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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Washington State Appellate Court, Division Three

In re the Marriage of)	
)	Brief of Appellant
James Wallace, Appellant)	
)	Case no. 357490
v.)	
)	Title Page
Kim Collins, Respondent)	

Review from Kittitas County Superior Court No. 16-3-00124-2

by

Appellant

James Wallace
138 Old Cedars Rd
Cle Elum, WA 98922

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Washington State Appellate Court, Division Three

James Wallace,)	Brief of Appellant
	Appellant)	
v.)	Case no. 357490
)	
Kim Collins)	
	Respondent)	

Review from Kittitas County Superior Court No. 16-3-00124-2

I, James Wallace, appeal the trial court decision pursuant to the above referenced divorce proceeding in the Kittitas County Superior Court, State of Washington, entered on November 20, 2017 per RAP 2.2(a)(1).

ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The court erred by ruling the SeaTac Cannabis License Application was valued at \$500,000.

Issues pertaining to assignment of error no. 1

1. Did the court err, ruling the SeaTac Cannabis License Application was valued at \$500,000?

Assignment of Error No. 2

The court erred by refusing to address the issue of spousal maintenance.

Issues pertaining to assignment of error 2

1. Did the court err by refusing to address the issue of spousal maintenance?

Assignment of Error No. 3

The court erred by ruling the quit claim deed, conveying the Cle Elum family home, was a valid conveyance from the husband to the wife, as the wife's separate property.

Issues pertaining to assignment of error 3

1. Did the court err by ruling the quit claim deed, conveying the Cle Elum family home, was a valid conveyance from the husband to the wife, as the wife's separate property.

Assignment of Error No. 4

The court erred by imputing the husband's income according to his rate of pay while living in Federal Way, instead of Cle Elum, and using the wife's former income prior to her present rate of pay.

Issues pertaining to assignment of error 4

1. Did the court err by imputing the husband's income according to his rate of pay while living in Federal Way, instead of Cle Elum, and using the wife's former income prior to her present rate of pay?

STATEMENT OF THE CASE

My name is James Wallace. I am the appellant and Kim Collins (wife of the marriage) is the respondent to this appeal. For clarity sake, I will refer to the respondent as "Kim" and to myself as "James" as appropriate.

Kim and I married on July 22, 2006, but were living together since 2005. We have two children from our marriage, including Collin Wallace, born on November 6, 2007; and Katherine Wallace, born on April 7, 2009. Our primary assets included our family home in Cle Elum, two rental houses in Tacoma, Kim's retirement plan, my mechanic tools, and motor vehicles, and other tangible personal property. Kim was awarded custody of our children and I was awarded visitation. I am contesting the issue of child support based on the income used by the trial court for Kim and I, as well.

Since the court must determine the character of property prior to deciding property division and spousal maintenance, I spent

considerable time in my trial brief and presentation, tracing the acquisition and transitions of our real property to determine its character. Particularly the character of our family home. There is an issue of a quit-claim deed on our Cle Elum home, prepared by Kim for my execution, to remove my name from the title, which Kim contended was necessary to protect the house from an IRS lien, which never occurred. Kim admitted this in her testimony at trial. Finally, there was an issue of misrepresentation that emerged during trial, including testimony of one Tom Gordon regarding the valuation of the SeaTac Cannabis License application. The issue was addressed via a motion to vacate after the trial court testimony, but before the court made its final ruling on the division of property, and the entry of final orders. The court treated the motion to vacate as a motion for reconsideration, but ultimately denied the motion, ruling the prohibition of a cannabis business could change, despite the ordinance prohibiting any land use in violation of federal law for which SeaTac City ordinance 13-1001 was adopted to prohibit. So the court denied the motion to vacate based on what the law may allow in the future. Consequently, the court upheld its \$500,000 valuation of the cannabis license application, which cannot be used

under current law. SeaTac Municipal Code, Section 15.05.060,
Ordinance No. 13-1001

I was shocked. The ordinance may never change. I'm left with a useless piece of paper. Why was the burden of the risk that the ordinance will never change placed on my shoulders? Since Seatac is largely federally funded, it may take an act of Congress before the license has value. It seems if the court was dividing our property according to the fair, just, and equitable elements required under RCW 26.09.080, the risk of a law change should be allocated to us fairly according our proportionate incomes, similarly to unexpected health care expenses in child support worksheets.

Kim admittedly earns \$14,000/month, while my income is only \$2,700/month. VRP 112, lines 20-25 I believe the \$500,000 valuation of the SeaTac cannabis license application was due to an error of law, by being based on what the law may be in the future, when the statute requires permanent consideration under RCW 35.21.550. The error so materially affected the outcome of the proceedings, that the appellate court should order a complete redistribution of our marital property, recalculation of child support, and an award of maintenance. I'll discuss these issues below.

