

FILED  
Court of Appeals  
Division III  
State of Washington  
2/15/2019 4:49 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 OPENING 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.....	i
TABLE OF AUTHORITIES .....	v
I. INTRODUCTION .....	1
II. ISSUES/ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE.....	7
IV. ARGUMENT.....	17
A. Standard of Review.....	17
B. The trial court committed reversible error when it mischaracterized several of the parties’ assets.....	18
1. The trial court committed reversible error by mischaracterizing the proceeds of the December 2007 sale of Miller White Runkle as the Husband’s separate property, because the Husband sold his marital earning power during marital earning years, and his earning power is a community asset.....	18
a) The material asset sold in the 2007 Ascentium sales contract was not the Husband’s stock, it was a non-compete agreement whereby the Husband sold his marital earning power between 2008-2011 .....	19

b)	The proceeds of a spouse’s sale of their marital earning ability through a non-compete agreement is community property.....	22
c)	The proceeds of the December 2007 Agreement are presumed to be community funds, and the Husband failed to rebut that presumption by clear and convincing evidence.....	25
d)	Even if the trial court correctly identified the 2007 sale as a sale of stock in some fashion, the stock that sold was community stock, because it was acquired by the community in 2005 with one of the Husband’s wage bonuses.....	26
2.	The trial court committed reversible error in characterizing the Husband’s Radio Lane residence as separate property because the acquisition was sourced from the 2007 Ascentium sale proceeds, and thus, it is community property.....	32
3.	The trial court committed reversible error in failing to characterize the value the Wife created in the Glenaire Home as her separate property when she increased its value using her post-separation labor and insurance proceeds from a policy	

	she paid with her maintenance income post-separation .....	32
a.	Fire insurance proceeds used to restore Glenaire were the Wife’s separate property .....	34
b.	The Wife’s post-separation labor restoring the Glenaire home to trial value warranted a lien against that property or against the Husband’s interest in that property .....	37
4.	The trial court committed reversible error in mischaracterizing the Wife’s right to \$355,132 of Safeco “contents” proceeds as community property when that fund was acquired by the Wife by her post- separation labor and her maintenance income.....	39
5.	The trial court committed reversible error in mischaracterizing the 2008 Cobalt boat as the Husband’s separate property.....	40
C.	The trial court abused its discretion when it failed to assign to the Husband as his community property received some \$802,840 he wrongfully dissipated from the Centaurus fund.....	41
D.	The trial court abused its discretion when it assigned the Husband’s 2002 Sea-Doos to the Wife because it forced the Wife to buy them .....	43

E.	The trial court abused its discretion when it did not properly consider the RCW 26.09.080 factors when it distributed the property .....	44
F.	The trial court abused its discretion in denying the Wife attorney fee assistance in the trial court.....	46
G.	Maintenance should be assessed on any remand if property has been dissipated.....	48
H.	The Wife should receive RAP 18.1 fees on appeal.....	48
V.	CONCLUSION.....	48
	CERTIFICATE OF SERVICE .....	50

## TABLE OF AUTHORITIES

<u>CASES:</u>	Page
<i>Aetna Life Ins. Co. v. Wadsworth</i> , 102 Wn.2d 652 (1984).....	35, 36, 37, 40
<i>Bobbitt (In re Marriage of)</i> , 135 Wn. App. 8 (2006).....	43
<i>Chumbley (In re Marriage of)</i> , 150 Wn.2d 1 (2003).....	18, 26, 32
<i>Cirrito v. Cirrito</i> , 44 Va. App. 287 (2004).....	23
<i>Davidson v. Comm'r of Internal Revenue</i> , 305 U.S. 44 (1938).....	28, 31
<i>DeHollander (In re Marriage of)</i> , 53 Wn. App. 695 (1989).....	33, 37, 38
<i>Estate of Bellingham (Matter of)</i> , 85 Wn. App. 450 (1997).....	35
<i>Estate of Borghi (In re)</i> , 167 Wn.2d at 484.....	24
<i>Estate of Hickman (In re)</i> , 41 Wn.2d 519 (1952).....	35, 36
<i>Estate of Witte (In re)</i> , 21 Wn.2d 112 (1944).....	33
<i>Ferree v. Doric Co.</i> , 62 Wn.2d 561, 383 P.2d 900 (1963).....	17
<i>Griswold (In re Marriage of)</i> , 112 Wn. App. 333 (2002).....	23, 24, 40

<i>Katare v. Katare</i> , 175 Wn.2d 23, 283 P.3d 546, (2012).....	17
<i>Kile &amp; Kendall (In re Marriage of)</i> , 186 Wn. App. 864 (2015).....	47, 48
<i>King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.</i> , 142 Wn.2d 543, 14 P.3d 133 (2000).....	17
<i>Landry (In re Marriage of)</i> , 103 Wn.2d 807 (1985).....	23
<i>Larson &amp; Calhoun (In re Marriage of)</i> , 178 Wn. App. 133 (2013).....	44, 45, 46
<i>Lindemann v. Lindemann</i> , 92 Wn. App. 64 (1998).....	23, 24
<i>Littlefield (In re Marriage of)</i> 133 Wn.2d 39, 940 P.2d 1362 (1997).....	17, 45
<i>Marzetta (In re Marriage of)</i> , 129 Wn. App. 607 (2005).....	23
<i>Miracle (In re Marriage of)</i> , 101 Wn.2d 137 (1984).....	33
<i>Muhammad (In re Marriage of)</i> , 153 Wn.2d 795, 108 P.3d 779 (2005).....	17
<i>Pearson-Maines (In re Marriage of)</i> , 70 Wn. App. 860 (1993).....	36
<i>Peters v. Skalman</i> , 27 Wn. App. 247 (1980).....	42
<i>Pollock v. Pollock</i> , 7 Wn. App. 394 (1972).....	18, 36

<i>Sager (In re Marriage of)</i> , 71 Wn. App. 855 (1993).	35
<i>Short (In re Marriage of)</i> , 125 Wn.2d 865 (1995).	24
<i>Skarbek (In re Marriage of)</i> , 100 Wn. App. 444 (2000).	18, 26
<i>White (In re Marriage of)</i> , 105 Wn. App. 545 (2001).	26, 40
<i>Williams (In re Marriage of)</i> , 84 Wn. App. 263 (1996).	41

**STATUTES:**

26 U.S.C.A. § 71	36, 37
RCW 26.09.080	<i>Passim</i>
RCW 26.09.090	36, 48
RCW 26.09.140	46

**RULES:**

RAP 8.1	48
---------	----

**SECONDARY SOURCES:**

<i>Black's Law Dictionary</i> (10 <sup>th</sup> Ed. 2014).	43
------------------------------------------------------------	----

## **I. INTRODUCTION.**

This appeal involves the propriety of the trial court's characterization of property, and its distribution of property and debt, attendant to the dissolution of the parties' 10-year committed relationship and marriage. The Appellant Wife respectfully contends that the trial court erred in determining that the following items were the Husband's separate property, when they should have been characterized as community property:

- 1) \$2,607,661 of proceeds from a 2007 sale of the Husband's three year non-compete agreement;
- 2) Stock shares acquired in 2005 in exchange for the Husband's wage bonus;
- 3) A Radio Lane residence purchased with funds sourced to the foregoing community property; and,
- 4) A 2008 boat purchased during the marriage with community funds.

The trial court also erred in failing to award the Wife the following items as her separate property:

- 1) The value of the Wife's post-separation contributions to real property value;

2) The proceeds of a fire insurance policy the Wife purchased post-separation;

3) The value of the Wife's pre-separation contributions of separate funds to the community; and,

4) The value of the community's use of the Wife's separate lake home over the couple's ten year relationship.

The court also erred in failing to assign the Husband over \$800,000 of cash he dissipated during the action, and in requiring the Wife to buy the Husband's old separate property 2002 Sea-Doo jet skis through its award. The Wife further contends that the trial court's overall distribution failed to comply with RCW 26.09.080, and that this matter should be remanded for redistribution of property and debt. The Trial court should be directed further to award the Wife fees for trial, and asks that the trial court be directed on remand to order her maintenance for any property that should have been awarded to her, but dissipated by the Husband by the time of any ordered redistribution.

