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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Marriage of:

BEVERLY SEVIGNY,

Respondent/Cross-Appellant,

v.

MICHAEL G. SEVIGNY,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY
THE HONORABLE GAYLE M. HARTHCOCK

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

The trial court divided the parties' marital estate 60/40 in favor of the wife, ordering the husband to pay an equalizing judgment because he was awarded all the income-producing property, held by a community business the husband operates with the parties' eldest child. The trial court at the conclusion of this 4-decade marriage also ordered monthly maintenance of \$6,500 for 10 years from the husband, whose gross monthly income in 2016 exceeded \$20,000, to the wife, who earns \$2,000 a month.

The husband now appeals, making the unsupported (and insupportable) argument that the trial court lacked "authority in the jurisdictional sense" to value or divide properties acquired by the admittedly community business he controls after the parties separated in 2013. The husband makes this argument despite having made no effort below to trace any properties to his separate "earnings and accumulations" and putting on no financial evidence for the two years before trial, relying solely on his personal estimate of the book value of the community businesses in 2012. This Court should reject this frivolous argument, affirm the trial court's division of the marital estate and maintenance award as within its broad discretion, and award the wife her fees for having to respond to this appeal.

If the trial court committed any error, it was in providing for less than statutory interest on the equalizing judgment and \$10,000 fee award to the wife. The trial court's imposition of only 4 percent interest on the judgment and fee award has allowed the husband to treat the wife as a "soft money" lender. He has neither stayed nor paid the judgment pending appeal and has no incentive to do so; indeed, he has not even paid the modest fee award even though he does not challenge it on appeal. On this ground, and this ground alone, this Court should reverse and direct the trial court on remand to impose 12 percent interest on the equalizing judgment and fee award.

II. CROSS-APPEAL ASSIGNMENT OF ERROR

The trial court erred in allowing interest at 4 percent, rather than the statutory rate of 12 percent, on the equalizing property judgment and fee award. (CP 38, 51-53)

III. RESTATEMENT OF ISSUES

1. Did the trial court abuse its discretion in concluding that real property acquired by a community business shortly after separation was community property when the husband failed to present clear and convincing evidence tracing the properties to his separate earnings and accumulations?

2. RCW 26.09.080 expressly authorizes and requires the dissolution court to “make disposition of the property and the liabilities of the parties, either community or separate.” Does RCW 26.16.140, which provides that “[w]hen spouses . . . are living separate and apart, their respective earnings and accumulations shall be the separate property of each” prohibit the dissolution court from dividing property acquired after separation?

3. If the trial court mischaracterized any of the property before it at the end of the parties’ long-term marriage, is a remand necessary so that the court can enter findings whether it would have made the same just and equitable division of the marital estate?

4. Did the trial court abuse its discretion in its award of 10 years of maintenance to the wife, who earns a tenth of the husband’s income, after four decades of marriage?

IV. CROSS-APPEAL STATEMENT OF ISSUE

5. Judgments must comply with RCW 4.56.110, which requires that interest accrue at 12 percent, the maximum rate permitted under RCW 19.52.020. Did the trial court err in imposing interest of only 4 percent on the equalizing judgment and fee award without a satisfactory reason?

V. RESTATEMENT OF FACTS

A. **The parties married in 1979. The husband worked in construction and real estate; the wife worked for the Zillah School District after raising their five children.**

Beverly and Mike Sevigny, now both age 61, began dating in high school after meeting at a wrestling match in early 1976. (RP 99-100) Beverly left to attend college that fall, intending to pursue a teaching career, but quit before obtaining her degree to marry Mike in August 1979. (RP 99-100) Mike worked for his father's construction company. Beverly stopped working outside the home with the birth of their eldest son Matthew in 1980 and was a stay-at-home mom to the parties' five children, who were all adults by the time of trial. (RP 11-12, 14-15)

In 1990, Mike and Beverly built the house where Beverly still lives. (RP 15) Beverly returned to work part-time in 1995 as a paraprofessional for the Zillah School District; she became a full-time employee of the District in 2000 and still works there, earning a gross salary of \$26,530 per year. (RP 13-14, 45; Pet. Ex. 1.2) At trial, she testified she hopes to retire in four years, at age 65. (RP 46)

In 2007, the community started their own construction firm, M. Sevigny Construction, as equal partners with the parties' son

Matthew. (RP 14-15) In 2012, Mike and Matthew started a real estate company, 16th Avenue Properties, as equal partners. (RP 102)

Mike earned a substantial income from these community businesses, and the parties had planned to fund their retirement with the real estate business. (RP 45-46) At trial, Mike did not submit any financial information for either of the community businesses for years after 2012 (Resp. Exs. 2.8, 2.9), but his 2016 tax return (the most recent year provided) showed that he grossed \$244,571 in salary and corporate disbursements that year. (Resp. Ex. 2.2)

B. After the parties separated in 2013 the husband continued to operate the community businesses. The wife filed for divorce in 2015. At trial in 2018, the husband relied solely on the 2012 book value of the businesses and did not trace any of the marital estate to separate earnings or accumulations.