ARGUMENT

Assignment of Error No. 1

The court erred by ruling the SeaTac Cannabis License Application was valued at \$500,000.

Issues pertaining to assignment of error no. 1

1. Did the court err, ruling the SeaTac Cannabis License Application was valued at \$500,000?

“A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009) A motion to vacate judgment presents a question of law. *State v. Price*, 59 Wn.2d 788, 791-92, 370 P.2d 979 (1962) The court reviews questions of law de novo. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005) It is an error of law for a motion to be decided on an improper basis, requiring de novo review. It is error of law for the court to enter insufficient findings, causing the parties to guess at its ruling. Where the court disregards a statute, law, or

ordinance, which has controlling authority over the issue before the court, it is an error of law, requiring de novo review.

RCW 35.21.550 mandates proof of ordinances shall be given **permanent** and general effect of the city or town in all courts and administrative tribunals of this state. Hence, mandatory judicial notice of ordinances is required by the court, without respect to how the court feels about the ordinance. I should not have to bear the risk of an ordinance change to realize the court's \$500,000 valuation of the marijuana application. The court ruled the license application was community property, so the risk of its valuation should be shared by both parties. A court does not have the discretion to disregard an ordinance because it feels it may change some day because it's only an ordinance, and it's a violation of due process of law, under both state and federal Constitutions. VRP at 413, lines 5 -16 Therefore, it is an error of law to do so.

The court said the ultimate question regarding the cannabis license application was (a) does it have value, and (b) what is a reasonable basis to determine its value. VRP 210, lines 15-18 The court determined its value without respect to Seatac City ordinance no. 13-1001, prohibiting land use for any activity contrary to state, local, and federal law. After the court was informed of ordinance

13-1001, the court refused to rely on it because it was an ordinance, which could be changed. VRP at 413, lines 5 -16
Meanwhile, I'm holding a license application which the City of Seatac will not approve, so it has no present market value, but the court ruled its value is \$500,000. I believe it is an error of law for the court to make a substantial property valuation based on its opinion that the City of Seatac could change the ordinance someday. I proposed an equal division of the license for that reason.

Under RCW 5.24.010, judicial notice is required of all statutes, civil laws, and constitutions of every state in the union. RCW 35.21.550 requires the court to give permanent and general effect of ordinances in all courts and administrative tribunals of the state.

Under Ordinance 13-1001, dated January 8, 2013 (a copy of which was attached to my motion to vacate as Exhibit A) the City of SeaTac amended its municipal code in response to I-502 (the new marijuana law) to prohibit any land use for purposes that are prohibited by local, state, or federal law, thereby rendering the marijuana license application no. 414506 in the City of SeaTac issued to me, James Wallace, commercially worthless, since

marijuana manufacturing and possession is prohibited under federal law as a Schedule I drug under the Controlled Substance Act (CSA), 84 Stat. 1242, 21 U.S.C. 801 et seq.

Here, the sixty page testimony of Tom Gordon omitted the SeaTac marijuana sales prohibition that renders the value of the marijuana license application in the City of SeaTac worthless, since it cannot be used to sell marijuana, and most of his testimony is actually irrelevant concerning his purported offer. Specifically, the City of SeaTac does not allow a marijuana retail sales business because it is prohibited under federal law as a Schedule I drug under the Controlled Substance Act (CSA), 84 Stat. 1242, 21 U.S.C. 801 et seq. The SeaTac City Council amended its code in response to I-502 to prohibit land use for any purpose that is not allowed under federal law, such as marijuana sales, thereby rendering Tom Gordon's testimony contradictory to the law, and impeaching Mr. Gordon's testimony, due to absence of the material fact bearing on the outcome of the case. On cross-examination, I asked Mr. Gordon if there was a moratorium in the City of SeaTac right now? VRP 191, lines 11 -12 Mr. Gordon testified in response that he knew of "no ordinance brought to the table to deny or to allow marijuana sales in SeaTac." VRP 191, lines 16-18 Since Mr.

Gordon's testimony omits any knowledge of Ordinance 13-1001, his testimony omitted material facts regarding the controlling issue of our case, resulting in a \$500,000 valuation of a license application that has no market value under present law.

