Point 1 in Conclusion: Judith's first paragraph states that the court erred in “seeking a present value calculation where the wife was in pay status.” **Response:** The court simply took her pension into account as an economic factor, and the court awarded Judith 5/6ths of her pension,

and awarded Andre 1/6th. There is no error here. Harmless dicta regarding bases of evidence neither presented nor relief upon by the court are simply not relevant.

Judith's Point 2 in Conclusion: Next, Judith does state the appropriate standard of review: "The trial court manifestly abused its discretion in making a tremendously disproportionate division of property." Response: First, Judith shifts from her facts and argument about a disproportionate distribution of *community* property, which did occur in this case, to Judith now implying the completely false statement that there was a disproportionate division of property generally. There was a 13% disparity in property, and that is omitting the fact of Judith receiving 5/6ths of her pension. Second, Judith presented no focused or credible argument that the distribution in this case was one that no reasonable person would make. (Hence, Judith's appeal is frivolous.) Third, Judith concludes the first paragraph of her conclusion simply re-hashing disagreements with the trial court, without showing a manifest abuse of discretion. Finally, Judith again abandons discussing the actual disproportionate distribution of community property, and misleadingly discusses "a substantial disproportionate distribution in favor of the husband," as if all property, separate and community, ended up being

grossly disproportionate in total. That is a false and misleading implication. The total distributions were largely equal.

Judith's Point 3 in Conclusion: Judith alleges that the trial court was “guessing what the husband’s pre-marital retirement/investments might have been.” **Response:** First, no finding of fact was specifically challenged in her Opening Brief. Second, Judith’s argument is factually false. Andre Tulleners admitted Exhibits R-125 to R-150 (index at VRP 206) detail his separate property. Andre’s testimony explicates these exhibits and their history. See, e.g., VRP at 45-49, 82-96, 98-99, 101-102, 110, 115, 120 (lines 1-4), 123-24, 127(lines19-22), 258-61, 264, 267, 276-81, and *en passim*. In short, the trial court was not “guessing.” Andre’s documents showed the only plausible source of the wealth in community accounts was from Andre’s 32 years of work, careful saving, and his conversion of his defined pension benefit, upon retirement in 2006, into an investment fund.

This allegation of “guessing” should have occurred in an assignment of error, not as a conclusory afterthought. Nonetheless, Judith’s allegation about the court’s determination is simply false, and the record contradicts Judith’s sweeping and vague allegation that Judge Harold Clarke “guessed” about the origin of \$800,000 in Andre Tulleners’ lifetime accumulations. There was no other possible or proffered source

of these funds. Further, Judith does not tie this alleged “guess” to any plausible argument that a 13% difference in the property distribution (and her retention of 5/6ths of her pension) was a manifest abuse of discretion.

Judith’s Point 4 in Conclusion: Finally, after her sweeping laments, Judith asks the court to simply split a \$409,000 account awarded to Andre in the decree without remand.

The authorities have already been cited to this court that there is no remand if the distribution can stand. If a new distribution of property is to be made, the court must remand with instructions.

Judith cites no authority for the appellate court to modify the distribution without remand, because there is none. The appellate court can only avoid remand when the error discovered on appeal is harmless, and the trial court’s distribution is upheld:

Thus, from these two lines of cases, we discern the following rule. Remand is required where (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. In such a case, remand enables the trial court to exercise its discretion in making a fair, just and equitable division on tenable grounds, that is, with the correct character of the property in mind. See *Baker v. Baker*, 80 Wash.2d 736, 746–47, 498 P.2d 315 (1972).

In re Marriage of Shannon, 55 Wash. App. 137, 142, 777 P.2d 8, 11 (1989).

The *Shannon* court continues:

Furthermore, under the facts presented here we are unwilling to say that the court's division of this asset is so evidently fair that it obviates the need for remand.

In re Marriage of Shannon, 55 Wash. App. 137, 142, 777 P.2d 8, 11

(1989) (remanded under re-characterization of property).

Finally, *Shannon* summarized the line of cases in which remand was not required:

Worthington involved a marriage of long duration, in which the trial court made it clear that it was less concerned with characterization issues than with making an equitable division. See *Worthington*, 73 Wash.2d at 767, 440 P.2d 478. Similarly, in *Brossman*, the trial court explicitly stated that its property division was appropriate “regardless of the characterization” of the property at issue. *Brossman*, 32 Wash.App. at 853, 650 P.2d 246.