Mike and Beverly separated in February 2013. (CP 13) On April 20, 2015, Beverly filed a petition for dissolution. (CP 3) Trial, to Yakima County Superior Court Judge Gayle Harthcock on April 30 and May 1, 2018, focused on valuing and distributing the substantial community assets, including the family home, a cabin, a time share in Hawaii, several retirement and life insurance accounts, vehicles, and personal property. (CP 36-37)

The main issue at trial was the community's interest in M. Seigny Construction and 16th Avenue Properties, the businesses Mike operated with the parties' son Matthew. Specifically, 16th Avenue Properties had acquired several properties in Yakima shortly after Mike and Beverly separated, including two office buildings, a vacant lot, three residential rental properties, and a 20% interest in another LLC, MBM Land, which owned a large medical building. (RP 127-28, 169) 16th Avenue Properties also acquired an industrial warehouse in Union Gap. (Resp. Ex. 2.23)

Mike argued Beverly had no community interest in these real properties, and listed them as separate property in his proposed distribution spreadsheet. (RP 217-18; Resp. Ex. 2.3) But Mike testified that he did not own these assets—16th Avenue Properties LLC did. (RP 189) He further admitted that, because 16th Avenue Properties was a community asset, Beverly had a 25% ownership interest in the LLC. (RP 189) When asked to produce evidence that he had put post-separation funds or credit into any of the properties, Mike failed to do so. (RP 189)

Beverly's commercial real estate appraisal expert Steve Korn appraised the value of 16th Avenue Properties, including its real property holdings. (Resp. Ex. 2.23) Mr. Korn's appraisal considered

the sales comparison method, the cost method, and the income method. (CP 50) Mike relied on a 2012 income tax return to estimate the value of the community interest at \$153,228, based on the 2012 book value of the LLC's assets minus total liabilities. (RP 113-14; Resp. Ex. 2.9) (Resp. Ex. 2.3) Although it could not value the interest in MBM Lands (CP 50), the trial court accepted trial expert Korn's appraisal to value the community's 50% interest in the other LLC real property at \$341,332. (CP 52)

Mike did not produce any expert testimony supporting his estimate of the value of M. Sevigny Construction either, instead relying on a 2012 financial report to estimate the value of the construction company using the "asset value" method at \$719,040 (RP 112; Resp. Ex. 2.8), and the community's 50% interest at \$359,520. (Resp. Ex. 2.3) Glen Rasmussen, who had done accounting work for M. Sevigny Construction in the past and prepared the 2012 financial report on which Mike relied, testified as an agreed valuation expert, as initially proposed by Mike. (RP 55-56) Mr. Rasmussen testified that the asset value method Mike used is inaccurate and disfavored. (RP 56-57; 64) Rasmussen testified that because it includes the expected income of a business, the capitalization method is preferred. (RP 57) Rasmussen valued M.

Sevigny Construction at \$1,600,000 as of 2014 and \$1,500,000 as of 2015. (Pet. Ex. 1.19; CP 50) The trial court accepted accountant Rasmussen's valuations and split the difference between the two dates to value the community's 50% interest in the construction business at \$775,000. (CP 50)

C. Expressing concern that the husband had not been transparent in providing financial information, the trial court awarded the husband the only income-producing assets and ordered an equalizing judgment and maintenance for the wife.

The trial court in its oral ruling expressed concern that Mike had not been transparent in providing financial information:

There were a couple of things that was concerning about the testimony as taken and things that were missing in the court file and presented—or not presented during trial that the Court would have liked to have seen. One concern that I have particularly is the lack of information from 2017.

(RP 226) The court noted that Mike failed to produce any recent income information, despite testifying that he could do so:

We did not have any written documentation of Mr. Sevigny's income. He did testify but we didn't get any kind of documentation. We did not have any written documentation of Mr. Sevigny's income. He did testify but we didn't get any kind of documentation.

(RP 226) The trial court was also concerned about the lack of financial information for MBM Lands, the LLC that owns the large

medical building in which 16th Avenue Properties has a 20% ownership interest, noting that “the husband . . . did not want the wife to know that there had been some additional rental” from the property:

There was very little information regarding MBM and a profit and loss statement would have been very helpful from that corporation for the Court to consider. And the result was a concerning testimony as far as the valuation on 16th Avenue. In that it was based upon a percentage of the MBM and . . . we had testimony that the husband . . . did not want the wife to know that there had been some additional rental . . . [A]pparently the son got involved and got that corrected for purposes of an amended valuation.

