

No. 62519-5-I

COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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STACEY DEFOOR,

Respondent/Cross-Appellant,

v.

TERRY DEFOOR AND G.W.C., INC.,

Appellants/Cross-Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE LAURA INVEEN

---

REPLY BRIEF OF APPELLANTS  
AND CROSS-RESPONDENTS' BRIEF

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EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

STOKES LAWRENCE, P.S.

By: Howard M. Goodfriend  
WSBA No. 14355  
Valerie A. Villacin  
WSBA No. 34515

By: Gail N. Wahrenberger  
WSBA No. 15427  
Thomas A. Lerner  
WSBA No. 26769

1109 First Avenue, Suite 500  
Seattle, WA 98101  
(206) 624-0974

800 Fifth Avenue, Suite 4000  
Seattle, WA 98104-3179  
(206) 626-6000

Attorneys for Appellants/Cross-Respondents

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*[Signature]*

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## I. INTRODUCTION

Stacey does not deny that the trial court's purported "equal" division gave her a grossly disproportionate share of the parties' assets. The trial court could only find this division of property "equitable" by ignoring nearly \$2 million in undisputed obligations for which Terry is entirely responsible and awarding Stacey cash that secured the purchase of real property. By giving Stacey both the cash and the property free and clear, the trial court doubled her award. Stacey also concedes that a \$725,000 note that was awarded to Terry as part of his "equal" division, no longer existed at the time of trial. Finally, Stacey admits that the \$2.6 million value placed on the Branson, Missouri real property awarded to Terry was not its fair market value, but was based on what the value could be if Terry continued using his separate efforts to develop the property after trial.

RCW 26.09.080, which serves as a guide for trial courts in dividing a quasi-community estate at the conclusion of a non-marital relationship, requires the trial court to distribute all of the quasi-community assets and liabilities to the parties "without regard to misconduct" after considering, among other things, the economic

circumstances in which the parties will be left after the distribution. However, the court is limited to distributing only those assets that would be characterized as community property had the parties married.

Here, the trial court concluded that a “just and equitable” division of the parties’ quasi-community estate would be an “equal division,” which would allow “each party to go forward in a strong financial condition.” (Conclusion of Law (CL) 5, CP 316) But the trial court utterly failed in its endeavor to make an equal division and leave *both* parties in a strong financial condition by including Terry’s separate property in its property division, ignoring undisputed quasi-community obligations, awarding an asset to Terry that indisputably did not exist at the time of trial, and overvaluing real property awarded to Terry, while undervaluing real property awarded to Stacey.

Stacey makes no attempt to argue that the trial court’s distribution was “equal,” and her argument that it was nonetheless “equitable” is premised on her contention that Terry deserves to be punished because he treated her badly in excluding her from their business when they separated. If so, then apart from the court’s

mathematical errors that thwarted its stated intent, and its disregard of basic principles of quasi-community property in non-marital relations, the trial court further erred as a matter of law in basing this skewed distribution of non-marital property on misconduct. This court should reverse and remand for an equitable distribution of only quasi-community assets after a proper valuation and consideration of the quasi-community liabilities.

## II. REPLY ARGUMENT

**A. The Trial Court Failed To Make The “Equal Division” It Found Would Be “Just And Equitable” By Ignoring Undisputed Liabilities, For Which Terry Was Ultimately Left Obligated, And Awarding A Non-Existent Asset To Terry.**

**1. The Trial Court’s Failure To Account For The Line Of Credit Used To Acquire Real Property That Was Awarded To Stacey Free And Clear, And For Which Terry Is Ultimately Responsible, Leaves Terry With \$1.5 Million Less In Assets Than Intended.**

Stacey concedes that Terry, through GWCA, took out a \$1.5 million line of credit at United Bank of Switzerland (UBS) to acquire the Sea-Tac property, which though purchased post-separation, was ultimately awarded to her free and clear. (See Resp. Br. 34-36) This acquisition was made through a joint-venture agreement with GWC and GWCA to allow both entities to benefit. Even if the

trial court could find this agreement to be a “sham,” (See Reply Arg., *infra*, at § B.2), it is undisputed that Terry funded the purchase price for Sea-Tac with a line of credit in the name of his newly formed company, GWCA - an obligation that was still owing at the time of trial. (See CP 201-02, 212-13, 433-34)

Stacey’s argument “that the trial court did not abuse its discretion in allocating to Terry the debt he chose to incur after the couple’s separation,” (Resp. Br. 36), is particularly disingenuous given her attempt to support the trial court’s characterization of the Sea-Tac property, which was purchased post-separation, as a quasi-community asset. While Terry disputes the trial court’s characterization of Sea-Tac (see Reply Arg., *infra*, at § B.2), to the extent the trial court found that the asset was quasi-community property, it should have also found that the line of credit used to purchase Sea-Tac was a quasi-community obligation. ***Marriage of Hurd***, 69 Wn. App. 38, 54-55, 848 P.2d 185, *rev. denied*, 122 Wn.2d 1020 (1993) (“the test for determining whether a debt obligation is separate or community in nature is the purpose for which the note was executed”), *overruled on other grounds by Estate of Borghi*, 167 Wn.2d 480, 219 P.3d 932 (2009).

