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NO. 65179-0-1

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

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In re the marriage of:

LOIS MARGARET GELMAN,

Appellant,

And

ERIC NEAL FASSLER,

Respondent.

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SEATTLE, WA

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**BRIEF OF RESPONDENT**

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## INTRODUCTION

While the dissolution was pending, Dr. Eric Fassler was diagnosed with osteosarcoma, a rare and aggressive form of bone cancer. After surgery and an arduous chemotherapy regimen, his prognosis is poor. He cannot now work as an obstetrician/gynecologist and knows no other type of medicine.

Dr. Lois Gelman closed her anesthesiology practice, due in large part to circumstances outside the parties' control, including competition from another anesthesiology practice. Gelman immediately joined the competition, earning almost twice Fassler's fixed-income from his disability insurance.

In short, Fassler is plainly in ill-health and his earning capacity has suffered dramatically as a result. While Gelman compares her depression to Fassler's cancer, she also states that it has never prevented her from working. CP 223. Their situations are not comparable. The 60/40 asset distribution is just and equitable.

The trial court properly valued and characterized the assets before it, often based on uncontradicted evidence. This Court should affirm.

## **RESTATEMENT OF THE ISSUES**

1. Is the record adequate for this Court to review the trial court's decisions, where there are written findings of fact and conclusions or law, supplemental findings and conclusions, and substantial evidence supporting the trial court's rulings?

2. Is a 60/40 distribution in Eric Fassler's favor within the trial court's broad discretion, where (a) Fassler suffers from a rare and aggressive form of cancer, leaving him unable to work and living on a fixed-disability income of \$11,593 each month; and (b) Lois Gelman works full-time in an anesthesiology practice, taking home \$21,914 after taxes each month – almost twice Fassler's income?

3. Was the trial court within its broad discretion in denying Gelman's request for a credit for paying more of the mortgage during the separation, where (a) Gelman continued to live in the marital home, refusing to refinance to lower the mortgage; (b) Fassler contributed to the mortgage while also renting an apartment; and (c) the distribution of the proceeds from the house sale effectuated the 60/40 distribution of assets that the trial court plainly felt was appropriate?

4. Was the trial court within its broad discretion in awarding Gelman some value in her current anesthesiology practice, where Steven Kessler – the only expert to testify – opined that Gelman, a partner in the practice, (a) derives value from the practice’s contract with the hospital to exclusively provide all anesthesiology services; and (b) earns more as a partner in the practice than she would earn elsewhere?

5. Did the trial court properly characterize Gelman’s inheritance as community property, where the parties deposited some of the funds into their children’s college savings accounts and deposited the remainder into a joint investment account, commingling the inherited funds with other funds and using the commingled funds to purchase a variety of stocks and mutual funds?

6. Did the trial court properly award Gelman the value of accounts receivable from her former anesthesia practice, where (a) Gelman was the sole proprietor; (b) the accounts were receivable when the parties separated; (c) the value was discounted to Gelman’s average collection rate; and (d) the funds Gelman collected were not otherwise accounted for?

## RESTATEMENT OF THE CASE

**A. During the dissolution proceedings, Fassler was diagnosed with a rare and aggressive form of cancer that has left him unable to work.**

Dr. Eric Fassler practiced medicine for 21 years at the same clinic. RP 160. The last five years of Fassler's practice were 30-to-40% obstetrics and 60-to-70% gynecology and gynecologic surgery. *Id.* Fassler left his practice on May 26, 2009, when he was diagnosed with osteosarcoma, a rare and aggressive type of bone cancer. RP 161, 164; CP 21, 23. The cancer is located in Fassler's left humerus (the upper arm bone) – he is left-handed. RP 161-62; CP 21.

An open biopsy confirmed Fassler's diagnosis in June, 2009 – Fassler had a 13-to-14 centimeter tumor. RP 161; CP 21. In the third week of June, Fassler began a "very arduous" chemotherapy regimen, initially completing four rounds spaced three-to-four weeks apart. RP 161-62; CP 23, 30. His response to chemotherapy was "moderate" – there was no significant tumor shrinkage. CP 23.