(RP 226) Working with the evidence it had, and noting that “it was important to acknowledge . . . that all of the income producing property has been awarded to Mr. Sevigny” (RP 226), the trial court issued its letter opinion on May 2 (CP 49-51) and entered findings, conclusions and a final decree on July 6, 2018. (CP 7-26)

Mike had recognized a disproportionate division was appropriate (Resp. Ex. 2.3), and the trial court ordered a 60/40 division of property in Beverly’s favor. (CP 10-11) The court awarded Mike the cabin, several vehicles, and the community interest in both M. Sevigny Construction and 16th Avenue Properties. (CP 10-11) Beverly received the family home, her car, the retirement and life

insurance accounts, a sewing machine, and an equalizing judgment to achieve a 60-40 division. (CP 10-11) On Mike's motion for reconsideration, the trial court increased the value of the family home awarded to Beverly and reduced the value of Mike's business disbursements to reflect taxes. (CP 52-53) The court ultimately ordered an equalizing payment of \$707,485 from Mike to Beverly, to be paid by August 5, 2018, and bearing interest at 4% per annum. (CP 46)

The property division is summarized below:

	Mike	Beverly
Real Property	\$200,000	\$253,533
Businesses	\$1,116,332	
Retirement Accounts		\$219,188
Life Insurance		\$62,190
Vehicles	\$4,250	\$23,000
Personal Property/Other	\$240,500	\$15,000
Total	\$1,561,082	\$572,911
Transfer Payment	(\$707,485)	\$707,485
	\$853,897	\$1,280,396

The trial court awarded Beverly 10 years of maintenance at \$6,500 per month (CP 9), finding that amount equitable given Beverly's

estimated net monthly income is \$1,701.70, and Mike's of \$14,832. (CP 9) The trial court also awarded Beverly \$10,000 in attorney fees. (CP 42)

Mike appeals. Beverly cross-appeals only the 4 percent interest rate on the equalizing judgment and fee award.

VI. RESPONSE ARGUMENT (AND CROSS-APPEAL)

A. Introduction.

This Court should be very clear what appellant proposes in his challenge to the trial court's property division: he argues that a large portion of the marital estate was "off-limits" and his indivisible separate property as a matter of law because the community-owned business he controlled acquired these assets shortly after separation. But despite controlling the business, and all information relevant to it, appellant utterly failed to prove the separate character of any assets before the trial court. Further, neither statutory nor case law supports appellant's argument that these "post-separation acquisitions" could not be divided – a proposition that is directly contrary to RCW 26.09.080. Regardless of their character, the trial court did not abuse its wide discretion in dividing the marital estate and ordering an equalizing judgment to the wife for her interest in

the community businesses from which the husband continues to enjoy a very substantial income.

Nor did the trial court abuse its discretion in awarding the wife 10 years of maintenance to ameliorate (but not eliminate) the wide disparity in the parties' income and income-producing abilities after four decades of marriage. Far from being punitive or based on the husband's "misconduct," the trial court's maintenance award reflects a proper consideration of the factors of RCW 26.09.090. This court should affirm the property division and maintenance award, award the wife her fees on appeal, and remand only for imposition of interest at the statutory rate on the equalizing judgment and trial court fee award.

B. The husband did not prove that properties acquired after separation by the community business were his separate property. (Response to App. Br. 26-33)

This appeal is premised on the claim that the trial court mischaracterized assets acquired by the parties' community real property business after separation as community property. While "the ultimate characterization of the property as community or separate is a question of law," "the time of acquisition, the method of acquisition, and the intent of the donor, for example, are questions for the trier of fact" and reviewed for substantial evidence. *Marriage*

of Kile & Kendall, 186 Wn. App. 864, 876, ¶ 28, 347 P.3d 894 (2015) (cited sources omitted). Absent clear and convincing evidence that property was acquired with post-separation earnings or accumulations, it must be characterized as community property. *Marriage of Sedlock*, 69 Wn. App. 484, 509, 849 P.2d 1243, *rev. denied*, 122 Wn.2d 1014 (1993).

In this case, appellant utterly failed to produce any evidence, much less prove by clear and convincing evidence, that properties acquired by the community business after separation could be traced to his separate earnings or accumulations. Instead, the husband's argument on appeal is based solely on the timing of the acquisitions; he asserts that any property acquired after the date of separation was as a matter of law his separate property under RCW 26.16.140.

But RCW 26.16.140 does not control the character of property acquired post-separation. It merely provides that “[w]hen spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each.” A spouse asserting the separate character of assets acquired post-separation is required to prove by clear and convincing evidence that those assets were acquired with post-separation “earnings and accumulations.”

