

COURT OF APPEALS NO. 73415-6-I

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

In re the Marriage of

BARBARA TEMPLIN
(f/k/a KLAVANO),

Appellant/Cross-Respondent,

and

JAMES KLAVANO,

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT

AND

OPENING BRIEF OF CROSS-APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred in finding that the \$142,172.51 in separate funds Jim used to pay down the mortgage on the parties' home when he refinanced it barely three months before the parties separated became community property.

2. The trial court erred by concluding that the parties' Post-Nuptial Agreement was "unfair and therefore, invalid."

3. In the absence of a valid Post-Nuptial Agreement, the trial court erred by finding "the characterization of the Sammamish home is found to be community property". FF 2.7, CP 2326.

4. The court erred in denying Jim's request to obtain Barbara's psychiatric records.

5. The court erred by imposing sanctions against Jim when he sought leave to obtain Barbara's daily journals from her psychiatrist, and by refusing his request.

6. The court erred by denying the Respondent's Motion to Deem Requests for Admission Admitted.

7. The trial court erred by finding that "both parties needlessly increased the costs of this litigation" FF 2.15, CP 2340, if its intent was to equate the conduct of each party.

8. The trial court erred and abused its discretion by failing to award Jim the attorney fees he incurred due to the intransigence of Barbara and her attorney.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did substantial evidence support the court's finding that the \$142,172.51 in separate funds Jim used to pay down the mortgage on the parties' home barely three months before the parties separated became community property?

2. Did the court err in concluding that the parties' Postnuptial Agreement was "unfair, and therefore invalid", because Jim's "intent was to insulate his investment in the family home as his separate property", when it created community property for Barbara solely from his separate property and credit?

3. In the absence of a valid Postnuptial Agreement, did substantial evidence support the court's finding that the residence was community property when it was purchased solely with Jim's separate money and credit?

4. Did the court err in denying Jim's request to obtain Barbara's psychiatric records after she accused him of engaging in domestic abuse throughout the marriage, when such evidence is

admissible and relevant to her claim that she could not work full-time and the validity of parties' Post-Nuptial Agreement?

5. Did the court err by imposing sanctions against Jim for simply asking for the court's leave to obtain Barbara's daily journals from her psychiatrist, and refusing his request?

6. Did the court err by failing to award Jim the attorney fees he was compelled to incur due to the intransigence of Barbara and her attorney?

Statement of the Case.

Response to Petitioner's Statement of Facts.

A. Barbara Worked, But Jim Paid For Everything.

James Klavano and Barbara Templin f/k/a Klavano¹ were married on May 4, 2003. This was a second marriage for both. No children were born of this marriage. Jim had two grown daughters from his first marriage, Jamie and Lauren. The parties separated ten years later, on July 22, 2013. 2.8(3); CP 2332.

When Barbara and Jim married, Jim had substantial separate property. Barbara had a pension. She also owned a townhome of modest value, RP 147, which she sold to pay some of

¹ For ease of consideration, James Klavano will be referred to as "Jim". Barbara Templin f/k/a Klavano will be referred to as "Barbara". No disrespect is intended.

her separate debt (RP 147-148, 150, 446). FF 2.8(2), CP 2329.

Jim had no intent to transmute his separate property into community property. FF 2.8(2). CP 2330. Jim's primary business was Australia Unlimited, Inc. When Barbara refused to consider a prenuptial agreement, RP 165, 1429-1430, Jim formed LLCs to make sure his other businesses and real estate holdings remained separate. FF 2.8(2), CP 2330. No community funds were commingled with his separate property or businesses. FF 2.8(2), CP 2330. The court found, FF 2.8(1), CP 2327:

During the marriage, the Respondent received a salary from his separate business, Australia Unlimited, Inc., which was formed in 1981. The Petitioner was and is a Senior Flight Attendant with Alaska Airlines. The parties agreed that the Petitioner would use her salary to pay her separate debt. When she was unable to pay that debt after a few years into the marriage, the Respondent agreed to pay her remaining debts.

The parties agreed that the expenses of the marital community would be paid from the Respondent's community and separate income. There is little evidence that the Petitioner contributed any significant income to meet the expenses of the marital community (other than groceries, and other household expenses that Mr. Klavano reimbursed her for routinely).

Jim made substantial contributions of his separate property and income to meet the community's living expenses, needs and financial obligations, and to create community property. FF 2.8, CP 2331; FF 2.12, CP 2340.

Even though Barbara testified that Jim required her to pay any credit card charges with which he disagreed, RP 182-185, at first, she could not identify anything she had ever wanted which Jim had not let her buy with his money. RP 455-456, 458. Later, she testified that he had not bought a new computer and an I-Pad she had wanted. RP 681. Although Jim tried to explain to her that he could not afford the charges she continued to run up on his credit card, and that she had to stop, RP 756, CP 43, she didn't. See also, Exs. 492, 506, 508, 511; RP 780-782, 1400-1402. Yet, she complained bitterly throughout the marriage, that Jim would not make his separate property community, and that he did not do more to make her financially independent. See eg. CP 7-15.

On June 22, 2007, Barbara took out a life insurance policy on Jim for \$1,000,000, in which she was the beneficiary. Ex. 74; RP 194, 283, 1039. Jim made Barbara the executrix and a beneficiary to his will on November 26, 2007. RP 281-282 1037-1038; Ex. 394.

B. Barbara Plans To Leave The Marriage.

Barbara maintained a detailed daily journal. On March 8, 2008, while on a family vacation to Washington, D.C., and while Australia Unlimited was in a fight for its life against Crocs, Inc., she wrote about her plan to leave the marriage. RP 260-261, Ex. 301.

Barbara complained about the “emotional abuse [she] had put [up] with over the past 5 years”, and of being upset by Jim’s “lies about all our finances.”² Ex. 301.

She testified that she had been abused and humiliated when Jim suggested she use the bathroom before they got on the plane to fly to Washington D.C., and again, when he suggested she might not want another free drink offered on the plane. RP 360-362.³

Barbara wanted Jim to continue to use his separate property to pay down the mortgage on their home, which she believed would mean more community property for her to share. Ex. 301; RP 263.

She also wanted Jim to buy her a new car---not a four year old car---“it will be exactly what I want & something I can afford when I leave him.” Ex. 301; RP 264-266.

² At trial, she testified that she did not know if Jim had lied about their finances. RP 294.

³ Her latter complaint is belied by her own diary entry where she begins by stating that apart from the bathroom incident, Jim had been “pretty decent” on this trip. Ex. 301; RP 261-262.

According to her journal entry, Barbara hated Jim so much that she thought about going to Ron Snyder, the CEO of Crocs, and offering to give him a flash drive of Jim's privileged attorney-client communications, if Crocs would pay for her divorce. According to Barbara, Jim would "never know what hit him." RP 266. She wrote:

Also I have my own life insurance policy, which needs to be in full force a full 2 years before I leave because Jim's unstable and such a drama king that if I left and his company failed at the same time---he could suicide.[sic].If I did that, the policy wouldn't pay off.

Ex 301, RP 283-285. In the meantime, she would continue gathering the things she would need in her "new life" on Jim's dime. From "now on", she was going to work 70 hours per month and convert her paycheck to cash to put in her safety deposit box.⁴ Jim would "pay off the house" and think "everything is fine with us because [she] will be a better actress from now on." She would continue to fake her affections so he would not "catch on" and avoid ruining her plan. Ex. 301; RP 262.

At trial, Barbara argued that her plan, Ex. 301, was merely a

⁴ At trial, Barbara acknowledged that 70 hours per month would be full-time work, and that she had made no complaint about any alleged back injuries when she wrote this entry. RP 295-296.

fantasy because in July of 2008, when Jim was in China and thought Washington Mutual was about to fail, he transferred half a million dollars from his Washington Mutual account to Barbara's Wells Fargo account. RP 670-673, Ex. 538. Although it is true that Barbara did not attempt to take this money for the five months it was there, RP 669-674, Ex. 538, it is also true that the insurance policy on Jim's life if he committed suicide had not yet vested.

