

FILED
Court of Appeals
Division III
State of Washington
5/1/2019 4:28 PM
COA No. 36040-7-III

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

IN RE THE MARRIAGE OF EDWARD A. MILLER,

Petitioner/Respondent,

and

RITA L. YTURRI-SMITH,

Respondent/Appellant.

APPELLANT'S REPLY BRIEF

MARY SCHULTZ
WSBA #14198
Mary Schultz Law, P.S.
2111 E. Red Barn Lane
Spangle, WA 99031
(509) 245-3522
Attorney for Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	3
I. REPLY	6
A. The husband applies the legal presumption of community property incorrectly. The Centaurus money before the court was acquired during the marriage, and thus the funds in the Centaurus account were presumptively community property	7
B. The husband did not clearly and convincingly show that the Centaurus money, acquired in 2008-2010, was money acquired from Ascentium <i>in exchange for his 1993 stock</i>	9
1) Ascentium’s agreement to pay the husband was an agreement to acquire the husband’s personal performance, which was a community asset.....	11
2) The cost basis of the stock that was sold within the Ascentium transaction confirms that the stock sold was acquired in 2007, not 1993.....	14
3) The accountant’s inconsistency only prevents the husband’s achieving the level of clear and convincing evidence of tracing.....	21

C.	The husband was only able to retire because he sold his ability to perform his profession.....	22
D.	The wife did not waive her lien and equity assignments of error.....	22
E.	<i>Hickman's</i> Texas-based fire insurance reasoning does not apply here.....	25
F.	The husband's testimony that he bought the Cobalt boat "with my funds" is not competent tracing evidence.....	26
G.	No one wanted the husband's old Sea-Doos; forcing them on the wife at a fair market value was improper.....	27
H.	The husband's dissipation of funds was not appealed, and is a verity.....	27
I.	The husband does not dispute that the court's distribution effected only \$143,000 to the wife with \$360,000 of debt.....	28
J.	Attorney fees: It was untenable not to give the wife fee assistance in this complex case.....	29
K.	Attorney fees: Appellate fees should be awarded.....	30
II.	CONCLUSION.....	30
	CERTIFICATE OF SERVICE.....	31
	APPENDIX A: 2007 Installment Sale Tax Schedule (Ex. 323 at 533).....	32

TABLE OF AUTHORITIES

Cases

<i>Aetna Life Ins. Co. v. Wadsworth</i> , 102 Wn.2d 652, 689 P.2d 46 (1984)	25, 26
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	13
<i>Berol v. Berol</i> , 37 Wn.2d	27
<i>Davidson v. Comm'r of Internal Revenue</i> , 305 U.S. 44, 59 S. Ct. 43, 83 L. Ed. 31 (1938)	17, 21
<i>Friedlander v. Friedlander</i> , 58 Wn.2d 288, 362 P.2d 352 (1961)	29
<i>In re Estate of Borghi</i> , 167 Wn.2d 480, 219 P.3d 932 (2009)	8
<i>In re Hickman's Estate</i> , 41 Wn.2d 519, 250 P.2d 524 (1952)	7, 25, 26
<i>In re Marriage of Marzetta</i> , 129 Wn. App. 607, 120 P.3d 75 (2005)	15, 21
<i>In re Marriage of Morrow</i> , 53 Wn. App. 579, 770 P.2d 197 (1989)	29, 30
<i>In re Marriage of Pearson-Maines</i> , 70 Wn. App.	24
<i>In re Marriage of Short</i> , 125 Wn.2d 865, 890 P.2d 12 (1995)	10
<i>In re Marriage of Skarbek</i> , 100 Wn. App. 444, 997 P.2d 447 (2000)	9
<i>In re Marriage of Wakefield</i> , 52 Wn. App. 647, 763 P.2d 459 (1988)	24
<i>In re Marriage of White</i> , 105 Wn. App. 545, 20 P.3d 481 (2001)	9, 23, 27
<i>Kaech v. Lewis Cty. Pub. Util. Dist. No. 1</i> , 106 Wn. App. 260, 23 P.3d 529 (2001)	24

<i>Matter of Estate of Bellingham</i> , 85 Wn. App. 450, 933 P.2d 425 (1997)	25
<i>Paradise Orchards Gen. P'ship v. Fearing</i> , 122 Wn. App. 507, 94 P.3d 372 (2004)	12, 13
<i>PIA-Asheville, Inc. v. Bowen</i> , 850 F.2d 739 (D.C. Cir. 1988)	16
<i>Richey Manor, Inc. v. Schweiker</i> , 684 F.2d 130 (D.C. Cir. 1982)	17
<i>Rolater v. Rolater</i> , Tex.Civ.App., 198 S.W. 391 (1917)	7, 25, 26
<i>Rush v. Blackburn</i> , 190 Wn. App. 945, 361 P.3d 217 (2015)	28
<i>Schwarz v. Schwarz</i> , 192 Wn. App. 180, 368 P.3d 173 (2016)	6, 8, 9, 27
<i>State v. Chipman</i> , 176 Wn. App. 615, 309 P.3d 669 (2013)	28
<i>State v. Lathrop</i> , 125 Wn. App. 353, 104 P.3d 737 (2005)	12, 13
<i>Stranberg v. Lasz</i> , 115 Wn. App. 396, 63 P.3d 809 (2003)	12
<i>Supreme Inv. Corp. v. United States</i> , 468 F.2d 370 (5th Cir. 1972).....	17
<i>Vasquez v. Hawthorne</i> , 145 Wn.2d 103, 33 P.3d 735 (2001)	22
<i>Worthington v. Worthington</i> , 73 Wn.2d 759, 440 P.2d 478 (1968)	24
 Statutes	
RCW 26.16.010	9
 Other Authorities	
<i>19 Kenneth W. Weber, Washington Practice: Family and Community Property Law § 10.1</i> , at 133 (1997)	8