In *Sedlock*, for instance, the husband claimed that a condo he had purchased after separation was his separate property because he made the down payment from post-separation earnings. The Court of Appeals held that “[b]ecause [the husband] contends that the payment was made with his post separation earnings, he has the burden of proving this by clear and convincing evidence.” *Sedlock*, 69 Wn. App. at 509. Appellant here also had the burden of proving he acquired properties after separation with separate “earnings or accumulations.” And although he was the only one with access to this information, in this case the husband utterly failed to trace the source of any of the properties he claimed were his separate property.

Further, appellant did not acquire these assets —16th Avenue Properties did. The properties were not appellant’s personal “earnings and accumulations,” but instead belong to 16th Avenue Properties, which the husband conceded was a community asset. (RP 189) When the marital community has an interest in a business, the value of that interest rises and falls with the business even after separation. This can work to the advantage or disadvantage of the community, but it does not change the character of the asset. In a discussion ignored in appellant’s selective reading of the resource (App. Br. 29), Washington Practice explains:

Despite the separation of the spouses, cases have held that the management acts of a spouse after separation are binding on the community. For example, a spouse who permits the other spouse to have the management of a community business during the pendency of a dissolution of marriage proceeding may subject the community estate to debts incurred in the operation of that business . . . [S]ince the legal status remains, the management is presumptively on behalf of the community, and the burden is upon the person who says it is not to prove this fact by clear and convincing evidence.

19 Scott J. Horenstein, *Washington Practice, Family and Community Property Law* § 12:18 (2nd ed., 2015), citing *Dizard & Getty v. Damson*, 63 Wn.2d 526, 530-31, 387 P.2d 964 (1964).

The *Dizard* Court held that the marital community was liable for a corporate debt incurred after separation by the husband, who managed the corporation. The case illustrates that when a corporation is a community asset, a post-separation increase or decrease to that asset's value is presumptively community property. In *Dizard*, the husband continued to operate the community's construction business after the parties separated, incurring a debt to a subcontractor after separation but before the spouses were divorced. 63 Wn.2d at 527. The wife argued that because she was separated from her husband, the debt was solely the husband's, and

not the marital community's. *Dizard*, 63 Wn.2d at 530. Our Supreme Court disagreed:

To convert community business assets into separate property of the spouse at fault, without agreement or operation of law, seems an intolerable result.

“The very nature of the property acquired during [marriage] clearly indicates that community and individual property must retain its status and remain intact until such time as the marital relation shall cease to exist or the parties, themselves, voluntarily enter into proper agreement for the allocation of their properties, community and separate, upon some other basis.”

Dizard, 63 Wn.2d at 530-31, quoting *Cohn v. Cohn*, 4 Wn.2d 322, 326, 103 P.2d 366 (1940).

The same principle applies to the real properties acquired by the community business after separation here. Just like the debt at issue in *Dizard*, they do not belong to the husband, but to the business, which is a community asset. Any appreciation in value or debts incurred by the business are not either spouse's separate property, but instead affect the business and the community's interest in it.

Courts follow an analogous rule with marital real estate, where any post-separation increase or decrease to a property's value is shared by the community unless a party can trace separate

contributions by clear and convincing evidence. *See* 19 *Washington Practice* at § 32:7; *Sedlock*, 69 Wn. App. at 509. Far from proving that any post-separation acquisitions were his separate property, the evidence the husband did submit below instead supported a conclusion that the properties were community property. Corporate income tax returns for 16th Avenue Properties proved that the properties belonged to the business, and not to him. (Resp. Ex. 2.9, 2.21) A loan statement showed that at least two of the properties were obtained using corporate (and thus community) debt. (Resp. Ex. 2.22) When asked during cross-examination to produce any evidence that he had contributed separate assets to obtain any these properties, the husband claimed that such evidence existed, but failed to produce it at trial. (RP 189)

The cases upon which appellant relies (App. Br. 26-29) have nothing to do with this failure of proof on the husband's part. In *Marriage of Short*, 125 Wn.2d 865, 869-70, 890 P.2d 12 (1995), the question was whether stock options acquired during marriage but vested after separation were to compensate the husband for community or separate efforts. In *Marriage of Griswold*, 112 Wn. App. 333, 339-41, 48 P.3d 1018 (2002), *rev. denied*, 148 Wn.2d 1023 (2003), this Court relied on *Short* to address the same issue.

Appellant relies on *Elam v. Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982) for the proposition that “any increase in value of separate property is presumed to be separate property,” but the issue in *Elam* was whether any community interest existed in a house that the wife had purchased *before* marriage—an unambiguously separate asset. 97 Wn.2d at 812. If it has any application, *Elam* supports the proposition that any post-separation increase in the value of the community real property business was presumptively community property.

Appellant also in passing asserts that assets acquired by the community business after separation were his alone because the marriage was “defunct.” (App. Br. 27) But the “mere physical separation of the parties does not establish that they are living separate and apart sufficient to negate the existence of a community.” *Oil Heat Co. of Port Angeles, Inc., v. Sweeney*, 26 Wn. App. 351, 354, 613 P.2d 169 (1980). Absent clear and convincing evidence of something more than the physical “date of separation” of the parties (as found by the trial court in completing the mandatory forms), any property acquired presumptively belongs to the community. *Rustad v. Rustad*, 61 Wn.2d 176, 179-80, 377 P.2d 414 (1963).