When Jim discovered this note, Ex. 301, in some papers in his office months later, in November of 2008, RP 1042-1043, he was emotionally crushed, RP 1043. He waited until January to ask Barbara if she was planning to leave him and to show her the note.

But when Barbara told Jim that she had been so happy to be married to him that she had stopped taking her medications when she wrote the note, and that she wanted to work on the marriage, he accepted her explanation. RP 1044-1045. Jim never showed or threatened to show the note to anyone else. He did not bring the issue of the note up again until Barbara moved out of the home in July, 2013, and initiated these proceedings. RP 1045, 1245.

C. Barbara Puts Her Plan Into Operation.

At the end of February, 2013, Barbara talked Jim into paying

for her to undergo a liposuction, RP 432, even though he told her he thought such an operation was unnecessary. RP 1254-1255.

In March of 2013, Barbara persuaded Jim to buy a new Audi 5 convertible for her use, Ex. 405, just as she had planned in 2008. RP 301-302. Before Jim purchased the Audi 5, Barbara used Jim's credit card to purchase an extended warranty on the Lexus, he had previously purchased for her. Barbara then canceled that warranty and had Lexus send her the refund of \$3,192. She kept it. When Audi sent a check back in the amount of \$1,000 because Jim had overpaid the purchase price, Barbara cashed that check and kept that money as well. FF 2.8(2), CP 2331-2332.

In April, Barbara "encouraged" Jim to use his separate property to pay an additional \$142,172.51, down on the mortgage on their home when they refinanced it, Exs. 307, 308, 309, 310, RP1385-1386, just as she had planned. According to Ex. 427, p.9:

After years of asking Jim to put money in our home, he has never done so, until recently, when he refinanced the house to lower the payment.

Later that month, while they were vacationing in Maui, RP 308-309, Barbara persuaded Jim to take a family vacation to Maui

with his two daughters that July. RP 1269-1270.

Response to Petitioner's Statement of Proceedings

On May 24, 2013, Barbara commenced her attorney-client relationship with Camden Hall.⁵

On May 30, 2013, Barbara surreptitiously opened up a new personal bank account at Banner Bank and leased a safety deposit box. RP 301, 312-313; RP 312, Exs. 395, 396.

On June 29, 2014, she put down a nonrefundable deposit to rent an apartment near the parties' home. Ex. 401, RP 314-315.

Barbara then told Jim that she wanted him to open an account for both of them containing \$200,000, RP 330, because another flight attendant had had a recent stroke while on a layover in Hawaii⁶, which had left her family in dire financial straits. Barbara told Jim that in the event he had a medical emergency she needed to be on such an account in case she needed cash to meet the expenses of their marital community. RP 222, 319-321, 1271; Ex. 427. She became angry when Jim suggested using a line of credit, rather than opening a new account. RP 222-223, 321-324;

⁵ Camden Hall will be referred to as "Hall". No disrespect is intended.

⁶ Barbara did not remember the name of this flight attendant, or when this alleged event occurred. RP 320-321.

1272-1273. Finally, on July 10, 2013, Jim relented and made her a signatory on the Union Bank account of his separate business, Nothinz, LLC, Ex. 416.

Jim had formed Nothinz, LLC to protect the payments coming from the buyer of Australia Unlimited's assets from Crocs' claims, and to segregate the promissory notes he had received from that sale from any future sale of its remaining assets. RP 723-725, 738, 770-771, 1304-1305; Ex. 100. Barbara knew the only money in that account were funds which had been transferred to it by Australia Unlimited, Inc., RP 484-489, 771, 1274, 1470-1471; Ex. 445. She was unhappy there was not more money in this account. RP 321-324; Ex. 427.

Contrary to her contention, the fact that Jim made her a signatory on this account, did not convert this account into a "joint" account, or give her any ownership interest in its funds. *State v. Mora*, 110 Wn.App. 850, 856-857, 43 P.3d 38, *review denied*, 147 Wash.2d 1021, 60 P.3d 92(2002), RP 1275.

A week later, on July 17, 2013, when Jim was in Maui with his two daughters, Barbara transferred \$90,000 from the Union Bank Nothinz business account to her Banner Bank account. RP

332; Ex. 417. When she transferred this money, she knew that Jim did not have a medical emergency, and that she did not need these funds to meet the expenses of their marital community. RP 490. Her unauthorized withdrawal of these funds constitutes theft under RCW 9A.56.020. *State v. Mora*, 110 Wash. App. at 857.

Kirkland Police Detective Adam Haas, who investigated this theft, Ex. 454, CP 4573, spoke to Barbara who admitted taking this \$90,000 from the Nothinz' Union Bank business account, but

told me she had withdrawn the money from the account only after receiving advice to do so from her attorney Camden Hall, the attorney representing her in the divorce proceedings.⁷

Compare RP 334-339; Ex. 433. Two days later, on July 19, 2013, she issued a check to Camden Hall, PLLC for "Prepaid Fees" in the amount of \$10,000. RP 335, 345-346, 350-352; Ex. 433. Hall

⁷ Jim filed a grievance with the WSBA that Hall's advice to Barbara to fraudulently induce him to make her a signatory to the Nothinz, LLC bank account and to then advise her to steal its money violates RPC 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent..."). The WSBA dismissed that grievance because Nothinz' conversion claims were dismissed, but indicated that if this Court finds that Hall acted improperly, it will re-open the grievance. That ruling is presently under review. In the meantime, this Court should find that it is unethical for an attorney to advise his client to steal money from a third party (eg. Nothinz, LLC) to pay his or her retainer---particularly, when there are legal mechanisms available under our dissolution statutes to obtain attorney fees, RCW 26.09.140, and maintenance, RCW 26.09.080. If this Court does not call out this conduct, it will establish a very dangerous and troubling ethical precedent by its silence.

filed her Petition for Dissolution that same day. CP 1-4.

Hall used those funds to pay his invoice in the amount of \$5,407 for the legal fees and costs which had been accrued up to that date. Ex. 473; RP 349-352.

By the time Jim could get before the court to address this wrongful taking, Barbara had already spent \$14,000 of the \$90,000 she had taken---\$10,000 of it for her retainer with Hall. CP 2398.

In its Temporary Order, Ex. 38, Family Law Court Commissioner Jacqueline Jeske ruled in pertinent part as follows:

Page 4. Section 3.2 The Court requires that the \$76,000 Petitioner removed from the Nothinz, LLC account should be returned to the same. The \$14,000 previously authorized to remain in her possession by the prior Commissioner shall be deemed to be maintenance for the month of August/September unless the trial court characterizes it as an advance/draw/predistribution against her ultimate share of the division of property herein....

The trial court found, FF 2.15, CP 2341:

Petitioner's secret withdrawal of \$90,000 from the Nothinz bank account just prior to her separation from the Respondent was questionable and started this dissolution on an unnecessarily contentious path.

But Barbara's and her attorney's misconduct and their intransigence was not limited to this incident, as will be shown and discussed more fully in the Opening Brief of the Cross-Appellant.

Argument.

A. The Standard of Review In Dissolution Actions.

In *In re Marriage of Landry*, 103 Wash.2d 807, 809–810, 699 P.2d 214 (1985), the Supreme Court held:

We once again repeat the rule that trial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best.... The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. [citations omitted]. The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

And, in *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702, 713-714, 308 P.3d 644 (2013), this Court set forth the standards regarding its review following a bench trial:

This court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. [citation omitted]. In determining the sufficiency

of the evidence, this court need only consider evidence favorable to the prevailing party. [citation omitted]. There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. [citation omitted]. Unchallenged findings of facts are verities on appeal. [citation omitted].

“The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument,” or they become verities on appeal. [citation omitted]. Such unsupported arguments need not be considered. [citation omitted]. We review questions of law de novo. [citation omitted].

