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

IN RE THE MARRIAGE OF EDWARD A. MILLER,

Petitioner/Respondent,

vs.

RITA L. YTURRI-SMITH,

Respondent/Appellant.

MILLER'S RESPONSE BRIEF

Valerie D. McOmie
WSBA No. 33240
4549 NW Aspen Street
Camas, WA 98607
(360) 852-3332

Daniel E. Huntington
WSBA No. 8277
422 Riverside, Suite 1300
Spokane, WA 99201
(509) 455-4201

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RESTATEMENT OF THE ISSUES/ ASSIGNMENTS OF ERROR	3
III. STATEMENT OF THE CASE	6
IV. ARGUMENT	7
A. Standard of review and applicable law generally.	7
B. The trial court correctly characterized the parties' assets.	9
1. The trial court correctly characterized the proceeds of the 2007 sale of Miller.WhiteRunkle stock as a sale of the husband's separate property.	9
a. Substantial evidence supports the trial court's finding that the 2007 sale was a stock purchase and not a sale of Ed's marital earning power.	9
b. Substantial evidence supports the trial court's finding that the stock sold to Ascentium was acquired by Ed as his separate property in 1993, and not in 2005 with one of Ed's wage bonuses.	14
2. The trial court correctly characterized the Radio Lane residence as Ed's separate property.	24
3. The trial court did not err in its characterization of the Glenaire home.	25
a. The fire insurance proceeds were correctly characterized according to the parties' respective ownership interest in the Glenaire home.	25
b. The Wife is not entitled to a lien for post- separation labor of the Glenaire home.	26

4.	The trial court did not err in its characterization of the Safeco “contents” proceeds.	27
5.	The trial court did not err in its characterization of the 2008 Cobalt boat as Ed’s separate property.	28
C.	The trial court did not abuse its discretion in its consideration and resolution of any alleged dissipation of the Centaurus fund.	28
D.	The trial court did not err in awarding the Sea-Doos to the Wife and offsetting their value against her community property award.	31
E.	The trial court properly considered the statutory factors under RCW 26.09.080 to arrive at a fair and equitable distribution.	32
F.	The trial court did not abuse its discretion in declining to award the Wife attorney fees.	37
G.	There is no basis for remand or maintenance.	39
H.	The court should decline to award fees on appeal under RAP 18.1(c).	39
I.	The court should not address the Wife’s fourth Assignment of Error regarding her request for an equitable lien for the tort settlement proceeds and the rental and use value of the Lake Home	40
V.	CONCLUSION	40

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Aetna Life Ins. Co. v. Wadsworth</i> , 102 Wn.2d 652 (1984)	25, 26
<i>Bercier v. Kiga</i> , 127 Wn. App. 809, 103 P.3d 232 (2004)	40
<i>Blood v. Blood</i> , 69 Wn.2d 680, 419 P.2d 1006 (1966)	8
<i>Brewer v. Brewer</i> , 137 Wn.2d 756, 976 P.2d 102 (1999)	33, 34
<i>Cirrito v. Cirrito</i> , 605 S.E.2d 268 (Va. 2004)	12, 13
<i>Ellerman v. Centerpoint Prepress, Inc.</i> , 143 Wn.2d 514, 22 P.3d 795 (2001)	9, 36
<i>Estep v. King County</i> , 66 Wn.2d 76, 401 P.2d 332 (1965)	22
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 494 P.2d 208 (1972)	33
<i>In re Estate of Borghi</i> , 167 Wn.2d 480, 219 P.3d 932 (2009)	24
<i>In re Estate of Witte</i> , 21 Wn.2d 112, 150 P.2d 595 (1944)	8
<i>In re Hickman's Estate</i> , 41 Wn.2d 519, 250 P.2d 524 (1952)	25, 26

<i>In re Marriage of Boisen,</i> 87 Wn. App. 912, 943 P.2d 682 (1997)	11
<i>In re Marriage of Crosetto,</i> 82 Wn. App. 545, 918 P.2d 954 (1996)	38
<i>In re Marriage of Kile and Kendall,</i> 186 Wn. App. 864, 347 P.3d 894 (2015)	38
<i>In re Marriage of Konzen,</i> 103 Wn.2d 470, 693 P.2d 97 (1985)	33
<i>In re Marriage of Larson & Calhoun,</i> 178 Wn. App. 133, 313 P.3d 1228 (2013)	34, 35, 36
<i>In re Marriage of Littlefield,</i> 133 Wn.2d 39, 940 P.2d 1362 (1997)	34
<i>In re Marriage of Pearson-Maines,</i> 70 Wn. App. 860, 855 P.2d 1210 (1993)	26
<i>In re Marriage of Pollard,</i> 99 Wn. App. 48, 991 P.2d 1201 (2000)	39
<i>In re Marriage of Shannon,</i> 55 Wn. App. 137, 777 P.2d 8 (1989)	9
<i>In re Marriage of Skarbek,</i> 100 Wn. App. 444, 997 P.2d 447 (2000)	7, 8, 28, 32
<i>In re Marriage of Stenshoel,</i> 72 Wn. App. 800, 866 P.2d 635 (1993)	34
<i>In re Marriage of Zahm,</i> 138 Wn.2d 213, 978 P.2d 498 (1999)	8

<i>Matter of Estate of Bellingham</i> , 85 Wn. App. 450, 933 P.2d 425 (1997)	26
<i>Mestrovac v. Dep't of Labor & Indus.</i> , 142 Wn. App. 693, 176 P.3d 536 (2008)	9
<i>Paradise Orchards Gen'l Partnership v. Fearing</i> , 122 Wn. App. 507, 94 P.3d 372 (2004)	10
<i>Robbins v. Dep't of Labor & Indus.</i> , 187 Wn. App. 238, 349 P.3d 59 (2015)	9
<i>Schwarz v. Schwarz</i> , 192 Wn. App. 180, 368 P.3d 173 (2016)	7, 8
<i>Smith v. King</i> , 106 Wn.2d 443, 722 P.2d 796 (1986)	40
<i>Tanner Electric Coop. v. Puget Sound Power & Light</i> , 128 Wn.2d 656, 911 P.2d 1301 (1996)	10
Statutes	
RCW 26.09.080	passim
RCW 26.09.140	37, 38, 39
RCW 26.16.010	7
Rules	
RAP 18.1(c)	39

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of the dissolution of the six-year marriage, ten-year committed intimate relationship, of Rita L. Yturri-Smith (Rita or Wife) and Edward A. Miller (Ed or Husband). A second marriage for both, they had each recently gone through a divorce when they started dating and they brought substantial assets to the relationship. They both had children from their prior marriages and no children together. Once together, they maintained some separate property assets, while also accumulating some community assets. Ed maintained separate ownership of his assets, including 458 shares of MWR stock he obtained in 1993, which he later sold to Ascentium Corporation in 2007. Ed also generously shared his separate funds with Rita in a variety of ways, and was generous with her mother and children. Eventually, however, Ed became concerned that he could not support Rita's spending habits. They began to fight constantly. On November 7, 2013, they formally separated.

Upon their dissolution, there were substantial community and separate assets before the trial court. In order to fairly and accurately distribute the assets, the trial court conducted a nine-day bench trial. It heard the testimony of seven witnesses, including both the Wife and the Husband, the Certified Public Accountant (CPA) for Ed's former company, Miller.WhiteRunkle (hereinafter MWR), a CPA and accounting expert, an attorney, and the Wife's former significant other. Over 200 exhibits were submitted, and 150 were admitted. The case presented complicated issues

involving tracing of assets, stock redemptions, ownership interest in multiple homes as well as in retirement and investment accounts, and distribution of countless items of personal property. In its findings of fact and conclusions of law, the court made specific findings regarding the proper characterization of the community and separate assets. It also relied on equitable factors for its decision, explaining that “[u]ltimately, the court relied on RCW 26.09.080 to reach a just and equitable decision.” *CP 508 lines 17-18* (Memorandum Decision) (brackets added).