Because the trial court awarded Sea-Tac to Stacey, it should have also made her liable for the obligation that was incurred to acquire it.

In any event, what the trial court did here was not “allocate” the debt to Terry, as Stacey contends – it ignored it. Had the trial court “allocated” the debt to Terry as part of its “equal” division of the quasi-community estate, it would have recognized that Terry in fact has more than \$1.5 million *less* in assets than the trial court intended.

Further, Stacey improperly attempts to divorce this debt from the asset to which it is inextricably bound. ***Dizard & Getty v. Damson***, 63 Wn.2d 526, 387 P.2d 964 (1964) (App. Br. 30), addresses this exact point. In ***Dizard***, the wife sought to avoid liability for obligations incurred by the community business after the parties separated, just as Stacey argues here. The Supreme Court held that “it is inconceivable that respondent may authorize the husband to carry on the community business, create a potential source of assets, ultimately share in these assets, and yet be immune from the claims of creditors who contribute to the accumulations, if any.” ***Dizard***, 63 Wn.2d at 530.

By ignoring the existence of the \$1.5 million line of credit in its property distribution, the trial court not only thwarted its express goal of achieving an “equal division” of the parties’ quasi-community estate, it also failed to consider the economic circumstances of the parties as a result of its decision. See RCW 26.09.080(4) (the trial court must consider the economic circumstances of each party at the time the division of property is to become effective). The trial court’s decision purports to divide the quasi-community estate equally, but by ignoring the line of credit for which Terry remains responsible, the trial court left Terry with \$1.5 million *less* than it awarded Stacey.

**2. The Trial Court Compounded Its Error In Ignoring The Liability Associated With Real Property Awarded To Stacey When It Also Awarded Her The Cash That Was Securing The Debt On The Property.**

The trial court compounded its error in awarding Stacey Sea-Tac free and clear and ignoring Terry’s \$1.5 million obligation used to acquire Sea-Tac, by also awarding to Stacey the cash that was pledged to secure the purchase of Sea-Tac in order to “equalize” the distribution. (See Ex. 22, 225; CP 201-02, 212-13, 433-34) It was undisputed that the post-separation line of credit used to

purchase Sea-Tac was secured by cash deposited in an investment account at UBS. (*Compare* Ex. 22 with CP 212-13; *see also* CP 433-35) By awarding the cash from the investment account to Stacey *and* the real property free and clear, the trial court doubled Stacey's award while leaving Terry with an obligation and no means to pay it.

The trial court's award gave Stacey both the real property *and* the cash used to secure its purchase. Worse yet, the trial court failed to acknowledge that by the time the judgment was entered, the value of the UBS account had evaporated as a result of the collapse of the financial markets the same week the court entered its Findings of Fact and Conclusions of Law, (*See* App. Br. 31, fn. 1; 3/26 RP 47-48, 50), a point that Stacey does not dispute.

Even if the funds on deposit in the UBS account were still available after the demise of the commercial paper market, the trial court erroneously ignored the fact that of the \$2,708,040 on deposit, \$1,571,526.05 was owed on the line of credit used to purchase Sea-Tac. (Ex. 22, CP 212; *see also* Exhibit 949) Therefore, while the account had an unencumbered value of only

\$1,136,514, the trial court awarded Stacey \$2,223,368.60<sup>1</sup> from the account – twice more than was available. (CP 550)

Citing ***Marriage of Wallace***, 111 Wn. App. 697, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003), Stacey claims that it was within the trial court’s discretion “regardless of Terry’s potential obligations to parties other than Stacey” to award her the cash in the UBS account. (Resp. Br. 35) However, ***Wallace*** holds only that in a marriage dissolution action, the trial court has no authority to determine the rights of any nonparty. 111 Wn. App. at 709. Here, Terry was not asking the trial court to determine the rights of UBS or any other third party. Instead, Terry asked the trial court to acknowledge the undisputed evidence that the cash in the UBS account from which the trial court ordered Stacey’s judgment paid was in fact the collateral securing the purchase obligation for the Sea-Tac property, for which Terry was solely responsible. ***Wallace*** does not support Stacey’s claim that it was within the trial

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<sup>1</sup> \$723,652 (“equalizing” cash payment) plus \$992,194 (one-half of account after \$723,652 is deducted) plus \$550,000 (“additional cash sum” upon Stacey’s election to take cash in lieu of the Tobin property).

court's discretion to award Stacey both Sea-Tac free and clear *and* the cash that was paid for its purchase.

If Sea-Tac was in fact a quasi-community asset that could properly be awarded to Stacey, a point challenged by Terry *infra* Reply Arg. § B.2, the line of credit used to pay for Sea-Tac was then a quasi-community liability, for which Stacey should be responsible. This court should vacate that portion of the judgment that awarded Stacey the cash in the UBS account.

**3. The Trial Court's Award Of A \$725,000 Asset That No Longer Existed At Trial Was Error.**

The trial court erred in treating the \$725,000 Costa Rica promissory note as an existing asset, and then awarding its full value to Terry because the note had been paid and no longer existed at the time of trial. (CP 203-04, 216-22) “[I]f one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial.” ***Marriage of White***, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). The trial court erred in awarding this illusory asset to Terry.