Mr. Gordon's testimony encompasses sixty pages of the verbatim report of the proceedings (pp.180 to 240) but it is misleading and unreliable, since it is predicated on Mr. Gordon's testimony that the City of SeaTac has neither addressed the marijuana issue nor opted out of it. VRP 192, lines 11-22. When in fact, SeaTac City Ordinance No. 13-1001 addressed the marijuana issue head on, stating in part "...Whereas, federal law prohibits the manufacture and possession of marijuana as a Schedule I drug under the Controlled Substance Act (CSA), 84 Stat. 1242, 21 U.S.C. 801 et seq; and Whereas, the City Council deems it to be in the public interest to amend Section 15.05.060 of the SeaTac Municipal Code to clarify that any land use which is prohibited under Federal, State, or local law is not allowed in the City of SeaTac." Ordinance 13.1001 then amends Section 15.05.060 by adding Paragraph G., reading "This Title does not allow any use which is in violation of any local, State, or Federal laws, regulations, codes and/or ordinances." The presence of the SeaTac International Airport poses a substantial

concern for the welfare and safety of the people of the state and visitors from, virtually, around the world. No other cannabis jurisdictions in Washington State have an international airport. Due to the presence of Seatac International Airport, Seatac is a one of a kind jurisdiction in Washington State for consideration of cannabis licensing. Ordinance 13-1001 was adopted just two months after the enactment of I-502, on January 8, 2013, immediately after the holiday season. It was the first ordinance of the year 2013, indicated by 13-1001. Tom Gordon's testimony omits these facts, which were material to the division of property in our case but to my detriment in the amount of \$500,000, and a windfall of property awarded to Kim that should have been awarded to me, especially, since her income is no less than quadruple mine by her own admission. VRP 112, lines 20-25 Therefore, the court should reverse the trial court decision based on Mr. Gordon's testimony and order redistribution of our property, due to its unfair and inequitable effect on the outcome of our case.

The court said the ultimate question regarding the cannabis license application was (a) does it have value? and (b) what is a reasonable basis to determine its value. VRP 210, lines 15-18 However, when I asked Tom Gordon, if the City of SeaTac objects to

a marijuana store would it be possible to open the store in the City of SeaTac? Mr. Cole objected to the question, and the court quickly sustained the objection without hesitation. VRP 196, lines 11-16. A substantial part of valuing property is ascertaining what a willing buyer would pay knowing all material facts concerning the property. A willing buyer must know whether Seatac allows a cannabis business, but the court would not allow the answer from the alleged expert, Tom Gordon, thereby manifesting an abuse of discretion, and grounds for reversal.

Much time was given at trial to the purported offer that Tom Gordon said he attempted to sweeten for me, the seller, but any offer Mr. Gordon prepared would necessarily omit the material fact to a buyer that SeaTac City Ordinance No. 13-1001 prohibits the sale of marijuana, since it prohibits all land use for activities that violate federal law. Consequently, even if a purchase was executed, it is substantially certain to be vacated by the court based on misrepresentation allegations against broker Tom Gordon by the omission or non-disclosure of Ordinance 13-1001. Therefore, the court should reverse the trial court decision, since it based its valuation of the license application on the testimony of Tom Gordon.

Tom Gordon also testified that the license can travel, contrary to the authorities at the Liquor and Cannabis Board. VRP 200, lines 11-22 And again at VRP 219, 11-19. Shannon Angell, the Licensing Supervisor for the Marijuana Unit of the Liquor and Cannabis Board of the State of Washington declared under penalty of perjury that the license application is only valid for jurisdiction which it was awarded and cannot be transferred to another jurisdiction issued CP 461. I submitted her declaration with my motion to vacate. CP 438-446

Since the court must take mandatory judicial notice of an ordinance under RCW 35.21.550 at any time during the proceedings, even for the first time on appeal, I presented the ordinance supporting my motion to vacate under CR 60(b)(4) based on fraud, misrepresentation, or other misconduct of an adverse party. Kim argued the ordinance is new evidence and should be excluded, but judicial notice of statutes and ordinances is mandatory at any time during the proceedings, even for the first time on appeal. The law is not evidence which may be suppressed at any time, but may be introduced at any time during the proceedings, even for the first time on appeal, since the Constitution guarantees due process of law in all judicial proceedings under the Fourteenth Amendment. U.S. Const. XIV

Amend. Also, under the Washington State Constitution as well, qualifying as an issue raised for the first time on appeal. Wash. St. Const. Art. 1 § 3, RAP 2.5(a)(3)

The court ruled the ordinance could be changed, stating, "...the problem with ordinances is that they can always be changed. So, even assuming that the -- SeaTac has that -- takes that position today it doesn't mean they'll take that position tomorrow" so the court reasoned it could disregard Ordinance 13-1001, and thereby, violated RCW 35.21.550, requiring the court to give permanent and general effect of the ordinance in the court proceeding, and depriving me of due process of law, resulting in a fallacious community award of the license to me, which the court set at \$500,000.

The court classified the ordinance as new evidence, which could not be admitted after the trial on a motion for reconsideration or motion to vacate because it was not pleaded at trial. Taking the court's position, laws affecting the material outcomes of trials, resulting in deprivation of property rights can be rendered null and void, even on appeal, because of a party's failure to cite them, even in the face of false testimony. If this was true, most of the law could

not be cited on appeal, even where the court erred on material issues of law pertaining to its ruling.