*Income Taxes – in General – Stock Cost Is Basis of Corporate Assets
Acquired by Purchasing Stock of Another Corporation and Liquidating
It.,
65 Harv. L. Rev. 513 (1952) 20*

I. REPLY

Respondent Ed Miller's brief ignores the critical importance of legal presumptions in the community property law. He argues that substantial evidence supports the trial court's property characterizations, but acknowledges that the ultimate characterization of property is a question of law reviewed de novo.¹ All characterization of marital property before the court begins with the legal presumption attendant to the acquisition date of that asset. To reach his result, the husband reverses that legal presumption attendant to the acquisition date of the funds before the court, and starts with the presumption that the husband's 1993 stock was separate, and thereby carries through to the Centaurus funds now before the court unless the *wife* shows otherwise. That reverses the presumption. With funds acquired in 2008-2010, it was the *husband* who was required to, and failed to, present clear and convincing evidence tracing those funds as proceeds of his 1993 stock. That tracing cannot be done on this record. The funds received in 2008-2010 were received from a contract sale committing the husband to a three-year performance of non-compete provisions as the material terms of the sale. And even in the part of that transaction that involved stock, it was not the 1993 stock that

¹ *Schwarz v. Schwarz*, 192 Wn. App. 180, 192, 368 P.3d 173 (2016).

sold. The parties had acquired new stock in November 2007 with the husband's wages, and they sold that new stock to Ascentium, as confirmed by the "stepped up" cost basis they represented on their 2007 income tax return. The husband could not thereby trace the 2008-2010 funds acquired to his 1993 separate stock because what the parties sold to Ascentium Corporation in the year 2007 were two community property assets: 1) the husband's performance of a non-compete agreement for the next three years; and 2) the community's stock, which they purchased with the husband's wage bonus in November 2007.

As to fire insurance proceeds, there are no viable distinctions between term insurance policies. The rationale of the earlier *Hickman* case,² which relies on an even earlier Texas decision,³ is not viable under these facts, and is implicitly overruled.

In all other respects, Appellant Rita Yturri-Smith stands on her opening brief.

A. The husband applies the legal presumption of community property incorrectly. The Centaurus money before the court was acquired during the marriage, and thus the funds in the Centaurus account were presumptively community property.

² *In re Hickman's Estate*, 41 Wn.2d 519, 523, 250 P.2d 524 (1952).

³ *Rolater v. Rolater*, Tex.Civ.App., 198 S.W. 391 (1917).

The husband agrees that the Centaurus funds were acquired during the marriage from 2008-2010, and were acquired through a 2007 contract sale between Ed Miller and Ascentium Corporation. But he fails to apply the legal presumptions arising from that acquisition date.

Legal presumptions are critical in community property law. “[P]resumptions play a significant role in determining the character of property as separate or community property.” *In re Estate of Borghi*, 167 Wn.2d 480, 483–84, 219 P.3d 932 (2009), as corrected (Mar. 3, 2010), citing 19 *Kenneth W. Weber, Washington Practice: Family and Community Property Law* § 10.1, at 133 (1997). *Borghi* cites the latter resource for the proposition that “[P]ossibly more than in any other area of law, presumptions play an important role in determining ownership of assets and responsibility for debt in community property law.” *Id.* The community property presumption attendant to the acquisition date of the property before the court is a “true presumption, and in the absence of evidence sufficient to rebut an applicable presumption, the court must determine the character of property according to the weight of the presumption.” *Id.* As Respondent agrees, property acquired during marriage is presumptively community property. *Schwarz*, 192 Wn. App. at 189.

The funds in the parties' Centaurus account were acquired during the marriage in the years 2008-2010. The husband therefore had the burden of rebutting the community property presumption attached to those funds by "clear and convincing evidence" that each lump sum payment was acquired with the proceeds of his separate property. *Schwarz* at 189, citing *In re Marriage of Skarbek*, 100 Wn. App. 444, 449, 997 P.2d 447 (2000). The husband's response brief shows why this cannot be done on this record. The two assets sold to Ascentium in 2007 were community property assets-- 1) the husband's performance, and 2) the community's stock.

B. The husband did not clearly and convincingly show that the Centaurus money, acquired in 2008-2010, was money acquired from Ascentium in exchange for his 1993 stock.