Stacey attempts to distinguish ***White***, arguing that, the trial court had discretion to “award” the promissory note to Terry because it existed at the time of the parties’ separation, even

though it is undisputed that it no longer existed at the time of trial. (Resp. Br. 33) But **White** does not make that distinction. Instead the **White** court held that if an asset is disposed of “before trial,” the court simply cannot distribute that asset at trial. 105 Wn. App. at 549.

Likewise, in **Marriage of Kaseburg**, 126 Wn. App. 546, 559, 108 P.3d 1278 (2005), the parties owned a home at the time of separation. The home was subsequently lost in foreclosure during the dissolution proceeding as a result of an action initiated by the husband’s parents who held a deed of trust on the home. The trial court awarded the wife her one-half interest in the home in the form of a money judgment. The Court of Appeals reversed, holding that because the real property was no longer owned by the parties at the time of trial, the trial court erred in awarding a judgment to the wife based on the value of the real property regardless whether they owned the property when the action was commenced. **Kaseburg**, 126 Wn. App. 559, ¶¶ 34-35.

The trial court made no finding that Terry “wasted” the promissory note, which might warrant crediting him with the note’s value. Therefore, **Marriage of Griswold**, 112 Wn. App. 333, 48

P.3d 1018 (2002), *rev. denied*, 148 Wn.2d 1023 (2003) (Resp. Br. 33), cited by Stacey does not apply in this case. In ***Griswold***, the Court of Appeals affirmed the trial court's decision to value the home at a higher value because any decrease in value was due to the wife's waste during separation. 112 Wn. App. at 351. Here, by contrast, it was undisputed that the note proceeds were rolled into the UBS account, which in turn was valued and distributed by the trial court. (CP 203-04, 216-22)

The trial court erred by crediting Terry with a \$725,000 asset that did not exist. By crediting Terry with this non-existent asset, the trial court failed to properly consider the parties' economic circumstances at the time of division, because Terry is left with \$725,000 less in assets than the trial court intended in its "equal division."

**4. The Trial Court's Failure To Acknowledge The Commissions Payable, For Which Terry Is Ultimately Responsible, And Which Were Unchallenged, Leaves Terry With An Additional \$425,000 Less In Assets Than Intended.**

Stacey presented two witnesses, Ed Flanigan and Shelly Hyatt, who testified that they were owed \$100,000 and \$325,000 respectively for commissions earned for work performed for GWC

during the parties' relationship. (See 3/11 RP 105, 115-16; 3/13 RP 3-4)<sup>2</sup> Stacey established the existence of these obligations at trial, and they are reflected in the records of GWC. (See 3/18 RP 158-59) No competent evidence supported the court's conclusion that these debts were not "real." (FF 66 (a), (b), CP 314)

In support of the trial court's decision to ignore these obligations, Stacey notes that Ed Flanigan had, as yet, "taken no action to pursue this claim," without explaining how Mr. Flanigan's decision makes the obligation any more or less "real," and argues that Terry had "vigorously dispute[d] the Hyatt claims." (Resp. Br. 37) But Ms. Hyatt's lawsuit was subject to a pending lawsuit that was not yet resolved at the time of trial. (See 3/13 RP 8-11) There was no evidence that Mr. Flanigan and Ms. Hyatt were not owed their commissions.

By failing to acknowledge the debts of GWC, which Stacey herself established, the trial court failed to properly consider the economic circumstances of the parties because in fact, Terry has

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<sup>2</sup> Ms. Hyatt testified that she was owed \$400,000, but other evidence showed that she was in fact owed only \$325,000. (See 3/18 RP 158-59)

\$425,000 less in assets than the trial court intended as part of its “equal division.” See RCW 26.09.080

**5. The Trial Court’s Inequitable Distribution Cannot Be Justified By Stacey’s Allegations Of Terry’s Misconduct.**

Stacey concedes that Terry is responsible for \$2 million in liabilities that the trial court ignored, that the trial court “awarded” to Terry a non-existent asset of \$725,000, and acknowledges that her money judgment is based in part on cash, which is not in fact available to the parties because it was used as collateral to secure the line of credit incurred to acquire real property that was awarded to her free and clear. As a result of the trial court’s errors, Terry has over \$2.7 million less in assets than was intended by the trial court.

This distribution is far from “equal.” Despite Stacey’s arguments that it is nonetheless “equitable,” the trial court’s property division cannot be affirmed on the basis that – as Stacey claims – Terry “aggressively opposed Stacey’s committed intimate relationship and corporate alter ego claims.” (Resp. Br. 12) While the record does reflect the trial court’s displeasure with Terry’s decision to vigorously contest the existence of a committed non-

marital relationship, it did not base its property distribution on any finding of litigation misconduct, but instead purported to nonetheless make an “equal” division of property. (CL 5, CP 316)

In any event, there is no authority – and Stacey cites none – for the proposition that a trial court may base its property distribution on post-separation litigation misconduct. Again, the trial court made no finding that Terry wasted or dissipated quasi-community assets. Under Chapter 26.09, which applies by analogy, a trial court’s property distribution that is based on such an improper consideration of misconduct is “manifestly unreasonable or based on untenable grounds or untenable reasons” and an abuse of discretion requiring reversal. ***Marriage of Muhammad***, 153 Wn.2d 795, 806, ¶ 16, 108 P.3d 779 (2005).