In re *Forks v. Fletcher*, the superior court's judgment was reversed and remanded. 33 Wn. App. 104, 652 P.2d 16** (1982). The court held that a municipal court was required to take judicial notice of ordinances of the municipality in which it sat, regardless of whether the ordinance was properly pleaded. Where the omitted ordinances materially affect the judgment of the court, reversal is required.

The court disregarded the SeaTac Ordinance No. 13-1001 for two reasons. First, ruling the City might change the ordinance. VRP at 413, lines 5 -16 Second, ruling it was new evidence. VRP at 415, lines 10-15. Based on the court's reasoning, any legal authority that can be "changed" does not have to be taken into consideration by the court, which actually encompasses all laws, constitutions, statutes, and ordinances because all are subject to change, thereby dispensing with judicial notice of laws altogether. This is a clear error of law. It is also an abuse of discretion in applying the law to the facts of any case before it.

The court said it could **not** take judicial notice of the law, only of "things like today is Monday". Here, the court limits judicial

notice to adjudicated facts, and says it cannot take judicial notice of laws and ordinances, ruling contrary to RCW 5.24.010 and RCW 35.21.550. This is an error of law. The result: the court placed a \$500,000 value on a worthless cannabis license application and awarded it to me as part of my property, constituting an abuse of discretion, which increased Kim's share of property proportionately to include all interest in the family home, all of her retirement, and one rental house. I was awarded one rental house with \$84,000 in equity, no retirement, and no share of our family home, which we acquired together and improved with my separate property proceeds from our Federal Way home I acquired prior to the marriage.

Therefore, due to the erroneous valuation of the cannabis license, the appellate court should reverse and remand to the trial court for further proceedings to redistribute the parties property consistent with the ruling of the appellate court.

Assignment of Error No. 2

The court erred by refusing to address the issue of spousal maintenance.

Issues pertaining to assignment of error 2

1. Did the court err by refusing to address the issue of spousal maintenance?

Article 1, section 3 of the Washington State Constitution provides that no person shall be deprived of life, liberty or property without due process of law. Procedural elements of this constitutional guaranty are notice and the opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *Wenatchee Reclamation Dist. v. Mustell*, 102 Wn.2d 721, 725, 684 P.2d 1275 (1984). Judgments entered in a proceeding failing to comply with the procedural due process requirements are void. *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); *Baxter v. Jones*, 34 Wn. App. 1, 3, 658 P.2d 1274 (1983); *Halsted v. Sallee*, 31 Wn. App. 193, 195, 639 P.2d 877 (1982); *In re Clark*, 26 Wn. App. 832, 837, 611 P.2d 1343 (1980); *Esmieu v. Schrag*, 15 Wn. App. 260, 265, 548 P.2d 581 (1976).

Here, the court would not allow me to raise the issue of spousal maintenance even though it was raised in my brief, since my attorney of record purportedly asked me to waive maintenance towards the beginning of our case. When I realized it was

craziness to waive maintenance, since my wife's income was higher than mine. I fired him. Neither did this attorney research the Seatac ordinance, prohibiting the sale of marijuana. His counsel was purely ineffective, and deprived me of my fundamental right to have the court consider the statutory elements in dissolution, including division of property and liabilities, spousal support, etc. Accordingly, here, I will restate my case for spousal maintenance as argued in my trial brief.

Under RCW 26.09.090, the statutory maintenance factors include “(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party; (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances; (c) The standard of living established during the marriage or domestic partnership; (d) The duration of the marriage or domestic partnership; (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking

maintenance; and (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.” The following are rules of law quoted verbatim by Washington State Courts. I'm asking the court to be mindful of the application of these cases in make a just decision in our case.

“The court reviews a trial court's award of maintenance for abuse of discretion. In re the *Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999). An award of maintenance that is not based on a fair consideration of the statutory factors constitutes an abuse of discretion, so I will discuss the statutory maintenance elements under RCW 26.09.090 . In re the *Marriage of Crosetto*, 82 Wn. App. 545, 558, 918 P.2d 954 (1996) Ultimately, the court's main concern must be the parties' economic situations post-dissolution. In re the *Marriage of Williams*, 84 Wn. App. At 268 (1996) The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of relevant factors, the award must be just. In re the *Marriage of Bulicek*, 59 Wn. App. 630, 633, 800 P.2d 394 (1990) A spouse's right to receive social security benefits is nontransferable and nonassignable. 42 U.S.C. § 407(a); In re

Marriage of Zahm, 138 Wn.2d at 220-221 Nevertheless, our Supreme Court has held that a trial court may consider divorcing spouses' social security benefits when fashioning a just and equitable maintenance award. *Zahm*, 138 Wn.2d at 227. Consideration of such benefits aids the trial court in determining the relative needs of the parties and their respective ability to pay maintenance. *Zahm*, 138 Wn.2d at 227 An award of maintenance that is not based on a fair consideration of the statutory factors constitutes an abuse of discretion.”

