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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 35749-0-III

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

In re the Marriage of

KIM COLLINS,

Respondent,

vs.

JAMES WALLACE,

Appellant.

LAW OFFICES OF RICHARD T. COLE, P.S.
BRIEF OF RESPONDENT

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I. INTRODUCTION

This brief is written, inasmuch as possible, in response to Appellant's brief appealing Judge Blaine Gibson's 20 November 2017 ruling in Kittitas County Superior Court in Case. No. 16-3-00124-2. Appellant's brief makes a minimum of 120 references to the record whose location in the trial transcript is not identified. Further, appellant has made at least 20 assertions for which he has provided no supporting information or citation. This has made it nearly impossible to respond to the bulk of Mr. Wallace's argument. We have responded to the extent that we were able and renew our objection to Appellant's brief as being improper.

II. STATEMENT OF THE CASE

Kim Collins (Respondent, hereinafter referred to as Ms. Collins) and James Wallace (Appellant, hereinafter referred to as Mr. Wallace) were married on 22 July 2006. They were married for ten years. On 24 August 2016, Ms. Collins filed a Petition for Dissolution of Marriage (Kittitas County Superior Court Case No. 16-3-00124-2). During the marriage, the couple had two children, born in 2007 and 2009, who were aged seven and eight at the time of the filing of the Petition for Dissolution of Marriage.

Prior to the marriage, Ms. Collins and Mr. Wallace cohabitated. In 2004, Ms. Collins sold her Seattle home and moved into a Des Moines residence owned by Mr. Wallace. The proceeds of the sale of Ms. Collins's condominium were used to purchase a rental property at 6221 S. Oakes in Tacoma, Washington. Later that year, Mr. Wallace sold his Des Moines home. The proceeds of that sale were used as part of the down payment on the couple's purchase of a new home in Federal Way, Washington. The purchase of the Federal Way home closed in February 2005. This all occurred prior to their marriage of 22 July 2006.

In December 2006, the couple purchased a second rental property in Tacoma and funded the down payment with monies from Ms. Collins's separate account. Likewise, funds from Ms. Collins's separate account were used to purchase a vacation property in Cle Elum, Washington, in 2011. In 2014, seeking a better and more rural environment in which to raise their children, Ms. Collins and Mr. Wallace sold the Federal Way home, and the family moved permanently to the Cle Elum property.

When they purchased the Cle Elum property, which is approximately five acres, in 2011, the only improvement on the land

was a small manufactured home. In 2012, Ms. Collins separately financed the construction of a garage, with a studio apartment upstairs, which was intended to house the family's recreational vehicles and to provide a garage for the maintenance and repair of the family's motor vehicles. In 2014, Ms. Collins separately financed extensive renovations to the home. Later, a small barn was constructed on the property for the purpose of housing their daughter's horse and attendant equine equipment and supplies.

Throughout their marriage, Ms. Collins and Mr. Wallace maintained separate bank accounts. At the beginning of their marriage, the couple had agreed to share expenses equally. While Mr. Wallace did occasionally contribute to the household expenses during the first year of marriage, after that time Ms. Collins paid all household expenses entirely on her own.

Ms. Collins and Mr. Wallace are both self-employed. Their separate businesses were licensed and extant prior to their marriage. Mr. Wallace had a car-rental entity, Express Rent-a-Car in SeaTac, that he operated under JBD Wallace, LLC. With a decline in that business, Mr. Wallace began an automotive repair business (*i.e.*, EuroAsian Garage, operated under PWR Enterprises, LLC) where he serviced primarily foreign automobiles.

Mr. Wallace is an experienced and talented master mechanic possessing numerous ASE (Automotive Service Excellence, also known as the Blue Seal of Excellence) certifications. Ms. Collins, a computer expert, owns Collins Consulting, LLC, established in 2005; her expertise is in healthcare-related software. She has worked as an independent contractor providing consulting services for Facets software since 2006.

After the family moved, Mr. Wallace continued to maintain his business in SeaTac and commuted there on a daily basis. In 2015, Mr. Wallace's business was evicted from its SeaTac location for nonpayment of rent. Mr. Wallace moved his extensive collection of automotive tools and equipment to the Cle Elum property and began operating his automotive repair business there even though the property was not zoned for that use. Throughout the marriage, Ms. Collins – in addition to working full-time in her own business – would often work in Mr. Wallace's business assisting him with bookkeeping. She was not compensated for this work. Mr. Wallace operated his business on a primarily cash basis.

When Ms. Collins discovered that Mr. Wallace was not complying with tax laws, she became concerned for her personal liability and the impact that this could have on her family.