On appeal, the Wife challenges the court’s findings of facts and conclusions of law, citing countless asserted errors in the court’s decision. Specifically, the Wife contends the trial court erred by:

- Its characterization of several assets, including the proceeds of the 2007 Ascentium sale, the Radio Lane residence, and the 2008 Cobalt boat, as the Husband’s separate property, *see* Appellant Op. Br. at 1;
- Its characterization of certain assets as community property and not the wife’s separate property, including the wife’s “post-separation contributions to real property value” of the Glenaire home and the proceeds of a fire insurance policy, *see* Appellant Op. Br. at 1-2;
- Failing to assign alleged “dissipated” funds by Ed to his community property award, *see* Appellant Op. Br. at 2;
- Its award of the Sea-Doos to the Wife, *see id.*;

- Its consideration of the factors under RCW 26.09.080, *see id.*

Based on these asserted errors, the Wife asks this court to remand the case for redistribution of property and debt. She also requests fees for trial on remand, as well as maintenance. There was substantial evidence at trial to support the court's findings, however. The court did not err in its characterization of the separate and community assets, nor in its determination of what was fair and equitable under the totality of the circumstances in this case. This court should affirm the trial court.¹

II. RESTATEMENT OF THE ISSUES

- 1) Was there substantial evidence to support the trial court's finding that the proceeds of the 2007 sale of MWR Stock to Ascentium Corporation was the husband's separate property?²
 - a) Was there substantial evidence to support the trial court's finding that the 2007 sale to Ascentium was properly characterized as the sale of the husband's separate property interest in the MWR stock and not a community property interest in the husband's marital earning power?
 - b) Was there substantial evidence to support the trial court's finding that the stock sold in 2007 was separate property because it was the

¹ For simplicity, this Brief follows the general structure of the Wife's Opening Brief. Because many of the issues are fact-intensive, there is a general summary of facts in § III, Statement of the Case, but detailed facts germane to specific legal issues are contained in the subsections addressing the legal arguments.

² The trial court did not err in its 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).

same separate property interest in the 458 shares acquired from MWR by the Husband in 1993?

- 2) Was there substantial evidence to support the trial court's finding that the Radio Lane home was Ed's separate property because it was acquired with Ed's separate property funds from the proceeds of the 2007 stock sale to Ascentium?³
- 3) Did the trial court err in its treatment of the \$802,840 of "dissipated" funds, when it carefully considered the tracing testimony of CPA Todd Carlson to characterize the funds as partially separate and partially community, and also assigned a \$40,000 contempt fine against Ed for any alleged wrongdoing?⁴
- 4) Was there substantial evidence to support the court's finding that Ed was generous with Rita, as well as her mother and her children, and that the court did not err in declining to award the Wife separate liens against the community property or against the Husband's separate assets for (a) a \$300,000 tort settlement the Wife received during the marriage, (b) rental and use value of the Lake Home, or (c) additional monies for the Glenaire home?⁵
- 5) Did the court err in concluding that the fire insurance proceeds were properly characterized as community property?⁶

³ The trial court did not err in making FOF 22(I)

⁴ See FOF 22J(16).

⁵ The trial court did not err in making FOF 22(H)(7), (H)(9) or (H)(10).

⁶ The trial court did not err in making FOF 22 and Conclusions of Law (COL) (G)(2), (6), (13) and (15).

- 6) Was there substantial evidence to support the trial court's finding that the 2008 Cobalt boat was the Husband's separate property?⁷
- 7) Did the trial court abuse its discretion in its award to the wife of the "Sea-Doo" jet skis?⁸
- 8) Did the trial court abuse its discretion by awarding the Wife financial support and assigning it to her as community property?⁹
- 9) Did the trial court abuse its discretion in its consideration of the alleged "dissipation" issue, when it assigned the Husband a \$40,000 contempt fine and then carefully considered expert testimony to trace the disputed funds to ensure their accurate characterization as separate or community?¹⁰
- 10) Did the trial court abuse its discretion by awarding the property based on legal character, when it noted its decision was intended to effect a fair and equitable distribution?¹¹
- 11) Did the trial court abuse its discretion in its consideration of the factors for achieving a fair and equitable distribution under RCW 26.09.080?¹²
- 12) Did the trial court abuse its discretion in its finding regarding its total award to the Husband?
- 13) Did the trial court abuse its discretion in its finding regarding the total award to the Wife?

⁷ The trial court did not err in making FOF 22(J)(4).

⁸ The trial court did not err in making FOF 22(J)(5).

⁹ The trial court did not err in making FOF(J)(18).

¹⁰ See FOF 22(J)(16).

¹¹ See CP 508 (Memorandum Decision); FOF(H)(7).

¹² See CP 508.

14) Did the trial court abuse its discretion in declining to award the Wife attorney fees?¹³

15) Did the trial court abuse its discretion in finding that the Wife's decision not to work contributed to her personal debt, where during the period of separation the Husband paid \$3400 to the Wife's monthly expenses, and she received additional insurance proceeds to fund monthly expenses during the period of any alleged displacement?¹⁴

III. STATEMENT OF THE CASE

Ed Miller and Rita Yturri-Smith began a committed intimate relationship (CIR) in late 2003, and were married in 2007. *FOF 22(B)(15); FOF 22(A)(24)*. They formally separated on November 7, 2013. *FOF 22(A)(26)*. It was a second marriage for both. *FOF 22(A)(18)*. Ed was 53 and Rita was 43 when they got married. *FOF 22 (A)(1)-(2); (A)(24)*. They had both gone through divorces and had children from their previous marriages and both brought substantial assets to the relationship.

The Wife attended Gonzaga Preparatory School and later went on to earn a Bachelor of Arts degree from Eastern Washington State University. *FOF 22(A)(5)*. She worked in marketing for a time, earning an approximate annual salary of \$80,000. *FOF 22(A)(14)*. At the time that they began their relationship, the Wife owned an interest in two real properties: The "Glennaire" Home she owned with her previous husband

¹³ The trial court did not err in making FOF 14.

¹⁴ The trial court did not err in making FOF 22(A)(16)-(17).

Steve Smith, and the Coeur d'Alene Lake home (Lake Home) she owned with her mother. *FOF 22(F)(1); FOF 22(H)(2)*.

Ed is a graduate of Spokane Falls Community College, where he obtained an Associate of Arts degree. *FOF 22(A)(4)*. In the early 80's, he began working for Clark White, a local advertising firm. *FOF 22(A)(6)*. He continued with the firm until 1993, when its partners recognized his contribution to the firm (then remaned WhiteRunkle), and gave him 458 shares in the company. *FOF 22(A)(6)-(10)*.

Ed and Rita had no children together, but each had children from their first marriages. Ed was generous with Rita and her children, as well as Rita's mother. *FOF 22(H)(7)*. He contributed substantial funds from his separate property to improvements of the Lake Home that Rita shared with her mother. *RP 696; 731*. He also expended substantial amounts of his separate funds each month to support a variety of activities for the couple. *Miller - RP 1037-1041*.

IV. ARGUMENT

A. Standard of Review and Applicable Law Generally

The character of property as separate or community is established at the point of acquisition. *See Schwarz v. Schwarz*, 192 Wn. App. 180, 189, 368 P.3d 173 (2016). Property acquired before marriage is separate property. *See RCW 26.16.010; In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). Once property is characterized as separate property, it retains its separate property character “unless changed by deed,

agreement of the parties, operation of law, or some other direct and positive evidence to the contrary.” *Skarbek*, 100 Wn. App. at 447 (citing *In re Estate of Witte*, 21 Wn.2d 112, 125, 150 P.2d 595 (1944)). Property acquired during marriage is presumptively community property. *See Skarbek*, 100 Wn. App. at 449. However, property acquired during the marriage takes on the character of the property used to acquire it. *See In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999). Thus, if the source of the property acquired during marriage can be traced to separate funds, it retains its separate property character.