Fassler underwent surgery removing more than half of the humerus up to his shoulder. RP 162. After waiting two months to

heal from the surgery, Fassler had two more rounds of chemotherapy. RP 162.

The chemotherapy drugs Fassler was on were “extraordinarily toxic.” CP 23. Each round of chemotherapy made Fassler so ill that he had to be hospitalized for four-to-eight days. RP 162; CP 27, 31. He was on anti-nausea medication and intravenous fluids and nutrition almost the entire time. CP 27, 28, 31. He suffered hair loss, weight loss, hearing loss, kidney damage, nausea, and severe bone-marrow suppression. RP 164; CP 27. He lost sensation in his fingertips and in his hands, and lost mobility of his left arm. RP 164.

Fassler completed chemotherapy about three weeks before trial started. RP 162. He cannot have more chemotherapy – he has reached the maximum toxic level before there are too many irreversible side effects. RP 163.

Fassler's prognosis is poor. CP 23. The tumor is aggressive and chemotherapy was only moderately successful – killing about 50% of the tumor cells – which puts Fassler in a poor prognostic group. CP 23-24. Although his doctors think that the tumor is confined to the bone, they are “closely” watching a spot on his lung that could be metastasis. CP 23. Assuming the spot on

Fassler's lung is not cancer, his chances of surviving are 45-to-55%. CP 24.

Although Fassler will recover from some of his chemotherapy symptoms, he may not recover from others, including hearing damage and impaired kidney function. CP 28. Fassler also had what Dr. Kaplan referred to as "chemo brain" – memory problems and difficulty taking in large quantities of information. CP 32. During trial, it was impossible to tell the extent to which Fassler would recover his brain function. *Id.*

Fassler could not work during his chemotherapy. RP 164. He testified that he will not be able to return to work as an obstetrician/gynecologist and that he does not know any other type of medicine. *Id.* Although Dr. Kaplan testified that it was too early to say for certain, he agreed that it was "a real likelihood" that Fassler would never return to work. CP 29.

Since Fassler cannot work, his sole income is proceeds from his disability insurance policy and social security benefits, totaling \$11,593.64. CP 66.<sup>1</sup> Fassler cannot contribute to his retirement

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<sup>1</sup> \$9,500 of Fassler's total income is tax-free, not the entire amount as Gelman claims. *Compare* BA 6 with RP 138.

accounts, and has to dip into his savings every month to meet his expenses. RP 264-66.

The disability payment decreases in value over time, as there is no cost of living increase. RP 265. And when Fassler turns 65, his disability payout is treated as a retirement benefit and Gelman will get half.<sup>2</sup> CP 85.

Finally, if the cancer returns, Fassler could be facing experimental treatments that will not be covered by his health insurance. RP 265-66. Such treatments could cost tens of thousands of dollars each. RP 266.

**B. Gelman, a senior partner in an anesthesiology practice, earns \$263,000 per year after taxes.**

Gelman repeatedly claims that she “lost” her anesthesia practice due to depression brought on by the dissolution. BA 1, 5, 8, 17-18. She even suggests that the parties face similar post-dissolution circumstances, claiming that they both “experienced a career-changing medical condition.” BA 1. Gelman tells less than half the story behind her “lost” anesthesiology practice.

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<sup>2</sup> Gelman gratuitously mentions that Fassler initially believed that his disability benefits ended when he turns 65. BA 7. Fassler was relying on policy language stating that his benefits terminate when he turns 65. CP 55-56. He later became aware of a rider stating that he may be eligible for benefits depending on his disability status until his 65<sup>th</sup> birthday. *Id.*; Ex 158.