## **II. ISSUES/ASSIGNMENT OF ERROR.**

1) The trial court erred in finding and concluding that a 2007 sale between the Husband and "Ascentium" company was a sale of the

Husband's separately acquired 1993 stock.<sup>1</sup> The 2007 sale was a sale of a community asset, because the proceeds received were received for the Husband's foregoing his marital earning capacity for three years under a non-compete agreement. Moreover, the only stock that would have existed for sale in 2007 was community property, and the stock "sold" was community stock as confirmed by the parties' tax return, which evidenced that the stock sold in the 2007 sale was stock acquired by the Husband in 2005 with a wage bonus earned during the parties' relationship.

2) The trial court erred in finding that the Husband's Radio Lane home was his separate property.<sup>2</sup> The Radio Lane home was community property, because it was purchased by the Husband with funds received from the 2007 Ascentium sale.

3) The trial court erred in failing to assess the Husband over \$802,840 of funds he dissipated from the "Centaurus Fund" and D.A. Davidson accounts while the dissolution action was pending. Those funds dissipated should have been quantified and assigned to the Husband as property received.

4) The trial court erred in failing to award the Wife separate

---

<sup>1</sup> The trial court erred in making Findings of Fact ("FOF") CP 618-633, at ¶ 22(C)(11), (C)(12)-(15); (D)(3), (5), (7), (9), (14), (15); and (E)(9), (10), (11).

<sup>2</sup> The trial court erred in making FOF 22(I).

liens against the community property or against the Husband's separate property,<sup>3</sup> when the Wife contributed: (a) over \$300,000 of cash to the community from a separate tort claim settlement she received during the relationship; (b) approximately \$750,000 of rental and use value she gave to the community over the ten years during which the community used her separate Coeur d'Alene lake property; and (c) some \$390,000 of trial date value to the "Glennaire" home by her post-separation fire insurance proceeds and her separate labor in managing the reconstruction.

5) The trial court erred in characterizing fire insurance proceeds received by the Wife a year-and-a-half after the parties' separation as community property.<sup>4</sup> Fire insurance proceeds acquired by the Wife's post-separation insurance premium payments and post-separation labor are the Wife's separate property.

6) The trial court erred in finding that a 2008 boat was acquired by the Husband before 2003, and therefore the Husband's separate property.<sup>5</sup> This 2008 boat was demonstrably purchased in 2008, and thus community

---

<sup>3</sup> The trial court erred in making FOF 22 (H)(7), (finding that the Husband was "generous" with the Wife, while failing to appreciate that his wages were community funds), (9) (wife's lien only) and (10).

<sup>4</sup> The trial court erred in making FOF 22 and Conclusions of Law (G)(2), (6), (13), (15).

<sup>5</sup> The trial court erred in making FOF 22(J)(4).

property.

7) The trial court abuse its discretion when it forced the Wife to buy the Husband's 14-year old separate property "Sea-Doos" as part of its property "distribution." <sup>6</sup>

8) The trial court abused its discretion when it assigned the Wife the minimal financial support it awarded her for fees and debt as community property awarded her. <sup>7</sup>

9) The trial court abused its discretion when it failed to remedy the inequity it had found to exist under a contempt order because of the Husband's undisclosed dissipation of cash and spending. <sup>8</sup>

10) The trial court abused its discretion when it inequitably distributed the property based upon (mis)characterization of property alone. <sup>9</sup>

11) The trial court abused its discretion when it distributed the property and debt without regard to the equitable factors of RCW

---

<sup>6</sup> The trial court erred in making FOF 22(J)(5).

<sup>7</sup> The trial court erred in making FOF 22(J)(18).

<sup>8</sup> The trial court erred in failing to implement or consider its order finding the Husband in contempt. *CP 405-406, and FOF 22 (J)(16)*.

<sup>9</sup> The trial court's decree shows a distribution based upon property and debt characterization alone. *CP 636-40; Order, para. 20(A)-(G)*.

26.09.080.<sup>10</sup>

12) The trial court abuse its discretion in finding that the Husband received an award of only \$2,623,868.19,<sup>11</sup> when it awarded the Husband a total of \$3,193,499.59 of community liquid funds, including \$2,958,637.09 from the Centaurus Fund,<sup>12</sup> \$40,000 the Husband paid for his contempt fine from the Centaurus Fund, and some \$70,000 of a D.A. Davidson cash account the Husband depleted during this action [assigning the Husband only \$57,297.50 of that account]. *CP 626, 638.*

13) The trial court erred when it concluded the Wife received an award of \$1,506,045.94 when it awarded her her pre-maritally owned separate real property interests, offset \$385,539.55 of the community property cash it awarded her to \$0, and then assigned her \$360,000 of separate personal debt. *Decree, at para. 20(A), (B), (E), and (G).*

14) The trial court abused its discretion in refusing to award

---

<sup>10</sup> The trial court's decree shows a distribution based upon property and debt characterization alone. *CP 636-40; Order, para. 20(A)-(G).*

<sup>11</sup> *Decree, at para. 20 (C).*

<sup>12</sup> The \$2,958,637.09 figure includes the remaining \$1,387,441.09 Centaurus account consisted of a "separate" \$725,631.69, and *both* halves of the alleged community portion (\$330,904.70 times two), which it gave to the Husband by applying offsets, the cash that went into the Radio Lane home of \$766,196, and the \$802,840 the Wife showed that the Husband had already dissipated prior to trial, which the trial court failed to identify, calculate or mention. *CP 638-9.*

attorney fees to the Wife when it allowed the Husband access to, use of, and an award of over \$3 million in liquid funds.<sup>13</sup>

15) The trial court abused its discretion in finding that the Wife's "decision not to work" caused the \$360,000 of personal debt it assigned her, when, over the four years of this dissolution action pending, it provided her with maintenance less than her monthly expenses while she was attending school, failed to consider her changed circumstances of displacement from her home by fire, gave her little to no fee support throughout the proceeding, and, where the Husband didn't work either, but dissipated in excess of \$800,000 of funds for his own expenses.<sup>14</sup>

### **III. STATEMENT OF THE CASE.**

Ed Miller (Ed or "the Husband") and Rita Yturri-Smith (Rita or "the Wife") began an exclusive relationship in mid-to-late 2002. *RP 1550-1563*. The couple commenced a committed intimate relationship in December 2003 when Ed formally moved into Rita's home (hereafter the "Glennaire" home.) *CP 622, FOF 22(A)(23); CP 623, FOF 22(B)(15)*. The parties married on July 25, 2007. *CP 622, FOF 22(A)(24)*. They separated on November 7, 2013. *CP 622, FOF 22(A)(26)*.

---

<sup>13</sup> The trial court erred in making FOF 14. *CP 620*.

<sup>14</sup> The trial court erred in making FOF 22(A)(16)-(17).

1. Real Property.

When the couple began their committed intimate relationship, Rita owned two real properties - the Glenaire home and her family's Coeur d'Alene Lake home (hereinafter the "Lake Home"). *CP 627 (FOF 22(F)(1)); CP 629 (FOF 22(H)(2))*. In 2003, Ed purchased Rita's former Husband's half interest in the Glenaire Home, culminating in his obtaining a 77.15% interest. *CP 627, FOF 22(F)(11)*.

Throughout their relationship, the parties lived in the Glenaire home as their marital home and used the Wife's Lake Home as a vacation home. Rita worked and produced income for the community. *CP 622, FOF 22(A)(14)*. She contributed over \$300,000 of a separate tort settlement to her community's lifestyle. *RP 1721-1722, and Ex. 308, RP 1721-22; 1169*.