The husband's repeated claims that he "sold his 1993 stock in 2007," is not established in his exhaustive *recitation* of evidence. An asset acquired during the marriage can only be separate property if "acquired during marriage with the traceable proceeds of separate property..." *Schwarz* at 188-189, citing *In re Marriage of White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001) (footnotes omitted); RCW 26.16.010. The husband initiates his tracing by a discussion on contract construction. *Response brief* at p. 10. This is because the origin of the Ascentium

proceeds received by the marital community in 2008-2010 was not a stock sale on an open market or a stock dividend, it was a contract for the husband's performance. Often, a stock asset before the court for distribution is a classic stock dividends or stock option; the proceeds of that stock or those options are thus readily traceable. *See, e.g., In re Marriage of Short*, 125 Wn.2d 865, 871, 890 P.2d 12 (1995)(discussing the "time rule" formula for the acquisition of stock options). But that is not what happened here. Here, in 2007, Ed sold his client roster to an acquiring corporation under a three-year non-compete agreement, which he was then required to perform. *Ex. 361, and see Section 5.5, pp 970-972.*⁴ The stock Ed held simply went along with the deal of necessity. But it was not disputed that Ed's corporation did not even use stock certificates, or that none were transferred in this exchange. *Ex. 361 at 973, ¶ 6.7.* The contract's paragraph about the transfer of shares specifically had to be modified by the parties to address this anomaly. *Id.* Even though Ed was still required to certify that there were no stock certificates under this modified language, he never did that either. *RP 1527-28.* As well, the payments Ascentium made were not made in a lump sum, as with a completed sale for an asset. Instead, Ascentium paid

⁴ Even Ed acknowledges that all he had of value was not corporate stock, but his clients. *Response Brief* at 11, citing *RP 887*.

the sums owed in installments from 2008-2010 while the husband was committed to performing the three-year non-compete requirement. *See CP 625, FOF (D)(11).*

The husband was thus unable to present clear and convincing evidence that traced the Ascentium payments directly to his 1993 stock. What was sold to Ascentium in Section 5.5 of the parties' contract, what was performed by Ed, and what was paid for over a period of three years, was Ed's *performance* of the three year non-compete agreement, not any transfer of stock certificates. The contract itself prevents the husband from directly tracing the primary source of the sale proceeds to any stock at all, much less his 1993 stock.

1) Ascentium's agreement to pay the husband was an agreement to acquire the husband's personal performance, which was a community asset.

The 2007 Ascentium sale contract makes no reference to "1993" stock. Ed asserts that *some* generic "stock" was sold (which he would like to be the 1993 stock) because the document's title is "Stock Purchase Agreement," and its Article 1 is called "Purchase and Sale of Shares." *Ex. 361*. But contracts are reviewed as a whole, and their construction includes the subject matter and objective of the contract, the circumstances surrounding the making of the contract, the subsequent acts and conduct of

the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. *State v. Lathrop*, 125 Wn. App. 353, 362, 104 P.3d 737 (2005). If the contract's provisions are unambiguous, then the interpretation is a question of law. *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 516, 94 P.3d 372 (2004), citing *Stranberg v. Lasz*, 115 Wn. App. 396, 402, 63 P.3d 809 (2003). "Whether a contract provision is ambiguous is also a question of law subject to de novo review." *Id.* at 517, citing *Stranberg*, at 402.

The 2007 contract between Ascentium and Ed Miller is not ambiguous when read as a whole. Although its *title* is "Stock Purchase Agreement," and its Article 1 is called "Purchase and Sale of Shares," that same Article I is explicit about how and why these shares will be purchased. Ascentium would only pay for shares "[S]ubject to the terms and conditions of this Agreement." *Ex. 361, Section 1.1, 1.2, 1.2(a), 1.2(b), 1.2(c)*. The parties agreed as to what those terms and conditions for payment were. They agreed that Section 5.5's restrictions were "necessary" to the transaction. *Ex. 361 at 972, Section 5.5(e)*. Section 5.5 was "material and of essence to [the] Agreement." *See Ex. 361 at 972, Section 5.5(f)*. Ascentium makes explicit that it "would not have entered into this Agreement but for the covenants and agreements contained in this

Section 5.5.” *Ex. 361 at Section 5.5(a)(iv), p. 970.* The non-compete provision is what “induce[d] Buyer to enter into this Agreement.” *Id.* The consideration paid by Ascentium explicitly “reflects and assumes Shareholder’s strict compliance with, and the enforceability by the Company and Buyer of these restrictions.” *Ex 361, Bates 972 at 5.5(e).* Ed’s response brief ignores this language, but construed as a whole, there is nothing ambiguous about this language, or about Ascentium’s contracting intent. Ascentium was buying Ed’s clients, and Ed’s performance of a three-year nationwide non-compete agreement.

Even where contract language is clear and unambiguous, “the trial court may consider extrinsic evidence for the limited purpose of determining the intent of the parties.” *Paradise Orchards*, at 517, citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (remainder of cites omitted). The subsequent acts and conduct of the parties to the contract are considered. *Lathrop*, 125 Wn. App. at 362. All extrinsic evidence here, and the subsequent acts of the parties, are equally consistent with the contract’s materiality language. Ascentium paid Ed money during the three-year non-compete period. *CP 625, FOF 22(D)(11)*. Ed did not work anywhere in the country during that period. As importantly, Ed never certified that no stock certificates existed to

transfer, as was specifically required, but Ascentium paid him anyway. *RP 1527-1528*. The trial court itself found that the Ascentium transaction was simply *characterized* as a sale of (generic) stock or assets to avoid taxation on sums that would otherwise be considered *ordinary income*. *CP 624, FOF (D)(8)*.⁵

As a matter of law, construed as a whole, this contract shows that Ascentium paid money for the husband's clients and for his agreement not to compete with those clients over a period of three years. The contract's explicit terms prevent the husband from presenting clear and convincing evidence that the funds acquired in 2008-2010 were the direct proceeds of his 1993 stock. He is unable to overcome the community property presumption on this record. The funds received from Ascentium during three years of the marriage, and deposited into and residing in the parties' Centaurus fund, remained community property.