Thereafter, she filed all her returns to the Internal Revenue Service as married filing separately (dating back to at least 2009). Prior to and throughout the marriage, Ms. Collins complied with all state and federal tax laws, including those regarding self-employment taxes and quarterly filings. Mr. Wallace, conversely, was not filing his federal income tax returns, was not paying his quarterly self-employment taxes, and was not remitting to the Washington Department of Revenue the sales taxes that he owed for repair work performed by his business. This was a subject of grave concern for Ms. Collins.

After Mr. Wallace had not filed tax returns for six or seven consecutive years, Ms. Collins and Mr. Wallace discussed Mr. Wallace's malfeasance and the danger it posed to the family. As a result of these discussions, it was agreed that Mr. Wallace would forfeit any claim to the Cle Elum property – making it Ms. Collins's separate property – so that there would be no risk of tax liens against Mr. Wallace or his business being placed against the property. The quit claim deed that Mr. Wallace signed was prepared by a bank as part of Ms. Collins's refinancing of the Cle Elum home, a process that occurred over a period of several weeks, during which time Mr. Wallace had ample opportunity to ask

questions and seek counsel if he had any misgivings about making this gift to Ms. Collins.

In 2013, the State of Washington legalized the retail sale of marijuana. Mr. Wallace applied for a license to operate a retail store in the cities of SeaTac and Auburn and participated in a lottery for this license. He won the lottery and was granted the license. Over the next several years, Mr. Wallace made no attempt to utilize this license or to erect a retail marijuana store. Tom Gordon, a recognized expert who, at the time of trial, had brokered 69 previous transactions involving the sale of these marijuana licenses, obtained a bona fide buyer prior to trial who was willing to purchase this license from Mr. Wallace for \$700,000.

At trial, Judge Gibson awarded the marijuana license to Mr. Wallace, finding it to be valued at \$500,000. The family home, whose appraised value was \$386,000, was awarded to Ms. Collins, who held title as her separate property. Each party received one of the Tacoma rental homes, which were located on the same street and were comparable in value. In addition, each party was awarded that party's business and any accompanying business assets. The parties had previously agreed on the disposition of various items of personal property. Ms. Collins was made the

custodial parent and Mr. Wallace was awarded visitation according to the proposed parenting plan that he submitted. The court ordered child support in accordance with the Washington State Schedule, based on the couple's combined incomes, with Mr. Wallace being the obligor and Ms. Collins the obligee. Mr. Wallace's income was imputed at \$60,000, considerably less than what the court determined he was capable of earning. Mr. Wallace's support obligation was established at \$793.92 per month, with \$50.00 per month to be paid as his proportionate share of expenses for the children's extracurricular activities. No maintenance was awarded.

Mr. Wallace, who represented himself *pro se* at trial, had benefit of counsel from 25 August 2016, the day after this action was initiated, until 7 September 2017, 19 days prior to trial, when Mr. Wallace fired his attorney. Despite the expectation under the law that *pro se* parties are held to the same standard as attorneys, the trial court took pains to explain the law to and to instruct Mr. Wallace on no less than 41 occasions during the trial.

Mr. Wallace now appeals the trial court decision, alleging that the court erred in its ruling in four areas: in valuing the marijuana license at \$500,000; in refusing to address and award

spousal maintenance; in ruling the quit claim deed conveying the Cle Elum property from Mr. Wallace to Ms. Collins was valid; and in the determination of incomes for child support (*i.e.*, imputing income to Mr. Wallace because the court found him underemployed).

Mr. Wallace objects to the valuation of the marijuana license at \$500,000. The court based its valuation of this asset on Tom Gordon's testimony at trial. Mr. Gordon was an expert witness called by Ms. Collins. Mr. Wallace was made aware of her intent to use Mr. Gordon as a witness – as well as the expected content of his testimony – in Ms. Collins's discovery response handed over to Mr. Wallace's attorney in April 2017. Mr. Wallace made no attempt to provide any evidence that contradicted Mr. Gordon's testimony and called no witnesses to testify as to the purported value (or lack thereof, as Mr. Wallace maintains).

Similarly, Mr. Wallace submitted no evidence that called the validity of the quit claim deed into question, and the court found the conveyance to be valid in establishing the Cle Elum property as Ms. Collins's separate property.