Barbara has challenged nearly every finding of fact and conclusion of law, but failed to make separate assignments of error as required by RAP 10.3(a)(4) and (g). The Supreme Court addressed this problem in *In re Disciplinary Proceeding Against Jackson*, 180 Wash.2d 201, 226, 322 P.3d 795(2014), as follows:

Jackson generally claims that all of the hearing officer's 391 findings of fact are unsupported, noting that it is impossible to specifically assert error to each of the findings within the page limitation set forth by our court. Acknowledging this difficulty, we review his entire brief, and consider Jackson's specific assignments of errors

as they arise within his other arguments. But we are not required to address findings not specifically referred to, and we reject challenges he fails to support with citations to the record or legal authority.

It is important to note that challenged findings which Barbara fails to discuss in her opening brief are verities on appeal. *Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn.App. at 709 fn.9. Similarly, passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Johnson v. Mermis*, 91 Wn.App. 127,136, 955 P.2d 826 (1998).

Finally, this Court does “not review credibility determinations of a trial court.” *Mansour v. Mansour*, 126 Wn.App. 1, 13, 106 P.3d 768(2004). In this case, the trial court found that Barbara’s testimony was not credible. FF 2; CP 2384.

B. The Court’s Decisions Regarding Maintenance And Property Division Were Guided By The Appropriate Statutory Factors, Not By Marital Misconduct.

Contrary to Barbara’s contentions, even a cursory review of the Findings of Fact and Conclusions of Law entered in this case, shows that the trial court carefully considered each of the statutory factors set forth in RCW 26.09.080 and RCW 26.09.090, with the

evidence presented at trial, to properly guide its discretion. FF 2.8, CP 2326-2335, 2344-2346, 2348-2350; FF 2.12, CP 2335-2340.

The whole thrust of Barbara's Brief is her unfounded accusation that the trial court based its rulings on "fault" or "marital misconduct".⁸ She provides no evidence to support her accusation.

Indeed, the court expressly found no fault. 1/21/15 RP 197.

In particular, while the court did find that Ex. 301 established that Barbara "had been planning to leave the marriage at least as early as March 8, 2008," FF 2.8(3), CP 2332⁹, there is no evidence the court thought Barbara's plan to leave the marriage was marital misconduct, or based any of its rulings concerning the disposition of the parties' property, or maintenance, on this finding, or on any other purported finding of "misconduct" or "fault".¹⁰

When the court divided the parties' property, and denied her

⁸ The "marital misconduct" which a court "may not consider under RCW 26.09.080 or RCW 26.09.090 refers to immoral or physically abusive conduct within the marital relationship". *In re Marriage of Muhammad*, 153 Wash.2d 795, 803-804, 108 P.3d 779 (2005); *In re Marriage of Steadman*, 63 Wn.App. 523, 528, 821 P.2d 59 (1991).

⁹ Although Barbara disputes this finding, credibility determinations are not reviewable. *Mansour v. Mansour, supra*.

¹⁰ The court expressly rejected Ex. 301 for the purpose of finding "fault", or for purposes of property division and maintenance, CP 1546, but indicated it would consider it for purposes of determining credibility and motive, RP 63-64, 258-259. The quote from Jim's attorney's closing argument in footnote 9 of Barbara's Brief, shows that he used Ex. 301 to assess Barbara's credibility and to show her motivation to fabricate false claims of domestic abuse, not to assign fault.

requests for maintenance and attorney fees, it expressly found that the parties had been married for ten years, FF 2.8(3), CP 2332; FF 2.12(a), CP 2338; FF 2.12(e), CP 2340; FF 2.15, CP 2340-2341.

While its subsequent finding that this “was a short term marriage of four years”, FF1, CP 2384, may have been error, it was a harmless error¹¹ because it was made in conjunction with its order denying Barbara’s second motion for reconsideration of its denial of her previous requests for attorney fees.

C. The Court Did Not Abuse Its Discretion By Awarding The Wife Fifty (50%) Percent of the Community Property After A Ten Year Second Marriage.

The trial court carefully considered each of the statutory factors set forth in RCW 26.09.080, with the evidence presented at trial, to properly guide its discretion to award each party their separate property and fifty (50%) percent of their community property. FF 2.8, CP 2326-2335, 2344-2346, 2348-2350.

¹¹ Errors in civil cases are rarely grounds for relief without a showing of prejudice to the losing party. *In re Marriage of Morris*, 176 Wn.App. 893, 903, 309 P.3d 767 (2013). Even in criminal trials, “[W]here the error is *not* of constitutional magnitude, we apply the rule that ‘error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” *State v. Barry*, 183 Wash.2d 297, 303, 352 P.3d 161(2015).

1. The Wife's Entitlement To Her Share of The Community Property May Depend Upon Her Efforts to Create It And May Be Satisfied With Pre-Decree Distributions.

While the “fact one spouse, be it husband or wife, may be the major income producer will not justify giving him a larger share of the community property”, *In re Marriage of DeHollander*, 53 Wn. App. 695, 701, 770 P.2d 638 (1989), there is no evidence that the court did so here. On the other hand, the court may consider non-statutory factors, including “whether the property to be divided should be attributed to the inheritance or efforts of one or both of the spouses.” *In re Marriage of Gillespie*, 89 Wn.App. 390, 399, 948 P.2d 1338(1997); See also, *In re Marriage of White*, 105 Wn.App. 545, 551, 20 P.3d 48 (2001). Thus, even in the absence of a valid Post-Nuptial Agreement, the trial court did not abuse its discretion by awarding Jim his separate property down payment. *In re Marriage of DeHollander*, 53 Wn. App. at 700 (Mr. DeHollander has a right to be reimbursed for ...his \$2,500 down payment.”).

Barbara's complaint that “the trial court ... failed to acknowledge that relatively little community property had been accumulated during the marriage,” Brief, p. 32, rests on a false

premise. A marital community is not duty-bound to create any particular amount of community property. Married people, no less than unmarried people, are free to spend their money as they wish.

Barbara also ignores the fact that Jim was required to make “substantial contributions of his separate property and income to meet the expenses of the marital community and to create community property.” FF 2.8(2), CP 2331.

Barbara’s reliance upon *In re Marriage of Kaseburg*, 126 Wn.App. 546, 559, 108 P.3d 1278 (2005) and *In re Marriage of White*, 105 Wn.App. at 549, for the proposition that the court cannot award an asset to a party which does not exist at trial, is misplaced.

The court correctly reduced Barbara’s reconciliation payment by treating her temporary maintenance as a pre-decree distribution, as the court had indicated it might when it made that award, Ex. 38. *Glorfield v. Glorfield*, 27 Wn.App. 358, 362, 617 P.2d 1051 (1980).

Likewise, the court properly exercised its discretion to credit Jim for paying Barbara’s employment taxes after the parties’ separated. CP 2350. Payments on community debt made post-separation are considered to be separate contributions. *In re Marriage of Sedlock*, 69 Wn.App. 484, 508, 849 P.2d 1243 (1993).

The trial court did not “award” the Audi automobile rebate and the Lexus warranty refund to Jim, as “assets”. Rather, the court properly offset those funds from her reconciliation payment for the reasons set forth in FF 2.8(2), CP 2331-2332, 2350.

Even though Hall knew that there would have to be an evaluation of the retirement accounts from the inception of these proceedings, RP 20, he only presented evidence of the premarital portion of Barbara’s Alaska Airlines retirement account, Ex. 581, during her rebuttal, RP 1447-1449, and no evidence as to whether there had been any growth of that portion. See RP 937.

Barbara provides no legal authority or evidence for her contention that the “trial court should have acknowledged the community interest in the patents as part of the property division”. There was no community interest. A patent application must be filed in the name of the inventor(s), 35 U.S.C.A. § 111, Jim developed the patents as an employee of Australia Unlimited, who owns them. RP 747-748, 773-774, 980-982, 1348-1349, 1/21/15 RP 93. Australia Unlimited sold one patent with its major product lines before the parties separated. RP 743; Ex. 182: pp. BK 001803-1805, 1809, and 1820. There was no evidence that the

remaining patents had any value. RP 749, 924, 1/21/15 RP 93.