2) The cost basis of the stock that was sold within the Ascentium transaction confirms that the stock that sold was acquired in 2007, not 1993.

The trial court repeatedly uses the word "stock" in its findings without referencing the difference between Ed's 1993 stock, which had a

⁵ The Court found that the parties' 2007-2010 tax returns "characterized the sale as a stock or asset sale. (This resulted in taxation based on capital gains rates rather than ordinary income and lowered their taxes.*)" *CP 624, FOF (D)(8)*.

cost basis of \$0, and the stock acquired by Ed in 2007 with his wage bonus, which had a cost basis of \$359,850. *See e.g. CP 623, Section C through CP 625, Section D.* Stock sold as a part of the 2007 Ascentium sale transaction, but the husband and wife represented to the IRS in their 2007 community tax return that the stock they sold was acquired in 2007 by the husband's 2005 wage bonus, which resulted in a tax benefit to them, and which benefit they took. Ed cannot therefore now avail himself of the reduced capital gain he reported to the IRS on the community's 2007 tax return, and then upon this divorce, call it something else. Such an argument is "completely without merit." *In re Marriage of Marzetta*, 129 Wn. App. 607, 619, 120 P.3d 75 (2005)(overruled on other grounds by *McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007)). In reporting his 2007 sale of stock to Ascentium, the husband and wife reported that the stock they sold was stock with a \$359,850 cost basis, and thereupon calculated their "taxable gain" on that basis; they did not use the \$0 cost basis of the husband's 1993 stock. *Ex. 323 at 533 (Installment Sale Schedule); Appendix A.* The husband's accountant confirmed the community's use of a "stepped up" cost basis on the community's taxes.⁶

⁶ (Schultz) "Q: What sold in 2007 between Ed and Ascentium, Ms. Foltz, was not Ed's 5 percent with a cost basis of 0; it was stock that had a cost basis of \$359,850, correct?
(CPA Foltz) A: Correct.

Ed's description of this cost basis transaction in his brief confirms the wife's point. "The effect of converting the loan to paid-in capital was that it gives Ed a basis in his stock for tax purposes." *Response Brief* at 19. That is exactly correct. But there is a distinct legal meaning to a "stepped-up" cost basis. A stepped-up cost basis signifies a new purchase of stock as a matter of law.

Parties often attempt to gain a stepped-up cost basis in corporate stock in corporate acquisitions and mergers. *See, e.g., PIA-Asheville, Inc. v. Bowen*, 850 F.2d 739 (D.C. Cir. 1988) (disallowing the use of a stepped-up cost basis in a "two-step acquisition" where the acquirer purchased stock of a corporation and followed the purchase with liquidation and distribution of the acquired company's assets to the acquirer himself); *Supreme Inv. Corp. v. United States*, 468 F.2d 370, 377 (5th Cir. 1972) (holding that a purchase of a corporation's stock is to be treated as a direct purchase of the assets, with the consequence that the

Q: Whatever happened to this \$0 cost basis stopped, it kind of went away, because in 2007 the stock that was sold to Ascentium had a cost basis of what? Was it 359-something?

A: Yes.....it's on the installment schedule.

Q: P-4 at 43. That's his tax return. \$359,850. Is that right?

A: Yes.

Q: And that \$359,850 cost basis was for a hundred percent of the stock, wasn't it?

A: Yes.

Q: Where did that \$359,850 come from?

A: Shareholder loan."

RP 100-101.

cost of the stock should serve as the basis for the assets); *Richey Manor, Inc. v. Schweiker*, 684 F.2d 130, 132–33 (D.C. Cir. 1982) (noting that “the price paid by the purchaser shall be the cost basis where the purchaser can demonstrate that the sale was a bona fide sale and the price did not exceed the fair market value of the facility at the time of the sale....”). Here, the marital community also used a stepped-up cost basis to lower their taxable gain on their sale. *Ex. 323 at 533; App. A*. These cost basis representations are controlling as to the identity of the stock that sold. *Davidson v. Comm’r of Internal Revenue*, 305 U.S. 44, 45, 59 S. Ct. 43, 44, 83 L. Ed. 31 (1938).

The husband had repeatedly loaned his (community property) wages back to his corporation. *RP 138-139*. This was unpaid compensation to the marital community, even though the community paid income taxes on that unpaid compensation via the W-2 form issued to Ed. *Id.* The husband agrees that one such wage loan was a \$359,850 wage loan to his corporation, and that this loan “was converted to \$359,850 in paid-in capital on November 30, 2007...” *Response brief* at p. 19. The community’s \$359,850 wage loan to the corporation was repaid to the community dollar for dollar in this capital transaction, with the \$359,850 “applied towards the acquisition of stock—Ed’s 458 shares.” *RP 130: 14-*

24; *RP 134*. This is how the reported \$359,850 became the new stepped-up basis in Ed's stock. When the Ascentium sale occurred thereafter in the middle of December, 2007,⁷ the parties used that stepped-up cost basis on their income tax return to reduce their capital gains from that sale. *RP 100-101* (see n. 4 above); *Ex. 323 at 533: Ins. 8, 10 and 14 (App.A)*. The parties were only able to take that tax benefit because they identified to the IRS a purchase of stock at a price of \$359,850, represented that it was the latter stock that was sold to Ascentium, and thereby benefitted from the reduced capital gain on which they would otherwise have been taxed. *Ex. 323 at 533, ln. 14*. The husband provides no authority to controvert *Davidson* or the tax law regarding these stepped-up cost basis transactions, even though he acknowledges that this is exactly what occurred. There is no legitimate argument to be made that the stock that sold to Ascentium in 2007 was 1993 stock. The parties' tax return shows that the 1993 "zero basis" stock was simply not the stock that was sold.