Gelman omits two major factors in the demise of Gelman Anesthesia: (1) competition from another anesthesia group, Valley Anesthesia Associates; and (2) the decision not to allow nurse anesthetists. RP 40-41; CP 222-224.<sup>3</sup> From 1998 to 2009, Gelman operated Gelman Anesthesia Services, the exclusive provider of anesthesia services for Valley Orthopedic Associates Ambulatory Surgical Center in Renton Washington (the Center). RP 14-15; CP 222. In 2009, the Center learned that Valley Anesthesia was interested in the Center's business. CP 222-23. At the same time, the Center's parent group decided to allow only MD anesthetists, and Gelman had to terminate her nurse anesthetists. CP 223. Also at the same time, Valley Aesthesia asked Gelman to rejoin them as a partner. RP 42-43.<sup>4</sup>

Although Gelman knew that she would earn significantly less at Valley Anesthesia, the Center's decision not to allow nurse anesthetist would have caused a "big financial loss anyway." CP 224. And Gelman knew that the the Center was talking to Valley Anesthesia, and grew concerned about the threat that Valley

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<sup>3</sup> Gelman was a partner at Valley Anesthesia before leaving to form Gelman Anesthesia Services. CP 222.

<sup>4</sup> While all of this was going on, the Center insisted that Gelman take on a partner. CP 223. Although they did not say why, Gelman blames it on concerns about her depression. CP 222-24.

Anesthesia would take over the business. *Id.* In May 2009, Gelman rejoined Valley Anesthesia as a senior partner. RP 43; CP 224.

In short, there were many circumstances beyond either party's control that caused Gelman "to close her practice." BA 5. It is disingenuous to blame Gelman's depression, in turn blaming the dissolution and, by implication, Fassler. BA 5, 8, 17-18.

Gelman's gross income is approximately \$375,000. RP 241, 251. She earns \$262,976.52 per year after taxes – \$21,914.71 per month – almost twice Fassler's income. CP 66-67. As the economy improves, her income will improve. RP 251-52. Despite claiming that she had to "dip into savings to keep up with expenses," Gelman contributed \$4,000 each month to her retirement accounts. *Compare* BA 13 *with* RP 110-11.

Finally, Gelman also complains that she does not have disability insurance, blaming Fassler for failing to make a payment on her policy. BA 3-4, Issue 2; BA 10. Gelman cites her age and her depression (which began in 2007) as the reasons why she is having a difficult time replacing her disability insurance, but she neglects to mention that her policy lapsed sometime between 1997 and 2000, if not earlier. RP 111.

**C. The trial court divided the assets 60/40 in Fassler's favor.**

After a 23-year marriage, the parties separated in December 2007, and Gelman petitioned for dissolution in July 2008.<sup>5</sup> RP 49-50; CP 88. The parties' assets consisted mainly of investment accounts, retirement accounts, and the marital home, which Gelman was still living in during trial. CP 156, 169-70. The parties jointly retained expert Steven Kessler to value their respective medical practices, which were also before the court for distribution. RP 236-37.<sup>6</sup>

The trial court asked both sides to submit proposed findings and conclusions. RP 325. The court adopted Fassler's proposed findings, distributing the assets 60/40. CP 78-84, 87-92; Ex 157. Gelman moved for reconsideration. CP 93-102. Although Gelman complains that the trial court first denied her motion without reading her reply, she omits that the court did so because it failed to note that Gelman had received an extension of time for filing her reply. *Compare* BA 14 *with* CP 173. The court ultimately granted Gelman's motion in part, making many small changes Gelman

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<sup>5</sup> Although Gelman discusses her reasons for filing for divorce, she is no doubt aware that considering fault is improper. BA 5; *In re Marriage of Muhammad*, 153 Wn.2d 795, 797-98, 108 P.3d 779 (2005).

<sup>6</sup> This brief discusses individual assets in the argument section.

raised that were unrelated to the asset distribution, but preserving the asset distribution. BA 14; CP 152-56.

### ARGUMENT

**A. This Court will affirm the asset distribution absent a manifest abuse of discretion.**

A dissolution court must make a just and equitable distribution of assets in light of the following non-exclusive factors: “(1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse at the time the division of the property is to become effective.” *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007) (citing RCW 26.09.080), *rev. denied*, 163 Wn.2d 1005 (2008). The trial court may also consider, among other things, the parties’ health, ages, and earning capacities. *Rockwell*, 141 Wn. App. at 248; *Olivares v. Olivares*, 69 Wn. App. 324, 329, 848 P.2d 1218 (1993) *disapproved on other grounds*, *In re Estate of Borghi*, 167 Wn. 2d 480, 219 P.3d 932 (2009). The paramount concern is the parties’ post-dissolution economic circumstances. *Olivares*, 69 Wn. App. at 330.