2. Origin of the Centaurus Investment Fund.

From 2003 through 2005, Ed was a 5% minority shareholder in a corporation named WhiteRunkle. *Ex. 303(d) at 104 (458 of 9,154 shares)*. The parties supported Ed's minority interest by loaning Ed's wage bonuses to the corporation, e.g., *RP 73, 110*. In 2005, the majority shareholders left the corporation and, consistent with the 1993 stockholder agreement, the corporation bought back the White and Runkle shares with

its retained earnings. *CP 623, FOF 22(C)(5), (7), (10)*. After White and Runkle's departure, the corporation became "Miller White Runkle" and Ed acquired a 100% stock ownership interest in this new corporation. *CP 623, FOF 22(C)(12)*. He acquired that stock by loaning WhiteRunkle his November 2005 wage bonus of \$359,850 for its operating expense, and then Miller White Runkle repaid Ed's wage loan by issuing Ed 458 shares of stock as credit against the loan "dollar for dollar." *RP 100-101, 102, 130, 134 (see infra)*.

In December 2007, Ed then entered into a sales transaction with a company called Ascentium, whereby Ascentium would pay Ed \$2,607,661 in payments in proceeds over the ensuing three years of the parties' marriage from 2008-2010. *Ex. 323 at 533 (Installment Sale Schedule); CP 623, FOF 22(D)(11)*. Ed deposited the funds into an investment fund ultimately called the "Centaurus Fund." *CP 625, FOF 22(E)(3), (9)*.

### 3. Distribution of Income Prior to Trial.

The parties separated on November 7, 2013. *CP 619, FOF 5*. At the time of separation, both parties lived off of the income generated by their primary investment fund containing the Ascentium sale proceeds, and neither party was employed. *CP 7-12; 39-44*. The Centaurus fund, then identified as a "RBC Dain Rauscher" Fund (P-109 at 05482-05486),

in addition to some pension assets which Ed kept in his name, totaled \$3.1 million of the community's liquid assets. *CP 41: 18.*

Prior to the dissolution trial, the court entered temporary orders identifying who would control these assets and their income. *CP 45-48.*

Ed reported drawing \$8,000 a month from the Centaurus Fund. *CP 39: 16.* He had little debt, identifying two credit cards with a total balance of \$18,000 and \$1,000 on deposit in the bank. *CP 9, 43.* Rita's expenses were approximately \$7,000 a month, with a single credit card debt balance of approximately \$2,000 and \$20 cash on hand. *CP 9, 11; 47.*<sup>15</sup>

Instead of allocating income equally to the parties from the Centaurus Fund, the trial court "defaulted" full control of all funds to Ed. *CP 47.* Despite Rita's expenses, the trial court required Ed to pay Rita only \$3,400 per month in maintenance from the couple's funds. *CP 47.* The trial court gave her no assistance with her attorney fees. *CP 48.*

Rita was quickly rendered unable to pay her attorney fees on her maintenance income. *CP 57; 71; 85; CP 125-30; CP 198 (Mary Schultz appears); CP 313 (Gloria Porter withdraws).* By the end of trial, Rita had accrued over \$250,000 of attorney fees for her trial counsel alone, which she paid by taking loans from her parents. *CP 590.*

---

<sup>15</sup> Rita had also accrued a premarital pension of \$237,000. *CP 9, 394.*

4. Rita's Contribution to The Glenaire Home Post-Separation.

In June 2015, while her dissolution action was pending, Rita's Glenaire home was substantially damaged by fire. *CP 93; 208*. Rita was now "homeless," "living like a vagabond," borrowing cars, and staying with her mother at her mother's apartment, her ex-husband's house, with friends, and at her family lake home. *CP 208-209; 128, ¶ 11*. The trial court gave Rita no additional monthly financial assistance during her displacement.

Rita spent over two years restoring the Glenaire home and working with contractors and with her Safeco insurance company to increase the value of the home and the insurance payout. *CP 203-214*. She meticulously inventoried the Glenaire home contents and personal items that had been damaged or destroyed. *Ex. 118*. Her inventory work increased Safeco's cash payout by an additional \$355,000. *CP 200-202*. The trial court ordered the funds into an IOLTA account pending trial. *CP 205, ¶ 10*.

5. The Court's Refusal to Provide Rita Attorney Fees Assistance for Complex Tracing Issues.

Rita moved the court for attorney fee assistance on the grounds that tracing the parties' multi-million dollar estate was complex and expensive. She provided a detailed declaration from her trial counsel explaining the complexities. *CP 230-231; 257-271*. The court awarded no funds. *See, e.g.,*

CP 100, 350.<sup>16</sup>

By October 2016 Rita's monthly expenses had increased to \$13,000 per month due to her inability to pay her debt with her monthly maintenance. By that time she had borrowed over \$130,000 from friends, family, and credit cards to pay her attorney's fees. CP 216-217, 223-224, 227.

6. Ed's Pre-Trial Dissipation of the Centaurus Funds.

Prior to trial, Ed spent over \$1.556 million of the parties' primary investment fund,<sup>17</sup> and spent another \$70,000 from a \$114,959 D.A.

---

<sup>16</sup> The court had earlier released \$55,000 to Rita from the fire funds so that she could buy a functional vehicle and pay some of her already past-due fees and debt, but the money was insufficient by that point and had to be applied to expert costs and attorney fees. CP 205; 210-212.

<sup>17</sup> From RBC #5708 (what would become Centaurus #318563): \$1,297,196 in withdrawals from 2014 through 2016:

In 2014: -\$226,000

In 2015: -\$907,669

In 2016: -\$163,527

*P-109 at 05487, and 05485 (January–October 2016).*

From RBC # 91157; -\$131,840 from 2014 through October 2016

In 2014: -\$31,698.

In 2015: -\$32, 671

In 2016: -\$67,471

*P-109 at 05488.*

From Centaurus 318563: -\$73,000 in 2016.

Sept. 2016: -\$16,000

Oct. 2016: -\$26,000

Nov. 2016: \$8,000

Dec. 2016: \$23,000

*P-109 at 05491.*

2017 Centaurus withdrawals through March: -\$54,000

Davidson account. *CP 570; 14-17 (court's finding)*. Ed used \$644,969 of the cash taken to buy himself a new home, and another \$103,529 to remodel and repair his new home, totaling \$766,196.00. (*P-114 at 887 showing withdrawal*); *P-114 at 905-908*.

The trial court found Ed in contempt of its temporary order requiring Ed to preserve funds. *CP 401-406, at ¶ 6*. It found that Ed had removed a “substantial amount” of funds from the parties’ main liquid account. *CP 404*. It held that a financial “inequity” had occurred, which required “that some balance be made to remedy the wife’s debt situation and the allowance to her of a far lesser standard of living while this matter has been ongoing because of the Husband’s failure to disclose his spending and dissipation.” *CP 404-405, ¶ 12*. But it then “reserved” any disbursement of funds to the Wife for trial, *CP 405, ¶ 5*. It also then allowed Ed to pay his contempt fine from the Centaurus Fund, giving him another \$40,000 of the fund. *CP 401-406, at ¶ 6*. It held that it would determine the additional amounts Ed spent at trial. *CP 404, 406*.

---

Jan. 2017:     -\$23,000 – (P-109 at 05491), *RP 454*.  
Feb. 2017:     “-\$8,000” – (monthly allotment)  
March 2017:   -\$23,000 – *CP 383 at pp. 237-238*.