2. The Husband's Separate Property Was Not Enhanced By His Services During The Marriage.

Contrary to Barbara's contention (Brief, pp. 35-36), the court did consider "the community's contributions to the husband's separate property in dividing the marital estate." It found that there:

is no evidence that the increase in value of any separate real estate was due to community labor....Nor is there any evidence that any of the Respondent's other separate property increased in value due to community labor.

FF 2.8(2); CP 2330-2331.¹² The value of Australia Unlimited on the date of the parties' marriage was \$5,635,000, Ex. 571, not the \$4,344,000 shown on Ex. 568---a difference of \$1,291,000. RP 1206-1208, 1212-1213; 1/21/15 RP 39, 68. The value of Jim's separate property at the date of marriage was thus \$9,094,236.

When the parties separated in 2013, Australia Unlimited had a negative net worth of \$137,306. Exs. 567, 568, 613. By the time of trial, it had a negative net worth of \$267,283. Ex. 614. See also, FF 2.8(2), CP 2331. At the end of the marriage, Jim's separate property was worth \$6,812,842. CP 2349-2350.

¹² The trial court did not find Mr. Hawes' opinions credible. *Mansour v. Mansour, supra*.

No community funds were co-mingled with any of Jim's separate property or businesses. FF 2.8(2); CP 2330.

Barbara produced no evidence to overcome the presumption that the increase in the value of Jim's separate real property was due to inflation. *Elam v. Elam*, 97 Wash.2d 811, 813, 650 P.2d 213 (1982); *In re Marriage of Johnson*, 28 Wn.App. 574, 579, 625 P.2d 720(1981).¹³ See RCW 26.16.010. FF 2.8(2), CP 2330-2331.

Contrary to what Barbara contends is "an undisputed fact", the court did **not** find that the husband's separate businesses had undercompensated the marital community for his efforts. FF 2.8(1), CP 2338.¹⁴ Rather, the court correctly recognized that under *Hamlin v. Merlino*, 44 Wash.2d. 851, 860, 272 P.2d 125 (1954), no evidence was presented that Jim's W-2 wages unfairly compensated the marital community based "upon the earnings of the corporation during the time such a salary was paid." FF 2.8(1), CP 2328.

Barbara's contention fails on this basis alone.

But, she also misstates the testimony of Steve Kessler,

¹³ A spouse is not entitled to an interest in the separate property of the other on the basis that performance of usual homemaker's chores helped produce the increase in value. *In re Marriage of Johnson, supra*.

¹⁴ The "lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof". *In re Welfare of A.B.*, 168 Wash.2d 908, 927, 232 P.3d 1104 (2010).

Jim's expert. Barbara does not contest, FF 2.8, CP 2328:

Respondent's expert opined that, even if the Respondent's W-2 wages were compared to those of a CFO, who was working full-time (compared to the Respondent's claim of working approximately 20 hours per week), for a corporation with \$25 million to \$99 million in sales (which dwarfed those of Australia Unlimited, Inc.), any such resulting undercompensation to the marital community was more than adequately made up by the substantial contributions of the Respondent's separate property and income to the marital community. Trial Exhibits 567-571.

The court went on to find, FF 2.8, CP 2329:

The Petitioner proffered no evidence to refute this opinion. Thus, even if this court were to find that the marital community was unfairly undercompensated by the Respondent's W-2 wages alone, the court finds that any such undercompensation was more than made up by the Respondent's substantial separate property contributions to the marital community. [citations omitted].¹⁵

Finally, Barbara's contention that because "of the husband's substantial separate property, the trial court should have at least

¹⁵ While Barbara disputes this portion of the court's findings, she fails to present any argument why they are not supported by the evidence or cite to the record to support her argument. Indeed, it essentially repeats the unchallenged findings which preceded them. Hence, they are verities on appeal, and need not be considered. *Buck Mountain Owner's Ass'n v. Prestwich, supra.*

awarded the wife a disproportionate share of the community property, a portion of the husband's separate property, or both" is without merit. The court is in the best position to assess the assets and liabilities of the parties and to determine what is "fair, just and equitable under all the circumstances", *In re Marriage of Brewer*, 137 Wash.2d 756, 769, 976 P.2d 102 (1999), and it did so here.

3. The Court Did Consider The Economic Circumstances of Each Spouse When The Division of Property Became Effective.

Once again, contrary to Barbara's contention, the court did consider the economic circumstances of each spouse at the time the division of property became effective, FF 2.8(4), CP 2334.¹⁶

Barbara was awarded property worth \$945,074, including a reconciliation cash payment of \$284,348, which was partially offset by pre-decree distributions, and no debt.¹⁷ CP 2349-2350.

The cases relied upon by Barbara do not support her contention that the court abused its discretion by awarding her half the parties' community property. In *In re Marriage of Estes*, 84

¹⁶ The only portions of these findings which Barbara challenges are underlined. But, once again she fails to present any argument why they are not supported by the evidence or cite to the record to support her argument. Hence, they are verities on appeal, and need not be considered. *Buck Mountain Owner's Ass'n v. Prestwich*, *supra*.

¹⁷ Barbara did not include her pre-decree distributions in her calculations in her Brief, p. 26. The court found she owned her jewelry. *Mansour v. Mansour*, *supra*.

Wn.App. 586, 594 929 P.2d 500(1007), the court awarded the wife more than 50% of the community property in lieu of maintenance where her income was not sufficient to meet her monthly expenses. The matter was remanded only “for entry of an express finding as to whether 16 months [was] an appropriate length of time for maintenance” in view of the parties’ disparate earning capacities .

In *Lynn v. Lynn*, 4 Wn.App. 171, 176, 480 P.2d 789(1971), the wife was awarded the family home located on the husband’s separate property when she had custody of the parties’ four children ranging in age from 2 to 9 years, and was a waitress.

In *In re Marriage of Donovan*, 25 Wn.App. 691, 612 P.2d 387 (1980), the wife had been a homemaker, the husband was an airline pilot, and she had custody of the parties’ three children.

In *Urbana v. Urbana*, 147 Wn.App. 1, 14-15, 195 P.3d 959 (2008), the court’s finding that Robert had engaged in abusive conduct with his stepdaughters, in conjunction with an unexplained 20/80 percent split of community property, suggested that the court had considered his marital misconduct in dividing the property.

In this case, there was no finding of “marital misconduct”. Nor was the split of community property disproportionate.

**D. The Court Did Not Abuse Its Discretion
By Denying Barbara's Request For Maintenance.**

The court carefully considered each of the statutory factors set forth in RCW 26.09.090, with the evidence presented at trial, and properly exercised its discretion to deny her request for maintenance. FF 2.12, CP 2335-2340.

Barbara's decision to not contest the court's ruling that the temporary maintenance she was awarded be treated as a pre-decree distribution, when her "need" would have been greater¹⁸ (apart from her complaint that she had spent that money), is telling. It shows that her complaint that the court did not award her future maintenance is just part of her ongoing effort to extract more money from Jim which she knows she neither needs nor deserves.

Spousal maintenance is within the discretion of the trial court. It is not a matter of right. *In re Marriage of Foley*, 84 Wn. App. 839, 845, 930 P.2d 929 (1997).

**1. The court properly considered the wife's
financial resources and her ability to meet her
needs independently.**

Contrary to Barbara's contention, the court did consider her

¹⁸ Her salary was lower. See fn. 20. She had not yet been awarded property worth \$945,074 (community property: \$444,793 + separate property: \$215,933 + reconciliation payment: \$284,348). CP 2350.

financial resources and her ability to meet her needs independently in exercising its discretion to not award her maintenance.

FF 2.12(a)-(d); CP 2338-2340.

However, Barbara never submitted a credible Financial Declaration, FF 2.12(3), CP 2335-2340, or otherwise established a “need” for maintenance. FF 2.12, CP 2335-2340.