In a dissolution action, all property of the parties, both community and separate, is before the court for distribution. *See Schwarz*, 192 Wn. App. at 188. In its distribution of the assets, the court is not bound by the legal character of the property, but “the court must have in mind the correct character and status of the property as community or separate before any theory of division is ordered.” *Blood v. Blood*, 69 Wn.2d 680, 682, 419 P.2d 1006 (1966). Legal characterization of property by the trial court presents a mixed question of law and fact. *See Schwarz*, 192 Wn. App. at 191-92. An appellate court will review findings of fact for substantial evidence. *Skarbek*, 100 Wn. App. at 447. The ultimate characterization of the property is a question of law that is reviewed de novo. *See Schwarz*, 192 Wn. App. at 192.

Where the appellate court determines that the trial court has mischaracterized property, remand for further consideration is generally not

appropriate unless 1) the trial court's distribution was significantly influenced by its erroneous characterization, and 2) it is not clear the court would have divided the property in the same way had it characterized the property differently. *See In re Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P.2d 8 (1989).

In reviewing a trial court decision, a reviewing court will review the trial court's letter opinion, findings and conclusions, and judgment as a whole. *Robbins v. Dep't of Labor & Indus.*, 187 Wn. App. 238, 246, 349 P.3d 59 (2015) (citing *Mestrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 702, 176 P.3d 536 (2008), *aff'd on other grounds by Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010)). The trial court's memorandum opinion may be considered by the court of appeals as supplementation of formal findings of fact and conclusions of law. *See Robbins*, 187 Wn. App. at 246 (citing *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 523 n.3, 22 P.3d 795 (2001)).

B. The trial court correctly characterized the parties' assets.

1. The trial court correctly characterized the proceeds of the 2007 sale of MWR stock as a sale of the Husband's separate property.

a. Substantial evidence supports the trial court's finding that the 2007 sale was a stock purchase and not a sale of Ed's marital earning power.

A critical issue at trial was whether the proceeds of the 2007 sale of MWR stock to Ascentium Corporation constituted a sale of Ed's separate property interest in MWR, or instead constituted the sale of his "marital

earning power” from 2008 – 2011. The trial court found that the 2007 sale to Ascentium was properly characterized as a stock sale and not a sale of Ed’s material earning power. *FOF 22(D)(9)*.

On appeal, the Wife submits that the trial court erred in its finding that the proceeds of the 2007 sale of Ascentium was a sale of stock: “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.” Appellant’s Op. Br. at 19. In support of this claim, she cites provisions of the Stock Purchase Agreement that state the non-compete provision is material to the contract. *See* Appellants’ Op. Br. at 19 (quoting *Ex. 361 at 5.5, p. 970-72; Ex. 361 at 972 at 5.5(f); Ex. 361 at 5.5(a)(iv)*).

Interpretation of a contract turns on the parties’ intent. *See Paradise Orchards Gen’l Partnership v. Fearing*, 122 Wn. App. 507, 516, 94 P.3d 372 (2004); *see also Tanner Electric Coop. v. Puget Sound Power & Light*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) (recognizing that “[t]he touchstone of contract interpretation is the parties’ intent” (brackets added)). Intent of the parties is generally a question of fact. *See Fearing* 122 Wn. App. at 517. Relevant evidence of contracting parties’ intent includes “the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.” *Tanner*, 128 Wn.2d at

674 (citation omitted). Where a question of contract interpretation is presented, “the trial court must identify and adopt the meaning that reflects the parties’ intent; the appellate court reviews the trial court’s decision for substantial evidence.” *In re Marriage of Boisen*, 87 Wn. App. 912, 920, 943 P.2d 682 (1997).

Here, the trial court concluded that “the evidence was clear and convincing that the sale was a stock sale and not payment for future wages or some other characterization.” *FOF 22(D)(9)*. There was substantial evidence to support this finding. At trial, Ed was asked what asset Ascentium received as a result of the stock purchase. *RP 887*. To that question, Ed answered: “In my opinion, the only thing that I had of value were the clients that I had, my client portfolio.” *RP 887*. Ed testified that upon the sale of his interest in MWR, his plan was to retire. *RP 889 lines 5-8*. The Stock Purchase Agreement between MWR and Ascentium characterized the transaction as a “stock purchase.” *FOF 22(D)(7)*; *CP 511* (Memorandum Decision). This characterization of the transaction as a stock sale was consistent with the testimony of CPA Zoe Foltz as well as the tax returns of Ed and Rita for the years 2007, 2008, 2009 and 2010. The trial court expressly relied on these facts to conclude that by clear and convincing evidence, “the sale was a stock sale and not payment for future wages or some other characterization.” *FOF 22(D)(8)*.¹⁵

¹⁵ Ed’s forbearance from competing with Ascentium after the sale was arguably necessary to Ascentium to protect the value of the asset it purchased, *i.e.*, the accounts and client base that had been serviced by MWR prior to the stock sale. Had Ed competed against Ascentium, Ascentium’s property interest in the accounts sold would potentially be

Appellant cites *Cirrito v. Cirrito*, 605 S.E.2d 268 (Va. 2004), a Virginia court of appeals decision, for the proposition that “[t]he proceeds of a spouse’s sale of their marital earning ability through a non-compete agreement is community property.” Appellant Op. Br. at 22 (brackets added). *Cirrito* is inapposite, however, because unlike the evidence before the Court there, the trial court in this case correctly found that Ed did not sell his “marital earning ability” by executing the Stock Transfer Agreement. His intent, rather, was to *retire*, and as part of his retirement, he sold his separate property interest in MWR to Ascentium.

In *Cirrito*, the husband executed an agreement to sell his interest in a telecommunications company. In exchange for his property interest, he received shares of the acquiring company, appointment as president of its consumer division, and an annual salary of \$375,000. In addition, the sale contract included a separate clause providing \$1 million as “additional consideration for Executive’s noncompetition obligation.” *Cirrito*, 605 S.E.2d at 270. Ten days after the execution of this agreement, the husband married the wife. The husband complied with the noncompete agreement, and one year after the marriage, received the \$1 million in “additional consideration” for his compliance with the noncompete provision of the contract.

jeopardized. Thus, in order to ensure the value of its newly-acquired asset, it was necessary that Ed not compete against Ascentium. Understood in this way, Ed’s forbearance was not Ascentium’s *reason* for executing the agreement, but it was a necessary condition, *i.e.*, *material*, for Ascentium to secure and protect the value of its acquisition.

When the couple divorced years later, the wife argued the \$1 million reflected loss of the husband's contribution of labor to the community and was therefore community property. Importantly, the wife did *not* seek an interest in any of the separate property that was exchanged in the course of the stock sale. That particular contract expressly valued the "marital earning power" at \$1 million. That is the sole interest the wife sought to characterize as a community asset.

The Virginia court of appeals noted that the "touchstone of classification" was the parties' intent in executing the agreement. *See Cirrito*, 605 S.E.2d at 271. In *Cirrito*, there was a specific contract provision valuing the non-compete portion of the agreement, so intent as to its value was not at issue. Rather, the intent question there was "whether the one million dollars for non-competition was to compensate husband for forbearance made prior to the marriage or to compensate him for efforts made during the marriage." *Cirrito*, 605 S.E.2d at 271. The court noted that "the one million dollars replaced lost earnings during the period of time the husband was not working." *Cirrito*, 605 S.E.2d at 270-71. In contrast to the facts in *Cirrito*, the evidence before the trial court here was that Ed *intended to retire* and did not intend to continue working.

Here, the key factual question before the trial court was the parties' intent in executing the 2007 sale, and the value of the assets exchanged in that agreement. Indeed, the Wife did not seek to separately value the non-compete portion of the stock sale, but instead argued that it was the only

material asset and that the entire value of the sale should be characterized as “marital earning power,” and thus community property:

The contract has two parts – the Stock Purchase Agreement . . . and its attached consulting agreement. . . . The material terms of these joined contracts show that what Ascentium is acquiring is Ed’s customers . . . and it specifies that the only *material* term of this purchase agreement is the Section 5.5 restrictive covenant preventing Ed from continuing to work in the advertising field.