Appellant failed as a matter of fact to rebut the presumption that assets acquired post-separation by a community business were community property. *See Dizard*, 63 Wn.2d at 531; *Sedlock*, 69 Wn. App. at 509; 19 *Washington Practice* at § 12:18. Given that failure, and appellant's reliance on mischaracterization as a basis for vacation of the trial court's just and equitable division of the property before it, this Court's review of the trial court's exercise of its discretion in dividing the marital estate should be at an end.

C. Separate property is before the dissolution court for division under RCW 26.09.080. RCW 26.16.140 does not prohibit division of assets acquired post-separation. (Response to App. Br. 33-35)

Building on his claim that assets acquired by the community business after separation were his separate property, appellant makes the extraordinary baseless claim that the trial court did not have the "authority in the jurisdictional sense" to divide those post-separation assets. (App. Br. 33) But RCW 26.09.080 expressly gives the dissolution court the authority, and obligation, to "make disposition of the property and the liabilities of the parties, either community or separate," regardless when property claimed to be separate was acquired. Nothing in RCW 26.09.080, RCW 26.16.140, or elsewhere, restricts the trial court's "jurisdictional authority" to

divide post-separation property, and appellant cites no statutory or case law authority for the absurd proposition that “post-separation earnings and acquisitions cannot be subject to division by the dissolution court.” (App. Br. 35)

To the contrary, among many other cases *Marriage of Larson and Calhoun*, 178 Wn. App. 133, 313 P.3d 1228 (2013), *rev. denied*, 180 Wn.2d 1011 (2014) and *Marriage of Wright*, 179 Wn. App. 257, 319 P.3d 45 (2013), *rev. denied*, 180 Wn.2d 1016 (2014) both confirm that separate property is not entitled to special “protected” status in division of the marital estate. *Larson/Calhoun* rejected the husband’s argument that separate property should not be invaded if the wife could be adequately provided for from the parties’ community property, holding that “Washington law imposes no such restriction on the trial court’s broad discretion to make a fair and equitable property distribution.” 178 Wn. App. at 139, ¶ 12. In affirming the trial court’s distribution of the husband’s separate property to the wife in that case, the court relied in particular on the length of the marriage. *Larson/Calhoun*, 178 Wn. App. at 144-45, ¶ 25. *Wright* similarly rejected the husband’s argument that assets acquired during the parties’ long physical separation should not be divided. 179 Wn. App. at 264, ¶ 10.

RCW 26.16.140, which appellant relies upon in making this argument, has nothing to do with the division of property on dissolution. As originally enacted in 1881, the statute did reflect the “genius of community property law” (App Br. 34) by protecting only the *wife’s* earnings and accumulations from post-separation creditors of the husband – a provision necessary because at the time, only the husband could act on behalf of the community. Harry M. Cross, *The Community Property Law (Revised 1985)*, 61 Wash. L. Rev. 13, 32-35 (1985) (“Prior to the 1972 amendments, [RCW 26.16.140] provided only that the wife’s earnings and accumulations while ‘living separate and apart’ were her separate property.”); *see also* Laws of 1972, 1st Ex. Sess., ch. 108, § 5. The statute was amended in 1972 to apply to both spouses’ “earnings and accumulations,” but does not purport to, and has never been interpreted, to limit the property subject to division on dissolution.

It would be a perversion of its purpose, and of the “genius of community property law,” to impose a limitation on the trial court’s authority and obligation under RCW 26.09.080 to “make disposition of the property and the liabilities of the parties, either community or separate,” based on the provisions of RCW 26.16.140. This Court must reject this frivolous argument.

D. The trial court did not abuse its wide discretion in dividing the marital estate. Even if the trial court mischaracterized some of the property before it, the appropriate remedy would be remand for findings, not vacation of the distribution. (Response to App. Br. 21-25, 35-37)

Appellant insists that this Court must vacate the property division because of the allegedly erroneous characterization and inclusion of assets acquired by the community business post-separation. (App. Br. 35-37) But even if this Court concluded that the trial court mischaracterized certain property – and it should not on this record – it need only remand to provide the trial court an opportunity to determine whether in its discretion it would make the same division of the marital estate with the correct property characterization.

“[A]ll of the property of the parties, whether it be community or separate, is before the trial court for disposition.” *Marriage of Shannon*, 55 Wn. App. 137, 141, 777 P.2d 8 (1989). Accordingly, the “characterization of the property . . . is not necessarily controlling; the ultimate question [is] whether the final division of the property is fair, just and equitable under all the circumstances.” *Shannon*, 55 Wn. App. at 141, quoting *Marriage of Hadley*, 88 Wn.2d 649, 656, 565 P.2d 790 (1977).