The paramount concern is the economic condition in which the decree will leave the parties. In re *Marriage of Tower*, 55 Wash. App. 697, 700, 780 P.2d 863 (1989), *review denied*, 114 Wash. 2d 1002, 788 P.2d 1077 (1990). The parties' relative health, age, education and employ-ability are also considered. In re *Marriage of Dessauer*, 97 Wash.2d 831, 839, 650 P.2d 1099 (1982) "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, *review denied*, 86 Wash.2d 1001 (1975) A trial court has broad discretion in its division of property. *Baker v. Baker*, 80 Wash. 2D 736, 747, 498 P.2d 315 (1972)

Under RCW 26.09.090(a), the first element of consideration for maintenance is weighing the financial resources of the party seeking maintenance, including the separate and community property awarded to each spouse and the ability of each spouse to meet his or her needs independently, as well as accounting for children. We have two minor children. My average annual income over the last three years is approximately \$27,000. My trial brief is indexed in the Clerk Papers. CP 291-306

My wife's income is \$240,000, since she signed a new contract, earning \$120/hr. See my Exhibit No. 8 (Exhibit 108) The Cle Elum family home will likely be awarded to my wife because the children reside with her. My financial resources include my monthly income. I have no retirement account. My wife has ample income to buy health insurance, but I do not, so I need maintenance to acquire health insurance.

My wife has a 401k, valued at \$180,000. Presently, my parents are allowing me to live in a home that they own, but I need additional income to meet my needs. If our rental properties are awarded to me, I will have to income producing assets, but the income from them is only a couple hundred dollars above the monthly mortgage obligation, so the rentals will not contribute much

to my basic necessities. My monthly income is about \$2,000.00, my wife's monthly income is \$20,000.00. My financial declaration was filed with my brief. My wife convinced the court to use a lower figure for her income, but \$20,000 a month is her current income.

Regardless of the exact income of my wife, it was undisputed that her income was several times mine. Given this material fact, the issue of maintenance was a substantial claim I raised before the court which is also a statutory issue in the same class as the division of property. I contend the purported waiver of maintenance was in consideration of a larger share of our marital property, not a lesser share, which is what resulted at the trial. Therefore, I believe it was an abuse of discretion for the court to deny my claim for maintenance, based on the disparity of our incomes and the statutory analysis required by the court under RCW 26.09.090.

Under RCW 26.09.090(b) the second element of maintenance consideration is the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances. Since I am self-employed as a mechanic and will continue in the same occupation, I'm not seeking maintenance for retraining in another occupation.

Under RCW 26.09.090(c), the third element is the standard of living established during the marriage. In our case, we were married on July 22, 2006, and separated August 1, 2016, but we were together for twelve years in our own residence. Due to Kim's income, our standard of living established during our marriage has been plentiful, because her income is no less than five times an average income household. Considering the standard of living during our marriage, temporary maintenance is fair for me to adjust to life without the full support of my wife. RCW 26.09.090 requires that the maintenance elements to be confined to the spouses. Presently, my parents are sharing the burden of my support by allowing me to live in their Cle Elum home, but the law requires the spouse who has the ability to pay to be the source of maintenance. I'm in need of maintenance to support myself and to adjust my lifestyle accordingly.

RCW 26.09.090(d), the fourth element is the duration of the marriage. We were married for eleven years and lived together twelve years. The longer the marriage, the more important the consideration of maintenance, since more years means the more time a spouse would naturally have relied on the other spouse for support. Considering the twelve years we were together, I believe

the law requires Kim to pay me maintenance, due to my financial reliance on her support all these years.

Under RCW 26.09.090(e), the fifth element of maintenance is the age, physical and emotional health of the spouse seeking maintenance. I'm 44 years old. I'm in good physical and emotional health.

Under 26.09.090(f), the final element of maintenance is the ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance. Kim's income of \$20,000 a month is evidence that she is able to meet her own needs and to pay monthly maintenance to me as well, with little effort.

Therefore, considering the disparity of our incomes, my low income, the duration of our marriage, the standard of living during the marriage, my inability to engage in substantial gainful employment comparable to Kim and her ability to pay, I'm requesting monthly maintenance for five years at \$5,000/month. It was error for the court to refuse to address the issue of spousal maintenance, considering all of the above.

Assignment of Error No. 3

The court erred by ruling the quit claim deed, conveying the Cle Elum family home, was a valid conveyance from the husband to the wife, as the wife's separate property.