This court must vacate the \$2.2 million “equalizing” judgment that was awarded to Stacey and remand for the trial court to make the equal division it intended while considering the assets and liabilities that existed at the time of trial. See ***Marriage of Shannon***, 55 Wn. App. 137, 142, 777 P.2d 8 (1989) (remand is necessary when it is not clear that the trial court would have made

the same division of assets had it properly characterized the assets).

**B. The Trial Court Erred By Distributing Terry's Separate Property As Part Of Its "Equal" Division. The Trial Court's Error Was Compounded By Overvaluing The Separate Real Property Awarded To Terry And Undervaluing The Separate Real Property Awarded To Stacey.**

**1. The Trial Court's Property Distribution Was Based On The Parties' Non-Marital Relationship, And Not Their Status As Owners Of GWC.**

As Stacey concedes, the trial court has no authority to distribute the separate property of one party to the other when dividing the property at the end of a non-marital relationship. Parties to a non-marital relationship are not entitled to the same protections as those in a marriage. The court's equitable authority to divide property at the conclusion of a non-marital relation is "limited" to the property acquired during the parties' relationship. *Olver v. Fowler*, 161 Wn.2d 655, 669, ¶¶ 26, 168 P.3d 348 (2007).

While recognizing this principle, Stacey argues that she nonetheless could be awarded Terry's separate property because the assets are owned by GWC, of which she was a co-owner.

(Resp. Br. 20-21)<sup>3</sup> But the trial court did not dissolve the corporation. While the trial court chose to disregard the GWC corporate entity because the parties treated the assets of GWC as their own, (FF 30, CP 302), it expressly based its property distribution on the dissolution of the parties' non-marital relationship: "Petitioner and Respondent are entitled to a just and equitable disposition of the assets of the meretricious relationship." (Conclusion of Law (CL) 5, CP 316)

***Henry George & Sons, Inc. v. Cooper-George, Inc.***, 95 Wn.2d 944, 632 P.2d 512 (1981) (Resp. Br. 21) does not support Stacey's claim that the trial court had discretion to award Stacey assets acquired by Terry after the parties' separated. In ***Henry George & Sons***, the appellate court reversed the trial court's decree of corporate dissolution because it failed to consider equitable reasons to not dissolve the corporation. 95 Wn.2d at 953. That case does not deal at all with the issues present in this case.

Had the trial court intended to dissolve the corporation, it would have been required to make specific findings, which it did not

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<sup>3</sup> In any event, GWCA, formed post-separation, and not GWC, was the owner of Sea-Tac. (Reply Arg. § B.2, *infra*)

make here, that the directors were deadlocked in management, or the directors acted or will act in a manner that is “illegal, oppressive, or fraudulent,” or the corporate assets are being misapplied or wasted, or that the corporation has ceased all business activity. RCW 23B.14.300. Instead, the trial court awarded GWC to Terry as a quasi-community asset, (see CP 323), while disregarding the corporate form to award its major assets to the parties based upon the status of the parties’ personal relationship. (see CL 5, CP 316). The trial court had no authority to distribute assets acquired by Terry after the parties separated to Stacey as they were his separate property under RCW 26.16.140.

**2. The Trial Court Could Not Distribute Sea-Tac To Stacey At The End Of The Parties’ Non-Marital Relationship. It Compounded Its Error By Undervaluing The Property, Which It Awarded To Stacey.**

**a. Sea-Tac Was Terry’s Separate Property As He Acquired It After The Parties’ Non-Marital Relationship Ended.**

The trial court distributed the Sea-Tac property, which it valued at \$1.625 million, to Stacey at the conclusion of the parties’ non-marital relationship based on its erroneous conclusion that Sea-Tac was entirely quasi-community. (FF 49, CP 310; CL 4, CP 316) But it is undisputed that Terry acquired Sea-Tac ten months

after the parties separated in July 2007 through a company (GWCA) that he started five months after the parties separated. (3/24 RP 118, 127) It is also undisputed that Terry alone conducted the feasibility study for Sea-Tac and hired an architect. It was entirely through his efforts that Sea-Tac was acquired. (3/24 RP 129-30, 3/31 RP 30-31; CP 479) Even if the trial court could ignore GWCA's title, Sea-Tac was Terry's separate property as a matter of law. See RCW 26.16.140 ("When spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each.").

In support of the trial court's conclusion that Sea-Tac was an entirely quasi-community owned by GWC, Stacey argues that "Terry formed GWCA in order 'to separate assets and deals from GWC in an attempt to keep them from Stacey.'" (Resp. Br. 21, *citing* FF 33) But there was nothing untoward in Terry making efforts to keep separate any post-separation assets or deals from Stacey. A party to a non-marital relationship should not be chilled in his or her efforts to continue making a living for fear that any benefits reaped will be given away to the other party.