The trial court had the discretion to order the same property division even if it mischaracterized the business assets at issue here, especially given the parties' long marriage. Indeed, the trial court concluded that the property division was fair, just, and equitable (CP 58-59), and that determination is subject to deference. *Larson/Calhoun*, 178 Wn. App. at 138-39, ¶¶ 11-12.

The appellant wrongly accuses the trial court of abusing its discretion because it thought it had to use the property division to “place the parties in roughly equal financial positions for the rest of their lives.” (App. Br. 23) The husband knocks down a particularly wispy straw man in this discussion of the “*Rockwell* rule,” citing *Marriage of Rockwell*, 141 Wn. App. 235, 170 P.3d 572 (2007), *rev. denied*, 163 Wn.2d 1055 (2008). Nothing in the record indicates this was the trial court's intent, nor was it the consequence of its award. And the recent decisions in *Marriage of Doneen*, 197 Wn. App. 941, 391 P.3d 594, *rev. denied*, 188 Wn.2d 1018 (2017) and *Marriage of Kaplan*, 4 Wn.App.2d 466, 421 P.3d 1046, *rev. denied*, 191 Wn.2d 1025 (2018) (App. Br. 23-25) disavowing the so-called “*Rockwell* rule” do nothing more than confirm the trial court's broad discretion in its division of property.

Given the trial court's conclusion that the property division is equitable, remand would be required only to determine whether the trial court "would have divided it in the same way . . . on tenable grounds, that is, with the correct character of the property in mind." *Shannon*, 55 Wn. App. at 142. Vacation of the property award is neither required nor justified.

E. The trial court did not abuse its discretion in awarding maintenance given the length of the marriage and the relative financial positions of the parties. (Response to App. Br. 37-45)

The trial court has "broad discretionary powers" in awarding maintenance; its award "will not be overturned on appeal absent a showing of manifest abuse of discretion." *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). "The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be 'just.'" *Marriage of Wright*, 179 Wn. App. 257, 269, ¶ 23, 319 P.3d 45 (2013) (quoted case omitted), *rev. denied*, 180 Wn.2d 1016 (2014). The trial court is not required "to make specific factual findings on each of the factors." *Mansour v. Mansour*, 126 Wn. App. 1, 16, 106 P.3d 768 (2004). The trial court's maintenance award here was neither an improper division of property nor

premised on an improper attempt to maintain respondent's "lifestyle," and appellant clearly has the ability to pay the award.

Each of the RCW 26.09.090 factors justify the trial court's exercise of its wide discretion to make the award challenged here:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

The wife earns a modest salary as a public school secretary and parapro, netting \$1,701 per month (CP 9), while her monthly

expenses totaled nearly \$5,000. (Pet. Ex. 1.2) (Factor a) It would be unreasonable to expect the wife, now age 61, to obtain additional education or training to support herself on her own, particularly when she left school in 1979 to marry the husband and raise five children with him. (Factor b) The parties enjoyed a comfortable standard of living during their long marriage. (Factor d) They regularly took vacations to Hawaii and Mexico, bought a new car every five years, and purchased other assets like the cabin and a timeshare in Hawaii. (RP 16-18) (Factor c) The husband's robust earning capacity made their comfortable lifestyle possible. In 2016, the husband had net monthly income of \$16,534—nearly ten times more than the wife (CP 9) and the trial court awarded him the only income-producing assets. (RP 105-06) (Factor f)

It is in fact likely the husband's income had grown by the time of the trial – in sole control of this information, the husband produced no evidence of his recent income, or financial information for the businesses. Appellant appears to believe he is entitled to congratulations because he “voluntarily” paid the wife \$3,000 per month during their separation, and that should somehow reduce or inform his maintenance obligation. But relevant to factors e and f, in addition to paying the wife \$3,000 a month and covering his own

expenses during separation, the husband also had enough disposable income to pay the woman with whom he currently lives \$5,000 per month. (RP 181-84) The husband argues that evidence of these payments was an improper smear tactic (App. Br. 36) but the fact that he could afford \$5,000 a month to finance a new household is unquestionably relevant to his ability to pay maintenance to his wife of four decades.

Nor is the award here unreasonable given the trial court's property distribution. Appellant cites a number of cases (App. Br. 38-40) to argue that the maintenance award is an abuse of discretion in light of the wife's property award but none of these cases suggest the trial court abused its discretion here. To the contrary, they each affirm the trial court's exercise of its broad discretion in fashioning maintenance awards. *See Marriage of Irwin*, 64 Wn. App. 38, 55, 822 P.2d 797 (affirming trial court's denial of wife's request for permanent maintenance when she was awarded income-producing properties), *rev. denied*, 119 Wn.2d 1009 (1992); *Marriage of Rink*, 18 Wn. App. 549, 553-54, 571 P.2d 210 (1977) (affirming a disproportionate property award to the wife in addition to maintenance); *Marriage of Bulicek*, 59 Wn. App. 630, 633-34, 800 P.2d 394 (1990) (affirming maintenance award after a long-term

marriage because the wife “does not live on income close to the income that supported the couple’s standard of living during marriage and will likely never achieve the post-dissolution economic level of [the husband].”).