CP 467-68 (Respondent’s Closing Brief at 55-56).

The trial court carefully considered the testimony and evidence before the court, which substantially supported the court’s finding that the 2007 sale effectuated the sale of Ed’s separate property interest in MWR stock to Ascentium, and not the sale of his marital earning power.

b. Substantial evidence supports the trial court’s finding that the 458 shares of MWR stock sold to Ascentium in 2007 was acquired by Ed as his separate property in 1993, and not in 2005 with Ed’s wage bonus.

In the alternative, the Wife contends that even if the 2007 Ascentium sale is properly characterized as a sale of stock, the trial court nonetheless erred in awarding its proceeds to Ed as his separate property, because the asset sold was a community interest in MWR stock that was acquired in 2005 with one of Ed’s wage bonuses. *See* Appellant Op. Br. at 27. Specifically, the Wife contends that the 458 shares that were sold by Ed to Ascentium in 2007 were actually issued to him in 2005 as “repayment” for a \$359,850 loan from Ed to MWR. To support this theory, the Wife relies on a provision of the 1993 Stock Transfer Agreement that was entered into by White, Runkle, Miller (who were called “shareholders” in the

agreement) and WR, which restricted Miller's right of ownership acquisition to only another 5% of what the other shareholders relinquished: The "ratio of the number of shares owned by the acquiring shareholder to the number of shares owned by all non-transferring shareholders." *Ex. 303(d) at 105, 1993 Stock Purchase at Art. II, 2.1, "Lifetime Transfers," 2.2A.* To address the Wife's argument, it is necessary to provide some detail regarding Ed's acquisition of his 458 shares in 1993 and the later events surrounding the stock redemption in 2005.

Ed Miller began working for an advertising company, Clark White, Inc., in 1985. Clark White, Inc. became WhiteRunkle, Inc. (WR), and Ed continued to work for that company. By 1993, the company founders, White and Runkle, invited Ed to become a shareholder. *Foltz – RP 57, lines 21-24.*¹⁶ He was given 458 shares in the company, which constituted 5% of the total shares. *Foltz – RP 59 lines 14-22; RP 105, lines 21-23; RP 108, lines 6-22; Exhibit P – 21 at 402; Exhibit P – 4 at 43, line 2a.; Miller – RP 828 line 16 – RP 831 line 11.* The shares were given to Ed because of his contributions to the company and Ed did not have to pay anything for the stock. *Foltz – RP 61, lines 8-17; RP 129 lines 23 – RP 130 line 6.* Ed had secured a major client, Cellular One, which was the reason he received 5% of the stock of WR. *Miller – RP 829 line 16 – RP 831 line 11.*

¹⁶ Zoe Foltz was the CPA accountant for WR and MWR from 1988 to 2007. *Foltz – RP 47, line 10-16.* Foltz was the CPA accountant for individual tax work for Jack White and Robert Runkle since 1988. *Foltz – RP 47 line 10-RP 48 line 2.* Foltz did individual tax returns for Miller from 1998 to 2007. *Foltz – RP 48, line 5 – 13.*

Ed's ownership of the 458 shares of WR was acknowledged in the 1993 Stock Transfer Agreement that was entered into by White, Runkle, Miller (who were called "shareholders" in the agreement) and WR. *Ex. P-21 at 402, Background 1*. The purpose of the Share Transfer Agreement was to restrict the shareholders' rights to dispose of their shares, in order to "assure the continuation of the sound and harmonious management of the Corporation," and "to protect against the disruptive result of outsiders acquiring stock who may not prove compatible with the remaining shareholders." *Ex. P-21 at 402, Background 2*.

To further that purpose, in the event that a shareholder disposed of his shares, the non-transferring shareholders had the option to purchase shares according to "the ratio of the number of shares owned by the acquiring shareholder to the number of shares owned by all non-transferring shareholders." *Ex. 21 at 403, 2.2A*. In the latter event, if Ed was a non-transferring shareholder, he could be limited in the number of shares he could acquire from the transferring shareholder, depending upon whether another non-transferring shareholder sought to acquire shares, but in no event would that amount be limited to the 5% interest in WR he owned in 1993. *Ex. P-21 at 403, 2.2 A., B*. If the non-transferring shareholders did not want to acquire the shares from the transferring shareholder, the Corporation could elect to purchase all of the shares. *Ex. P-21 at 404, 2.2 C*. In the latter event, *i.e.*, the purchase of the transferring shareholder's shares by the Corporation, the provisions limiting Ed's acquisition of shares

are inapplicable. *Compare paragraphs A., B. and C., Ex. P-21 at 403-04, 2.2.*

The Share Transfer Agreement also provided that the agreement would automatically terminate upon “[t]he reduction in the number of shareholders who are bound by the terms of this agreement to one.” *Ex. E-21 at 418-19, Article XI, 11.1 D.* This provision makes sense, in that if only one shareholder remained, there would be no need for an agreement among shareholders for disposing of shares, and that one remaining shareholder would be allowed to dispose of his shares as he chose.

Ed’s previous marriage ended in 2003, and in that dissolution Ed received the 458 shares in WR as his separate property. *Ex. P-1 at 6.* In that dissolution, Ed’s previous spouse, Debbie Miller, contended the value of the 458 shares was \$587,000; Ed contended the value was \$85,000. *Miller – RP 838 lines 1-10; Ex. P-2 at 15.* The court did not assign a value to the stock in that dissolution. *Miller – RP 838 line 21 – RP 839 line 3.*

In the ordinary course of the operation of WR, the three shareholders were paid bonuses each quarter. *Foltz – RP 72, line 18 – RP 73, line 1.* Frequently, there was insufficient cash in the corporation at the end of the quarter to pay cash bonuses, so the bonuses were carried as loans to the Corporation owing to the shareholders. *Foltz – RP 73 lines 2-8; RP 116 line 13 – RP 117 line 24; Ex. P-24 at 451.* The corporation regularly had substantial accounts receivable, and as those accounts receivable were collected during the following quarter, the bonuses would be paid to the

shareholders. *Foltz – RP 114 line 8 – RP 115 line 18; RP 139 lines 11-22.* By way of example, at the close of the 2004 corporate tax year, \$1,500,505 in loans were owed by the corporation to the shareholders. *Foltz – RP 73, lines 9-23; Ex. P – 24 at 441.* Those loans were paid to the shareholders during the 2005 corporate tax year. *Foltz – RP 110 lines 3-22; Exhibit P – 24 at 448 n. 7.* Those loans were repaid before the \$1 million stock redemption was paid to White and Runkle. *Foltz – RP 109 lines 11-18.*

On October 1, 2005, the Corporation redeemed the total interests of Jack White and Robert Runkle (a combined 8686 shares) for \$1 million. *Foltz – RP 61 line 18 – RP 62 line 7; RP 63 lines 1-3; Ex. P – 24 at 447 n. 4.* The \$1 million redemption for White and Runkle’s shares was paid by the Corporation. *Foltz – RP 62 lines 22-25; RP 63 lines 1-5; RP 67 line 18 – RP 69 line 18.* The Corporation’s retained earnings were used to pay White and Runkle for their shares. *Foltz – RP 118 line 25 – RP 119 line 22.* Ed did not pay anything to White and Runkle for their stock redemption. *Foltz – RP 62 lines 5-25; RP 69 lines 13-18.* The Corporation’s retained earnings used to pay for White and Runkle’s stock did not include any money owed to Ed. *Foltz – RP 72 lines 6- 17.* No bonus owing to Ed from the Corporation was used to pay for the stock redemption. *Foltz – RP 74 line 9 – RP 75 line 13.*

Immediately before the October 1, 2005, stock redemption, Ed owned 458 shares of WR. *Foltz – RP 61 line 21 – RP 62 line 4.* After the October 1, 2005, stock redemption, Ed owned the same 458 shares of WR.