There is a single line—line 2a—on the 2007 installment sale schedule that indeed says that the stock being sold was stock acquired on "1/01/93." *Ex. 323 at 533, ln. 2a*. But this line contradicts the immediately following lines 8 and 10 showing the cost basis of what was

⁷ *Response brief* at 22.

sold, and the taxable gain reported at line 14. The latter were the line items that were actively used by the marital community for the tax benefit, not line 2a.

Thus, even if the court could construe the 2007 sales contract as being *primarily* a stock sale simply given its title and section 1.1, and not a non-compete agreement per section 5.5, the stock that sold in any event was not the husband's 1993 stock, but the marital community's 2007 stock acquired with the husband's wage bonus, and this was the sale of a community asset.

The 2005 buy-out transaction which the husband discusses in his brief and upon which the trial court made findings is largely irrelevant given what occurred with the 2007 contract and the marital community's 2007 tax reporting. *CP 623-624, Section C*. But the buy-out is actually consistent with the foregoing tax law. The trial court found that, in 2005, White and Runkle "returned their issued and outstanding stock and it was cancelled." *CP 624, FOF (C)(9)*. The trial court found that the return of White and Runkle's shares "resulted in Mr. Miller being the sole shareholder of WhiteRunkle, Inc." *Id. at FOF 11*. But that isn't the record. As a matter of law, the buy-out that happened in 2005 was a stock liquidation, because the husband's zero basis stock "stopped, it kind of went away, because in 2007,

the stock that was sold to Ascentium had a cost basis of ...” \$359,850 (“Yes). *RP 100-101*. The 2007 sales contract with Ascentium confirms that the husband never possessed or issued himself any stock certificates thereafter. *Ex. 361 at 973*, ¶ 6.7 (stating that “(ii) that the Company has never issued any certificates representing shares of its capital stock and that the Shares are uncertificated...”). The 2005 buy out was thus a corporate liquidation as a matter of law, and the tax consequences of such a liquidation “will be substantially the same as purchasing stock and liquidating the corporation.” *Income Taxes – in General – Stock Cost Is Basis of Corporate Assets Acquired by Purchasing Stock of Another Corporation and Liquidating It*, 65 Harv. L. Rev. 513, 514 (1952). This liquidation of the older corporation and its shares is why Ed was able to acquire his new 458 shares in November 2007 for \$359,850. His old shares were essentially canceled during the buy-out, no new certificates ever issued, and his November 2007 acquisition of stock was a new acquisition, which is precisely what his 2007 tax return says.

All of this evidence is consistent with the tax law regarding taxable gain. The parties took the benefit of a stepped up cost basis on their taxes, and that cost basis is controlling as a matter of law as to *what* stock was sold. *Marzetta*, 129 Wn. App. at 619; *Davidson*, 305 U.S. at 45.

The trial court erred in finding clear and convincing evidence that Ed's 1993 stock survived the 2005 corporate liquidation/buyout, the husband's 2007 capital loan purchase of new stock, and even the Ascentium performance contract, to hold that the husband's 1993 stock produced the 2007 Ascentium contract payments. That is plainly contrary to law.

3) The accountant's inconsistency only prevents the husband's achieving the level of clear and convincing evidence of tracing.

The husband points out that his CPA testified inconsistently. She did, but that only prevents the husband from reaching the clear and convincing evidence standard. Ed's accountant testified that Ed's contribution to capital in 2007 resulted in his acquiring the 458 shares that sold in 2007 to Ascentium. *RP 130: 14-24*. The accountant was thereafter given different wording from Ed's counsel, but she still generally landed on the same result. The loan, she agreed, went *both* "toward the acquisition of the stock or ... towards creating additional stockholder's equity...Correct." *Response Brief* at 20, citing Foltz at *RP 130: 25 – RP 132: 9*. Ed's counsel had to try again: "Let's start over." He gradually led her to this:

Q: Did this \$359,850 get applied towards the acquisition of any shares?

A: No.

RP 130: 25 – RP 132: 9.

This singular answer contradicts the tax law, the accountant's own tax return's cost basis, and her prior testimony. *See RP 130: 25 – 132: 9.* Such evidence cannot meet the clear and convincing evidence standard.

C. The husband was only able to retire because he sold his ability to perform his profession.

The husband argues that he did not sell his marital earning ability to Ascentium because he intended to retire anyway. *See Response Brief*, p. 12. There is no evidence that Ed *could* have retired absent this sale. He had no other income, and he testified he set the sales price to replace his earnings. *RP 868: 5-14; RP 869.*

D. The wife did not waive her lien and equity assignments of error.

The Appellate Court exercises its discretion in deciding whether to review a claim made even *without* an assignment of error. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 111, 33 P.3d 735 (2001). The husband argues that the wife waived her assignment of error to the trial court's refusing her equitable liens for her contribution of her \$300,000 tort settlement to the community, and for the community's use of her lake home for over ten years. She did not waive this error. Her argument is an equity argument. Consideration of each party's responsibility for creating or

dissipating marital assets “is relevant to the just and equitable distribution of property.” *White v. White*, 105 Wn. App. at 551 (quote source omitted).