Issues pertaining to assignment of error 3

1. Did the court err by ruling the quit claim deed, conveying the Cle Elum family home, was a valid conveyance from the husband to the wife, as the wife's separate property.

If a spouse traces a separate property interest in the community home, the separate property interest is preserved. I will restate my trial court contention that I have a separate property interest in the Cle Elum property and that the quit-claim deed she prepared for me to transfer my title in the home to her should be voided by the court.

Under RCW 26.09.080, the law provides, "In a dissolution proceeding, before dividing the property the trial court must consider all relevant factors, including but not limited to:

- (1) The nature and extent of the community property;
 - (2) The nature and extent of the separate property;
 - (3) The duration of the marriage or domestic partnership;
- and

(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.”

The court must have in mind the correct character and status of the property before any theory of division is ordered. *Brewer v. Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999) Distribution of property by the trial court should be disturbed only if there is a manifest abuse of discretion. *Brewer*, 137 Wn.2d at 769 But the characterization of property as community or separate property is a mixed question of law and fact. *In re the Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000) "The time of acquisition, the method of acquisition, and the intent of the donor, for example, are questions for the trier of fact." *In re Marriage of Kile*, 186 Wn. App. 864, 876, 347 P.3d 894 (2015). The ultimate characterization of property as community or separate is a question of law that this court reviews de novo. *Kile*, 186 Wn. App. 864 at 876.

The character of property as separate or community property is determined at its acquisition date. *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009) "Separate property will remain separate property through changes and

transitions, if the separate property remains traceable and identifiable. ..." *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003).

An asset is separate property if acquired before marriage, during marriage by gift or inheritance, or during marriage by the traceable proceeds of separate property. RCW 26.16.010 *In re Marriage of White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001). Property acquired during marriage is generally presumed to be community property, and the party asserting otherwise has the burden of proving it was acquired using separate funds by clear and convincing evidence. RCW 26.16.030 *Skarbek*, 100 Wn. App. at 451 his requires the proponent of the separate property to trace the funds used to acquire the property with some degree of particularity. *Berol v. Berol*, 37 Wn.2d 380, 381-82, 223 P.2d 1055 (1950)

"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." *Borghi*, 167 Wn.2d at 484 One way of establishing this is where "the property becomes so

commingled that it is impossible to distinguish or apportion it, then the entire amount becomes community property.” Chumbley, 150 Wn.2d at 5-6. If the party succeeds in doing this, all the funds or property into which the funds were invested belong to the community. In re *Bing's Estate*, 5 Wn.2d 446, 456-57, 105 P.2d 689 (1940)

A separate property contribution to community property gives rise to a separate property equitable lien on the community property. The claim for an equitable lien must be supported by direct evidence of a contribution to the property on which the lien is asserted."

GORDON W. WILCOX & THOMAS G. HAMMERLINCK,
WASHINGTON FAMILY LAW DESKBOOK, § 38.6 at 38-20, 38-21
(citing *Guye v. Guye*, 63 Wash. 340, 352-53, 115 P. 731 (1911)). See also *Farrow v. Ostrom*, 16 Wn.2d 547, 555-56, 133 P.2d 974 (1943) (holding that equity will impress a lien on community property "in favor of one who is clearly shown to have contributed separate funds to its acquisition or to the enhancement of its value thereafter."); 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 1234 at 693-95 (5th ed. 1941) (theory of equitable liens has ultimate foundation in contracts, express or implied, which either deal with or in some manner relate to specific

property; equity regards such contracts as creating a charge upon the specific property rather than a right to a general pecuniary recovery such as would be granted by a court of law).

Here, Kim and I took title to our Cle Elum home as husband and wife, during our marriage, so there is a presumption that the property is community under RCW 26.16.030. However, if a spouse traces a separate property interest in the community home, the separate property interest is preserved. *Chumbley, supra*. So now I will present my contention that I have a separate property interest in the Cle Elum property.

In 1999, I was purchasing a home from my parents, Bruce Richard Wallace and Debra E. Wallace. The home was located at 26615 16th Ave. S, Des Moines, WA 98198-9326. In order to sell the home with enough equity to purchase my Federal Way home, my parents conveyed and quit-claimed their interest in the Des Moines property to me, on January 4, 2005, which was recorded contemporaneously with the sale of the property to Earl A. Harper and Doreen E. Harper, under King County recording numbers 20050203001859 and 20050203001860, respectively. The Des Moines home sale netted me \$178,302, of which, \$128,300 was

used as a down payment to purchase my home in Federal Way. The statutory warranty deed for the sale of the Des Moines property and the statutory warranty deed for the purchase of the Federal Way property were both signed on January 27, 2005, but the Des Moines deed was recorded first on February 3, 2005 to free the equity for the down payment to purchase the Federal Way property, and the statutory warranty deed for the Federal Way property purchase was recorded on February 4, 2005, thereby evidencing some degree of particularity, since neither Kim nor I had the down payment from any other source to purchase the Federal Way property. I've attached the Deeds as my Exhibit 1 (Exhibit 101) for the purchase and sale of the Des Moines Property, and my Exhibit 2 (Exhibit 102) for the purchase of the Federal Way property, thereby satisfying the evidence standard of some degree of particularity for tracing a separate interest in property. *Berol, supra* I present these deeds to the court and request the court admit them into evidence to satisfying the tracing requirement of separate property contribution to community property.