In re Marriage of Shannon, 55 Wash. App. 137, 141–42, 777 P.2d 8, 11

(1989).

A new distribution, if manifest abuse of discretion is found, and if such error is not harmless, would require remand to Judge Clarke, with instructions.

Judith presented no authority to justify the distribution by the appellate court, without remand, of the funds she covets.

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IX. Andre's Conclusion to His Response Brief

The burden was on Judith Tulleners to show that Judge Harold Clarke's nearly equal distribution of the totality of the assets and property before him was a manifest abuse of discretion. She has failed to do so.

There are multiple alternative bases on which Judge Clarke's distribution could be upheld, including the facts in the record that Andre's pre-marriage funds were not "hopelessly commingled." See, e.g., *Schwarz v. Schwarz*, 192 Wash. App. 180, 188–92, 368 P.3d 173, 178–80 (2016).

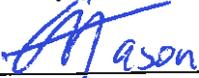
However, Andre understood that even if the trial court committed an error of law in finding the property at issue to be community property, there was no sufficient basis for Andre to challenge the distribution of the property. In other words, Andre appreciated that even if he won an appeal as to the character of the property that he believed was his separate property, the distribution Judge Harold Clarke made in this case within the wide discretion of the court's authority to make a just and equitable allocation of all property before it in a dissolution.

The point remains that Judith has no colorable claim in this appeal as to the character of the property, nor its distribution, as manifestly unreasonable. Judith has not even come close to showing that Judge Harold Clarke's decision was one that no reasonable person would have

made. Fees and costs are requested for having to answer this frivolous appeal.

Denial of Judith's appeal, and an award of fees and costs, are requested.

Respectfully submitted on 7/30/18,



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Appendix on *Schwarz v. Schwarz*, 192 Wash. App. 180, 368 P.3d 173

(2016): As was noted in the text of the respondent's brief, the burden was on Judith to show a manifest abuse of discretion, not on Andre to show alternative reasonable bases for the judge's decision. The following detailed citation is referenced in the text, above, but the lengthy quote is offered as additional authority as to the law of commingling and the character of property.

In a dissolution action, all property, both community and separate, is before the court for distribution. *Friedlander v. Friedlander*, 80 Wash.2d 293, 305, 494 P.2d 208 (1972). An asset is separate property if "acquired before marriage; acquired during marriage by gift or inheritance; acquired during marriage with the traceable proceeds of separate property; or, in the case of earnings or accumulations, acquired during permanent

separation.” *In re Marriage of White*, 105 Wash.App. 545, 550, 20 P.3d 481 (2001) (footnotes omitted); RCW 26.16.010.

The character of property, whether separate or community, is determined at the time of acquisition. *In re Marriage of Pearson–Maines*, 70 Wash.App. 860, 865, 855 P.2d 1210 (1993). Property *acquired* during marriage is presumptively community property. A party may rebut this presumption by offering clear and convincing evidence that the property was acquired with separate funds. *In re Marriage of Skarbek*, 100 Wash.App. 444, 449, 997 P.2d 447 (2000). “The requirement of clear and satisfactory evidence¹ 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.” *Berol v. Berol*, 37 Wash.2d 380, 382, 223 P.2d 1055 (1950). “Separate funds used for such a purpose should be traced with some degree of particularity.” *Id.*

A presumption that an asset *possessed* by a married person is community property may arise even though the particular time of acquisition has not been established. Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 Wash. L. Rev. 13, 29 (1986) (citing *State ex rel. Marshall v. Superior Court*, 119 Wash. 631, 206 P. 362 (1922)). Property *in the possession* of a married person is presumed to be community property “ ‘until the contrary is shown;’ ” this presumption “is not a very strong presumption and is one that may be easily overcome.” *Marshall*, 119 Wash., at 637, 206 P. 362 (quoting 5 Ruling Case Law *Community Property* § 26, at 844 (1914)).

Although this presumption will always yield to a preponderance of the evidence, the duration of the marriage may affect whether the trial court should apply it at all. “As a general rule, the longer the duration of the marriage the more likely the court will assume that assets in the possession of the spouses are community.” 19 Kenneth W. Weber, *Washington Practice: Family and Community Property Law* § 10.4 at 137 (1997).