The wife discusses her unrecognized contribution to the trial value of the Glenaire home by her post-separation labor and fire insurance proceeds. *Opening Brief at pp. 11, 32-39*. As to her tort settlement and the lake home, it is not disputed that the wife contributed over \$300,000 of a separate tort settlement to her community’s lifestyle. *See Opening Brief at p. 8 citing RP 1721-1722, and Ex. 308, RP 1721-22; 1169*. It is not disputed that each party attested to the substantial value of the community’s use of the wife’s lake cabin over ten years. The husband’s testimony supported an equitable contribution by the wife of between \$662,000-\$742,000 over the parties’ ten year relationship.⁸ The wife testified consistently with her husband. Her figures, over ten years, resulted in a value given by her to her marital community of some \$956,500.⁹ The trial court found that the

⁸ The husband testified that the rental season for the cabin began around April. *RP 1320*. His opinion was that over a five month “use season,” which was “fair,” the rental value of the lake home in May would likely be \$200 a night (\$6,200 for 31 nights), \$250 in June (\$7500 for 30 days), \$6,000-\$7,000 a week in July and August (\$48,000-56,000 for eight weeks respectively), and \$150 a night in September (\$4500 over 30 days). *RP 1317-1318*. The husband’s opinion of the total use value was \$66,200-\$74,200 per year.

⁹ The wife testified that the rental value in June was \$750-900 a night, *RP 1619*, that in July and August, it could be \$900-100 a night (\$31,000 per month, or \$62,000), *RP 1619-20*, and that September was likely \$400-\$500 a night for the first week of September, and \$250 a night thereafter, or \$450 for seven days (\$3,150) and \$250 for 23

parties “exchanged figures for the rental value of the lake residence,” but then disregarded all of this testimony because “respectfully, the parties lacked foundation for their competing opinions.” *CP 629, Finding H(9)*. But this testimony was extensive, consistent from both parties, and supported wife having given substantial value to the community.

Any owner of real property may testify as to the value of his or her property. *Kaech v. Lewis Cty. Pub. Util. Dist. No. 1*, 106 Wn. App. 260, 268, 23 P.3d 529 (2001); *Worthington v. Worthington*, 73 Wn.2d 759, 763, 440 P.2d 478 (1968). Where the community derives a compensating benefit from its use of Rita and her mother’s property, an offset for that benefit is properly applied. *See In re Marriage of Wakefield*, 52 Wn. App. 647, 649, 763 P.2d 459 (1988); *In re Marriage of Pearson-Maines*, 70 Wn. App. at 869. There need not be an “expert” establishing “reasonable” rental value. *Pearson-Maines* at 864. The amount simply needs to be reasonable. *Id.* at 870.

The trial court heard all of this testimony, commented on it by finding, and then disregarded it. The wife’s brief challenges this by her

days (\$5,750). *RP 1620*. The wife’s total, using \$825 a night average for June, or \$24,750, \$62,000 for July and August, and \$3,150 and \$5,750 for September, would be a contribution of some \$95,650 per season.

assignments of error, her statement of the case, and her equity argument. Her assignments of error are not waived.

E. *Hickman's* Texas-based fire insurance reasoning does not apply here.

The husband argues that *In re Hickman's Estate*, 41 Wn.2d 519, 523, 250 P.2d 524 (1952) controls the character of fire insurance proceeds to render all proceeds which the wife used to rebuild the Glenaire home “77.15%” his separate property, and that *Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d 652, 689 P.2d 46 (1984) (life insurance), or *Matter of Estate of Bellingham*, 85 Wn. App. 450, 933 P.2d 425 (1997) (applying “term policy” analysis to mortgage insurance) do not apply. But his reasoning gives him a windfall at the wife’s expense—which is the exact reverse of the concern stated by *Hickman* in the first place.

Hickman precedes *Aetna* by some 25 years. *Hickman* drew its holding from 1917 Texas civil law--*Rolater v. Rolater*, Tex.Civ.App., 198 S.W. 391 (1917). See 41 Wn.2d at 523. The *Rolater* court held that “a policy on appellee's home attached to and formed a part of the realty” because it was concerned that to hold otherwise would allow a party to convert community property to separate property by “upon their own initiative procur(ing) insurance in their own name.” *Rolater*, 198 S.W. at 393. The reverse concern is at issue here. The wife did not set out to

convert Ed's 77.15% interest to her own; she simply lived in a house that she insured, paid the policy, her house burned, and she repaired it with insurance money she paid for, and her own labor. Applying *Hickman's* "freehold" reasoning works a substantial injustice to the wife. She kept that policy in force and she rebuilt that home, only to then have her work and funds she paid for usurped as "the husband's 77.15% separate property." *Hickman's* reasoning is not appropriate here.

Moreover, in no respect did *Rolater*, applied in *Hickman*, address "contents coverage." Contents are not realty, and therefore *Aetna's* term policy reasoning applies to contents coverage. The contents coverage of \$355,132 is unequivocally properly analyzed under *Aetna*.