Similarly, the court did consider the parties’ property division, as required by *In re Marriage of Rink*, 18 Wn.App. 549, 552-553, 571 P.2d 210 (1977). See eg. FF 2.12(a), CP 2338; FF 2.12(d), CP 2339.¹⁹ There is nothing “paltry” about Barbara’s award of property worth \$945,074. CP 2349-2350.

Barbara’s reliance upon *In re Marriage of Sheffer*, 60 Wn. App. 51, 802 P.2d 817 (1990), is misplaced. In *In re Marriage of Sheffer*, 60 Wn.App. at 57-58, this Court held that the record did not convince it that the trial court had adequately considered the “standard of living of the parties during marriage and the parties’ post-dissolution economic condition...where the marriage is long term and the superior earning capacity of one spouse is one of the

¹⁹ Once again, while Barbara did challenge portions of FF 2.12(a) and all of FF 2.12(d), she failed to present any argument why they are not supported by the evidence or cite to the record to support her argument. Hence, they are verities on appeal, and need not be considered. *Buck Mountain Owner's Ass'n v. Prestwich*, *supra*.

few assets of the community”. The record in this case shows that the trial court did. FF 2.12, CP 2336-2340. This marriage was not long term. Jim is living off his separate property investments. Barbara now has the superior earning capacity.

As previously discussed, *In re Marriage of Estes*, 84 Wn.App at 594, is distinguishable because Barbara “has the ability to meet her needs independently.” FF 2.12(a), CP 2338. Ms. Estes did not.

2. The court did not ignore the practical realities of continued work as a flight attendant.

Contrary to Barbara’s bare assertion, there is no evidence that “her ability to work full-time as a flight attendant is also limited by her age”. Barbara “is in good physical and emotional condition”, FF 2.12(d), CP 2339, and she can “continue to work full-time as a Senior Flight Attendant for many years”, FF 2.8(4), CP 2334.

The court also properly rejected her proposed vocational Plan for the reasons set forth in FF 2.12(a)-(b), CP 2338-2339.^{20, 21}

²⁰ Barbara’s wages increased to \$55.50 per hour as provided in her new contract, Ex. 573. RP 1278-1282. Whether they increased to something less, as Barbara claimed, RP 1280, 1474, [See Brief, p. 44 fn. 11] is of no consequence. Her hourly wage is higher. No evidence was presented that her hourly wages are insufficient to meet her needs.

²¹ Although Barbara contests portions of these findings, she failed to present any argument why they are not supported by the evidence or cite to the record to support her argument. Hence, they are verities on appeal, and need not be considered. *Buck Mountain Owner's Ass'n v. Prestwich*, *supra*.

3. The court did not ignore the parties' standard of living during the marriage.

The court did consider the parties' standard of living during their 10 year marriage, FF 2.12(3), CP 2338, but it was not required to maintain it. "The maintenance of a lifestyle to which one has become accustomed is not a test of *need*." *Friedlander v. Friedlander*, 80 Wash.2d 293, 297, 494 P.2d 208 (1972).

4. The court did not ignore the wife's age, physical and emotional condition, and financial obligations.

Once again, contrary to Barbara's contention, the trial court found FF 2.12(d), CP 2339:²²

The Petitioner is 55 years old. She is in good physical and emotional condition. She has no financial obligations beyond her monthly living expenses and whatever debts she may have incurred since separation.

Barbara did not contest FF 2.12 (1),CP 2336:

The Petitioner's allegations of domestic abuse did not, and do not affect her present employability and prospective earning capacity, according to her own psychological expert, Vicki Boyd, Ph.D.

²² Once again, although Barbara contests portions of these findings, she failed to present any argument why they are not supported by the evidence or cite to the record to support her argument. Hence, they are verities on appeal, and need not be considered. *Buck Mountain Owner's Ass'n v. Prestwich, supra*.

Matter of Foran, 67 Wash.App. 242, 258, 834 P.2d 1081 (1992).²³

The court also found, FF 2.12 (1), CP 2336 that

...[w]hatever back injuries the Petitioner may have sustained did not, and do not affect her present employability and prospective earning capacity.²⁴

Barbara produced no competent evidence to show that the trial court's "denial of attorney fees leaves the wife with a financial obligation over \$280,000, in addition to the loans and other credit card debt she incurred to fund the litigation."²⁵

²³ Since Barbara does not contest this finding, it is a verity on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 808, 828 P.2d 549(1992).

²⁴ Barbara's reliance upon Ex. 533 for her contention that her lumbar and cervical spine were "significantly compromised" and limited her ability to work, is misplaced. Ex. 533 is an otherwise inadmissible hearsay letter which was not admitted for "the truth of the matter stated". It was admitted only because her vocational expert, William Skilling, had relied upon it in forming his opinions. RP 575-577, 611-612. See also, FF 2.12(b), CP 2339.

²⁵ In support of this assertion, Barbara refers to a declaration, CP 2291, she submitted in connection with her second Motion for Reconsideration Re Attorney Fees, CP 2118-2114, contrary to CR 59(j). See generally, CP 2297-2312, CP 2384-2385. Her declaration does not support her contention. Without providing any supporting documentation, she claimed only that she had charged some unidentified amount of "legal costs" on her Chase Visa credit card which "resulted in a minimum monthly payment of \$574.34." She also declared that she had borrowed \$50,000 from her 401K plan with Alaska Airlines, which "required a monthly payment of \$989.50". At trial, she testified that from this \$50,000 she had given \$27,500 to Hall, used \$7,000 to pay down a credit card, and put the rest in the bank. She testified that she understood that that was all she needed to pay for attorney fees at that time. RP 439, 500-502, 1472-1474. She is actually just repaying herself for that "loan". If she does not repay it, it is treated as a taxable distribution. 26 CFR 1.72(p)-1; RP 216. In any event, she did not present any evidence that her hourly wages, and her property award, were insufficient to meet these obligations.

5. The court did consider the husband's financial circumstances.

Once again, contrary to Barbara's contention, the court did consider Jim's financial circumstances in exercising its discretion to not award Barbara maintenance. FF 2.12(e); CP 2339-2340.

The fact that Jim's income may be significantly greater than Barbara's does not mandate a maintenance award, when each party is capable of self support. FF 2.12(a)-(b), (d), CP 2338-2339. *In re Marriage of Foley*, 84 Wn.App. at 846; *In re Marriage of Wright*, 78 Wn.App. 230, 238, 896 P.2d 735 (1995); *In re Marriage of Luckey*, 73 Wn. App. 201, 209-210, 868 P.2d 189(1994).

E. The Court Properly Exercised Its Discretion By Denying Barbara's Request For Attorney Fees.

Even though Barbara has always had the financial resources to pay her own attorney fees, RP 1465-1466, 1471-1472, Barbara and her attorney have tried to get Jim to pay all of her attorney fees and costs from the inception of these proceedings. CP 6. Barbara paid her \$10,000 retainer from the \$90,000 she took from Nothinz, LLC. Ex. 443. Shortly before trial, she borrowed \$50,000 from her 401(k), from which she paid Hall \$27,500. All other monies paid to Hall have come from Jim. RP 439-442, 500-502, 1472-1474.

An award under RCW 26.09.140 is discretionary, and neither party is entitled to attorney's fees as a matter of right. *Leslie v. Verhey*, 90 Wn.App. 796, 805, 954 P.2d 330(1998).

The party challenging the award bears the burden of proving that the court exercised its discretion in a way that was clearly untenable or manifestly unreasonable. *In re Marriage of Knight*, 75 Wn.App. 721, 729, 880 P.2d 71 (1994).

A party relying on RCW 26.09.140 “must make a showing of need and of the other's ability to pay fees in order to prevail.” *In re Marriage of Hoseth*, 115 Wn.App. 563, 63 P.3d 164 (2003). Contrary to Barbara’s contention, the court did not “refuse” to consider these factors. She did not make this required showing.²⁶

In particular, she never submitted a credible Financial Declaration---or otherwise establish a “need” for attorney fees, pursuant to RCW 26.09.140. FF 3, CP 2384.