Kim and I took title to the Federal Way home in both of our names in 2005, but we were not married at the time. A copy of the Statutory Warranty Deed of taking title is attached as my Exhibit 2A

(Exhibit 102A). Since the whole down payment of \$128,300 was provided by me, the whole down payment constitutes my separate interest in the property, even though we held the property in both of our names and later refinanced the mortgage in both of our names as husband and wife after we married. Arguably, my separate interest was reduced when the equity was reduced when we refinanced after we married. However, after we sold the Federal Way property and it was recorded on February 14, 2014, under King County Auditor No. 20140214001416, the proceeds from the sale were wired to Kim's bank account on February 18, 2014 in the amount of \$63,171.51, thereby documenting the separate property contribution, evidencing some degree of particularity. See my Exhibit 2B (exhibit102B) for Statutory Warranty Deed. See my Exhibit 2C (Exhibit 102C) showing the bank account transfer to Woodstone Credit Union. We used the money to construct the garage with an upstairs apartment on our Cle Elum Property, thereby representing my separate property interest in our community property home.

We purchased our Cle Elum property for \$110,000 and acquired title as husband and wife under a bargain and sale deed, executed on January 25, 2011, and duly recorded on February 4, 2011 in the Kittitas County Recorder's Office under recording no.

201102040028. A copy of the bargain and sale deed is filed with my brief as my Exhibit 3 (Exhibit 103). We also executed a Deed of Trust on January 31, 2011, as borrowers and as husband and wife, which was recorded contemporaneously with the bargain and sale deed under 201102040029. A copy of the deed of trust is filed with my brief as my Exhibit 4 (Exhibit 104). The community interest basis is \$110,000 based on the purchase price. My separate property interest basis is \$63,171.51. To compute my separate property interest percentage, \$63,171.51 is divided by the total basis or \$173,171.51, resulting in a 36.47% separate interest. The remainder is the community interest or 63.53%. The same ratio applies to the fair market value to determine community and separate property interests in the property. I've filed a certified appraisal of the property as my Exhibit 8 (Exhibit 108), evidencing its fair market value at \$386,000.

Finally, with respect to our Cle Elum property, there is an issue of a quit claim deed, executed by me on August 6, 2014, which Kim prepared for me to sign, representing it was necessary to protect our home from creditors. The quit claim deed is attached as my Exhibit 5 (Exhibit 105).

For the following reasons, I request the court to order that the quit claim deed is null and void.

The character of property as separate or community property is determined at its acquisition date. *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009)

The deed purports to be executed for two reasons, including “to correct vesting” and “to separate community property”. We took title to the property as husband and wife because we were married, so that was not a mistake which needed correction. See the Bargain and Sale Deed filed as my Exhibit 4A (exhibit 104A). We could not separate community property in the Bargain and Sale Deed because we did not own the property, so there was no community property to divide or separate. If it was Kim’s intention to separate our community property by having me quit claim my interest to her, it failed because she did not sign the deed, so her community interest was not changed, of which I have a community property interest. Since only I signed the quit claim deed on August 6, 2014, only my community property interest could have been transmuted into her separate estate. Her community property interest remained intact,

so I continued to have an interest in my Kim's community property. This assumes the deed is legally enforceable in all other respects.

If it was our intent to correct the acquisition deed with the deed signed on August 6, 2014, and to hold Kim's interest as her community property, then the deed at the time of acquisition would have read: "my wife, holding the husband's interest as to an undivided one half interest as her separate estate" and "my wife, holding her undivided one half interest as her community property." Why would either of us intend for my half of the property to be her separate estate and her half to be community property? It seems strange to me that either of us would have intended to hold title in such a bazaar manner.

If the deed was intended to separate community property between us, both of us must be grantors and grantees, otherwise, there is no separation or division of community property into separate estates. The deed must be signed by both spouses as community property holders to transmute the community property interest of both spouses. It is only signed by me, so the deed does not divide or separate our community property into separate estates, so it fails to do what it expressly states is its purpose.

In addition to the above, the deed includes contradictory language in the consideration clause, stating “for and in consideration of zero (\$0.00) dollars” and then “in hand paid” both cannot be true, so the consideration clause contradicts itself and nullifies itself by its own terms, rendering the deed void for contradictory consideration.