**Total Withdrawals from Centaurus funds January 1, 2014 –March 2017:**  
**\$1,556,036.**

7. Distribution at Trial.

Following trial, the trial court assigned Ed only the \$766,196 of the funds he withdrew—the funds he used to buy, remodel, and furnish his new Radio Lane home. It did not mention, nor quantify, the “substantial amount” that Rita had evidenced Ed had dissipated. It did nothing to remedy the inequity it had already determined existed. *CP 632, ¶ 16*. The court made no mention of Ed’s appropriating any cash pretrial, nor of its prior contempt order’s finding that it would determine at trial what amounts Ed had dissipated, other than to decide that the attorney fees assessed against Ed would not be counted against him. *CP 632 at ¶ 16; compare to P 404, FOF 12; CP 405, FOF 5*. Contrary to its contempt findings, the court did not mention, nor consider the financial inequity it already found that Rita had suffered, nor did it give her any additional or remedial cash distribution because of that inequity. *Id.*

The court then distributed all property and debt solely by its characterization of property and debt as community or separate. *CP 636-640*. It awarded Ed a total of \$3,193,499.59 of liquid funds. This included \$2,958,637.09 from the Centaurus Fund,<sup>18</sup> and \$40,000 Ed paid for his

---

<sup>18</sup> The \$2,958,637.09 figure includes the remaining \$1,387,441.09 Centaurus account consisted of a “separate” \$725,631.69, and *both* halves of the alleged community portion (\$330,904.70 times two), which it gave to Ed by

contempt fine from the Centaurus Fund, the latter of which it held it would not characterize as part of Ed's distribution. *CP 632 at ¶ 16*. It also included one half of a D.A. Davidson account in the amount of \$57,297.50, even though Ed had depleted this account by \$70,000 during his control. *CP 626, 638*. Finally, it awarded Ed liquid funds of \$137,565 of the \$355,000 cash payout from Safeco fire insurance proceeds that Rita acquired post-separation from her inventorying efforts. *CP 638*. Ed had no debt except for his trial attorney's trial fees. *CP 639 at (D)*.

The court then awarded Rita *portions* of the Glenaire home and the Lake Home, her separate jewelry, and the premarital pension she had accumulated before meeting Ed. *CP 637*. From the community property it deemed to exist, Rita received only an IRS refund of \$500 and \$4,661 cash from her "half" of the D.A. Davidson account. *CP 626, 641*. She also received \$137,565 of the \$355,000 of Safeco's cash payout she had acquired post-separation, which the court held to be community property. *CP 636*.

On paper, it appears that the court awarded Rita \$330,904 of the Centaurus Fund and \$57,297.50 of the D.A. Davidson account; however, the court gave Ed an offset of \$383,539.55 to apply against that share of those

---

applying offsets, the cash that went into the Radio Lane home of \$766,196, and the \$802,840 Ed had already dissipated, without mention. *CP 638-9*.

funds, decreasing Rita's actual cash award from both awards to only \$4,661.65. *Compare 636-637 with 640.* The trial court assigned Rita's earlier fee assistance of \$55,000 from her fire insurance proceeds to her as community property awarded her. *CP 637.* Rita thus received \$142,726.65<sup>19</sup> of usable cash from "community property," and then assigned \$360,000 of "separate" personal and credit debt she had accrued post-separation. *CP 639-640.* She had no income.<sup>20</sup>

The court makes no mention of RCW 26.09.080 in its findings or conclusions. *CP 618-633.* The court held that Rita had no need for attorney fee assistance because "each spouse is receiving an estate of more than one million dollars," *CP 620,* when it had just "offset" Rita's liquidity to \$142,426 against \$360,000 of debt. Ed's attorney fees and costs totaled \$232,622.08 following trial, and Rita's totaled \$255,530 for her trial counsel. *CP 590; Affidavit of Attorney Fees, Salina, Sept. 15, 2017.* Rita appeals the trial court's distribution. *CP 659.*

---

<sup>19</sup> Calculated as her \$137,565 of fire proceeds, her \$4,661.65 remainder from the D.A. Davidson funds, and her \$500 IRS refund.

<sup>20</sup> Rita was also given a one-half interest in a community Centaurus IRA account of \$79,725 (*CP 664*), but the latter was by a rollover, and not accessible without penalty.

#### IV. ARGUMENT.

##### A. Standard of Review.

This court reviews a trial court's property division made during a dissolution of marriage for manifest abuse of discretion. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803 (2005). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47 (1997) (citation omitted). “A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices considering the facts and applicable legal standard, it is based on untenable grounds if the factual findings are not supported by the record, and it is based on untenable reasons if it applies an incorrect standard or the facts do not meet the requirements of the correct standard.” *Littlefield*, 133 Wn.2d at 47 (citation omitted).

The trial court's findings of fact will not be disturbed so long as they are supported by substantial evidence. *Katara v. Katara*, 175 Wn.2d 23, 35 (2012) (citing *Ferree v. Doric Co.*, 62 Wn.2d 561, 568 (1963)). “Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the matter asserted.” *Katara*, 175 Wn.2d at 35 (citing *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wn.2d

543, 561 (2000).

**B. The trial court committed reversible error when it mischaracterized several of the parties' assets.**

This court reviews the trial court's characterization of property de novo. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5 (2003), citing *In re Marriage of Skarbek*, 100 Wn. App. 444, 447 (2000). The trial court's failure to correctly characterize the community or separate property status is reversible error. *Pollock v. Pollock*, 7 Wn. App. 394, 399 (1972).

1. The trial court committed reversible error by mischaracterizing the proceeds of the December 2007 sale of Miller White Runkle as the Husband's separate property, because the Husband sold his marital earning power during marital earning years, and his earning power is a community asset.

The trial court improperly characterized proceeds from a 2007 sale as the Husband's separate property, which is reversible error. *Pollock*, 7 Wn. App. at 399.

- a) The material asset sold in the 2007 Ascentium sales contract was not the Husband's stock, it was a non-compete agreement whereby the Husband sold his marital earning power between 2008-2011.

The trial court found that a sale contract dated December 31, 2007, entitled "Stock Purchase Agreement," encompassed the terms of the sale. *CP 624, FOF 22(D)(7), Ex. 361*. The plain language of the contract makes the purchase contingent upon the Husband's compliance with Section 5.5, which is a three-year non-compete provision. *Ex. 361 at 5.5, pp. 970-72*. Section 5.5 is the only section "material and of essence to [the] agreement." *See Ex. 361 at 972, Section 5.5(f) ("Materiality. Shareholder acknowledges and agrees that the provisions of this Section 5.5 are material and of the essence to this Agreement. ...." (emphasis added))*. Ascentium "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 "induce[d] Buyer to enter into this Agreement." *Id.* The consideration given 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)*. Section 5.5's restrictions were "necessary" to the

transaction. *Ex. 361 at 972, Section 5.5(e).*

Section 5.5 commits the Husband to his individual forbearance of work in his profession for three years between 2008-2011; Ed was required to forego work in his field “in the United States of America” for three years through Section 5.5’s non-competition and non-solicitation clauses. *Ex. 361 § 5.5(b) and (c), Bates p. 971.* Ed’s compliance period would thus be during his marital earning years, and the payments made by Ascentium in fact occurred during these years. *CP 623, FOF (D)(11).*

In addition, section 7.1 of a Consultant Agreement, which was incorporated in the sales contract by reference, makes it clear the unique nature of the Husband’s services was the substantial consideration for the sale. *Ex 361 at 996.* The Husband was not only required to forebear generating his own income for three marital years under the sales contract, but he was to be compensated another \$50,000 for his individual labor for an ensuing period of six months, during which time he would work for Ascentium as an independent consultant:

“In addition to the Total Purchase Price (as defined in the Purchase Agreement) to be paid by the Company in connection with the Closing of the transactions contemplated by the Purchase Agreement, the Consultant shall pay Consultant \$50,000 on June 30, 2008 if this Agreement has not been terminated prior to this date.”

*Ex. 361, p. 993, para. 1.2.*

The Husband's then-counsel, Al Rubens, confirmed to Ed in December 2007 that the sale price being negotiated was intended to remove Ed permanently from the advertising market (i.e., "Taking you out of the market.") *Ex. 359(a) at 935, 936*. The sale agreement was about "what (Ed) can, and cannot do." *Id., 936*. The Husband confirmed at trial that he fully understood that he was selling his forbearance from earning income, because he set the sale price at earnings replacement. *RP 868: 5-14;*<sup>21</sup> *RP 869*.