“[T]he trial court has broad discretion in distributing the marital property, and its decision will be reversed only if there is a

manifest abuse of discretion.” *Rockwell*, 141 Wn. App. at 242-43. This Court reviews the trial court’s findings for substantial evidence. 141 Wn. App. at 242. The Court will “not substitute [its] judgment for the trial courts, [or] weigh the evidence . . . .” *Id.*

The trial court has wide latitude to disproportionately distribute assets, particularly in a long-term marriage, where the trial court must “place the parties in roughly equal financial positions for the rest of their lives.” *Id.* at 241-42 (citing *In re Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001)). In doing so, the trial court must consider the asset distribution as well as the parties’ respective incomes and earning potentials. *Rockwell*, 141 Wn. App. at 249. The longer the marriage, the more appropriate a disproportionate asset distribution, particularly where health-issues are involved (*id.* at 243):

The longer the marriage, the more likely a court will make a disproportionate distribution of the community property. Where one spouse is older, semiretired, and dealing with ill health, and the other spouse is employable, the court does not abuse its discretion in ordering an unequal division of community property.

**B. The findings, supplemental findings, and the record support the trial court’s 60/40 asset distribution. (BA 14-20).**

Gelman complains that the record is insufficient for this Court’s review. BA 14-20. But the trial court entered findings,

supplemental findings, a child-support order, a dissolution decree with a detailed asset distribution sheet, and a detailed order granting in part and denying in part Gelman's motion for reconsideration. CP 66-72, 78-84, 85-86, 87-92, 152-56, 173. The court was well-aware of the community and separate property (CP 84, 88-90), the duration of the marriage (CP 88); and each party's earning capacity (CP 66-67). *Rockwell*, 141 Wn. App. at 242; RCW 26.09.080. The court heard detailed testimony about each party's health and their economic circumstances. *Id.*; CP 19-33; RP 27-36, 48-49, 121, 161-66, 264-270. This is more than enough for this Court to review the asset distribution.

Gelman's argument seems to be that trial court divided the assets in Fassler's favor out of "sympathy." BA 17-20. Gelman argues that there must be a "nexus" between Fassler's cancer and his economic circumstances, stating:

For example, if Fassler is one of the 50% whose cancer recurs, his life expectancy is very short, and his financial needs necessarily limited. If his cancer does not recur, he is positioned to work again.

BA 17. In other words, Gelman suggests that the trial court should have awarded her more because (1) Fassler might die soon; or (2) he might live, in which case he might be able to work. *Id.*

The trial court must exercise discretion without the benefit of a crystal ball. The trial court took a positive approach, providing Fassler with a post-dissolution economic situation comparable to Gelman's in case he survives. If he survives, there is no indication that he will be "positioned to work" – the only evidence on this point is Fassler's testimony that he will not be able to work again, and his doctor's testimony that it is entirely possible that Fassler will not work. RP 164; CP 29.

There is a "nexus" between Fassler's cancer and his economic circumstances. BA 17. Fassler is unable to work due to his cancer. RP 164-65. His earning capacity and financial circumstances are stagnant – he lives on income from his disability insurance and social security benefits. RP 165. Gelman falsely states that Fassler will "enjoy[]" over \$100,000 from his disability policy for the rest of his life – it is uncertain whether Fassler's policy will continue paying out after he turns 65, and if it does, Gelman will get half. CP 55-56, 85.

While Fassler's financial circumstances will not improve, there is a very real chance that his cancer will recur, in which case Fassler would likely be facing experimental cancer treatments, which would not be covered by his insurance. RP 163; CP 26, 33.

163. And Gelman's income is almost twice Fassler's income, and it will increase as the economy improves. RP 251-52; CP 66-67. While she claims hardship, she puts \$4,000 into her retirement accounts each month. RP 110.

In sum, the record is more than adequate for this Court's review. The trial court was well within its broad discretion in awarding Fassler 60% of the parties' assets to offset their grossly disproportionate earning capacities. This Court should affirm.