Stacey is also wrong when she claims that Sea-Tac was quasi-community property because it was “acquired with community funds.” (Resp. Br. 22, 25) In fact, Terry, through GWCA, acquired Sea-Tac using a line of credit for which GWCA is entirely responsible. (See 3/27 RP 126; 3/31 RP 83; CP 201-02, 212, 433-35; Ex. 22, 225, 949) To the extent quasi-community funds from GWC served as collateral for the line of credit, GWC retained the right to be compensated under the joint venture agreement between GWCA and GWC. (See CP 433-35; Ex. 951) The agreement fully and fairly recognized the “quasi-community interest” in Sea-Tac. The trial court erred in finding that the agreement was a “sham.” (FF 49, CP 310)

The joint venture agreement was similar to earlier GWC/Camwest agreements. GWCA brought the property into the venture, GWC financed the acquisition, and the two companies share the profits. (3/24 RP 128, 3/31 RP 31) Stacey attempts to distinguish the agreements by asserting that the “Camwest agreements involved the assignments of GWC’s interests in multiple parcels that would then be aggregated so Camwest could build dozens or hundreds of single-family homes. In contrast, Sea-

Tac is a single two-acre urban parcel.” (Resp. Br. 23) But characterizing the Sea-Tac acquisition as “a simple purchase of a piece of property,” as the trial court did (FF 49, CP 310), rather than as a development project, ignores all of the evidence of how Terry, through his company, conducted business. The act of locating, researching, and acquiring the property rights to a property for development is a significant benefit that is equal to any financial contribution, hence the partnerships between GWC and Camwest, from which Stacey benefited during the relationship.

There was no dispute that all of the contacts related to Sea-Tac, including presentation of the opportunity, feasibility study, and other labor and efforts by Terry to acquire Sea-Tac, occurred after the non-marital relationship ended. (3/24 RP 129-30) Because of these post-separation efforts, the trial court could not simply conclude that the entire interest in the property was quasi-community and award the property in its entirety to Stacey. To the extent that quasi-community funds were used by GWCA to secure the purchase of Sea-Tac, “there may arise a right of reimbursement in the ‘community,’” but the property itself should not have been

awarded to Stacey. See **Connell v. Francisco**, 127 Wn.2d 339, 351, 898 P.2d 831 (1995).

**b. Trial Court Undervalued The Award Of Sea-Tac To Stacey.**

Compounding its error, the trial court also undervalued Sea-Tac for purposes of making an “equal” division of the quasi-community estate. The trial court erred in valuing Sea-Tac at its acquisition price of \$1.625 million despite undisputed testimony that its fair market value was \$2.65 million. (3/27 RP 166-68; 3/31 RP 8; see also CP 508). Stacey makes much of the fact that Terry made the initial assessment of the property’s fair market value when entering into the GWC/GWCA joint venture agreement. (Resp. Br. 28) Terry testified in his deposition that he had conducted his own market research on Sea-Tac during the feasibility period, including a review of “comps and rents.” (3/31 RP 16) But a property owner’s testimony as to the value of his or her own property is proper evidence of value. **Worthington v. Worthington**, 73 Wn.2d 759, 763, 440 P.2d 478 (1968). It was especially appropriate here based on Terry’s background in real estate and the fact that his market value assessment turned out to be accurate based on a U.S. Bank appraisal which was conducted

two months after the property was acquired. (See 3/27 RP 166-68; CP 508)

Stacey did not challenge Terry's value of the property at \$2.65 million, and urged the trial court to accept this value if the property was awarded to Terry. (4/04 RP 107-08) Accordingly, the trial court should have valued Sea-Tac at its fair market value rather than its acquisition cost.

**3. The Trial Court Could Not Distribute The Boren Property To Terry As Part Of Its "Equal" Division Of Quasi-Community Property. It Compounded Its Error By Refusing To Value The Missouri Property At Its Fair Market Value.**

**a. Boren Was Terry's Separate Property As He Acquired It After The Parties' Non-Marital Relationship Ended.**

It is undisputed that Terry acquired the Boren property for \$75,000 in Fall 2007, a year after the parties' non-marital relationship ended. (3/24 RP 124) By treating Boren as a quasi-community asset, the trial court credited \$270,000 to Terry as part of the trial court's "equal" division of the quasi-community estate. Because Terry acquired Boren after the non-marital relationship terminated, it was his separate property, which could not be awarded at the conclusion of their non-marital relationship. See RCW 26.16.140; *Oliver v. Fowler*, 161 Wn.2d at 669, ¶ 26.

Even if, as Stacey claims, Boren was acquired with quasi-community funds (Resp. Br. 26), any quasi-community interest, should have been limited to its contribution of \$75,000, **Connell**, 127 Wn.2d at 339, and not the inflated value placed on Boren by the trial court, which was based on a speculative assessment of Terry's post-separation efforts to pursue its development. This court should reverse and remand to the trial court with directions to vacate its "award" of the Boren property as part of its equal division of the quasi-community estate.