"Stock" was non-essential to this sale. The Husband performed no stock valuation. *RP 876*. There were no stock certificates to transfer. *Ex. 361 at 973, ¶ 6.7*. In fact, Ed was required by the sale contract to certify that his company had never issued any certificates representing shares of

---

<sup>21</sup> *See, e.g., RP 868: 5-14:*

"(Ed): Well, immediately after pulling (myself) off the floor that somebody wanted to buy this thing, I contacted Jerry Karstetter because he was my financial advisor, and I contacted him because I needed to know if I did sell this thing, what would I have to sell it for in order to have a certain kind of income without touching the principal...And what would that figure be in order to get there.

(Ed's counsel, Salina): All right. And so in order to generate a certain level of cash flow —

A: Yes.

Q: -- for personal consumption, you needed to know how much money you had generating cash flow, I guess?

A: What I needed to generate the cash flow."

*RP 868: 5-14.*

its stock, but Ed never did this. *RP 1527-1528*. Ascentium paid him anyway. *CP 623, FOF (D)(11)*. Those payments were thus necessarily paid for Ed's compliance with the non-compete provision, because no stock ever transferred, and Ed never certified the status of any stock. In fact, the trial court itself found that the reason the Ascentium transaction was "characterized" as a sale of stock was to avoid taxation on sums *paid as ordinary income* to lower the parties' taxes. *CP 624, FOF (D)(8)*.

The asset sold in 2007 to Ascentium was thus Ed's forbearance of his marital earning power over a period of three years, and the trial court erred in characterizing these sale proceeds as Ed's separate funds.

- b) The proceeds of a spouse's sale of their marital earning ability through a non-compete agreement is community property.

Washington courts have not directly addressed the characterization of a spouse's sale of their marital earning ability through a non-compete agreement. The Virginia Court of Appeals, however, has addressed this issue by analogizing funds paid in exchange for a non-compete agreement to a severance package, and holding that money acquired "for not competing (with a prior employer)" is therefore "within the definition of marital property since the right to receive the money was

acquired during the marriage and is not separate property.” *Cirrito v. Cirrito*, 44 Va. App. 287, 292 (2004). The Virginia court’s analysis is persuasive and consistent with Washington’s existing law.

In Washington, earnings arising from services performed during marriage are community property. *In re Marriage of Landry*, 103 Wn.2d 807, 810 (1985). A (quasi-marital) community is entitled to the fruits of each party's labor. *Lindemann v. Lindemann*, 92 Wn. App. 64, 68 (1998). Salaries or wages earned by either spouse from their labor are community property. *In re Marriage of Marzetta*, 129 Wn. App. 607, 618 (2005); *see also In re Marriage of Griswold*, 112 Wn. App. 333, 341 (2002).

In *Cirrito*, the Virginia court analogized the proceeds received through a non-compete agreement as a payment made in substitute for future lost wages. Where the wages lost are lost during marital years, then the payments replace those lost marital earnings and are therefore community property. *Cirrito*, 44 Va. App. at 293-294. Non-compete agreements are entirely dependent on the spouse’s *conduct* during the non-compete period; thus, “[A]ny decision to breach or not breach the agreement would have been made during that time (referenced in the non-compete),” and thus “during the course of the marriage.” *Id.* at 293-294. This time-based analysis is consistent with the marital community’s

entitlement to the fruits of either's labor, per *Lindemann*, 92 Wn. App. at 68. If a party exchanges the fruits of their labor during a certain marital period for consideration, then the consideration given is being exchanged for the community's entitlement to that spouse's labor. This is equally consistent with *Griswold*, where this Division III Court characterized the acquisition of stock option rights by the period during which the right was acquired. *Griswold*, 112 Wn. App. at 341 (2002), applying *In re Marriage of Short*, 125 Wn.2d 865 (1995). If a spouse was required to stay employed for a certain period of time during the marriage to acquire the right, then the right acquired by that marital employment was a community right. *Id.* The theory is equally in accord with *In re Estate of Borghi*, 167 Wn.2d at 484, whereby property is acquired when the obligation is undertaken, e.g., through a real estate contract or mortgage. The characterization arises from the date of the obligation assumed.

Here, Ed acquired the "title" or "right" to the sale proceeds Ascentium paid by his performance through the three marital years following his undertaking this non-compete obligation, and during which time he performed the non-compete agreement; that is, payment was rendered to Ed "[S]ubject to the terms and conditions of this Agreement," and explicitly preconditioned upon Ed's compliance with Section 5.5.

*Ex. 361 at 952, § 1.1 and § 1.2 (language starting each paragraph).*

Because the right to those Ascentium payments was thus acquired through those marital employment years, that right is community property, as are the funds received. In sum, Ed's *right* to the funds was established only through his 2007 contract with Ascentium. The identity of what was sold is within the contract's Section 5.5, and that contract's terms confirm that the material asset sold to Ascentium in 2007, and for which Ascentium paid the sums before the court, was the Section 5.5 non-compete agreement. The payments were consistently made to Ed over the course of that three-year period. *See CP 625, FOF (D)(11).*

This court should adopt the Virginia Court of Appeals' reasoning and hold that that money acquired for not competing with another is within the definition of marital property, since the right to receive the money is acquired during those marital years and is received in exchange for the forbearance from marital earnings.

- c) The proceeds of the December 2007 sale contract are presumed to be community funds, and the Husband failed to rebut that presumption by clear and convincing evidence.

An asset is presumed to be community property if it is "acquired"

during marriage. *In re Marriage of White*, 105 Wn. App. 545, 550 (2001); *Chumbley*, 150 Wn.2d at 5. A party may overcome that presumption by presenting clear and convincing evidence that the funds before the court were acquired “with the traceable proceeds of separate property.” *White*, 105 Wn. App. at 550; *Skarbek*, 100 Wn. App. at 448; *Chumbley*, 150 Wn.2d at 5.

Here, the \$2.6 million of sales proceeds deposited into the Centaurus Fund were acquired through the 2007 sale of a community asset, the sale occurred during the marriage, and Ascentium’s payments were all received during the marriage. *Ex. 360; Ex. 109 at 05480 (funds received); Ex 323 at 533*. The Husband failed to present evidence sufficient to overcome the presumption the Centaurus Funds were community property.

- d) Even if the trial court correctly identified the 2007 sale as a sale of stock in some fashion, the stock that sold was community stock, because it was acquired by the community in 2005 with one of the Husband’s wage bonuses.

Property acquired during marriage has the same character as the funds used to purchase it. *Chumbley*, 150 Wn.2d at 6. The trial court

found that stock was sold in the 2007 Ascentium sale, and the stock sold was stock the Husband had acquired in 1993. There is no evidence in the record to support this finding. Ed's accountant confirmed that the stock sold in 2007 was stock acquired by the marital community in 2005 with one of Ed's community wage bonuses. *RP 102*.

Specifically, and first, the Husband's original 1993 shares were restricted. Under the 1993 agreement controlling those shares, Ed could not accrue more than a 5% minority shareholder position; if White or Runkle sold their majority ownership shares, only the corporation could buy such majority shares, not Ed. *See Ex. 303(d) at 105, 1993 Stock Purchase at Art. II, 2.1, "Lifetime Transfers," 2.2(A)*. Ed's 1993 stock was thus restricted to a right to acquire only another 5% of what White or Runkle relinquished—that "ratio of the number of shares owned by the acquiring shareholder to the number of shares owned by all non-transferring shareholders," i.e., 5%. *Id.* As a result, when White and Runkle wanted to leave the corporation in 2005, then consistent with the 1993 stock purchase agreement, the *corporation* repurchased White and Runkle's shares from its retained earnings. *CP 623, 624, FOF 22(C)(1), (5), (7) and (10)*. The trial court found that upon this *corporate* buyout, Ed's 1993 shares now became the 100% ownership of the corporation.

*CP 624, FOF (C)(11)*. But that finding violates the 1993 agreement. Ed could never acquire a 100% shareholder interest through his 1993 shares.