While Mr. Wallace complains that the trial court refused to address the issue of spousal maintenance, the court did in fact

consider this issue, despite it not having been properly raised at any point in the proceedings. Ms. Collins, in paragraph 1.10 of her Petition for Dissolution of Marriage filed 24 August 2016, stated that no maintenance was required. Mr. Wallace agreed with this in his response, which was filed on 5 April 2017 and which Mr. Wallace signed. Mr. Wallace first raised the issue of maintenance in his trial brief, which was delivered to Ms. Collins's attorney, Richard T. Cole, on the eve of trial. Nevertheless, the court both considered and discussed the statutory factors regarding maintenance, found in RCW 26.09.090, and found that the marriage was not a lengthy one; that Mr. Wallace, relatively young and in good physical health, was an expert in his field and required no additional training or education; and that Mr. Wallace was underemployed, had considerably higher earning capacity than he claimed, and was thus well able to meet his needs and continue to enjoy a good standard of living. The court also noted that Mr. Wallace engaged in questionable business practices, which had damaged his credibility with the court.

Mr. Wallace's credibility was also a factor in the court's determination of income. Although Mr. Wallace claimed that he had prepared his federal income taxes faithfully every year, he had

in fact not filed any return for at least ten years. Mr. Wallace ran his business on a primarily cash business, making it difficult to determine his actual income. The court based its finding as to Mr. Wallace's income and earning capacity on invoices submitted by Ms. Collins, testimony of Adam Robertson and Ms. Collins, and evidence of salaries being earned by mechanics with skills and abilities comparable to Mr. Wallace's.

The court made its ruling based on the evidence and testimony presented at trial and its ruling is consistent with that evidence and testimony. Based on the foregoing, the trial court has committed no error.

III. ARGUMENT

A. MARIJUANA LICENSE

The court did not err in valuing the SeaTac cannabis retail establishment license/lottery award (hereinafter referred to as the retail store) at \$500,000. During the trial, Tom Gordon, an expert who regularly markets and brokers the sale of cannabis licenses in the State of Washington, testified that he had procured a buyer who was willing to pay \$700,000 for this asset. Transcript of

Proceedings (TOP) at 186, line 1. His testimony corresponded with that of Ms. Collins, who also testified regarding this asset. TOP at 83, lines 9-12 and lines 18-25. Mr. Gordon explained that Mr. Wallace had been granted a 502 retail store license, which Mr. Gordon called “the gold standard.” *Supra*, at 189, line 20 and at 190, line 1. In response to questioning by the court, Mr. Gordon said that after his commission of \$50,000 was deducted, Mr. Wallace would realize \$650,000 for this retail store. TOP at 236, lines 10-14.

In *In re Marriage of Mathews*, the appellate court held, “While the court may have assigned values to property different from those suggested by Mr. Mathews, the court's valuation of the items was within the scope of the evidence and will not be disturbed.” *In re Marriage of Mathews*, 70 Wn. App. 116 (1993), citing *In re Marriage of Soriano*, 31 Wash.App. 432, 435, 643 P.2d 450 (1982).

At trial, Mr. Wallace had ample opportunity to cross examine Mr. Gordon and to present evidence contradicting Mr. Gordon's testimony. In fact, Mr. Wallace's cross and recross of Mr. Gordon absorbed at least 37 pages of the trial transcript. TOP at 189-205, 210-211, 212-220, and 221-231.

The court addressed this issue and said to Mr. Wallace:

You knew well in advance of the trial that Mr. Gordon was going to be their expert witness. You could have taken his deposition, you could have found out what he was going to testify to. You could have brought in witness that – or documents [–] to refute what he was saying. TOP at 415, lines 3-8.

On 20 November 2017, when the court made its final ruling, the court also addressed Mr. Wallace's motion for reconsideration that he had submitted on the issue of the retail store license, finding that it was an attempt to reopen the trial and present additional evidence that could and should have been presented at trial. TOP at 413, lines 7-9. The court explained,

[I]f we allowed people to come in after the trial was over and say well, I didn't know that witness was going to say something that I disagreed with or that I think is false[;] therefore, I'm entitled to present now additional new evidence. Again, the trials would never end.

The purpose of the trial is to have the one period, the one opportunity for everybody to present their case, which is also why we have what's called discovery[,] which is sending interrogatories and taking depositions and so on so that nobody is surprised. TOP at 415, lines 11-21.

Although Mr. Wallace represented himself at trial, he had benefit of counsel from 25 August 2016 – one day after Ms. Collins filed the petition for dissolution – until 7 September 2017, 20 days prior to trial. Ms. Collins filed her petition for dissolution on 24

August 2016. Mr. Wallace's attorney filed his notice of Appearance on 25 August 2016. Ms. Collins indicated her intention to call Mr. Gordon, as well as what he planned to say, in her discovery response submitted to Mr. Wallace on 19 April 2017. TOP at 411, line 1. In reference to his appearing *pro se*, the court noted that Mr. Wallace was held to the same standard as an attorney. TOP at 416, lines 3-5.