Therefore, for the above reasons, I'm asking the appellate court to order the quit claim deed, dated August 6, 2014 and recorded under auditor no. 201408200035 in the Kittitas County Recorder's Office, be declared null and void by the court.

Assignment of Error No. 4

The court erred by imputing the husband's income according to his rate of pay while living in Federal Way, instead of Cle Elum, and using the wife's former income prior to her present rate of pay.

Issues pertaining to assignment of error 4

1. Did the court err by imputing the husband's income according to his rate of pay while living in Federal Way, instead of Cle Elum, and using the wife's former income prior to her present rate of pay?

For child support the court is required to use the present rate of pay if it is known. The trial court used my (husband) rate of pay

while I lived in Federal Way and had my business in SeaTac prior to moving to Cle Elum in 2014. Mechanics in Cle Elum earn less than mechanics in the Seattle area. This was an abuse of discretion by the court. I presented evidence of Kim present rate of pay in the amount of \$20,000/month.

At trial Kim introduced some exhibits from her personal research, showing available jobs for mechanics and their rates of pay. VRP 140, lines 13-19 Mr. Cole asked Adam Robertson on direct examination about these positions and if I would be qualified for them. Mr. Cole asked Adam Robertson if I was qualified to work as a Honda Service mechanic, paying \$5,500 to \$9,000 a month. Mr. Robertson answered "Yes". However, there is no reference to where the job was located. VRP 140, lines 13-19 Next, Mr. Cole asked Mr. Robertson if I was qualified to work at Kirkland Buick, earning \$75,000/year. Mr. Robertson answered "Yes" VRP 140, lines 20-23. Next, Mr. Cole ask Mr. Robertson if I was qualified to work at Greg's Japanese Auto. Mr. Robertson answered "yes". VRP 140 line 24 to page 141, line 3. Greg's is located in Bellevue and Tukwila. Last, Mr. Cole asked Mr. Robertson if I was qualified to work in Monroe at Reardan Dodge. Mr. Robertson answered "Yes". All of this research was presented by Kim, who presented it

with the intent to show I was underemployed in Cle Elum. Kim could not find a job east of the mountains to show I was underemployed. Kim and I moved to Cle Elum together to raise our family. I'm not living in Cle Elum as a result of a decision made on my own to lower my child support obligation. Adam Robertson was a former business associate. I contested his testimony because we had a falling out, so he was a hostile witness against me, as far as I was concerned. The court overruled my objection and allowed him to testify. Even with our hostile history, Adam did not testify that I am under-employed in Cle Elum. Kim presented as much evidence as she could find to prove I was under-employed and she could not do so in Cle Elum. The fact is, the evidence the Kim presented is evidence that I am not under-employed because if there was a job to be had in Cle Elum, doubtless, Kim would have presented it as evidence of higher paying mechanic jobs. All of the jobs cited as evidence against me, are in the greater Seattle area, and are irrelevant, since I live in Cle Elum, due a joint decision made by Kim and I while married. Consequently, it was an abuse of discretion for the court to consider these jobs as evidence of under-employment, and to impute my income for child support at \$5,000/month accord. With respect to Kim's income, the court should use her current rate

of pay in the amount of \$20,000/month gross. Kim claims her new contract is not guaranteed, but neither was her old contract where she was an independent contractor, earning \$14,000/month gross . VRP 111 to112.

For these reasons, I'm asking the court to reverse the trial court decision regarding child support and to enter an order consistent with my average rate of pay in the amount of \$2,700/month gross.

CONCLUSION

Based on the aforementioned, the appellant requests the court to reverse the decision of the trial court entered on November 20, 2017, and order that the court enter orders consistent with ruling of the Appellate Court.

May 16, 2018.



Respectfully submitted,
Signature

James Wallace

Affidavit of Service to Parties is filed together with this Brief.

Washington State Court of Appeals, Division Three

James Wallace

Appellant,

Appellate Case No. 357490

and

Kim Collins

Respondent.

Declaration of Service of
Appellant's Brief

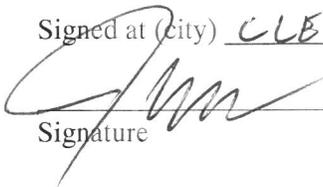
Kittitas County Superior Trial Court
No. 16-3-00124-2

I, James Wallace, declare that I sent my Appellate Brief on June 1, 2018, via first class U.S. Mail to the following persons at their respective addresses.

Richard T. Cole, P.S., P.O. Box 638, Ellensburg, WA 98926, Attorney for Kim Collins

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) CLB BLUM, (state) WA on (date) 6/1/18.


Signature

James Wallace
Print or Type Name