In fact, Ed's CPA, Zoe Foltz, testified that when the corporation redeemed its stock, it also repaid all of its then-outstanding stockholder loans. *RP 110: 17-22 (Foltz)*. Ed *thereafter* loaned his new sole owned corporation, "Miller White Runkle," \$375,000 from his November 2005 wages for its operating expense. *RP 120: 7-17; RP 110: 23 – RP 111: 2*. The new corporation *repaid* Ed this wage bonus loan by issuing him 458 shares of stock. *RP 130: 14-24*. The 100% stock ownership of the new corporation, "Miller White Runkle," was issued to Ed as a "dollar for dollar" repayment to Ed of his \$359,850 operating loan from his November 2005 *wage bonus*. *RP 134: 10-16*.

The installment sale schedule on Ed and Rita's joint 2007 tax return confirms this stock transaction—the source of Ed's acquisition of his stock shares by his wage bonus loan is confirmed through the tax schedule's "cost basis" line. *Ex. 323 at 533*. Specifically, a party must pay federal income tax on "taxable gain" from the sale of stock. *Davidson v. Comm'r of Internal Revenue*, 305 U.S. 44, 44–45 (1938). Because people often buy the same stock at different times, the income tax schedule identifies the specific stock being sold by the "cost basis" of

the stock being sold. *Id.* Ed's accountant, Zoe Foltz, confirmed that the "cost basis" on the parties' tax schedule shows the stock being sold by the amount of money originally paid for that stock. *Foltz, at 99; 106: 17-25.*<sup>22</sup> The stock that Ed sold in 2007 to Ascentium had a cost basis of \$359,850. *Ex. 323 at p. 533: 8; RP 105: 10-18.* But Ed paid nothing for his 1993 shares. *CP 622, FOF 22(A)(11); RP 99.* The stock Ed sold in 2007 was therefore not his 1993 shares with the \$0 cost basis. *RP 100: 19-22; 101: 5-12; RP 105: 10-20.*

The source of the 458 shares Ed sold in 2007 was a 2005 "debit to shareholder loan and a credit to additional paid in capital, and the loan now owed Ed from all the bonuses he had loaned back to the company was reduced by that amount dollar for dollar." *RP 134.* In other words, the company kept Ed's November 2005 \$359,850 wage bonus by giving Ed the 458 shares that now constituted his entire 100% share ownership, and canceling the debt the corporation owed him:

(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?"

---

<sup>22</sup> (Schultz ) Q: "And Mr. Salina went through the discussion with you that when you sell stock, there's a basis in it. You're able to take that basis out and you don't have to pay taxes on, right?"

(Foltz): Correct."

*RP at 99.*

(CPA Foltz) A: Correct.

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.<sup>23</sup> 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.*

The \$359,850 loan Ed gave the company from his wage bonus was "changed to paid in capital," and was the source of the 458 shares sold:

(Schultz): "So what happened in 2005, which was booked in 2006, right? Let me back up. In 2006, according to this tax return, Mr. Miller paid in capital of \$359,850, correct?

A: 11-30-2007.

Q: ...[A]nd that was paid in capital in the amount of 359,850, correct?

A: Correct.

Q: **And that is what sold in the Ascentium stock transaction in 2007, correct?**

A: **Correct.**

Q: **One hundred percent of the stock, correct?**

A: **Correct."**

---

<sup>23</sup> P-43 is same 2007 tax return and schedule as Ex 323.

*RP 102* (emphasis added in bold).

And this is precisely what is recorded on Ed and Rita's installment sale schedule filed for 2007. *RP 102, ref. Ex 303(l) (independent schedule, also contained in Ex. 323 at 533)*. The parties used this 2005 cost basis for their tax benefit. *CP 624, FOF (D)(8)*.<sup>24</sup> The \$359,850 cost basis taken reduced the community's taxable gain on its "stock sale" from taxable gain of \$2,225,000 to a gain of only \$1,865,150. *Ex. 323 at 533: 8*.

A single line on the parties' 2007 installment sale schedule states that the stock being sold was "acquired in 1993." *See CP 625, FOF (D)(14), (15)*. But that line contradicts the cost basis of the stock sold, and it was the latter line that Ed used to take his tax benefit. *P-323 at 533, compare ln. 2 with ln. 8, 10*. Per *Davidson*, tax is calculated "on the basis of what was done rather than on what petitioner intended to do." *Id.*, 305 U.S. at 46.

In sum, to the extent that this 2007 sale to Ascentium included a stock sale, the stock that sold in 2007 was the stock acquired in 2005 with Ed's \$359,850 wage bonus, and was community property.

---

<sup>24</sup> The trial court had earlier acknowledged that the 2007 stock sale "resulted in taxation based on capital gain rates rather than ordinary income and lowered their tax rate." *CP 624, FOF (D)(8)*.

2. The trial court committed reversible error in characterizing the Husband's Radio Lane residence as separate property because the acquisition was sourced from the 2007 Ascentium sale proceeds, and thus, it is community property.

Property acquired during marriage has the same character as the funds used to purchase it. *Chumbley*, 150 Wn.2d at 6. The Husband purchased his Radio Lane home with cash from the parties' Centaurus Fund, into which his expert traced the 2007 Ascentium sale proceeds. *RP 385; Ex. 301 at 316; P-114 at 889 showing \$645,203 transfer out of then-account "RBC 91157," which became the Centaurus account.* Per the above section regarding the characterization of those funds as community property, the Radio Lane home is also community property.

3. The trial court committed reversible error in failing to characterize the value the Wife created in the Glenaire Home as her separate property when she increased its value using her post-separation labor and insurance proceeds from a policy she paid with her maintenance income post-separation.

When community property is contributed to the separate property

of one of the spouses, a spouse who contributes separate property to improve community property may have a right of reimbursement. *In re Marriage of DeHollander*, 53 Wn. App. 695, 699-700 (1989). Where one spouse contributes to the separate property of another, it can change the character of that separate property where “the funds are so commingled that it is no longer possible to distinguish them.” *Id.* at 698, citing *In re Estate of Witte*, 21 Wn.2d 112, 125 (1944). In the latter circumstances, “the contributing spouse has a right of reimbursement for those contributions.” *Id.*, citing, e.g., *In re Marriage of Miracle*, 101 Wn.2d 137, 139 (1984).

Prior to the parties’ relationship, Rita owned the Glenaire home. Ed moved into that home in December 2003. *CP 622, FOF 22(A)(23)*. At the time Ed moved in, the parties engaged in a transaction which accorded Ed 77.15% of a separate interest in Rita’s home, and reduced Rita Yturri-Smith’s percentage to only 22.85%. *CP 627, FOF 22(F)(11)*. Rita disputed the validity of that transaction, but even assuming validity, neither party performed a November 2013 separation date appraisal of the home. The sole appraisal was one with a date of June 5, 2017, just before trial. *RP 787, ref. Ex. 127*. The only evidence of a 2013 value for Glenaire was its tax assessed value of \$316,000. *Ex. 300 at p. 35*.

In June 2015, while this action was pending, the Glenaire home sustained extensive fire damage. Ed's real estate appraiser, Randy Berg, acknowledged that when a home is fire damaged, then its value is often the land value. *RP 816*. The land value of the Glenaire home was \$85,000. *R-300 at 30 (Assessed value, land)*. Rita restored the Glenaire home to its trial value of \$480,000 by her labor in managing the rebuild, and by fire insurance proceeds she obtained from a homeowner's policy on which she alone paid policy premiums with her maintenance. *CP 47 (requiring the payment of Rita's homeowner's insurance as "maintenance.")* "But for" Rita's labor and her insurance proceeds, there would have been little to no value for the Glenaire home. The \$480,000 trial value was thus Glenaire's **rebuilt** value, achieved by Rita having paid the insurance premiums and investing two years of labor. The trial court gave Rita no consideration for her work or her insurance proceeds. It held the Glenaire home remained 77.15% the Husband's separate property at the time of trial, and awarded him 77.15% of the trial date value. This is error of characterization, reviewed de novo.

- a. Fire insurance proceeds used to restore Glenaire were the Wife's separate property.