In addition, in determining whether a requesting party has a need for fees, the trial court may consider such factors as the employment and health of that party, *Bennett v. Bennett*, 63 Wn.2d 404, 414–15, 387 P.2d 517 (1963), and the division of property

²⁶ The “lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof”. *In re Welfare of A.B.*, *supra*.

between the parties. *In re Marriage of Stenshoel*, 72 Wn.App. 800, 813–814, 866 P.2d 635 (1993). Barbara is in good health. She has a good job at a good salary. She was awarded separate and community property valued at \$945,074, and no debt.

A trial court abuses its discretion by awarding attorney fees under RCW 26.09.140 to a party who has the ability to pay. *In re Marriage of Foley*, 84 Wn. App. at 846. The court did not abuse its discretion simply because “payment of her attorney's fees may leave her in an economically disadvantaged position in comparison with her ex-husband”. *Bulicek v. Bulicek*, 59 Wn. App. 630, 640, 800 P.2d 394 (1990).

Nor is it clear that Jim has the ability to pay. While Jim was awarded his substantial separate property, half of the community property, and all the parties' debt, CP 2349-2350, the court found that Jim has to live off the income from his separate investments, and use his separate capital to meet his living expenses and his separate financial obligations. FF 2.12(e); CP 2339-2340.

Finally, Barbara failed to provide evidence of what attorney fees she actually incurred. *In re Marriage of Van Camp*, 82 Wn.App. 339, 340, 918 P.2d 509, *review denied*, 130 Wash.2nd

1019, 928 P.2d 416 (1996) (“reviewed the time sheets”); *In re Marriage of Knight*, 75 Wn.App. at 730 (“declarations and detailed billing statements”). For this reason alone, the court did not abuse its discretion by refusing to award her attorney fees. *In re Marriage of Estes*, 84 Wn.App. at 594.

F. Barbara Should Not Be Awarded Attorney Fees On Appeal.

In exercising its discretion for a request for fees and costs under RCW 26.09.140, appellate courts consider “the parties’ relative ability to pay” and “the arguable merit of the issues raised on appeal.” *In re Marriage of Muhammad*, 153 Wash.2d at 807.

In this case, there is no arguable merit to the issues Barbara has raised on appeal. She brazenly contends that the trial court failed to consider the proper statutory factors in dividing the parties’ property and liabilities, and in denying her request for maintenance, when it exercised its discretion. Yet, even a cursory review of the Findings of Fact and Conclusions of Law shows that it did.

Contrary to her contentions, she provided no evidence to support her accusations that the court believed that Barbara’s plan to leave the marriage was “marital misconduct” or based its awards

on “fault” or “marital misconduct”. The court expressly found that the parties had been married for 10 years when it exercised its discretion regarding property division and maintenance.

She challenged numerous findings without argument as to why those findings were not supported by the evidence, much less, citation to the record to support that argument. Many challenges involved unreviewable credibility determinations. Most of the cases she cited for legal authority did not support her contentions.

Given the substantial property she was awarded, her stable and well-paying employment, and her lack of a credible Financial Declaration, she never established---or could establish-- a “need” for maintenance or for attorney fees.

Since the issues Barbara has raised on appeal are without merit, her request for attorney fees should be denied. *In re Marriage of Fiorito*, 112 Wn.App. 657, 670, 50 P.3d 298 (2002).

G. Jim Should Be Awarded His Attorney Fees And Costs For Being Compelled To Respond To Barbara’s Frivolous Appeal.

On the other hand, Jim requests that he be awarded the attorney fees and costs he has been forced to incur responding to Barbara’s appeal, pursuant to RAP 18.9(a), because her appeal is

frivolous. Barbara presented “no debatable issues upon which reasonable minds might differ”. Her “appeal is so totally devoid of merit that there was no reasonable possibility of reversal.” *Mahoney v. Shinpoch*, 107 Wash.2d 679, 691-692, 732 P.2d 510 (1987).

The court’s rulings were well within its discretion.

Jim should be awarded the attorney fees and costs he has incurred in responding to her frivolous appeal. *In re Marriage of Greenlee*, 65 Wn.App. 703, 710-711, 829 P.2d 1120 (1992).

OPENING BRIEF OF CROSS-APPELLANT

Jim reincorporates his response brief herein by reference.

A. The Trial Court Erred By Not Finding That The \$142,173 Jim Used To Pay Down The Mortgage When He Refinanced The Home Barely Three Months Before The Parties Separated Remained His Separate Property.

Jim used \$142,173 of his separate money to pay down the mortgage, and his separate credit, when he refinanced the parties’ home barely three months before the parties separated. Exs. 65, 307-310, RP 754-755. Barbara was not a true borrower on the refinance. RP 753-754; Ex. 310. Her liability on the mortgage was limited to her interest in the home. Ex. 65:p. EB 701682. In *In re Estate of Borghi*, 167 Wash.2d 480, 484, 219 P.3d 32 (2009), the

Supreme Court held:

Once the separate character of property is established, a presumption arises that it remained separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property.

The court found that Jim did not intend to transmute his separate property to community property. FF 2.8(2), CP 2330.

Separate property is not rendered community property unless the separate property is commingled to the extent that it may not be distinguished or apportioned. *In re Marriage of Pearson–Maines*, 70 Wn.App. 860, 866, 855 P.2d 1210 (1993).

Thus, the court's finding that this \$142,173 became community property, CP 2349, is not supported by substantial evidence. Jim had a right to be reimbursed for his separate property down payment on the mortgage. *In re Marriage of DeHollander*, 53 Wn.App. at 700-701.

B. The Court Erred By Concluding That The Postnuptial Agreement Was Unfair.

After a rocky start to their marriage, RP 1018-1019, 1024-1025, Barbara told Jim that she might be going through an early menopause. RP 1027-1028. She was always angry. RP 1349-

1350. She told Jim that she had previously taken anti-depression medication, and thought she might need to resume taking it. She started seeing a psychiatrist, Dr. Rex Gentry, RP 1026, who began treating her for depression and anxiety arising from a serotonin imbalance. RP 376, 378-379, 1027-1028.

As a result, Jim was very concerned about whether their marriage would last. So when he decided to purchase a home in Sammamish so he could live closer to his daughters, RP 1029, he wanted to give Barbara an incentive to work on her problems, to take her medication, and to save their marriage. RP 1028-1032.

Contrary to Barbara's assertions, Jim never threatened to divorce her. RP 1245-1246.

So, even though the home was purchased solely with Jim's separate property and credit, he executed a Post-Nuptial Agreement, Ex. 213, which provided that while all of the funds he used to purchase the home would remain separate, if no dissolution proceeding was commenced within 18 months, Barbara would share equally in the home's appreciation. The Post-Nuptial Agreement thus created community property solely from Jim's separate property and credit.

Both parties thought the home was an “investment for their future”. RP 388, 1032-1033. Yet, the trial court concluded that the parties’ Postnuptial Agreement, was “unfair” and invalid, FF 2.7, CP 2325-2326, because:

although it characterizes the home as community property, Mr. Klavano is entitled to all of his contributions as separate property. Ms. Klavano was never in a financial position to pay the monthly mortgage payment so on one hand it reads as if it is intended to be community property but in the long run Mr. Klavano’s intent was to insulate his investment in the family home as his separate property. This is unfair and therefore, invalid.

The court erred in concluding that the Postnuptial Agreement was “unfair” because the very purpose of all such agreements is “to insulate [a party’s] investment ... as his separate property.”

Courts employ a two-pronged analysis for determining the validity of a prenuptial or post-nuptial agreement. Under the first prong, the court determines whether the agreement is substantively fair, specifically whether it makes reasonable provision for the spouse not seeking to enforce it. If it does, the analysis is at an end, and the court will enforce the agreement. *In re Marriage of*

Bernard, 165 Wn.2d 895, 902, 204 P.3d 907 (2009).