**b. The Trial Court Erred In Overvaluing The Missouri Property, Including The Boren Property, Which It Awarded To Terry At "Investment Value."**

The trial court also overvalued the Boren property, along with the other Branson properties awarded to Terry, for purposes of making its "equal" division of the quasi-community estate by eschewing fair market value in favor of "investment value," with a premium added for Terry's post-separation "investment skills." (3/17 RP 160; See *also* FF 48, CP 310: "The court finds [Kilpatrick's valuation] is credible and adopts that value. [Terry] expects to be able to develop the large parcel into 182 lots and the Boren parcel into town houses.") The trial court's newly minted theory was error

because fair market value is the standard for valuing assets in property division. WSBA, Washington Family Law Deskbook § 31.2(2) at 31-4 (2nd Ed. 2000).<sup>4</sup>

While the trial court has discretion in valuing property, “its discretion does not extend to completely overlooking factors material to the determination.” ***Marriage of Landauer***, 95 Wn. App. 579, 591, 975 P.2d 577, *rev. denied*, 139 Wn.2d 1002 (1999). The trial court could not base the value of the Branson property on how it might be developed in the future as that would be improper “conjecture.” ***City of Medina v. Cook***, 69 Wn.2d 574, 578, 418 P.2d 1020 (1966). Its failure to value the Missouri properties awarded to Terry at their fair market value was error. This court should reverse and remand with directions to value the Branson property at no more than \$850,000, which was its acquisition price. (3/24 RP 85, 3/26 RP 18-19)

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<sup>4</sup> Since trial, Stacey has admitted that the trial court’s value of Branson was based on the “assumption” that Terry would continue to develop Lea Ridge. (Sub no. 576, 577, Supp. CP \_\_\_\_). However, both the trial court’s property division, which limits Terry’s access to cash, and the collapse of the market, have delayed its development.

**C. The Trial Court Erred In Awarding To Stacey An Interest In The Proceeds Of Terry's Future Efforts As It Was An Impermissible Award Of His Separate Property, Akin To An Award Of Spousal Maintenance.**

The trial court erred in awarding Stacey one-half of any proceeds from assignment agreements between GWC and Camwest for five years after the non-marital relationship terminated (with a declining percentage in following years through 2019) (CP 319) because it essentially forces Terry to work for the “quasi-community” well after the non-marital relationship terminated, making the award akin to spousal maintenance, which is not available to parties in non-marital relationships. **Connell v. Francisco**, 123 Wn.2d at 349-50; see RCW 26.09.090. While courts have authority to distribute assets acquired during the non-marital relationship as a result of only one party's efforts, this does not entitle the non-working party to the fruits of the working party's labor *after* the relationship has ended. See **Connell**, 127 Wn.2d at 349-50.

Any proceeds received from these projects post-trial will necessarily be a result of efforts made by Terry. While the percentage of Stacey's interest in any proceeds received decreases over time, she nevertheless will continue to receive an

amount equal to Terry for five years after the parties' separation regardless of Terry's additional post-dissolution efforts and contributions.

The cases cited by Stacey do not support her claim that the trial court could award her an interest in future proceeds, which are a result of Terry's post-trial efforts. In ***Hartley v. Liberty Park Associates***, 54 Wn. App. 434, 774 P.2d 40, *rev. denied*, 113 Wn.2d 1013 (1989) (Resp. Br. 32), rather than sell the family residence and distribute the proceeds, the trial court awarded the husband a monetary lien on the family residence, which was then awarded to the wife. The husband's lien was not based on any post-dissolution efforts by the wife as it was a fixed sum. Even if the wife improved the family residence, increasing its value, the husband would be entitled to no more than that fixed sum. ***Hartley***, 54 Wn. App. at 438.

In ***Von Herberg v. Von Herberg***, 6 Wn.2d 100, 121, 106 P.2d 737 (1940) (Resp. Br. 32), our Supreme Court simply acknowledged that in some instances, the party who received greater assets may be obligated to pay more of the community obligations as a means to a just and equitable division of the

community estate. **Von Herberg** does not support the trial court's decision to award Stacey the proceeds from Terry's post-relationship efforts.

The trial court should vacate its award to Stacey of a percentage interest in the proceeds from the Camwest assignment agreements that will only come to fruition through Terry's separate efforts. On remand, the trial court should place a value on these assignment agreements based not on speculation, but on their fair market value as of the time of trial, and award them to Terry.

### III. RESPONSE TO CROSS-APPEAL

#### A. **In Light Of The Approximately One-Half Million Dollars Made Available To Stacey During The Proceeding, The Trial Court Properly Denied Her Request For Attorney Fees.**

There is no basis for an award of attorney fees from Terry to Stacey. RCW 26.09.140, which provides for an award of attorney fees based on one party's need and the other party's ability to pay in marriage dissolution proceedings, does not authorize a fee award in proceedings dissolving a non-marital relationship. **Foster v. Thilges**, 61 Wn. App. 880, 887-88, 812 P.2d 523 (1991).