**C. The trial court properly distributed the proceeds from the house sale 60/40. (BA 25-28).**

Gelman claims that she contributed "at least several hundred thousand dollars to the community," apparently by way of paying most of the parties' mortgage on the house Gelman lived in after the separation. BA 27. She ignores the benefit she obtained by living in the family home and Fassler's contributions to the mortgage. BA 25-28. Taking these things into account, the gross disparity in the parties' earning capacities amply explains the trial court's refusal to give Gelman a lien for her disproportionate mortgage payments. This Court should affirm.

It is not unusual for one spouse to occupy the family home while a dissolution is pending. *In re Marriage of Nuss*, 65 Wn.

App. 334, 338, 828 P.2d 627 (1992). This Court has recognized (1) that the spouse remaining in the home derives an economic benefit; and (2) that the spouse paying all or most of the mortgage, taxes, and insurance, may suffer an inequity. **Nuss**, 65 Wn. App. at 338-39. The trial court may address any inequity in the asset distribution “by utilizing a reimbursement theory, or simply by means of an unequal distribution of community assets.” 65 Wn. App. at 339 (footnote omitted). In other words, this Court reviews Gelman’s claim that she “has a right of reimbursement,” part and parcel with its review of the 60/40 property distribution. *Id.*

Gelman misses the point – reimbursement is discretionary, and is used where necessary to correct an inequity. *Id.* Here, no inequity arose, so the trial court was well within its broad discretion in distributing the assets 60/40, without reimbursing Gelman for “contributions” to the mortgage.

Gelman chose to remain in the parties’ home – with an \$11,000 per month mortgage – after they separated. RP 9, 34. She concedes that living in the home benefited her in the amount of \$5,000 per month, the cost of renting a comparable home. CP 169-70.

Fassler was paying \$3,400 toward the monthly mortgage from November 2008 until September 2009. RP 271-72; CP 13. In September, Fassler successfully moved the court to have his contribution reduced to \$2,000 per month. RP 271-72. The trial court ordered the parties to place the home on the market by March 2010, and ordered Fassler to pay 40% of the mortgage, while the sale was pending, approximately \$4,400 per month. CP 80.

The following table illustrates the parties' mortgage payment history and their net payments after separation:

	12/07-10/08	11/08-09/09	10/09-02/10
No. of months	11	11	5
Gelman's monthly payment	\$11,000	\$7,600	\$9,000
Gelman's residence benefit	\$5,000	\$5,000	\$5,000
Gelman's net monthly payment	\$6,000	\$2,600	\$4,000
Fassler's monthly payment	\$0	\$3,400	\$2,000
Gelman's net payments	\$66,000	\$28,600	\$20,000
Fassler's payments	\$0	\$37,400	\$10,000
Gelman's total			\$114,600
Fassler's total			\$47,400

Accounting for the benefit Gelman received, she contributed \$67,200 more to the mortgage than Fassler – not the “several

hundred thousand dollars” she claims. BA 27. This number is inflated – Gelman used an unknown amount of community funds from the parties’ joint account to maintain the house. RP 142, 148-49. Any disparity is more than made up for by Gelman’s far superior earning capacity. CP 66-67.

In short, Gelman derived a substantial economic benefit from living in the family home, and was far better situated to pay most of the mortgage. The court properly declined to reimburse Gelman, preserving the 60/40 asset distribution.

**D. The trial court properly awarded Gelman her interest in her practice, Valley Anesthesia Associates, adopting expert Steven Kessler’s testimony that that Valley Anesthesia derives value from its contract to be the exclusive anesthesia-services provider for Valley Medical Center. (BA 20-23).**

The trial court adopted expert Steven Kessler’s valuation of Gelman’s medical practice. CP 86. Kessler was the parties’ joint expert, and the only witness to testify on this issue. His opinion is substantial evidence supporting the trial court’s award. This Court should affirm.