The court's valuation was within the scope of the evidence presented at trial. Thus, the court ruled appropriately in assigning a value of \$500,000 to the marijuana retail store. There was no error.

B. MAINTENANCE

The court ruled appropriately in not awarding maintenance. Although Mr. Wallace contends the court did not address the issue of maintenance, this is not precisely the case. The court did in fact address this issue, more than once. TOP at 347, lines 17-21, *id.* at 395, line 14 to 397, line 4.

The court was not required to address the issue of maintenance, because Mr. Wallace did not raise this issue at any point in the proceedings prior to trial, a period that lasted more than a year. TOP at 26, line 22, to 27, line 3. In fact, Mr. Wallace first

addressed the issue of maintenance in his trial brief, which was delivered to Ms. Collins's attorney, Richard T. Cole, on the eve of trial. TOP at 34, lines 23-24. As Mr. Cole pointed out to the court, Mr. Wallace "has basically testified that this was an issue that he was aware of, maintenance, long before last night when I got the trial brief." TOP at 31, lines 21-24.

The court noted that Ms. Collins would be prejudiced if the court were to consider the issue of maintenance at trial. TOP at 34, line 9, to 35, line 21. Among other things, the court indicated that Ms. Collins would not have the opportunity to respond by calling witnesses who could testify to Mr. Wallace's income, a significant issue in the determination of maintenance. TOP at 34, lines 9-22.

Mr. Wallace obtained counsel on 25 August 2016, one day after the Petition for Dissolution of Marriage was filed. Mr. Wallace's counsel filed a Notice of Withdrawal on 28 August 2017, effective 7 September 2017, 29 and 19 days, respectively, from the scheduled date of trial. The intervening time period gave Mr. Wallace ample opportunity to file an amended response to the Petition for Dissolution of Marriage or to move the court for a continuance of the trial if he felt he had been denied effective counsel or if additional time was needed to prepare for trial. TOP at

29, lines 8-11. Ms. Collins's attorney, Richard T. Cole, addressed the former at trial. TOP at 24, lines 18-20. "[P]revious counsel was James Denison, who (sic) I consider a very skilled and accomplished attorney." *Supra*.

In paragraph 1.10 (regarding maintenance) of the Petition for Dissolution of Marriage, filed by Ms. Collins on 24 August 2016, it states that maintenance should not be ordered. In his response, filed 5 April 2017, Mr. Wallace agreed that no maintenance should be ordered. The response was prepared by Mr. Wallace's attorney and signed by Mr. Wallace on 4 April 2017. At the time that Mr. Wallace signed the response, he had been represented by counsel in this matter for 223 days, nearly eight months.

The court found that Ms. Collins alleged in her petition that there was no issue of maintenance and that Mr. Wallace agreed with this position in his response. TOP at 26, line 24, to 27, line 1. In *Brown*, the Court of Appeals found that the trial court had properly rejected a maintenance issue that was not raised until trial. *In re Marriage of Brown*, 178 Wn. App 1003 (COA, Div. I, Nov. 25, 2013), No. 68433-7-1.

Similarly, the *Brown* court found the appellant in that case failed to raise appropriate legal theories, including violation of due

process rights, at trial and, therefore, the Court of Appeals refused to hear them. *Supra*.

Under RAP 2.5(a),

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.... A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

The court in *State v. WWJ Corp.* held that constitutional issues that were not raised at trial could not be considered on appeal. *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999). Mr. Wallace asserts in his appeal that the trial court's failure to consider or award maintenance was a violation of his due process rights. Brief of Appellant at 17. This was not a claim that Mr. Wallace raised at trial; thus, it cannot be heard on appeal.

Likewise, Mr. Wallace's argument for maintenance, which he admits to restating "as argued in my trial brief," cannot be considered on appeal, because Mr. Wallace had not previously

raised this issue despite more than sufficient opportunity to do so. The trial court advised Mr. Wallace that it fully understood his stated concerns about maintenance and ineffective assistance of counsel; however, the court explained that if his attorney had in fact failed to raise the issue, which Mr. Wallace indicated was against his wishes, then that was a matter to be addressed directly with his former counsel. TOP at 30, lines 7-9.

Mr. Wallace's argument is also spurious. He is attempting to educate the Court of Appeals on what constitutes a trial court's abuse of discretion in making an award of maintenance. Brief of Appellant at 19-20. Further, his argument revolves around issues, such as social security and disability, that would not have pertained to this case even if maintenance had been an issue.

In this case, no award was made, because Mr. Wallace had agreed in his response to the Petition for Dissolution that maintenance was not to be considered. TOP at 29, lines 8-11.