“Once the separate character of property is established, a presumption arises that it remained separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property.” *In re Estate of Borghi*, 167 Wash.2d 480, 484, 219 P.3d 932 (2009). It will

retain that character as long as it can be traced or identified. *Pearson–Maines*, 70 Wash.App. at 865, 855 P.2d 1210 (citing *Baker v. Baker*, 80 Wash.2d 736, 745, 498 P.2d 315 (1972)).

“Commingling” of separate and community funds may give rise to a presumption that all are community property. This is not commingling in the ordinary sense, however²; it must be hopeless commingling. Unlike the foregoing presumptions, this one is conclusive, arising only after the effort at tracing proves impossible.³ “Only if community and separate funds are so commingled that they may not be distinguished or apportioned is the entire amount rendered community property.” *Pearson–Maines*, 70 Wash.App. at 866, 855 P.2d 1210 *191 citing *In re Estate of Allen*, 54 Wash.2d 616, 622, 343 P.2d 867 (1959)). “If the sources of the deposits can be traced and identified, the separate identity of the funds is preserved.” *Skarbek*, 100 Wash.App. at 448, 997 P.2d 447.

Commingling in this hopeless sense is illustrated by *Witte's Estate* and *In re Marriage of Shui v. Rose*, 132 Wash.App. 568, 125 P.3d 180 (2005). In *Witte's Estate*, farm income was found to have been commingled where, for much of a 44–year marriage, it was part separate (from the separate character of the farm ground) and part community (from community effort) and there was never any segregation as between the two items, and ... the entire amount was continuously devoted as a whole to the acquisition of other lands which were treated in the same manner, and ... it is now impossible to disentangle, separate, or apportion the component parts of the mass. 21 Wash.2d at 128, 150 P.2d 595.

In *Shui v. Rose*, stock options were exercised by the husband, the shares thus acquired were sold, and the proceeds were deposited to a single account. The options had different inherent values at the time of exercise and “some ... had a mixed character, some were entirely community property, and some were entirely separate property.” 132 Wash.App. at 583, 125 P.3d 180. The single account was later divided into four investment accounts, with the division being unrelated to the character of the original options. The court concluded that “the funds in the investment accounts simply are not traceable to the options that yielded them.” *Id.* at 585, 125 P.3d 180.

A trial court is not bound to award property to the individual or the community based on the property's classification but “the court must have in mind the correct character and status of the property as community or separate before any theory of division is ordered.” *Blood v. Blood*, 69 Wash.2d 680, 682, 419 P.2d 1006 (1966) (citing *Shaffer v. Shaffer*, 43 Wash.2d 629, 262 P.2d 763 (1953)).

A trial court's characterization of property as separate or community presents a mixed question of law and fact. *In re Marriage of Kile and Kendall*, 186 Wash.App. 864, 876, 347 P.3d 894 (2015) (citing *In re Marriage of Martin*, 32 Wash.App. 92, 94, 645 P.2d 1148 (1982)). “ ‘The time of acquisition, the method of acquisition, and the intent of the donor, for example, are questions for the trier of fact.’ ” *Id.* (quoting *Martin*, 32 Wash.App. at 94, 645 P.2d 1148). Accordingly, whether or not a rebuttable presumption of community or separate character is overcome is a question of fact. *See id.* at 881, 347 P.3d 894 (reviewing whether substantial evidence supports overcoming the presumption); *In re Marriage of Mix*, 14 Cal.3d 604, 612, 536 P.2d 479, 122 Cal.Rptr. 79 (1975). We review the factual findings supporting the trial court's characterization for substantial evidence. *Kile*, 186 Wash.App. at 876, 347 P.3d 894 (citing *In re Marriage of Mueller*, 140 Wash.App. 498, 504, 167 P.3d 568 (2007)). The ultimate characterization of the property as community or separate is a question of law that we review de novo. *Id.*

If a trial court mischaracterizes property, we will remand the matter for further consideration 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.” *In re Marriage of Shannon*, 55 Wash.App. 137, 142, 777 P.2d 8 (1989).

Schwarz v. Schwarz, 192 Wash. App. 180, 188–92, 368 P.3d 173, 178–80 (2016).

MASON LAW

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