This Court is “constrained to affirm” a trial court decision adopting credible expert testimony, substantial evidence supporting the decision. *In re Marriage of Sedlock*, 69 Wn. App. 484, 491,

849 P.2d 1243 (1993). The Court is constrained to affirm regardless of whether the trial court explains its reasoning. **Sedlock**, 69 Wn. App. at 491. "To rule otherwise would be to place the appellate courts in the position of *weighing* expert testimony, a position [this Court] decline[s] to take." *Id.*

Gelman argues at length that the trial court erroneously awarded Gelman value in Valley Anesthesia, claiming that it has no goodwill. BA 20-23. But the trial court did not find that Valley Anesthesia has goodwill. CP 86. Expert Kessler plainly acknowledged that Valley Anesthesia does not have traditional goodwill, but that it has "contract value," based on its exclusive contract to provide anesthesiology services for the Center. RP 238-40, 249-53. Using the income capitalization approach, Kessler valued Gelman's interest in Valley Anesthesia at \$112,000, opining that Gelman derives value as a partner in Valley Anesthesia, where: (1) she could not work at the Center without Valley Anesthesia's contract; and (2) her income is above "benchmark," based on the contract. RP 239-40, 249-51.

Gelman complains that the trial court adopted Kessler's opinion, but she did not call another expert or put on any contrary evidence. BA 10, 20. The trial court adopted Kessler's opinion,

explaining that Gelman had an “economic benefit expectancy” in Valley Anesthesia’s contract with the Center. CP 86. Kessler’s opinion is substantial evidence supporting the trial court’s decision. **Sedlock**, 69 Wn. App. at 491.

The cases Gelman relies on are inapposite – they address goodwill, not the value of a contract to provide services. BA 22-23 (citing **In re Marriage of Nordby**, 41 Wn. App. 531, 705 P.2d 277 (1985); and **In re Marriage of Zeigler**, 69 Wn. App. 602, 849 P.2d 695 (1993)). In **Nordby**, one expert testified, in response to a question from the court, that the husband’s anesthesiology practice lacked goodwill because he did not have patient contact and worked on a rotational basis. **Nordby**, 41 Wn. App. at 537. There was no other testimony on the point. 41 Wn. App. at 537. This Court reversed, holding that there was no evidence supporting the trial court’s decision awarding goodwill to the husband. *Id.* Kessler opined that Valley Anesthesia had contract value – not goodwill – expressly distinguishing **Nordby** on the ground that Dr. Nordby’s anesthesiology practice did not have a contract to be the exclusive anesthesiology provider for a major medical center. RP 249-50.

**Zeigler** is also inapposite – it too addresses goodwill. 69 Wn. App. at 604-05. The business at issue in **Zeigler** was a State

Farm Insurance “captive” agency – State Farm owned everything from the computers and software to the policyholders’ information. *Id.* at 604. The appellate court affirmed the trial court’s decision that any goodwill belonged to State Farm. *Id.* at 605.

In sum, substantial evidence supports the trial court’s decision. This Court should affirm.

**E. Gelman’s inheritance was commingled – the parties deposited some of it in the children’s college accounts, using the remainder to purchase stocks. (BA 23-25).**

Aside from stating that her inheritance is traceable, Gelman does not argue this point. BA 23-25. Gelman does not disagree that the parties cashed out her inherited IRA, using some funds to pay for the children’s schooling, and investing the remainder with other community funds. The parties plainly commingled whatever they did not spend or give to their children. This Court should affirm.

When a separate asset is commingled with community assets, “all of the asset becomes community property, and any asset acquired from the commingled asset is community property.” *In re Marriage of Shui and Rose*, 132 Wn. App. 568, 584, 125 P.3d 180 (2005). Commingling occurs when:

(1) a substantial amount of separate property is (2) intermixed with (3) a substantial amount of community property to the extent that (4) it is no longer possible to identify whether the remainder is the separate property portion or the community property portion.

**Shui**, 132 Wn. App. at 584. Gelman had the burden to “clearly and convincingly trace [the proceeds from her inheritance] to a separate source.” 132 Wn. App. at 584.

Gelman inherited an \$82,000 IRA, which the parties deposited into their Schwab money-market account. RP 149-50. Fassler managed the Schwab account, and over five years the IRA grew to \$157,054 – the amount Gelman claims is her separate property. BA 25; RP 104, 149-50.