While Stacey cites no recognized ground of equity that would support an award of attorney fees in this case, the trial court,

in any event, properly rejected as a matter of fact Stacey's allegation that Terry had access to GWC funds during the proceeding to pay his own attorney fees, so she must also have money from Terry to pay for her own lawyers. The trial court found that the Stacey's receipt of nearly one-half million dollars pre-trial was a "substantially equal off-set to Respondent's unilateral post-separation expenditures." (FF 65, CP 314)

Stacey does not dispute that she had access to one-half million dollars before trial, and this finding is supported by substantial undisputed evidence. (CP 926, 3/10 RP 74, 78) Moreover, Stacey's challenge to this finding ignores the undisputed fact that most of Terry's substantial post-separation expenditures were accounted for in the trial court's property distribution. For example, Stacey complains that because Terry had access to the GWC accounts, he was able to acquire a new home and furnishings. (Resp. Br. 10) But those acquisitions were already accounted for in the property division. (CP 323) Further, Terry was responsible for running GWC during the separation, including efforts to continue the development in Branson. Such efforts

required funding for the acquisition of property, equipment, and other costs of development. (See 3/24 RP 85; Ex. 176)

Further, the manner in which the trial court divided the purported quasi-community assets left Stacey with greater liquid assets from which she could pay her own attorney fees. For example, she received a “cash” award of \$723,652. (CP 320) In addition, even though it was undisputed that the funds in the UBS account secured the line of credit on which Terry is responsible, Stacey was awarded \$992,194 from that account as part of her money judgment. (CP 320) Finally, because she declined the award of the Tobin property, the trial court awarded her additional cash of \$550,000. (CP 553)

Because there is no basis to award attorney fees to a party in a non-marital relationship proceeding, the trial court did not err in denying Stacey’s request for attorney fees.

**B. Stacey Was Not Entitled To Attorney Fees Under The Mandatory Indemnification Provision Of The Business Corporation Act.**

The trial court properly denied Stacey’s request for attorney fees under RCW 23B.08.520, the mandatory indemnification provision of the Washington Business Corporation Act. RCW

23B.08.520 provides that a “corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the corporation.” The trial court properly found that this statute did not apply because Stacey was “not a party [to the action] because of being a director of GWC.” (CP 1370)

Terry’s complaint against Stacey was not based on her actions as a director or officer of GWC. In his complaint, he referred to himself as both a “private individual” and the “sole shareholder, officer and director of GWC, Inc.” (CP 560) Terry referred to Stacey as “the former spouse of Terry Defoor.” (CP 560)

Terry’s complaint was based on Stacey’s actions in her personal, not corporate, capacity. Terry alleged that Stacey defamed him by making false statements that he was a drug user and had mental health issues. (CP 561-62) Terry alleged that Stacey trespassed at the business premises of GWC, that she “threatened” and “intimidated” office staff, and “took a substantial amount of as yet unidentified business records from the offices of GWC,” and refused to return those documents. (CP 562-63) In his

amended complaint, Terry also alleged that Stacey tortiously interfered with the real estate purchase and sale agreement between her parents and GWC by encouraging them to not sign a correction deed. (CP 897-98) None of these allegations are based on Stacey's actions as a director. Moreover, in her prayer for relief in answer to Terry's complaint, Stacey did not seek attorney fees based on her role as a director under RCW 23B.08.520. Instead, she asked to "be awarded her costs and reasonable attorney fees pursuant to RCW 4.84.250 et seq., and RCW 7.64 et seq." (CP 14)

None of the cases cited by Stacey support a claim for attorney fees in lawsuit brought, not by a third party, but by the corporation itself, alleging actions taken in the defendant's individual capacity and not in the person's role as a director (or in this case, former officer) of the corporation. See ***Rudebeck v. Paulson***, 612 N.W.2d 450 (Minn. Ct. App. 2000) (manager entitled to indemnification from corporation for successfully defending against sexual harassment suit brought by a former employee) (Resp. Br. 43); ***Weisbart v. Agri Tech, Inc.***, 22 P.3d 954 (Colo. Ct. App. 2001) (director entitled to indemnification from corporation for successfully defending against action for negligence brought by

investors) (Resp. Br. 43); ***Emprise Bank v. Rumisek***, 215 P.3d 621 (Kan. Ct. App. 2009) (under LLC agreement, members were entitled to indemnification for fees incurred defending against action by bank for their guarantee on certain loans to LLC) (Resp. Br. 43); ***Witco Corp. v. Beekhuis***, 38 F.3d 682 (3d Cir. 1994) (corporation sued the estate of the deceased director of a corporation that had previously been acquired by the corporation for contribution for cleanup costs for environmental contaminants associated with site owned by former corporation; estate prevailed and was entitled to indemnification from the corporation); ***Heffernan v. Pacific Dunlop GNB Corp.***, 965 F.2d 369 (7<sup>th</sup> Cir. 1992) (corporation sued the former director of a corporation that had previously been acquired by the corporation based on allegations that the stock purchase and sale agreement for the acquisition was materially misleading; former director prevailed and was entitled to indemnification from the corporation) (Resp. Br. 44).

This lawsuit concerned the status of the parties' property following the termination of their (disputed) non-marital relationship. Because the action brought against Stacey was not based on her status as a former officer of GWC or any actions taken by Stacey in

her capacity as a former officer of GWC, the trial properly denied her request for attorney fees under RCW 23B.08.520.