Even though the court held that Mr. Wallace had not properly raised the issue of maintenance, the court nonetheless addressed it. TOP at 395-396. While we contend that the trial court had no authority to award maintenance, as the issue had not been previously or properly raised by Mr. Wallace, we address the

statutorily listed factors in the event the Court of Appeals were to consider them. The trial court considered these factors in making its decision. TOP at 395, lines 16-19.

Maintenance awards are governed by RCW 26.09.090. The statute reads, in relevant part:

(1) In a proceeding for dissolution of marriage ... the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

- (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.

Under RCW 26.09.090(1)(a), the court examined Mr. Wallace's financial resources, as the party seeking maintenance, including any separate or community property awarded to him and his 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." Here, Mr. Wallace does not have primary residential time with the minor children, which precludes consideration of the last item in this paragraph, because he is the obligor rather than the obligee.

After considering the evidence presented at trial, the court found that Mr. Wallace was underemployed. TOP at 396, lines 3-7, *id.* at 396, lines 18-20. The court noted that Mr. Wallace was supremely qualified in his field and had the ability to earn a very good income. TOP at 396, lines 20-23. In addition, the court was mindful of the fact that Mr. Wallace's deceptive business practices (*i.e.*, operating on primarily a cash basis, failing to report his earnings as required under the Internal Revenue Code, and collecting but not remitting sales taxes to the Washington Department of Revenue) made it difficult to reliably know exactly

what his income was. The trial court advised Mr. Wallace that the foregoing damaged his credibility before the court. Lastly, the trial court noted that after all the assets had been divided, Mr. Wallace would have “very substantial” assets, such that there could be no question of whether his financial condition warranted an award of spousal maintenance to him. TOP at 396, line 23, to 397, line 4.

As to RCW 26.09.090(1)(b), which address 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: Mr. Wallace admitted in his brief that he was self-employed as a mechanic and planned to continue in that profession. Mr. Wallace thus conceded that this factor did not apply to him. Brief of Appellant at 22.

When reviewing RCW 26.09.090(1)(c), the court considers the standard of living established during the marriage or domestic partnership. There was no evidence presented at trial that indicated the Collins-Wallace family lived extravagantly. To the contrary, they lived in a small manufactured home with a shop immediately adjacent, a small, unfinished barn, and an unlandscaped yard bereft of any plantings save a couple of bushes and flowering plants directly in front of the house. TOP at 65, line

14. More than half of the property was devoted to keeping a horse, which made it unsuitable for any other use and the remainder of the property was ungrouped. Furthermore, as the court noted, typically when people get divorced, the standard of living for both is reduced. TOP at 395, lines 20-23.

When examining RCW 26.09.090(1)(d), the court looks at the duration of the marriage. Ms. Collins and Mr. Wallace were married on 22 July 2006. Ms. Collins filed her Petition for Dissolution of Marriage on 24 August 2016, making this a 10-year marriage. In categorizing the length of a marriage, the courts evaluate whether a marriage is short, mid-length, or long.

Generally, the courts consider a marriage of long duration if it has lasted 25 years or more. Winsor, "Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions," *Washington State Bar News*, vol. 14, page 16 (Jan. 1982). A marriage of five years or less would be considered one of short duration. *Id.* A marriage of ten years is mid-length. The Collins-Wallace union is in fact fifteen years shy of being called long. The court addressed this issue is stating that the marriage was relatively short and that typically maintenance was not awarded to any party in marriages of this duration. TOP at 395, line 24, to 396, line 3.

The *Wright* court held that “[a] trial court is not required to place the parties in precisely equal financial positions at the moment of dissolution of a marriage; rather, if the spouses were in a long-term marriage of 25 years or more, the court's objective is to place the parties in roughly equal financial positions for the rest of their lives.” *In re Marriage of Wright*, 179 Wn. App. 257, 262, 319 P.3d 45 (2013). Being that this was not a lengthy consideration, this was not a priority for the trial court.

Under RCW 26.09.090(1)(e), the court considered the age, physical and emotional condition, and financial obligations of Mr. Wallace, the spouse seeking maintenance. The court found Mr. Wallace to be young and healthy and determined that maintenance was not warranted according to this factor. TOP at 295, line 20.

It was not necessary for the trial court to examine RCW 26.09.090(1)(f), which deals with the ability of the spouse from whom maintenance is sought to meet her needs and financial obligations while meeting those of the spouse seeking maintenance, because the court did not award maintenance to Mr. Wallace.

Mr. Wallace either misstates or misunderstands the purpose in the statutory factors of RCW 26.09.090. The factors are neither

weighted nor listed in order or importance. They are factors for the court to consider, but none by itself is dispositive. Further, the list is not exhaustive and the courts may consider other “relevant factors.” RCW 26.09.090(1).