For tax reasons, the parties had to cash out the IRA before March 2007. RP 183.<sup>7</sup> The parties deposited some of the funds into their children’s college savings accounts (529 accounts) and Fassler believes that they used some funds to pay for the children’s private schooling. RP 150-51. The parties “intermingled” the remaining funds with other funds in their investment account, valued at \$420,916. CP 84; RP 150.

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<sup>7</sup> Gelman complains that she did not want to withdraw the funds from the IRA, but did so only because Fassler told her she had to for tax reasons. BA 24. Yet she also acknowledges that tax law required the parties to cash out the IRA. BA 12. The parties’ accountant confirmed as much. RP 183.

Gelman states that her inheritance is “easily traceable and identifiable,” but never really argues the point. BA 25. She never contests – or even mentions – that the funds were either distributed to the children or commingled. *Compare* BA 25 with RP 150-51. In fact, she had no idea what stocks the funds were used to purchase or whether those stocks increased or decreased in value. RP 106. This is not tracing.

In short, the undisputed evidence supports the trial court's characterization of this asset as community property. This Court should affirm.

**F. The trial court properly awarded Gelman accounts receivable from Gelman Anesthesia, which existed when the parties' separated. (BA 28-29).**

Gelman argues that the trial court erroneously awarded her the value of her accounts receivable from Gelman Anesthesia, where the accounts were no longer receivables by trial. BA 28-29. Her sole argument is that the court cannot award an asset that no longer exists. BA 28 (citing *In re Marriage of Kaseburg*, 126 Wn. App. 546, 561, 108 P.3d 1278 (2005)).<sup>8</sup> Gelman's argument plainly

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<sup>8</sup> It is unclear why Gelman cites *Kaseburg*, holding that it is an abuse of discretion to consider a waste claim in a dissolution, where the assets were not before the dissolution court due to a foreclosure action. 126 Wn. App. at 561.

suggests that the trial court cannot account for community property that one spouse disposes of while the parties are separated. That cannot be the law. This Court should affirm.

Kessler valued Gellman's accounts receivable from Gelman Anesthesia as of December 31, 2007. RP 242; Ex 153. He discounted the accounts by Gelman's average collection rate, 58%, to a value of \$138,306. RP 243; CP 84. In her motion for reconsideration, Gelman complained that business expenses would be deducted before she realized a net income on her accounts receivable, but Gelman did not ask Kessler – a joint expert – to account for business expenses, or provide any other evidence on this point. RP 253-54; CP 163. She does not raise this issue on appeal. BA 2-4.

Gelman does not disagree that the accounts receivable were community property, and she agrees that she collected and spent the funds after the parties separated. BA 19, 28-29. She argues only that the trial court could not award her the accounts because they “no longer exist[.]” BA 28. The accounts receivable do not “exist” because Gelman collected them – awarding her the value of the accounts receivable accounts for the cash she collected.

And Gelman incorrectly claims that the trial court did not distribute Fassler's accounts receivable. BA 28. The trial court awarded Fassler his share of the accounts receivable from his medical practice, \$62,463. RP 127, 211; CP 89. Regardless of whether this was a "bonus," it was based on Fassler's share of his medical practice's accounts receivable. RP 126-27, 211. Although this asset was community property, the court awarded the entire amount to Fassler, just as it awarded the entire value of Gelman's accounts receivable to her. BA 28 n.7.

In short, the trial court properly awarded Gelman the value of her accounts receivable, community property she received and disposed of after the parties separated.

### **CONCLUSION**

The 60/40 asset distribution is just and equitable given the parties' grossly disproportionate post-dissolution economic circumstances. Substantial – often uncontradicted – evidence supports the trial court's asset valuations and characterizations. This Court should affirm.

RESPECTFULLY SUBMITTED this 28 day of March  
2011.

MASTERS LAW GROUP, P.L.L.C.

A handwritten signature in black ink, appearing to read "Kenneth W. Masters", written over a horizontal line.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 28 day of March 2011, to the following counsel of record at the following addresses:

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