Foltz – RP 63 lines 6-14. The November 30, 2005, Financial Statement for Miller.WhiteRunkle, Inc. states:

“October 1, 2005 the Company agreed to redeem 8686 shares stock for \$1 million. This redemption represents the entire interests of Jack White and Robert Runkle.... The remaining 458 shares are owned by Edward Miller. Effective November 2, 2005 the company changed its name to Miller.WhiteRunkle, Inc.”

Ex. P – 24 at 447 n.4.

After the October 1, 2005, stock redemption, Ed loaned the Corporation \$375,000 on November 30, 2005. *Foltz – RP 73 line 24 – RP 74 line 8.* This loan represented unpaid compensation owed to Ed. *Foltz – RP 132 line 18 – RP 133 line 6.* This loan was carried forward on the balance sheet. *Foltz – RP 74 lines 15-17.* Ed’s \$375,000 loan to the Corporation was not in the Corporation at the time of the redemption. It was paid into the Corporation two months after the redemption. *Foltz – RP 98 line 15 – RP 99 line 3; P – 24 at 448 n.7.* The MWR tax return for 12/1/2005 through 11/30/2006 sets forth the shareholder loan of \$375,000. *Ex. P – 15 at 325, line 19.* That loan was converted to \$359,850 in paid-in capital on November 30, 2007. *Foltz – RP 75 lines 14-19; RP 77 lines 5-11.* The effect of converting the loan to paid-in capital was that it gives Ed a basis in his stock for tax purposes. *Foltz – RP 77 lines 5-19.* Recharacterizing the loan to paid-in capital did not increase Ed’s stock ownership – he owned the same amount of shares before and after the adjustment. *Foltz – RP 134 lines 17-23.* Converting the loan to \$359,850 in paid-in capital does not indicate that amount was applied for the acquisition or redemption of any stock.

Foltz – RP 77 line 25 – RP 78 line 6; RP 132 lines 4-9. The basis for the stock is **not** the value of the stock. That basis was reported on Ed’s 2007 tax return. *Foltz – RP 79 lines 4-18; P – 4 at 43 line 13.*

This is consistent with the testimony of Zoe Foltz. The Wife cites selectively from the testimony of Zoe Foltz, to support her contention that “[t]he new corporation *repaid* Ed this wage bonus loan by issuing him 458 shares of stock.” Appellant Op. Br. at 28 (brackets added). The portion of Foltz’s testimony cited by the Wife reads as follows:

Q: Additional contribution to equity. Did Mr. Miller pay an additional contribution of capital?

A: Yes.

Q: How much was that?

A: \$359,850.

Q: Was any of that \$359,850 acquisition of stock?

A: Yes.

Q: The acquisition of what stock?

A: Ed's 458 shares.

See Appellant Op. Br. at 28 (citing *RP 130: 14-24*). Notably, the Wife did not include the lines of Foltz’s testimony that immediately follow this passage, which indicate the preceding exchange was actually a mistake:

Q: The 359,850 was -- I thought he already owned that stock?

MS. SCHULTZ: Objection. Leading. Witness has answered the question.

THE COURT: Sustained.

Q: (By Mr. Salina) The 359,850, did that go toward the acquisition of the stock or did it go towards creating additional stockholder's equity?

A: I understand now. Correct.

Q: Let's start over and you can answer that.

A: All right.

Q: Did the \$359,850 apply towards the acquisition of the stock?

A: No.

Q: Say that again. Did 359,850 --

MS. SCHULTZ: Objection as to vague, unless counsel identifies the stock. Are you talking about the 458 shares?

MR. SALINA: There's only 458 shares. Only been 458 shares.

MS. SCHULTZ: That's your theory.

THE COURT: Sustained. He can rephrase his question.

Q: (By Mr. Salina) Has Mr. Miller ever owned anything other than 458 shares of Miller.WhiteRunkle?

A: No.

Q: Did his share ownership at all increase, the number of shares increase as a consequence of the redemption?

A: No.

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

A: No.

Q: Did it get applied against the redemption of any shares?

A: No.

RP 130 line 25 – RP 132 line 9.

Instead, what occurred as a result of the shareholder loan and the subsequent conversion to paid in capital was the *cost basis* in Ed's 458 shares was changed from \$0 to \$359,850. In general, cost basis determines

a stockholder's tax liability. *See Estep v. King County*, 66 Wn.2d 76, 80, 401 P.2d 332 (1965). This event did not alter Ed's ownership of shares in the company, but merely altered his tax consequences were he later to sell this ownership interest.

After the October 1, 2005, stock redemption, Ed also opened a \$500,000 line of credit as "President/CEO" of MWR. *Ex. P – 26 at 457-58*. The line of credit was secured solely by corporate assets. *Ex. P – 26 at 470, Article I, 1.2*. The Corporation paid the debt on this line of credit, Ed did not. *Miller – RP 856 lines 6-14*. Ed did not guarantee the loan personally. *Miller – RP 860 line 2 – RP 861 line 12*.

The Cellular One account grew over the years. Cellular One was eventually obtained by AT&T as a client, and that business initially grew, and then declined to some extent. *Miller – RP 832 line 24 – RP 835 line 9; RP 839 line 17 – RP 842 line 21*. By 2007, Ed estimates that AT&T accounted for approximately 80% of the approximate \$5 million revenues. *Miller – RP 842 line 22 – RP 843 line 18*.

Ed sold MWR to Ascentium in 2007 for \$2,225,000. *Foltz – RP 78 line 7 – RP 79 line 3; Ex. P – 17 at 389; Miller – RP 871 line 22 – RP 782 line 22*. He believes that he sold the stock in the middle of December, 2007. *Miller – RP and 18 lines 13-16*. Ed attempted, but failed, to find a signed copy of the Stock Sale Agreement. *Miller – RP 877 lines 4-21*. Ed does not know whether there was a signed Stock Sale Agreement and does not recall signing one. *Miller – RP 877 line 22 – RP 878 line 3; RP 882 lines 5-22*. Ed

believed that he effectively sold Ascentium his client portfolio. *Miller – RP 887 lines 2-5.*

Exhibit R – 361 is an unsigned “execution copy” of a Stock Purchase Agreement between Ascentium, MWR and Ed. *Miller – RP 1285 lines 10-16; Ex. R – 361.* Ed does recall draft contracts going back and forth between the parties. *Miller RP 1286 lines 18-20; RP 1290 lines 16-19.* The documents that went back and forth between the parties were similar to R–361. *Miller – RP 1291 lines 4 – 10.* Exhibit R – 361 was admitted as one of the documents passed between the parties in negotiating the stock sale. *RP 1296 line 5 – RP 1305 line 4; RP 1417 line 3 – RP 1418 line 25.* The Agreement recited that Ed sold his shares in MWR to Ascentium for \$2,225,000. *Ex. R – 361 at 952, Article I, Sections 1.1, 1.2.* In the 12/1/2006 through 11/30/2007 MWR tax year immediately prior to the sale, MWR had \$4,099,583 in total income. *Ex. P – 16 at 355, line 11.* At the time of the sale, MWR had \$1,430,959 in total assets. *Ex. P – 17 at 381.* The Agreement acknowledged that the shares in MWR were uncertificated “and represented by entries into the books and records of the Company.” *Ex. R – 361 at 955, Article II Section 2.1; at 957, Article III Section 3.3(b); at 974, Article VI Section 6.7.* An exhibit to the Agreement confirmed that only 458 shares of the Company were outstanding. *Ex. R – 361 at 1001 paragraph 4.*

The sale was reported on Ed’s 2007 tax return as the sale of MWR stock for \$2,225,000, with a basis of \$359,850. *Foltz – RP 79 lines 4-24; Ex. P – 4 at 43 line 1.* Ed’s 2007 tax return states the stock that was sold to

Ascentium was acquired in 1993. *Ex. P – 4 at 43 line 2a.* Ed and Rita’s 2008, 2009, and 2010 joint tax returns state the MWR stock sold to Ascentium was acquired in 1993. *Ex. P – 5 at 88, line 2a; Ex. R – 325 at 594, line 2a; Ex. R – 326 at 625, line 2a.*

The 2005 loan to MWR from Ed’s wage bonus did not convert Ed’s separate property interest in his 458 shares of MWR stock into community property. *See In re Estate of Borghi*, 167 Wn.2d 480, 491 n.7, 219 P.3d 932 (2009) (holding that once the separate character of property has been established, subsequent community contributions “do not result in a transmutation of the property from separate to community property”). The proceeds of the subsequent 2007 sale to Ascentium were acquired with separate property, and were themselves Ed’s separate property, as the court properly found.