**C. Stacey Was Not Entitled To Recover Attorney Fees For Obtaining Records From GWC.**

The trial court properly denied attorney fees to Stacey under RCW 23B.16.040(3), which provides that if the court at the request of a shareholder “orders inspection and copying of the [corporate] records demanded,” it shall also order the corporation to pay the shareholder’s costs, including reasonable attorney fees incurred to obtain the order. Stacey brought her request for attorney fees under this statute for the first time after trial. Stacey’s pre-trial requests for review of corporate records were not under RCW 23B.16.020, which entitles shareholders to inspect and copy corporate records. Instead, they were brought under the civil rules of discovery. (See CP 987-89, 1256-59)

The trial court properly denied her request for attorney fees under this statute, after finding that the issue of “costs and expenses to obtain corporate documents was litigated in each individual discovery motion.” (CP 1370) For example, on December 4, 2007, Stacey sought an order compelling discovery from Terry, which was granted, and she was awarded \$450. (Sub

no. 528, Supp. CP \_\_) Therefore, even if Stacey was entitled to fees under RCW 23B.16.040(3), she already received them as a result of the December 4, 2007 order.

In any event, the trial court also properly found that there were “insufficient facts to find satisfaction of threshold requirements of RCW 23B.16.020(1).” (CP 1370) RCW 23B.16.020 requires a shareholder demanding inspection of court records to give “the corporation notice of the shareholder’s demand at least five business days before the date on which the shareholder wishes to inspect and copy.” There was no evidence that Stacey made such a demand under this statute. Stacey made her demands as discovery requests under the civil rules, and they were resolved under the civil rules. The trial court properly denied Stacey’s request for attorney fees under RCW 23B.16.040.

**D. This Court Should Deny Stacey’s Request For Attorney Fees On Appeal.**

There is no basis for an award of attorney fees to Stacey on appeal. Neither RCW 23B.08.520 nor RCW 23B.16.040 provide for an award of attorney fees to her on appeal. RCW 23B.08.520 provides for indemnification for attorney fees incurred defending against an action to a director who is made a party “because of

being a director.” Terry’s appeal raises issues related solely to Stacey’s action for a distribution of property based on their non-marital relationship and Stacey’s fees on appeal relate to the parties’ personal relationship. Further, RCW 23B.08.520 does not entitle Stacey to attorney fees incurred pursuing indemnification. Therefore, Stacey would not be entitled to attorney fees based on her cross-appeal even in the unlikely event that she is successful.

RCW 23B.16.040 only allow for fees “incurred to obtain the order” allowing inspection and copying of records. As Stacey’s cross-appeal is not related to any order for inspection, she is not entitled to attorney fees under this provision for this appeal.

Finally, there is no basis for an “equitable” award of attorney fees to Stacey as a result of the dissolution of their non-marital relationship. Stacey cites to recent legislation allowing for attorney fees for registered domestic partners, but these statutes do not support an award of attorney fees to two individuals who had the opportunity, but chose not to be married. (Resp. Br. 49, *citing* Senate Bill 5688 (2009-10)) Had the Legislature intended for “similarly situated couples in committed intimate relationships” to have the same rights as married couples (and now registered

domestic partners), it would have provided for such relief in the recent legislation. It is unlikely that its silence is an oversight. As the Supreme Court has stated, “until the Legislature, as a matter of public policy, concludes meretricious relationships are the legal equivalent to marriages,” protections allowed for these types of relationships will be limited. **Connell v. Francisco**, 127 Wn. 2d 339, 349, 898 P.2d 831 (1995)

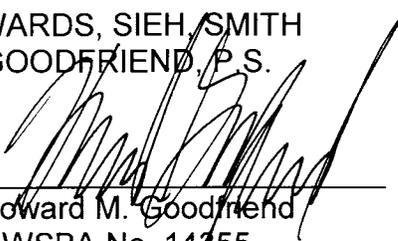
As the **Connell** Court held, if all of the statutes under RCW ch. 26.09 applied to non-marital relationship, it would be akin “to creating a common law marriage or making a decision for a couple which they have declined to make for themselves. Any other interpretation equates cohabitation with marriage; ignores the conscious decision by many couples not to marry; confers benefits when few, if any, economic risks or legal obligations are assumed; and disregards the explicit intent of the Legislature that RCW 26.09.080 apply to property distributions following a marriage.” **Connell**, 127 Wn.2d at 349-50. This court should deny Stacey’s request for attorney fees on appeal.

#### IV. CONCLUSION

At the end of the parties' non-marital relationship, the trial court awarded Stacey more than ten times more property than Terry, including assets that were Terry's separate property. This court should reverse and direct the trial court on remand to limit its award to quasi-community property, to account for all the quasi-community liabilities, and to not include non-existent assets in its award to Terry nor award Stacey the fruits of Terry's post-separation labor. This court should affirm the trial court's decision denying Stacey's request for attorney fees. This court should also deny Stacey's request for attorney fees on appeal.

Dated this 16<sup>th</sup> day of February, 2010.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: 

Howard M. Goodfriend  
WSBA No. 14255  
Valerie A. Villacin  
WSBA No. 34515

STOKES LAWRENCE, P.S.

By: 

Gail N. Wahrenberger  
WSBA No. 15427  
Thomas A. Lerner  
WSBA No. 26769

Attorneys for Appellants/Cross-Respondents

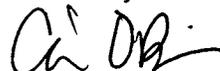
**DECLARATION OF SERVICE**

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

That on February 16, 2010, I arranged for service of the foregoing Reply Brief of Appellants and Cross-Respondent's Brief, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 16th day of February, 2010.

  
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Carrie O'Brien