In sum, there is no logical reason why a term fire insurance policy should be analyzed differently from any other term policy, and the husband fails to support any rationale for why such an inconsistency should continue to exist. *Hickman* has been rendered inconsistent with, and implicitly overruled by, *Aetna*. The application of *Hickman* should be rejected.

F. The husband's testimony that he bought the Cobalt boat "with my funds" is not competent tracing evidence.

The husband acknowledges that he did not acquire the boat "prior to the parties' 2003 CIR." That trial court finding is thus plain error, and must be reversed. Ed's tracing of this purchase during the marriage is this: "I

bought it with my funds.” *RP 897: 6*. This is grossly inadequate. *Schwarz*, 192 Wn. App at 189, citing *Berol v. Berol*, 37 Wn.2d at 382. The boat is community property.

G. No one wanted the husband’s old Sea-Doos; forcing them on the wife at a fair market value was improper.

Even under the husband’s “totality of circumstances” standard, the value of property no one wants is necessarily zero. The trial court could certainly properly give these vehicles to a wife who didn’t want them, but it was untenable to then charge her for them at full value.

H. The husband’s dissipation of funds was not appealed, and is a verity.

The trial court entirely ignored the husband’s wasting of funds and of the assets on hand at trial. *White v. White*, 105 Wn. App. at 551. It did so in contradiction of the law of the case. Its unappealed pretrial contempt order found that “funds have clearly been dissipated.” *CP 403: 18-21 (Court’s order on contempt)*. The trial court findings going into this trial were specific. The trial court found that reasonable life necessities for both the husband and wife would total around \$420,000 for the three year period of the dissolution. *CP 403-404*. The trial court stated its intent to confirm at trial the total of what was dissipated beyond this consumption level, and characterize the funds. *CP 403, FOF 3 (ii); 404, FOF 3 (iv); CP 406, FOF*

6. These unchallenged findings of fact and conclusions of law are verities on appeal, and the law of the case. *Rush v. Blackburn*, 190 Wn. App. 945, 956, 361 P.3d 217 (2015)(citations omitted). The court’s later dissolution decree did not modify or override these earlier findings. *See State v. Chipman*, 176 Wn. App. 615, 621–22, 309 P.3d 669 (2013) (holding that a subsequent order within the same proceeding does not modify an earlier order preexisting order unless the new order says so). Todd Carlson’s analysis at trial showed that the husband took over \$1.556 million in withdrawals from the parties’ primary investment fund while the dissolution was pending.¹⁰ Yet the court only divided what funds *remained*—\$1,454,807—after the husband spent this additional \$1.556 million. *See Response Brief*, p. 30, citing to *Ex. P-109* at 5482, 5490 and *Decree* at CP 637-639. The point of dissipation is not characterization; it is removal of an asset before the Court, *whatever its character*. The court abused its discretion in failing to assess nearly \$1.556 million of funds against the husband as property he received, and to then consider such in the overall distribution.

I. The husband does not dispute that the court’s distribution effected only \$143,000 to the wife with \$360,000 of debt.

The husband does not dispute that the wife ended up with \$143,000 of cash liquidity and \$360,000 of debt. *See Response Brief*, p. 38 (writing,

¹⁰ See Opening Brief at Nte. 17 for calculations.

“the court did in fact award her cash in the amount of at least \$143,000...”).

The disparity of this grotesquely lopsided result is confirmed.

J. Attorney fees: It was untenable not to give the wife fee assistance in this complex case.

The trial court’s finding that the wife made an “election” to forgo experts is untenable. *CP 619: 6-8*. Prior to trial, the wife’s only income was her maintenance income of \$3,111 a month, against expenses of \$11,909 a month. *CP 390-301*. Her pretrial fees had already totaled \$210,488, which she largely paid by taking loans. *CP 400*. The wife went through “six different lawyers throughout the pendency of this action” because she could pay none of them. *Response brief at 38*. The court further ignored “the difficulty of the litigation, as measured by the number of days required to try the case and the size of the record.” *In re Marriage of Morrow*, 53 Wn. App. 579, 591, 770 P.2d 197 (1989), citing *Friedlander v. Friedlander*, 58 Wn.2d 288, 290, 297, 362 P.2d 352 (1961). *Friedlander* took “5 days, 650 pages, and 127 exhibits.” This trial took nine days, 1,997 pages and 221 exhibits, 150 of which were admitted. *CP 619: 8-10*. The court recognized this case as “financially intricate,” even at the level of a pretrial contempt hearing. *CP 404, FOF 5*. Yet the wife was left to present her case by cross examination of the husband’s experts, and to “unravel numerous transactions to establish community interests” through that cross examination. *See Morrow, supra*.

Such a situation “justifies an award reflecting the fees and costs incurred in the process.” *Morrow*, 53 Wn. App. at 591. Refusing the wife fees was untenable and an abuse of discretion.

K. Attorney fees: Appellate fees should be awarded.

The wife will file her financial affidavit in accordance with RAP 18.1(c).

I. CONCLUSION

This appeal should be granted. This Court should reverse this property and debt distribution, and remand for redetermination.

Respectfully submitted this 1st day of May, 2019.

MARY SCHULTZ LAW, P.S.

/s/Mary Schultz, WSBA #14198

Attorney for Appellant

Mary Schultz Law, P.S.