2. The trial court correctly characterized the Radio Lane residence as Ed’s separate property.

After the couple separated, Ed purchased the Radio Lane home. At trial, CPA Carlson traced the origin of the funds that were used to purchase the Radio Lane home, and determined they were acquired from the proceeds of the 2007 stock sale to Ascentium. *Ex. P-109; Ex P-114; FOF 22(I)(1).* The Wife did not proffer a tracing expert to rebut Carlson’s testimony. Based on the evidence and testimony, the trial court found that the Radio Lane home was clearly and convincingly Mr. Miller’s separate property. *FOF 22(I)(3).* The trial court did not err.

3. The trial court did not err in its characterization of the Glenaire home.

The Wife also contends that the court erred by failing to award the Glenaire home to the Wife as her separate property. *See* Appellant Op. Br. at 32. She alleges that the \$480,000 value of the Glenaire home was effectuated through the Wife's post-separation insurance premium payments and labor, and the trial court erred in failing to award the entire value of the Glenaire home to the Wife as her separate property. *See* Appellant Op. Br. at 37.

a. The fire insurance proceeds were correctly characterized according to the parties' respective ownership interest in the Glenaire home.

Regarding the insurance premiums, the trial court correctly held: "Fire insurance proceeds stand in the place and stead of the property insured and partake of the same character." *FOF (G)(2)* (quoting *In re Hickman's Estate*, 41 Wn.2d 519, 523, 250 P.2d 524 (1952)). The court carefully and accurately traced the separate property interests of Ed and Rita in the Glenaire home as being 77.15%, and 22.85%, respectively. *FOF 22(F)(11); Ex. P-32*. The court's distribution of the insurance proceeds in accordance with the parties' relative ownership interests in the Glenaire home was consistent with Washington law.

Appellant contends, however, that *Hickman* was implicitly overruled by *Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d 652, 659-60 (1984). *See* Appellant Op. Br. at 35. She cites *Wadsworth* for the broad proposition that "[t]he character of funds paid for a *term* insurance policy

determines the character of the insurance policy.” *Id* (brackets added). *Wadsworth*, however, addressed the specific context of term *life insurance* policies, and it neither held nor suggested that its holding had other applications. Appellant cites *Matter of Estate of Bellingham*, 85 Wn. App. 450, 455, 933 P.2d 425 (1997), which applied the rule from *Wadsworth* to a mortgage insurance policy, and urges this court to apply similar reasoning to the fire insurance policy at issue here. However, in *Bellingham*, the court expressly *distinguished* fire insurance policies as falling outside the scope of the rule it announced and applied, and suggested that *Hickman* is one of a separate line of cases unaffected by *Wadsworth*:

[W]e must reject the trial court's reliance on *In re Estate of Hickman*, 41 Wn.2d 519, 250 P.2d 524 (1952), and *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 855 P.2d 1210 (1993). *Those cases concern fire insurance proceeds, which the court held assumed the character of the property insured. Hickman*, 41 Wn.2d at 523, 250 P.2d 524. Because this case concerns life insurance rather than fire or property insurance, the *Hickman* line of cases does not apply.

Bellingham, 85 Wn. App. at 455 (emphasis added). Appellant provides no basis for departing from the general rule in Washington regarding the disposition of fire insurance proceeds, and the trial court’s characterization was proper.

b. The Wife is not entitled to a lien for post-separation labor of the Glenaire home.

The wife also contends she should be credited with “post-separation” labor concerning her involvement with repairs performed on the Glenaire home after the fire. *See* Appellent Op. Br. at 37-39. The Wife appears to argue that she should be credited with the difference between the

land value of the Glenaire home, \$85,000, and the appraised value of the home, which is \$480,000. *See* Appellant Op. Br. at 38; *FOF 22(F)(17)*. This argument requires the court to assume the entire home was destroyed, and that the Wife can establish that the home had no independent value. It also assumes the Wife's asserted "labor" was documented at trial such that it could be measured. Neither assumption is warranted on this record.

First, the Wife provided no documentation as to the value of the structure of the Glenaire home after the fire. Moreover, there was evidence before the court that the Glenaire home primarily sustained damage to the garage, with some limited damage to the kitchen and family room, and that much of the rest of the home was largely intact. *RP 514*. There was insufficient evidence in the record on which the trial court could document or award value for any alleged post-separation labor asserted by the Wife. Second, the Wife failed to document the value of her time or labor investment. In fact, there was testimony that the Wife falsified documentation regarding labor performed at the Glenaire home in order to obtain insurance proceeds or reimbursement from the Husband. *RP 509*.

The evidence before the court does not support the Wife's contention that she is entitled to a lien for any alleged post-separation labor related to the Glenaire home. The trial court did not err.

4. The trial court did not err in its characterization of the Safeco "contents" proceeds.

For the reasons similar to those discussed above in § B.3., the court did not err in its characterization of the Safeco "contents" proceeds as

community property. The contents that were insured and for which the insurance proceeds were paid were not segregated into community and separate property. *Ex. P-118; FOF 22(G)(5)*. The court will presume property acquired by a married couple and not traced to a separate property origin is community property. *See Skarbek*, 100 Wn. App. at 449.

5. The 2008 Cobalt boat was correctly characterized as Ed's separate property.

Ed purchased the 2008 Cobalt boat with his separate property funds. *Miller – RP 895 lines 20-24; RP 896 line 11 – RP 897 line 6*. Based on the testimony, the trial court held that the boat was Ed's separate property. The trial court did not err.

C. The trial court did not abuse its discretion regarding any alleged dissipation of the Centaurus fund.

The Wife also contends that the trial court abused its discretion as to the alleged “dissipation” of \$802,840 from the Centaurus fund. The Wife's contention lacks merit. Ed hired CPA Todd Carlson to perform a tracing analysis of financial investment accounts. *Carlson – RP 150 lines 14-22; RP 155 lines 8-11*. The analysis began with the assumption that Ed and Rita's relationship began in December, 2003. *Carlson – RP 155 lines 12-19*. He reviewed voluminous records including financial records, bank statements and records, investment records and tax returns to formulate his testimony. *Carlson – RP 156 lines 3-8; RP 158 line 22 – RP 167 line 3*. Carlson used those voluminous records to prepare his tracing analysis, Exhibit P-109. *Carlson – RP 169 line 9 – RP 170 line 6*. Carlson traced the

payments to Ed from Ascentium for the sale of the stock of MWR into various accounts. *Carlson – RP 176 lines 13-19; RP 177 line 9 – RP 180 line 11; RP 194 line 5-10.* Carlson traced transfers between various accounts. *Carlson – RP 180 line 12 – RP 181 line 25; RP 194 line 18 – RP 196 line 15.* In his analysis, Carlson allocates the amounts in the accounts to separate property and community property. *Carlson – RP 182 lines 5-8.* Deposits to accounts before the beginning of Ed and Rita’s relationship in December, 2003, are treated as Ed’s separate property. *Carlson, RP 182 lines 19-22.* After the beginning of the relationship, deposits could be treated as either separate property or community property. *Carlson, RP 182 line 23 – RP 183 line 1.* In his analysis (Ex. P – 109), Carlson assumed that after Ed and Rita’s relationship began any contributions to the accounts were community, in the absence of proof they came from a separate property source. *Carlson – RP 362 line 22 – RP 363 line 21.* Beginning in 2004, Carlson allocated some deposits to community property. *Carlson, RP 186 lines 3-17; RP 189 lines 16-25.* When Ed began receiving payments from Ascentium in 2008, those deposits were allocated to his separate property. *Carlson – RP 191 line 18 – RP 192 line 14.*