Aside from these statutory factors, the paramount consideration in awarding maintenance is post-dissolution economic circumstances. *In re: Marriage of Williams*, 84 Wn. App. 263, 927 P.2d 679 (1996), review denied, 131 Wn.2d 1025 (1997); *In re Marriage of Terry*, 79 Wn. App. 800, 866 P.2d 635 (1993); *In re Marriage of Stenshoel*, 72 Wn. App. 800, 866 P.2d 635 (1993). The amount of maintenance is limited by need rather than ability to pay. *In re Marriage of Foley*, 84 Wn. App. 839, 930 P.2d 929 (1997). Furthermore, the amount of property may be considered when awarding maintenance. *In re Marriage of Estes*, 84 Wn. App. 586, 929 P.2d 500 (1997); *In re Marriage of Crosetto*, 82 Wn. App. 545, 918 P.2d 954 (1996); *In re Marriage of Wright*, 78 Wn. App. 230, 234, 896 P.2d 7354 (1995).

Where there is no need of maintenance, the courts have no authority to award it. *In re Marriage of Foley*, 84 Wn. App. 839, 930 P.2d 929 (1997). Here, the court found that Mr. Wallace would be in very favorable economic circumstances and that he would have

substantial assets post-dissolution; therefore, Mr. Wallace had no need for maintenance, and the trial court ruled appropriately in denying his request for maintenance. TOP at 397, lines 2-4.

C. QUIT CLAIM DEED

The trial court did not err when it found that the family home was separate property properly conveyed to Ms. Collins.

The family home – the property at issue in the quit claim deed – was located at 6121 Westside Road, Cle Elum, Washington 98922. TOP at 5, lines 16-18. In *Brewer v. Brewer*, the Washington State Supreme Court noted its practice in prior decisions of favoring the characterization of property as community rather than separate unless there was clearly no question as to its character. *Brewer v. Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

This issue was also addressed by the court in *In re Marriage of Shannon*:

The status of property, when once fixed, retains its character unless changed by deed, agreement of the parties, operation of law, or estoppel. Separate property continues to be separate so long as it can be clearly traced and identified. *In re Marriage of Shannon*, 55 Wash. App. 137, 143, 777

P.2d 8, 12 (1989), citing *In re Witte's Estate*, 21 Wn.2d 112, 125, 150 P.2d 595 (1944) (emphasis added).

Here, the court reviewed a quit claim deed that clearly conveyed the family home at 6121 Westside Road solely to Ms. Collins. Regardless of the characterization of the property prior to the conveyance (*i.e.*, August 2014), the property ceased to be community property when one of the community claimants, *i.e.*, Mr. Wallace, gifted his interest to Ms. Collins, thereby disclaiming any present or future interest in the property. At the point that the property was quit claimed to Ms. Collins, its character was clearly changed by deed from community to separate property.

Evidence at trial provided a history of the couple's finances and the rationale behind Mr. Wallace deciding to deed the entire property to Ms. Collins. Direct examination of Ms. Collins revealed that the parties maintained separate accounts and separate finances. TOP at 61, lines 8-22. Ms. Collins's testimony further revealed that Mr. Wallace did not contribute to the household even prior to the family moving to the 6121 Westside Road property. TOP at 62, lines 4-10. In addition, Ms. Collins separately funded considerable improvements to the property. TOP at 66, lines 2-8; *id.* at 67, lines 11-13.

The quit claim deed was executed in August 2014. TOP at 67, lines 5-6. Ms. Collins's testimony revealed that Mr. Wallace and she agreed that the family home should be deeded solely to her. TOP at 67, lines 8-17. At the time, Mr. Wallace had failed to file tax returns to the Internal Revenue Service for approximately a six- or seven-year period. TOP at 67, lines 14-15. In addition, he was not remitting to the Washington Department of Revenue the sales taxes that he collected on work he performed and was not paying his quarterly taxes. Ms. Collins had put several hundred thousand dollars of her own money into improvements to the property. TOP at 67, lines 11-13. Due to concerns that Mr. Wallace's tax troubles might endanger the property and put it at risk of tax liens, Mr. Wallace gifted the property entirely to Ms. Collins by forfeiting his interest in the property by quit claim deed. TOP at 67, lines 11-13.

In Washington, separate property is governed by RCW 26.16.010 and community property by RCW 26.16.030. Under RCW 26.16.010, property owned by a spouse prior to marriage and any property acquired "afterwards by gift, bequest, devise, descent, or inheritance ... shall not be subject to the debts and contracts of his or her spouse." RCW 26.16.030 provides,

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property. RCW 26.16.030.