An agreement's substantive fairness is determined at the time of execution. *In re Marriage of Bernard*, 165 Wn.2d at 904. This is entirely a question of law unless there are factual disputes that must be resolved in order for a court to interpret the meaning of the contract, *Matter of Foran*, 67 Wn.App. at 251 n. 7, which the trial court did not have to do here.

Hence, this Court's review of whether the agreement is substantively fair is a question of law reviewed *de novo*.

The Post-Nuptial Agreement here makes a fair and reasonable provision for Barbara because it created community property for Barbara solely from Jim's separate money and credit (as was all of the other community property, FF 2.8(2), CP 2331).

As a result, the analysis is at an end, and the agreement should have been enforced, pursuant to RCW 26.09.070(3), even though the evidence about procedural fairness was disputed. *In re Marriage of Bernard, supra*.

The court should have found that the \$142,173 in separate funds Jim used to pay down the mortgage when he refinanced the home remained his separate property.

C. In The Absence Of A Valid Post-Nuptial Agreement, The Trial Court Erred By Not Finding That The Parties' Residence Was Jim's Separate Property.

In re Estate of Borghi, 167 Wash.2d at 483, held:

...the character of property as separate or community property is determined at the date of acquisition. [citation omitted]. Under the "inception of title" theory, property acquired subject to a real estate contract or mortgage is acquired when the obligation is undertaken.

Property acquired during the marriage has the same character as the funds used to purchase it. *In Re Marriage of Zahm*, 138 Wash.2d 213, 224, 978 P.2d 498 (1999). Thus, property acquired with the traceable proceeds of separate funds is separate and remains separate property. *In re Marriage of White*, 105 Wn.App. at 550. It is immaterial whether the deed is made to one or both parties. The character thus established remains fixed, unless *changed* by deed, due process of law, or the working of some form of estoppel. *In re Estate of Borghi*, 167 Wash.2d at 486-491.

When Jim purchased the family home, he used \$207,000 of his separate property for the down payment. FF 2.7, CP 2326, 2349. Barbara contributed no funds for the down payment. RP 386,

1479-1480. Nor was Barbara's credit used to purchase the home. Although she may have been listed on the Settlement Statement as a "borrower", Ex. 306, Jim was the only true borrower. RP 1410-1413, 1479-1480; Ex. 198. Barbara's liability was limited to her interest in the home. RP 1033-1036.

As the Washington Supreme Court explained in *In re Marriage of Zahm*, 138 Wash.2d at 224:

The mortgage rule examines whether both parties concerned were obligated to make payments in order to retain ownership of the disputed asset. If there was no such continuing obligation, then the character of the asset is retrospectively determined to be proportionate to the ratio of separate and/or community funds used to acquire the asset.

Barbara had no such continuing obligation. Since Barbara signed the mortgage note only as an accommodation, the home is Jim's separate property. *In re Marriage of Chumbley*, 150 Wash.2d 1, 6-7, 74 P.3d 129(2003); *In re Marriage of Zahm, supra*; *In re Estate of Finn*, 106 Wash. 137, 143-45, 179 P. 103 (1919).

Thus, if the Postnuptial Agreement is invalid, the trial court's finding that "the characterization of the Sammamish home is found to be community property..." FF 2.7, CP 2326, is not supported by

substantial evidence. The residence is Jim's separate property.

D. The Trial Court Abused Its Discretion By Failing To Award Jim The Reasonable Attorney Fees He Incurred Due To The Intransigence Of Barbara And Her Attorney.

“An important consideration apart from the relative abilities of the two spouses to pay is the extent to which one spouse's intransigence caused the spouse seeking the award to require additional legal services.” *In re Marriage of Sievers*, 78 Wn.App. 287, 311–12, 897 P.2d 388 (1995). Intransigence can form the basis for attorney fees when a party engages in obstructive behavior or delay tactics, files unnecessary motions, fails to cooperate with counsel, or participates in other activities that make trial unduly difficult or unnecessarily expensive. *In re Marriage of Greenlee*, 65 Wn.App. at 708. If intransigence is established, the financial resources of the parties are irrelevant. *In re Marriage of Greenlee*, 65 Wn.App. at 711.

The court found in pertinent part, FF 2.15, CP 2340-2341:

Both parties needlessly increased the costs of this litigation....

If by this finding, the trial court was equating how Jim's conduct “needlessly increased the costs of this litigation”, with that

of Barbara and her attorney, that finding is in error and not supported by substantial evidence. In support of this finding, the court noted:

There were multiple motions brought by Petitioner against Respondent for his failure to disclose financial documents pertaining to his companies' profit and losses during the 10-year marriage, and his failure to disclose expert opinions in a timely fashion. Both parties blamed the other for late disclosure of expert witness' opinions further delaying the proceedings and increasing the cost of litigation. There were two orders granting Petitioner's motion to compel discovery.

Barbara's first motion to compel discovery involved a dispute over the scope of her discovery requests. CP 2773-3030. The court granted her motion to compel in part and denied it in part. Ex. 46, CP 101-109. Many of her discovery requests were overbroad or improper, CP 103-109. The court concluded that "neither party is prevailing party per CR 37(c)(4)", CP 109. Jim complied with the court's directives.

Shortly before trial Barbara filed a second motion to compel based on her complaints about how supplemental documents had been produced, and that she had not yet received the opinions of

Jim's experts. CP 3600-3670.

Jim's business records were unorganized largely because Barbara had rifled through them immediately before the parties' separation when she took his privileged personal records. CP 3675-3677. Jim had already provided the opinions of his non-rebuttal experts, except for the analysis of his retirement accounts. He had not been able to produce the opinions of his rebuttal experts, because Barbara had been so untimely in providing the opinions from her own experts.²⁷ CP 3671-3673.

The court ordered that Jim organize his business records and provide the opinions of his experts by a date certain. Ex. 541. Again, Jim complied.

In contrast, Barbara and her attorney engaged in the following intransigent conduct:

1. Barbara's Theft of \$90,000.

Barbara, with the assistance of her attorney, fraudulently induced Jim to make her a signatory on his separate Nothinz, LLC Union Bank business account, on the false pretext that in the event

²⁷ Contrary to Barbara's contention, Steve Kessler was identified as an expert witness in Jim's Disclosure of Possible Primary Witnesses on March 18, 2014, who "may also opine in rebuttal to any opinions which may be asserted by any of Mrs. Klavano's financial experts."

he had a medical emergency and Barbara needed money to pay the expenses of their marital community, she would have access to that account. Then when Jim was in Hawaii, and acting on the advice of her attorney, Barbara took \$90,000 from the Nothinz Union Bank account. This constituted theft. *State v. Mora, supra*.

What makes Barbara's theft of this \$90,000 particularly troubling is that at the same time Hall was advising Barbara to steal this money, he was preparing pleadings to ask the court to award her temporary maintenance and attorney fees, RP 1461-14765; Ex. 427; CP 5-16---which the court did. CP 88. Thus, there was a legal way for Barbara to get a "safety net" and to get help to pay for her attorney fees. She did not have to steal it.

But she did, acting on the advice of her attorney.

As the trial court found, FF 4; CP 2385:

It was upon the advice of counsel that this litigation began on its troubled path and ended with over \$220,000 in attorney fees.²⁸

2. Barbara's Claim For Maintenance.

Adding insult to injury, Barbara, again with the assistance of

²⁸ Although Barbara contests this finding, she failed to present any argument why it is not supported by the evidence or cite to the record to support her argument. Hence, it is a verity on appeal, and need not be considered. *Buck Mountain Owner's Ass'n v. Prestwich, supra*.

her attorney, based her request for maintenance on a bogus claim that she could not work a full schedule because of previous back injuries, CP 15, and that Jim had emotionally and financially abused her during the marriage. CP 7-15, 59-66, 70-71, 2399-2340. Her Financial Declaration, CP 17-22, set forth inflated and non-existent expenses, CP 35-36, without the financial documents required by KCLFR 10, CP 3854-3859. See also, FF 2.12, CP 2335-2338.