Carlson traced account withdrawals to either community purposes or separate purposes, and allocated the withdrawals accordingly. *Carlson – RP 199 line 5 – RP 200 line 25.* For example, when Ed withdrew funds from the account to pay taxes on the payment he received from Ascentium, Carlson deducted that amount from his separate property balance. *Carlson*

–RP 192 line 15 – RP 193 line 11. Carlson traced other account withdrawals as reductions in community property, such as expenses for household expenses. *Carlson – RP 196 lines 16-20; RP 197 lines 19-23.* Withdrawals after the date that Ed and Rita separated were allocated to separate property. *Carlson – RP 206 lines 17-24; RP 207 lines 9 – RP 209 line 9.*

In August, 2016, \$645,203 was transferred to a new fund, Centaurus # 318563. *Carlson – RP 349 line 4 – RP 350 line 17; Exhibit P – 109 at 5490.* The funds transferred into that account were allocated to community and separate property as they had been allocated in the transferring account. *Carlson – RP 350 lines 6-13.* Carlson allocated deposits and withdrawals in this fund to separate property, consistent with the other accounts, because it was after the date of Ed and Rita’s separation. *Carlson – RP 352 lines 21 – RP 355 line 6.*

Carlson’s analysis in Exhibit P-109 incorporates a separate analysis that he conducted regarding Ed’s withdrawals from the various accounts. *Carlson – RP 372 line 8 – RP 392 line 11.* Carlson’s analysis summarizes the values for the community property and separate property in each account. *Carlson – RP 363 line 22 – RP 364 line 1.* As of the date of his valuation, the Centaurus account #318563 had a balance of \$1,454,807, which Carlson attributed \$693,989 to community property and \$760,818 to Ed’s separate property. *Carlson – RP 364 lines 7-13; Ex. P – 109 at 5482, 5490.*

The trial court considered Carlson’s testimony and analysis, and found that analysis clearly and convincingly proved Carlson’s allocation of Centaurus account #318563 represented the parties’ interests in that account. *FOF 22(E)(1)-(9)*.

The trial court had earlier issued an Order on Contempt against Ed based upon his unauthorized withdrawal of funds. *CP 401-10*. The trial court ordered Ed to pay \$29,383.50 for attorney fees and costs, and \$10,000 as a sanction. *CP 404-05*. With respect to the funds that Ed had withdrawn without authorization, the trial court ordered “[i]t will be determined at trial how the funds Mr. Miller has received shall be characterized.” *CP 406 ¶ 8*. Carlson’s analysis set forth in Exhibit P – 109 incorporated a separate analysis that he prepared regarding Ed’s withdrawals, and Carlson characterized the funds in each account. The trial court’s acceptance of Carlson’s characterization of the funds in the Findings of Fact E. 1-11 constitutes the determination “at trial how the funds Mr. Miller has received shall be characterized.” The trial court’s acknowledgment of Ed’s contempt payment of \$40,000 in Finding of Fact J. 16 demonstrates the court’s awareness of that earlier Order on Contempt.

D. The court did not abuse its discretion in its assignment of the Sea-Doos to the Wife and offsetting their value against the Wife’s community property award.

At trial, the Wife asserted the 2002 Sea-Doos were community property. *CP 453-454 (closing brief at 41-42)*. She reasoned that they were purchased in or around July 24, 2002, which was during the “equity

relationship.” *Id.* In fact, the Husband’s divorce decree with his previous wife, Debbie Miller, confirmed that the Husband received the Sea-Doos in the property distribution following his first divorce. *Ex. P-1. FOF 22(J)(5)*. The trial court found they were the Husband’s separate property. It noted the parties’ agreement that they should be valued at \$3415, awarded them to the Wife, and give the Husband an offset for their value from the Wife’s community property award.

On appeal, with no citation to authority, the Wife asserts “a forced sale upon an unwilling party is abuse of discretion under RCW 26.09.080’s disposition authority.” *See* Appellant Op. Br. at 44. She appears to no longer dispute the separate property character of the Sea-Doos, nor does she challenge the accuracy of the court’s valuation. The Wife apparently thus concedes that the Sea-Doos constitute the Husband’s separate property and are correctly valued at \$3415. The court emphasized that in its disposition, it arrived at what it determined was a fair and equitable distribution under the “totality of the circumstances.” *CP 636, 638 (Final Divorce Order – Dissolution Decree)*. If the Wife does not wish to retain the Sea-Doos, there is nothing in her brief indicating she would be unable to sell them.

E. The court properly considered the statutory factors under RCW 26.09.080 to arrive at a fair and equitable distribution.

The Wife also maintains the trial court abused its discretion because it did not properly consider the RCW 26.09.080 factors when it distributed the property. The Wife is mistaken.

In a dissolution action, the property of the spouses, whether community or separate, is before the court for distribution. *See Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972). The court is directed by statute to distribute property and liabilities “as shall appear just and equitable,” based on consideration of the following factors:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage or domestic partnership; and
- (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.080.

The Washington Supreme Court has construed the statute to require that trial courts consider all relevant factors in its distribution determination, with an eye toward achieving a just and equitable result. *See In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985). The Court explained:

This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors. The statute directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property.

In re Marriage of Konzen, 103 Wn.2d at 478. The trial court is in the best position to determine the relative importance and weight of the statutory factors. *See Brewer v. Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). Accordingly, the court has “broad discretion” to determine what is just and equitable based under the circumstances of each case. *Brewer*, 137 Wn.2d

at 769. A trial court's distribution "should be disturbed only if there has been a manifest abuse of discretion." *Id.*, 137 Wn.2d at 769.

A court abuses its discretion if the decision is manifestly unreasonable or if it arrives at its decision based on untenable grounds or reasons. Our Supreme Court has explained:

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard of the facts do not meet the requirement of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (citation omitted). In light of the substantial discretion afforded trial courts, "[t]rial court decisions in dissolution proceedings will seldom be changed on appeal." *In re Marriage of Stenshoel*, 72 Wn. App. 800, 803, 866 P.2d 635 (1993) (brackets added).

Relying on *In re Marriage of Larson & Calhoun*, 178 Wn. App. 133, 135, 313 P.3d 1228 (2013), the Wife argues that the trial court abused its discretion in its consideration of the statutory factors because "[i]t 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." *See* Appellant Op. Br. at 45 (brackets added). In fact, the Wife's argument mischaracterizes the Court's opinion in *Larson* and overlooks the crux of that court's opinion: the trial court may weigh the statutory factors based on the particular circumstances presented in the case, and is afforded substantial discretion in determining a just and equitable distribution.

In *Larson*, the court framed the issue before it as whether “a trial court’s authority to award one spouse’s separate property to the other spouse in a dissolution action is limited to circumstances where a spouse cannot be amply provided for from community property alone.” 178 Wn. App. at 135. There, the husband had substantial separate assets, and there were also substantial assets owned by the community. The trial court considered the totality of the circumstances before it, including the long-term duration of the marriage and the substantial non-monetary contributions made by the wife to the community. Under these circumstances, the trial court found that it was fair and equitable to award the wife a portion of the husband’s separate property.

On appeal, the husband argued the trial court abused its discretion because it awarded separate property to the wife despite the adequacy of community funds to provide for her financial support. The husband essentially argued for a bright line rule requiring that separate assets be awarded to the owner of the separate property unless community assets are insufficient to provide adequate financial support to the nonowning spouse.