Evidence at trial showed that Mr. Wallace willingly and voluntarily quit claimed his interest in the property at 6121 Westside Road. TOP at 68, lines 9-22. Mr. Wallace was not coerced into quit claiming his interest and the decision to do so was made over a period of weeks. *Id.* Mr. Wallace's execution of a quit claim deed to the 6121 Westside Road property made it a gift to Ms. Collins by which it became her separate property. Because the property was deeded by Mr. Wallace to Ms. Collins as prescribed in RCW 26.16.010, it is not considered community property under RCW 26.16.030.

Mr. Wallace has attempted in his brief to claim a separate property interest in 6121 Westside Road property. Appellant's Brief at 29. This is evidence that was not presented at trial and cannot be considered by this court.

In *Merlin*, the court held that, because "[the] issue was not raised by the pleadings and, so far as we can determine from the record before us, was not presented to the trial court" the party

raising the issue to the Court of Appeals “was not entitled to have it considered.” *Merlin v. Rodine*, 32 Wn.2d 757 (1949), citing *Lawson v. Helmich*, 20 Wn.2d 167, 146 P.2d 537, 151 A.L.R. (1944), *Unemployment Compensation Department v. Hunt*, 17 Wn.2d 228, 135 P.2d 89 (1943). Mr. Wallace did not raise at trial his argument regarding a separate property interest in 6121 Westside Road. Consequently, that argument cannot be considered on appeal and the trial court’s characterization of 6121 Westside Road as Ms. Collins’s separate property must stand.

D. DETERMINATION OF INCOME

The court’s determination of Ms. Collins’s and Mr. Wallace’s incomes – and the subsequent imputation of \$60,000 as Mr. Wallace’s annual income – as the basis on which to establish child support was appropriate.

RCW 26.19.071 governs determination of income for child support purposes. Section 6 relates to imputation of income and reads as follows:

The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether

the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. Income shall not be imputed for an unemployable parent. Income shall not be imputed to a parent to the extent the parent is unemployed or significantly underemployed due to the parent's efforts to comply with court-ordered reunification efforts under chapter 13.34 RCW or under a voluntary placement agreement with an agency supervising the child. In the absence of records of a parent's actual earnings, the court shall impute a parent's income in the following order of priority:

- (a) Full-time earnings at the current rate of pay;
- (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;
- (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;
- (d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;

(e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census.

The court found that Mr. Wallace was voluntarily underemployed. Thus, the imputation of his income was mandatory. RCW 26.19.171(6); *In re Marriage of Goodell*, 130 Wn. App. 38, 122 P.3d 929 (2005); *In re Marriage of Clarke*, 112 Wn. App. 370, 48 P.3d 1032 (2002); *In re Marriage of Pollard*, 99 Wn. App. 48, 991 P.2d 1201 (2000). There were no pay stubs, tax returns, or other reliable records by which the court could determine Mr. Wallace's current or historical rate of pay as provided in subsections (a), (b), and (c). Subsection (d) does not apply, as Mr. Wallace has no history of recent minimum wage earnings and has not received any form of assistance listed under this item. Therefore, the most reliable indication of appropriate income for imputation of purposes was found in the evidence presented at trial in regards to the earning capacity of similarly skilled workers in the same occupation.

RCW 26.19.071(2) requires "Tax returns for the preceding two years and current paystubs shall be provided to verify income

and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs.” Mr. Wallace was unable to provide this information. As such, the court was then placed into a position of having to verify Mr. Wallace’s income through other sources. *Id.* It did this by considering the evidence presented at trial in regard to Mr. Wallace’s expertise and experience as a mechanic and the comparable pay rates for similarly situated workers. TOP at 141, lines 13-18.

It is important to note that the court found that Mr. Wallace had been deceptive in representing his earnings. In a similar case, the appellate court found it impossible to determine a party’s actual earnings due to his deceptions. *In re Marriage of Dodd*, 120 Wn. App. 638, 644 86 P.3d 801 (2004). Specifically, the court found “The record contains substantial evidence that Mr. Dodd’s admitted dishonesty rendered his claimed income unverifiable.” *Supra* at 646. The court further held that Mr. Dodd had the burden of proving his reduced income and failed to do so. *Supra*, citing *Lambert v. Lambert*, 66 Wn.2d 503, 504, 403 P.2d 664

(1965). Likewise, the trial court here found that Mr. Wallace had failed to prove that he was earning significantly below capacity.