Appellant also argues that the trial court’s maintenance award failed to consider his ability to pay maintenance while also meeting his own financial needs (App. Br. 41, citing *Bungay v. Bungay*, 179 Wash. 219, 36 P.2d 1058 (1934) and *Marriage of Matthews*, 70 Wn. App. 116, 853 P.2d 462, *rev. denied*, 122 Wn.2d 1021 (1993)). Neither *Bungay* nor *Matthews* suggest the trial court here abused its discretion. In this case, the trial court awarded the husband all of the income-producing assets, from which he grosses \$20,000 per month – a sum more than adequate for the husband to meet his own personal financial needs while also paying \$6,500 per month in maintenance. Appellant’s arithmetic is as dubious as his legal analysis – after payment of the tax-deductible maintenance award, the husband’s taxable gross income will still be at least \$14,000, while the wife’s taxable gross income will be approximately \$8,500. Thus, the award here is consistent with the authority appellant cites because it “helps ‘equalize[s] the post dissolution standard of living of the parties, where the marriage is long term and the superior

earning capacity of one spouse is one of the few assets of the community.” *Marriage of Scheffer*, 60 Wn. App. 51, 57, 802 P.2d 817 (1990) (quoted at App. Br. 40).

This case therefore is nothing like *Bungay*, where the Supreme Court (acting when it reviewed such matters de novo) concluded that the trial court’s maintenance award was “impossible” to perform because the husband only earned \$200 per month but was ordered to pay both \$125 per month to the wife for support and the mortgage, taxes, and utilities for the home where the wife and children reside. 179 Wash. at 223. Nor is it like *Mathews*, where the appellate court reversed a lifetime award of maintenance. 70 Wn. App. at 123. The trial court here limited the award to ten years.

Appellant also argues the trial court may not consider “potential” income in fashioning a maintenance award. (App. Br. 41) Here, however, the trial court based its award on the financial data that the husband provided—the income he earned in prior years from running the businesses he was awarded and still controls. It is not an abuse of discretion to consider reasonably anticipated earnings upon dissolution. *Wright*, 179 Wn. App. at 262, ¶ 7, 270, ¶ 25 (in dissolving long-term marriage, court must “look forward” and may

consider a spouse's "anticipated postdissolution earnings" both in dividing the marital estate and in awarding maintenance).

Finally, citing *Stacy v. Stacy*, 68 Wn.2d 573, 414 P.2d 791 (1966), appellant argues the trial court is not required to insure the parties maintain the same lifestyle they had become accustomed to during the marriage. (App. Br. 42-43) But, like appellant's discussion of the so-called "*Rockwell*" rule discussed *supra* at 23, the husband accuses the trial court of something that it did not do. Nothing in the record indicates the trial court based its award solely on an intent to insure the wife maintained the same lifestyle after dissolution. And in any event, a trial court is required to consider the standard of living established during the marriage when fashioning a maintenance award. RCW 26.09.090(1)(c).

The trial court's letter ruling and its findings and conclusions instead the maintenance award was fair and equitable in light of the wife's financial need, the husband's ability to pay, and an appropriate consideration of the factors of RCW 26.09.090. The trial court did not abuse its discretion in awarding maintenance given the length of the marriage and the relative financial positions of the parties.

F. The trial court erred in awarding less than the statutory interest rate on the fee award and equalizing judgment, encouraging the husband to delay paying the wife her share of the marital estate. (Argument of Cross-Appeal)

A trial court's judgment must comply with RCW 4.56.110, which requires that interest on judgments accrue at the maximum rate permitted under RCW 19.52.020. *Marriage of Harrington*, 85 Wn. App. 613, 630-32, 935 P.2d 1357 (1997). The failure to enter a judgment in compliance with RCW 4.56.110 "constitutes error meriting remand for correction of the judgment's interest rate to the statutory rate." *Harrington*, 85 Wn. App. at 631, quoting *Marriage of Knight*, 75 Wn. App. 721, 731, 880 P.2d 71 (1994), *rev. denied*, 126 Wn.2d 1011 (1995). To the extent the trial court made any error, it was only in awarding judgments for fees and to equalize the property award that bear interest at only 4 percent, instead of the statutory rate of 12 percent.