Emphasizing the abuse of discretion standard, the Court of Appeals rejected the husband’s argument. The court explained:

[The husband] contends that while the trial court generally has broad discretion to order a just and equitable distribution under RCW 26.09.080, Washington law prohibits the award of separate property to the nonowning spouse if “ample provision for the [nonowning] spouse can be made from the community estate alone.” As discussed below, *controlling Washington law imposes no such restriction on the trial court’s broad discretion to make a fair and equitable property distribution.*

Larson, 178 Wn. App. at 139 (brackets and emphasis added). The court in *Larson* did not conclude that a trial court must award liquidity. Rather, the court of appeals held that under the particular circumstances that were before the trial court in that case, which included the husband’s substantially greater future earning capacity, the wife’s nonmonetary contributions to the marital community and the long term nature of the marriage, awarding her a portion of the husband’s separate property was not an abuse of discretion:

The trial court provided ample, tenable justifications for its decision to award a portion of Larson’s separate estate to Calhoun. Its decision fell well within ‘the range of acceptable choices, given the facts and the applicable legal standard.’ It properly characterized all separate and community property and made a just and equitable distribution of the marital property in accordance with RCW 26.09.080. Finding no abuse of discretion, we affirm the trial court’s property distribution and its decree of dissolution.

Larson, 178 Wn. App. at 146 (internal citations omitted).

Here, the court expressly stated in its Memorandum Decision that “this was a long and difficult case to reconcile competing positions and testimony. *Ultimately, the court relied on RCW 26.09.080 to reach a just and equitable decision.*” RP 508 lines 17-18 (emphasis added). A trial court’s memorandum decision may supplement findings of fact and conclusions of law. *Ellerman*, 143 Wn.2d at 523 n.3.

The trial court’s statement in the Memorandum Decision is consistent with its findings and conclusions. Over the course of a nine-day trial, the court heard testimony from seven witnesses, including both the husband and the wife, as well as experts who could attest to the origins of

the various assets and the tracing of those assets to subsequent acquisitions. The parties submitted 221 exhibits, 150 of which were admitted. In its 16-page findings of fact and conclusions of law, the court carefully considered and resolved the evidence and arguments before the court, including those bearing on the statutory factors. It found that both parties brought substantial assets to the marriage. It heard evidence and made findings regarding their relative ages, education, and future earning potential. Despite her younger age, employment history and educational background, the court found the Wife chose not to work, thereby foregoing employment income during the pendency of the dissolution. *See FOF 22(A)(16)*. The court also found that Ed was generous with Rita, her children and her mother. *See FOF 22(H)(7)*. Based on the substantial evidence and argument before the court, the court “relied on RCW 26.09.080 to reach a just and equitable decision.” *RP 508 lines 17-18 (emphasis added)*.

F. The trial court did not abuse its discretion in declining to award the Wife attorney fees at trial.

Appellant maintains that the trial court abused its discretion in declining to award attorney fees to the Wife under RCW 26.09.140. That statute provides in pertinent part:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith. . . .

RCW 26.09.140.

This court reviews a trial court ruling regarding fees under § 26.09.140 for an abuse of discretion. *See In re Marriage of Kile and Kendall*, 186 Wn. App. 864, 888, 347 P.3d 894 (2015). To establish an abuse of discretion, the aggrieved party has the burden of proving that its discretion under this provision “exercised its discretion in a way that was ‘clearly untenable or manifestly unreasonable.’” *Id.*, 186 Wn. App. at 888 (quoting *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996)). Appellant cannot make this showing.

In declining to award fees, the court found that the Wife was 54 years old, ten years younger than the Husband. *FOF 14*. It noted the Wife retained six different lawyers throughout the pendency of this action. *Id.* It further found that the Wife’s education and training enabled her to work, and that she had previously earned approximately \$80,000 in annual salary. *FOF(A)(14)*. Despite her earning ability, the court found that she declined to work, choosing instead to pursue a new career path. *FOF 14*. The court found that this decision contributed to her debt situation. *FOF (A)(17)*. While the Wife maintains she should have been awarded more “cash liquidity,” the court did in fact award her cash in the amount of at least \$143,000, and also specifically noted that as a result of the dissolution, the Wife would receive assets that valued more than \$1,500,000.¹⁷

¹⁷ There was also evidence before the court that the Wife took affirmative steps to hide and even destroy property in order to misrepresent her financial situation, with the intention of increasing insurance proceeds. *RP 509; RP 513; RP 537*. While the court does not make specific findings regarding the Wife’s alleged fraudulent activities, it did note that it evaluated the credibility of the witnesses in arriving at its FFCL. *CP 508 (Memorandum Decision at 4)*.

G. There is no basis for remand or maintenance.

The Wife also requests remand “if the Husband has dissipated or transferred funds.” Appellant Op. Br. at 48. Based on the arguments presented in this brief, remand is unwarranted. Further, any request based on future dissipation of funds is at this point hypothetical and unnecessary.

H. The court should decline to award fees on appeal under RAP 18.1(c).

Appellant also seeks fees on appeal under RAP 18.1(c), based on “the Wife’s need and the Husband’s ability to pay per RCW 26.09.080.” Appellant Op. Br. at 48. RAP 18.1(c) provides:

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

Whether to award fees pursuant to RAP 18.1(c), under the authority afforded by RCW 26.09.140, falls within the discretion of the appellate court. *See* RCW 26.09.140. In making a determination regarding fees, the court considers both the financial needs of the parties and the relative merits of the parties’ arguments. *See In re Marriage of Pollard*, 99 Wn. App. 48, 56-57, 991 P.2d 1201 (2000). Based on the evidence and arguments detailed

in this brief, the court should decline to award fees and costs to Wife for this appeal.

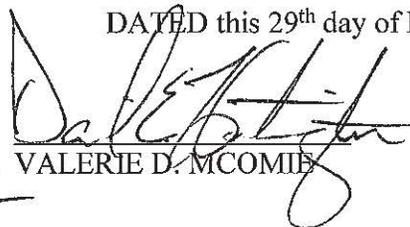
I. The court should not address the Wife's fourth Assignment of Error regarding her request for an equitable lien based on the tort settlement proceeds and the rental and use value of the Lake Home.

Finally, the Wife assigns error to the trial court's failure to award her an equitable lien for her tort settlement proceeds and the rental and use value of the Lake Home. *See* Appellant Op. Br. at 4 (Assignment of Error # 4). The Wife referenced this argument only in her assignments of error, and offered no argument or analysis to this issue in her brief. Without argument or authority to support an assignment of error, it is deemed waived. *See Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) (citing *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)). Accordingly, this court should not address the issue.

VI. CONCLUSION

The court should affirm the trial court.

DATED this 29th day of March, 2019.

for 
VALERIE D. MCOMIE


DANIEL E. HUNTINGTON

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2018, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal which will send notification of such filing to all counsel of record herein.

Counsel for Appellant:

Mary Schultz, WSBA # 14198
Mary Schultz Law, the. S.
2111 E. Red Barn Lane
Spangle, WA 99031
Telephone: (509) 245-3522
Email: Mary@MSchultz.com

Counsel for Respondent:

Martin L. Salina
Randall Danskin
601 W. Riverside Ave., Suite 1500
Spokane, WA 99201-0653
Telephone: (509) 747-2052
Email: dgs@randalldanskin.com

Valerie D. McOmie
4549 NW Aspen Street
Camas, WA 98607
Telephone: (360) 852-3332
Email: valeriemcomie@gmail.com


Daniel E. Huntington, WSBA #8277

March 29, 2019 - 4:22 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_20190329162218D3553627_0741.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Miller Final Brief.pdf

A copy of the uploaded files will be sent to:

- Mary@mschultz.com
- danhuntington@richter-wimberley.com
- dgs@randalldanskin.com

Comments:

Sender Name: Valerie McOmie - Email: valeriemcomie@gmail.com

Address:
4549 NW ASPEN ST
CAMAS, WA, 98607-8302
Phone: 360-852-3332

Note: The Filing Id is 20190329162218D3553627