Mr. Wallace claimed to make only \$27,000 per year. TOP at 40, lines 11-2. As a master mechanic (which requires that he hold ASE certifications in all areas) with more than twenty years' experience in his field, Mr. Wallace is thus claiming he makes only \$3,080 more per year than an unskilled worker making minimum wage. TOP at 141, lines 13-18. Mr. Wallace's stated income amounts to only \$256 more per month, or \$1.48 more per hour, than a minimum-wage employee earns in the State of Washington. This is not credible and the trial court also found it not credible.

The evidence presented at trial showed that Mr. Wallace easily had the ability to make \$90,000 per year or more. TOP at 109-110, *id.* at 144, lines 18-21. The courts have found that imputed income should not exceed the level "at which the parent is capable and qualified." *In re Marriage of Shellenberger*, 80 Wn. App. 71, 81, 906 P.2d 968 (1995); *In re Marriage of Sacco*, 114 Wn.2d 1, 4, 784 P.2d 1266 (1990). The trial court's finding that Mr.

Wallace's income should be imputed at \$60,000 was moderate given his earning capacity.

There was extensive evidence presented at trial of Mr. Wallace's earning capacity. Mr. Wallace's failed to present any credible evidence to refute these claims. Moreover, the court considered him to be deceptive in regard to his stated income. Given all these factors, the court thus ruled appropriately in imputing Mr. Wallace's income at \$60,000. (It should be noted that Mr. Wallace did not pay any child support from the inception of this action until the court's 20 November 2017 ruling, leaving Ms. Collins with an \$11,000 support deficit in that intervening period.)

IV. CONCLUSION

After considering all of the evidence presented at trial, including procedural issues, the trial court ruled appropriately on all issues that Mr. Wallace raised as assignments of errors. In fact, the court conceded that it had apportioned the assets more generously in favor of Mr. Wallace due to Ms. Collins's apparent ability to generate a higher income than he.

Expert testimony established that the marijuana retail store license had a value in excess of \$700,000 and that the license was

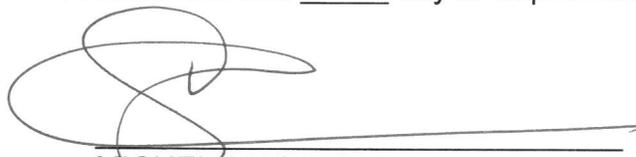
transferrable to other jurisdictions. Therefore, the court's valuation of the license at \$500,000 was within the trial court's discretion. While the court noted that Mr. Wallace had failed to raise the issue of maintenance prior to his trial brief, which was served on Ms. Collins on the eve of trial, the court nonetheless addressed the statutory factors in RCW 26.09.090 and found that Mr. Wallace was not entitled to maintenance. There was no evidence presented that the quit claim deed conveying the family home at 6121 Westside Road was not valid; therefore, the court's finding that it was valid, and subsequent award of the home to Ms. Collins as her separate property, was appropriate. In its determination of the income basis to be used in establishing child support, the court was forced to impute Mr. Wallace's income due to his failure to file income tax returns for the previous ten-year period and his dubious bookkeeping. The court's imputation of Mr. Wallace's income at \$60,000 was within its discretion and this amount was very modest given the evidence presented regarding Mr. Wallace's skill level in his profession and attendant earning capacity.

Numerous of Mr. Wallace's arguments and legal theories are presented *de novo* and may not be considered by the appellate court, because they were not raised with the trial court. In addition

to not having standing for several of his enumerated assignments of error, Mr. Wallace has neglected to properly cite the trial transcript in at least 120 instances within the body of his brief and has failed to provide supporting citations for another 20 assertions made in the brief. As such, Ms. Collins is unable to fully respond, because we can only speculate as to what Mr. Wallace may have meant or to what he referred. Further, this deficit in Mr. Wallace's brief has made the task of the appellate court much more onerous and the court should discount any argument made without appropriate citations to the trial transcript or to the source of the information.

We thus respectfully ask that the court deny Mr. Wallace's appeal and order that he pay Ms. Collins's attorney's fees.

RESPECTULLY SUBMITTED this 4th day of September, 2018.

A handwritten signature in black ink, appearing to read 'Michele Moore', written over a horizontal line.

MICHELE MOORE
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**COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON**

In re the Marriage of

JAMES WALLACE

Appellant,

vs.

KIM COLLINS,

Respondent.

No.: 35749-0-III

CERTIFICATE OF SERVICE

I, Michele Moore, declare that in accordance with the rules of appellate procedure, I caused a copy of BRIEF OF RESPONDENT to be emailed and mailed to Appellant by placing the same in a regular envelope addressed as follows:

James Wallace
138 Old Cedars Road
Cle Elum, WA 98922

DATED this 4th day of September 2018.



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