2111 E. Red Barn Lane, Spangle, WA 99031

Tel: (509) 245-3522

E-mail: Mary@MSchultz.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers, and that on the 1st day of May, 2019, she electronically filed the foregoing document with the Court of Appeals, Division III, and thereby served a copy to the following individuals:

SERVICE LIST	
Daniel E. Huntington 422 W. Riverside Ave., Suite 1300 Spokane, WA 99201 <i>Attorney for Respondent</i>	<input checked="" type="checkbox"/> E-Mail danhuntington@richter-wimberley.com
Valerie D. McOmie 4549 NW Aspen Street Camas, WA 98607 <i>Attorney for Respondent</i>	<input checked="" type="checkbox"/> E-Mail valeriemcomie@gmail.com
Martin L. Salina Michael R. Grover Randall Danskin 601 W. Riverside Ave., Suite 1500 Spokane, WA 99201-0653 <i>Attorneys for Respondent</i>	<input checked="" type="checkbox"/> E-Mail dgs@randalldanskin.com mrg@randalldanskin.com

Dated this 1st day of May, 2019.

/s/Mary Schultz, WSBA #14198
Attorney for Appellant
Mary Schultz Law, P.S.
2111 E. Red Barn Lane, Spangle, WA 99031
Tel: (509) 245-3522
E-mail: Mary@MSchultz.com

MARY SCHULTZ LAW PS

May 01, 2019 - 4:28 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36040-7
Appellate Court Case Title: In re Marriage of Edward A. Miller and Rita L. Yturri-Smith
Superior Court Case Number: 14-3-00584-7

The following documents have been uploaded:

- 360407_Briefs_20190501162642D3860135_6379.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was BRIEF.Reply 5.1.19_final.pdf
- 360407_Other_20190501162642D3860135_2777.pdf
This File Contains:
Other - Appendix A
The Original File Name was APPENDIX A.pdf

A copy of the uploaded files will be sent to:

- danhuntington@richter-wimberley.com
- dgs@randalldanskin.com
- valeriemcomie@gmail.com

Comments:

Sender Name: Mary Schultz - Email: Mary@MSchultz.com
Address:
2111 E RED BARN LN
SPANGLE, WA, 99031-5005
Phone: 509-245-3522 - Extension 306

Note: The Filing Id is 20190501162642D3860135

FILED
Court of Appeals
Division III
State of Washington
5/2/2019 10:32 AM

Appendix A

Installment Sale Income

2007

Attachment Sequence No. 79

Department of the Treasury Internal Revenue Service

Attach to your tax return. Use a separate form for each sale or other disposition of property on the installment method.

Name(s) shown on return

Identifying number

Edward A Miller and Rita L Yturri-Smith

- 1 Description of property MillerWhiterunkle Stock
2a Date acquired (month, day, year) 1/01/93 b Date sold (month, day, year) 12/14/07
3 Was the property sold to a related party... Yes No
4 Was the property you sold to a related party a marketable security?...

Part I Gross Profit and Contract Price. Complete this part for the year of sale only.

Table with 3 columns: Line number, Description, and Amount. Rows include Selling price (2,225,000), Mortgages/debts, Adjusted basis (359,850), and Contract price (2,225,000).

Part II Installment Sale Income. Complete this part for the year of sale and any year you receive a payment or have certain debts you must treat as a payment on installment obligations.

Table with 3 columns: Line number, Description, and Amount. Rows include Gross profit percentage (0.8383), Payments received during year, and Installment sale income (0).

Part III Related Party Installment Sale Income. Do not complete if you received the final payment this tax year.

- 27 Name, address, and taxpayer identifying number of related party
28 Did the related party resell or dispose of the property... Yes No
29 If the answer to question 28 is 'Yes,' complete lines 30 through 37 below unless one of the following conditions is met.
a The second disposition was more than 2 years after the first disposition...
b The first disposition was a sale or exchange of stock to the issuing corporation.
c The second disposition was an involuntary conversion...
d The second disposition occurred after the death of the original seller or buyer.
e It can be established to the satisfaction of the Internal Revenue Service that tax avoidance was not a principal purpose...
30 Selling price of property sold by related party...
31 Enter contract price from line 18 for year of first sale...
32 Enter the smaller of line 30 or line 31...
33 Total payments received by the end of your 2007 tax year...
34 Subtract line 33 from line 32...
35 Multiply line 34 by the gross profit percentage on line 19...
36 Enter the part of line 35 that is ordinary income...
37 Subtract line 36 from line 35...

MARY SCHULTZ LAW PS

May 02, 2019 - 10:32 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36040-7
Appellate Court Case Title: In re Marriage of Edward A. Miller and Rita L. Yturri-Smith
Superior Court Case Number: 14-3-00584-7

The following documents have been uploaded:

- 360407_Other_20190502103115D3541022_0879.pdf
This File Contains:
Other - CORRECTED APPENDIX A TO REPLY BRIEF
The Original File Name was APPENDIX A.pdf

A copy of the uploaded files will be sent to:

- danhuntington@richter-wimberley.com
- dgs@randalldanskin.com
- valeriemcomie@gmail.com

Comments:

Sender Name: Mary Schultz - Email: Mary@MSchultz.com
Address:
2111 E RED BARN LN
SPANGLE, WA, 99031-5005
Phone: 509-245-3522 - Extension 306

Note: The Filing Id is 20190502103115D3541022