The fire insurance proceeds used to restore this property should

have been deemed to be Rita's separate property. The characterization of these proceeds is controlled by *Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d 652, 659–60 (1984). The character of funds paid for a term insurance policy determines the character of the insurance policy. *Aetna* dealt specifically with a life insurance policy. *Matter of Estate of Bellingham*, 85 Wn. App. 450, 455 (1997) extended *Aetna's* reasoning to a mortgage insurance policy, noting that, as to term life insurance, “premiums for such policies purchase protection from risk of death only for a fixed period of time,” and that the same concept applies to a mortgage life insurance policy. *Id.* at 454.<sup>25</sup> These cases establish the concept that the character of a policy that protects from risk for a specific period of time—a term policy—takes on the character of the premium payments for that term. Under *Aetna*, the wife paid these premiums by her maintenance income, and that fire insurance policy was her separate property.

The trial court erred in applying *In re Estate of Hickman*, 41 Wn.2d 519, 523 (1952), because the latter 1952 decision was implicitly overruled by *Aetna*. Fire insurance policies are term policies which protect against a certain risk only for a fixed period of time, and the

---

<sup>25</sup> *In re Marriage of Sager*, 71 Wn. App. 855, 860–61(1993), also applies *Aetna* to its life insurance policy.

existence of such a policy and its coverage is entirely dependent upon the premiums paid, per *Aetna*. The 1952 *Hickman* decision is implicitly overruled and/or abrogated by *Aetna*, and this Court should so hold.

The trial court also cited to *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 866 (1993), but the parties did not challenge the character of fire insurance proceed in the latter; they challenged only whether the character had become sufficiently commingled to change its character. The *Pearson-Maines* court acknowledges in its commingling discussion that a trial court must consider the character of premium payments. *Id.* at 867, quoting from *Pollock*, 7 Wn. App. at 404.

When Glenaire burned on June 2, 2015, the term of the home insurance policy covering the home commenced on March 13, 2015 and ran through March 13, 2016. *P-110* at 05520. The payments for this policy began being paid in February 2015. *Id.* at 005521. The August 19, 2014 temporary order characterized all Glenaire homeowner insurance premium payments as taxable maintenance to the Wife. *CP 47*; *RCW 26.09.090*. Rita thus paid the \$2,517 premium for that 2015 term policy. *P-110* at 005535. Rita's maintenance income is separate under both community property law, per *RCW 26.09.090*, and it is separately taxed to Rita as her gross income under federal law. *26 U.S.C.A. § 71*.

Rita paid the federal income tax on this maintenance income, because both parties filed their taxes separately in 2015. *Ex. 329, 331*. Because the insurance premiums on Glenaire were paid exclusively by Rita's post-separation income, then the policy and its proceeds were Rita's separate property, per *Aetna*. The trial court erred in characterizing these proceeds as Ed's 77.15% separate property based on a 2003 deed showing his interest in the home. It also mischaracterized another \$7,765.13 paid by Safeco for the remaining structural repair for Glenaire, which funds were being held in a "fire insurance IOLTA" account. *CP 628, FOF 22(G)(8), (10)*. The trial court's community property characterization of these proceeds must be reversed. All fire insurance funds are the separate property of the Wife, acquired post-separation by her premium payments. When those separate funds were used to restore Glenaire, those funds were the Wife's separate contribution to that property, and the court should have so concluded.

- b. The Wife's post-separation labor restoring the Glenaire home to trial value warranted a lien against that property or against the Husband's interest in that property.

Per *DeHollander, supra*, a spouse's separate contribution to

community property may have a right of reimbursement. 53 Wn. App. at 699-700. After the fire and before the trial date, the Wife also worked continuously for three months on rebuilding this home, including hiring, managing, organizing, and directing contractors and subcontractors, while the Husband repeatedly “obstructed” her rebuilding efforts. *RP 1626-1628; RP 1641-1643*. In fact, because the court ordered the Wife’s insurance funds into an IOLTA account while this action was pending, the restoration work on Glenaire remained unfinished at the time of trial. *RP 1644*. The court then awarded 77.15% of these insurance proceeds necessary to complete the Glenaire construction work to the Husband, leaving the Wife with an unfinished Glenaire home. *CP 629, FOF 14-16. RP 1644*. The Glenaire property value at trial was thus a *rebuilt* value achieved only by Rita’s post-separation labor and her separate insurance funds. *Ex. 300 at 30*. The trial court failed to consider any of the Wife’s work. This is error, per *DeHollander, supra*. If Ed had a valid 77.15% separate property interest in that real property through his 2003 deed transaction, then so did Rita have a post-separation contribution interest or lien against his interest for the trial value she restored over that \$85,000 of land value. *CP 628, FOF 17*. The court’s failure to provide the Wife a lien for her post-separation work, and its failure to even

consider her contribution to this property in awarding the Husband 77.15% of the trial value the Wife restored, should be reversed.

4. The trial court committed reversible error in mischaracterizing the Wife's right to \$355,132 of Safeco "contents" proceeds as community property when that fund was acquired by the Wife by her post-separation labor and her maintenance income.

The trial court mischaracterized the \$355,131 of Safeco fire insurance "contents coverage" as "community property," and then awarded the Husband half of the Wife's separate proceeds the Wife had recovered. *CP 628 at (G)(7)*.

When Rita's Glenaire home burned in June 2015, so did the home's contents. Per the above section, Rita had made the term premium payment on the homeowner's insurance policy with her maintenance income, and she further engaged in an extensive post-separation inventorying, storage, and cleaning work on contents replacement. *P-118; RP 1708-1713; 1762-1766*. By virtue of her extensive piece-by-piece inventory, Rita generated the *right* to acquire the homeowner policy "contents" coverage of \$355,131.04. *CP 628, FOF (G)(3), ref. P-118*. The right to this contents coverage was thus not acquired until after the

parties' separation, and that right acquired was Rita's separate property. *See, e.g., Griswold*, 112 Wn. App. at 341. The right was acquired only by post-separation premiums, payments, and post-separation labor of the Wife in the extensive inventorying evidenced. *P-118. Aetna* controls the characterization of these funds.

The trial court abused its discretion in misapplying *Hickman's* overruled holding to what should have been the Wife's separate fire insurance proceeds under *Aetna*, and dividing the proceeds one-half to each party. Moreover, the Husband presented no evidence to show that contents inside Glenaire in June 2015 were community when the parties had separated in November 2013—a year-and-a-half earlier. The trial court's conclusion that these funds were community property should be reversed.

5. The trial court committed reversible error in mischaracterizing the 2008 Cobalt boat as the Husband's separate property.

Property acquired during the marriage is presumed to be community property. *In re White*, 105 Wn. App. at 550. In 2008, during their marriage, the parties acquired a 2008 Cobalt boat, per the Certificate of Title issued on September 29, 2008. *Ex. 371*. The trial court found

this 2008 boat to have been acquired by Ed prior to the parties' 2003 CIR, and thus Ed's separate property. *CP 630, FOF 22(J)(4)*. A 2008 boat cannot have been acquired in 2003. The characterization must be reversed. The value of the boat must be assigned to the Husband as community property received.

**C. The trial court abused its discretion when it failed to assign to the Husband as his community property received some \$802,840 he wrongfully dissipated from the Centaurus fund.**

Each party's responsibility for creating or dissipating marital assets is relevant to a just and equitable distribution of property. *In re Marriage of Williams*, 84 Wn. App. 263, 270 (1996). A community member given control of assets during separation is "charged with the statutory duty to manage and control community assets for the benefit of the community." *Peters v. Skalman*, 27 Wn. App. 247, 251 (1980). When "negatively productive conduct" depletes assets, the trial court is to consider this dissipation, including the remedy of apportioning a higher debt load or fewer assets to a wasteful marital partner. *Williams*, at 270. Via an earlier contempt order, the court found that the Husband had dissipated "a substantial amount" of funds in a manner that resulted in financial inequity. *CP 404-405*. In fact, Ed spent \$1,556,036 of the Centaurus

account on himself,<sup>26</sup> and another \$70,000 of a \$114,959 D.A. Davidson fund that Ed depleted to \$43,711,<sup>27</sup> while this action was pending. Ed spent \$1,626,036 of funds. Ed testified, “It is my money and I can spend it any way I want.” *CP 384, p. 241: 6-7.*

The trial court ultimately recognized \$766,196.00 of these funds as accounted for within the Radio Lane home value, and \$57,000 of the D.A. Davidson account, but it neglected the other \$802,840 the Wife evidenced that the Husband dissipated. The court’s failure to mention, consider, quantify, and allocate any of these dissipated funds to the Husband in its decree was a misapplication of the law and abuse of discretion. This is particularly so when it controverted its own earlier findings via its contempt order that the Husband had dissipated substantial funds, and that the amount dissipated would be determined at trial, with the Wife to receive a distribution to mitigate the inequity that had been caused her. *CP 405-406, ¶¶ 4, 5; CP 403, ¶¶ 3(ii)-(v), and ¶ 12.* All funds dissipated should be quantified and assigned to the Husband as property received, with an attendant distribution to the Wife.