An exception to the general rule requiring judgment interest at the judgment rate can arise in dissolution cases, where the trial court has discretion to reduce the interest rate on *deferred* payments in the decree of dissolution. *Harrington*, 85 Wn. App. at 631; *Knight*, 75 Wn. App. at 731. However, the trial court abuses its discretion if it reduces the interest rate without "setting forth adequate reasons

for the reduction.” *Harrington*, 85 Wn. App. at 631; *see also Knight*, 75 Wn. App. at 731 (“a trial court abuses this discretion if it provides for an interest rate below the statutory rate without setting forth adequate reasons for doing so”). Here, not only was the judgment not deferred, the trial court failed to give adequate reasons for reducing the rate on either the equalizing or fee judgments to 4 percent – one-third the statutory rate.

“The purpose of awarding interest on a judgment is to compensate a party having the right to use money when it has been denied use of that money.” *Lindsay v. Pac. Topsoils, Inc.*, 129 Wn. App. 672, 678, ¶ 13, 120 P.3d 102 (2005), *rev. denied*, 157 Wn.2d 1011 (2006) (quoted case omitted). “[T]here should be some apparent reason for giving one spouse the use, for business purposes, of the money of the other without interest or at less than the statutory rate.” *Berol v. Berol*, 37 Wn.2d 380, 383, 223 P.2d 1055 (1950) (reversing when the trial court failed to award any interest on the judgment awarded to the wife). Here, there is no justification for a reduced interest rate.

The trial court mentioned its disproportionate division in reducing the interest rate (CP 222), but its decision has instead had the effect of preventing any division at all, leaving the husband in

control of three-quarters of the marital estate with no incentive to pay the wife for her share. In essence, the trial court has allowed the husband to use the wife as a “soft money” lender, at rates he could not obtain from a commercial lender. And he has taken inequitable advantage of that, making no effort to either stay or pay either the equalizing judgment (despite falsely claiming he was making arrangements to stay the judgment in obtaining multiple extensions of time to file his opening brief) or even the modest fee award, which he does not challenge on appeal but still has not paid.

Another purpose of imposing statutory interest on judgments is to encourage the party obligated to pay the judgment to pay it quickly to avoid further interest accruing. *See Marriage of Barnett*, 63 Wn. App. 385, 387, 818 P.2d 1382 (1991) (ordering interest after a one-year deferral period to serve as a “financial incentive to encourage” the husband to sell property within a year of the decree to pay off the wife’s judgment before interest began to accrue); *see also, e.g., GTE Commc’n Sys. Corp. v. State of Wash., Dep’t of Revenue*, 49 Wn. App. 532, 536, 744 P.2d 638 (1987) (“One faced with a high interest rate . . . is given incentive not to be delinquent in the first place and, if delinquent, to abbreviate the period of interest by prompt payment”). That purpose is particularly important in

dissolution cases, and the trial court's imposition of less than the statutory interest rate undermines the policy that "spouses are entitled to receive their share of the community property within a reasonable time." *Marriage of Foley*, 84 Wn. App. 839, 844, 930 P.2d 929 (1997).

G. This Court should award respondent fees on appeal.

This Court should award respondent her fees on appeal. She and her appellate attorneys should not be required to finance the husband's appeal of discretionary, fact-based decisions, and she is entitled to fees based on her need and the husband's ability to pay. RCW 26.09.140; RAP 18.1(a). This Court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). As respondent's RAP 18.1(c) declaration will demonstrate, her need for her fees has only increased since the decree was entered.

Appellant has neither paid nor stayed the fee award or the equalizing judgment, which was due a year ago. Respondent's maintenance award and the limited property over which she has control is not sufficient to allow her to pay her attorney fees on appeal, and she should not be forced to use retirement funds to

defend this appeal. Meanwhile, appellant retains full control over the property awarded to him, including his interests in two profitable businesses, financed in part by money he has essentially “borrowed” from respondent at below-market rates by refusing to pay the equalizing judgment. Appellant has the ability to and should be ordered to pay respondent’s attorney fees.

VII. CONCLUSION

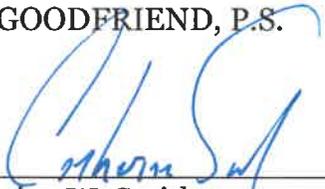
This Court should affirm on the husband’s appeal, and reverse on the wife’s cross-appeal. This Court should award attorney fees to the wife on appeal, and direct the trial court on remand to impose statutory interest on the judgments by the husband.

Dated this 19th day of July, 2019.

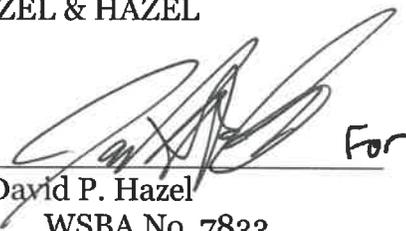
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Attorneys for Respondent/Cross-Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 19, 2019, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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