---

<sup>26</sup> *See n.17, supra.*

<sup>27</sup> *CP 626, FOF 22, para 20-21.*

**D. The trial court abused its discretion when it assigned the Husband's 2002 Sea-Doos to the Wife because it forced the Wife to buy them.**

A trial court may make “disposition” of the property and the liabilities of the parties, either community or separate, “as shall appear just and equitable after considering all relevant factors including...” *RCW 26.09.080*. Disposition means “[T]he act of transferring something to another’s care, esp. by deed or will; ...” *Black’s Law Dictionary* (10<sup>th</sup> Ed. 2014), “Disposition.” A trial court may thus properly transfer or award property to either spouse, but it “does not have jurisdiction to order the sale of the parties' assets without their consent because there is no statutory grant of such power to a trial court.” *In re Marriage of Bobbitt*, 135 Wn. App. 8, 15 (2006).

Here, the Husband bought two 2002 “Sea-Doo” jet skis with an ex-wife, “Debbie,” before Debbie filed for divorce in 2002. *CP 631, FOF 22(J)(5)*. The trial court concluded that the 2002 Sea-Doos were the Husband’s separate property. *Id.* In its property disposition, however, it then forced the Wife to *buy* the Husband’s old 2002 Sea-Doos from him by “awarding” them to the Wife, and then granting the Husband an offset for what it deemed the value of these items against the community funds Ed

owed Rita. *CP 640: 28 – 641: 1*. The offset is abuse of discretion, and should be reversed.

The trial court had every statutory right to “distribute” the Husband’s old Sea-Doos to the Wife, but it did not have the authority to charge the Wife for its award. A forced sale upon an unwilling party is abuse of discretion under RCW 26.09.080’s disposition authority. The trial court’s decision to *charge* the Wife money she was awarded for its disposition of the Husband’s old separate property should be reversed.

**E. The trial court abused its discretion when it did not properly consider the RCW 26.09.080 factors when it distributed the property.**

Under its distribution authority, a trial court must order a just and equitable distribution of the parties' property and liabilities, regardless of whether that property is deemed to be community or separate. *In re Marriage of Larson & Calhoun*, 178 Wn. App. 133, 135 (2013), citing *RCW 26.09.080*. *RCW 26.09.080* “does not single out the property's character or any other factor to be given more weight. This statute and controlling case authority direct the trial court to make a fair and equitable property division after weighing all relevant factors within the context of the parties' specific circumstances.” *Id.* In *Larson*, the trial court awarded

the Wife \$40 million of the Husband's separate property when the Husband's combined award of all characterized property totaled \$327 million, and the Wife's combined award totaled approximately \$181 million. The *Larson* court recognized the Wife's intangible contributions to the long-term marriage, found that Husband was in better position to acquire future wealth than the Wife, and significantly, after properly characterizing all separate and community property, it used the Husband's separate property to provide the Wife "with immediate liquidity." *Larson* emphasizes that, when fashioning just and equitable relief under RCW 26.09.080, the court must consider all of the statute's factors.

Here, the trial court makes no mention of (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 (4) the economic circumstances of each spouse at the time the property distribution is to become effective. It fails to consider, e.g., the lack of liquidity of its award to the Wife against \$360,000 of personal debt. The result is abuse of discretion. The decision is based on untenable grounds or untenable reasons, *In re Marriage of Littlefield*, 133 Wn.2d 39 at 46-47, because distribution by character alone is based on an incorrect standard. Such a distribution fails to apply RCW 26.09.080.

The trial court's failure to consider over \$1.7 million dollars of value the Wife gave the community is also critical here. The Wife's equitable contributions to the community property would have not just zeroed the Husband's "offsets" of \$383,539.55, but would have required reimbursement from whatever separate property existed in favor of the Husband. The court's allowing the Husband \$3,193,499.59 of community funds, with no debt, while leaving the Wife with \$142,700 of cash to pay \$360,000 in debt, is abuse of discretion. This award is indifferent even to the "inequity" it had earlier concluded existed because of the Husband's fund dissipation and spending. *CP 404-405*. This is discretion exercised in a way that is clearly untenable or manifestly unreasonable. *Calhoun*, 178 Wn. App. at 135. The distribution of property and debt should be reversed.

Even if it could be found that RCW 26.09.080 factors were somehow considered, even without mentioning them, the decision is manifestly unreasonable based upon the evidence before the court.

**F. The trial court abused its discretion in denying Rita attorney fee assistance in the trial court.**

RCW 26.09.140 provides that a party may be awarded reasonable amounts for fees based upon consideration of the financial resources of

both parties. As the party challenging the trial court's refusal to award fees, the Wife “bears the burden of showing that the trial court “exercised its discretion in a way that was ‘clearly untenable or manifestly unreasonable.’” *In re Marriage of Kile & Kendall*, 186 Wn. App. 864, 888 (2015). That showing is evident here.

The Wife’s financial need for fee assistance was established at the time the maintenance order was entered in August 2014. *CP 45-48*. She was already given less to live on than the monthly expenses she identified. *Compare CP 7, 9-11 with CP 47*. The situation only grew more dire as her circumstances changed, her home burned, and as her attorney fees increased in approaching trial. *CP 203-214; 216-225*. Yet the trial court gave her no meaningful assistance prior to trial, and then assigned her \$360,000 of debt after trial, while giving her only \$143,000 of cash liquidity. The trial court’s finding that the Wife had “no need” for fee assistance is not supported by the record, it is an abuse of discretion, and it should be reversed. The trial court should be directed to award the Wife the amounts necessary to pay her counsel’s trial fees, which would then include the sums sufficient for her to make repayments on loans the Wife incurred to pay those fees.

**G. Maintenance should be assessed on any remand if property has been dissipated.**

Substantial time passes in any appeal, and the Husband's established record is one of fund dissipation and transfers. Upon any remand for redistribution of property, if the Husband has dissipated or transferred funds to the point of rendering a proper distribution to the Wife unavailable, then the trial court should be directed to establish maintenance and support, and collection fees as support, as tools to arrive at a revised just distribution of property, debt, and income. *Kile & Kendall*, 186 Wn. App. at 887.

**H. The Wife should receive RAP 18.1 fees on appeal.**

For the reasons identified in this brief, and based upon RAP 18.1(c), and the Wife's need and the Husband's ability to pay per RCW 26.09.090, the Wife requests fees and costs for this appeal.

**V. CONCLUSION.**

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

Respectfully submitted this 15<sup>th</sup> day of February, 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/Fax: (509) 245-3308

E-mail: [MSchultz@MSchultz.com](mailto:MSchultz@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 15<sup>th</sup> day of February, 2019, she electronically filed the foregoing document with the Court of Appeals, Division III, and thereby served a copy to the following individuals:

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

Dated this 15<sup>th</sup> day of February, 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/Fax: (509) 245-3308

E-mail: [MSchultz@MSchultz.com](mailto:MSchultz@MSchultz.com)

**MARY SCHULTZ LAW PS**

**February 15, 2019 - 4:49 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\_20190215164841D3884373\_8097.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was BRIEF APPELLANTS Opening\_02 15 19.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 20190215164841D3884373**