The trial court found that Barbara's claims for maintenance were without merit, and ruled that the temporary maintenance she had been awarded would be treated as a pre-decree distribution. FF 2.12; CP 2335-2340.

In addition, as the court also found, FF 2.12, CP 2335-2336, when Commissioner Jeske entered her Temporary Order, Exhibit 38, awarding Barbara temporary maintenance, she also ruled:

...that if future discovery results in new evidence which could reasonably and substantially have influenced this Court's ruling on the issue of the temporary order regarding financial relief (more than a 'de minimus' amount), Counsel may move the Court to request the financial ruling here be reviewed without any further showing of a substantial change of circumstances and may seek an award of fees at any time prior to trial. [emphasis added].

Jim should be awarded the reasonable attorney fees he incurred for Barbara's and her attorney's intransigence in obtaining temporary maintenance on false pretenses, and for debunking those claims, as Commissioner Jeske ordered when she awarded Barbara temporary maintenance in the first place.

3. The Court Erred By Denying Jim's Request To Obtain Barbara's Psychiatric Records , And Imposing Sanctions Against Him When He Sought Leave To Obtain Her Daily Journals From Her Psychiatrist.

After Barbara claimed that Jim had been financially and emotionally abusive during the marriage, when she commenced these proceedings, CP 7-15, 58-71, Jim served a Notice of Intent Pursuant to RCW 70.02.060, to discover Dr. Rex Gentry's medical records, CP 2640-2641. If there was any merit to her accusations---which there was not---it is reasonable to assume that Barbara would have discussed this "abuse" with her psychiatrist.

In response, Barbara moved for a Protective Order. CP 2633-2698. Although she declared she had sought therapy from Dr. Gentry as a result of Jim's abuse, she contended that "any intrusion into her therapy will interfere with the therapeutic process." CP 2636. And, in particular, she contended, CP 2637:

But, more broadly, any request for healthcare information should be limited to just the healthcare issues that are relevant to this case: herpes and my back problems.

In her Reply Memorandum, Hall chastised Jim because “Washington is a no-fault state”... “the issues of property division and maintenance are to be determined ‘without regard to marital misconduct’”, and accordingly his request “is irrelevant to these proceedings”. CP 2707.

The Honorable Susan Amini then entered an Order Granting Motion for Protective Order, finding “that discovery should not be had from Dr. Rex Gentry for the reasons stated by petitioner in her Motion for this Protective Order...”. CP 2708.

This was error because evidence of domestic abuse is both discoverable and admissible, if as Barbara was contending, it affected her present employability and prospective earning capacity and/or the validity of the parties’ Post-nuptial agreement, Ex. 213. *Matter of Foran*, 67 Wn.App. at 258.

Jim then brought a motion for leave to obtain Barbara’s other daily journal entries, like Ex. 301, which he understood Barbara had

given to Dr. Gentry. CP 2743-2763.²⁹

In response, the court entered an Order Denying Motion--- Judgment, which not only denied Jim's motion for leave, but imposed sanctions against him of \$750 for even asking. CP 91-92.

There was no basis for these sanctions. Jim should not have been found intransigent simply for asking the court's leave. Moreover, the requested documents were probative of Barbara's claims of abuse, and discovery should have been permitted.

This was error and that judgment should be set aside.

4. Barbara Refused To Provide Discovery.

On September 3, 2013, Jim submitted a Supplemental Declaration, Ex 441, CP 2718-2724, and the Declaration of Michael Hamblin, CPA, Ex. 444, CP 2418-2427, 418-2327, the parties' accountant, detailing his assets and sources of income.

On December 17, 2013, Jim served Requests for Admission and his Second Set of Interrogatories and Requests for Production to determine whether Barbara agreed with his characterization of

²⁹ Barbara had failed and/or refused to produce any daily journal entries in response to Jim's Requests for Production, claiming they had been lost when her computer crashed, and that she did not have any daily journal entries after 2004 or 2005. CP 2761-2762, RP 260, 584. Yet, she provided additional daily journal records subsequent to those dates to Vicki Boyd, Ph.D. RP 602, 635.

their property as separate or community, and to obtain proof of the expenses she had claimed in her Financial Declaration.

In her Answers and Objections to the Requests for Admission, Barbara refused to admit or deny Jim's Requests for Admission concerning the property characterizations on the ground that she did not have enough information to admit or deny those Requests because Jim had not been forthcoming with discovery, or based on her "belief" that what he had identified as his separate property was community property. CP 3399-3415.

In the Second Set of Interrogatories and Requests for Production and Petitioner's January 15, 2014 Answer, Responses and Objections, Barbara produced only a handful of receipts and credit card statements which did not support the expenses she had claimed in her Financial Declaration. CP 3418-3499.

Jim then moved for Summary Judgment that what he had identified as their separate and community property in his Requests for Admission were, in fact, their separate and community property. CP 3146-3210. In response, Barbara argued again that she could not admit or deny the property characterizations which Jim claimed because he had not been forthcoming in discovery. CP 3234-3249.

Hall acknowledged that he had received all of the requested discovery, but that he and his expert needed more time to review the discovery received. CP 3251; 4769; But see, CP 3303-3309.

The court granted and denied the Respondent's Motion for Summary Judgment in part without prejudice, but ordered, CP160:

That petitioner shall in good faith supplement the respondent's Requests for Admission and related Interrogatories by July 18, 2014.

Yet, when Barbara supplemented her responses, she only provided a few more receipts. She did not supplement the related Interrogatories, as ordered by the court. Instead, Barbara and her attorney interposed new objections. CP 3514-3547.

Neither Barbara nor her attorney ever indicated precisely what discovery actually existed and was available that has not been produced which they needed to have before they could admit or deny the Respondent's Requests for Admission. CP 3385.

Jim then brought a Motion for a Temporary Order to Reduce Maintenance. CP 112-120, 121-129, 138-144. That Motion was denied. The issue of maintenance was reserved for trial. Ex. 55.

He then brought a Motion to Deem Requests for Admission

Admitted pursuant to CR 37(b)(2)(A) and For an Award of Terms. CP 3382-3547. That motion was also denied. CP 3581-3582.

This ruling was error, pursuant to CR 36(a). The purpose of CR 36 is to eliminate from a case factual matters that are not actually disputed. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wash.2d 447, 472, 105 P.3d 378 (2005); *Coleman v. Altman*, 7 Wn.App. 80, 86, 497 P.2d 1338 (1972).

Barbara's refusal to answer straight forward Requests for Admissions and Interrogatories and to provide documents requested in Jim's Requests for Production concerning her claims for maintenance, and the characterization of the parties' property and liabilities, warrants an award of the reasonable attorney fees and costs, pursuant to CR 36(a), CR 37(a)(4), and CR 37(b)(2).

In addition, her failure to do so needlessly increased the costs of this litigation and constitutes intransigence.

At trial, Hall produced the same documents showing Barbara's monthly expenses that had been provided in discovery. RP 580-582, 762. The court found that those documents provided "Little or no evidence ... to support the inflated monthly expenses she claimed in the Financial Declaration she presented at trial." FF

2.12(3), CP 2337-2338.³⁰ See also, FF 3, CP 2384.

At trial, Barbara did not dispute the separate or community character of Jim's property from what Jim and Mike Hamblin had represented shortly after this case began.

5. Barbara's Theft of Jim's Privileged Records.

When the parties separated, Barbara took a red file containing Jim's personal papers from his earlier dissolution proceedings, much of which was protected by both the attorney-client privilege and the attorney work product doctrine. RP 210-211.

Hall sent Jim's attorney a letter on March 7, 2014 notifying him that he intended to review that file on March 17, 2014. CP 3222. Jim's attorney notified Hall that same day that the folder contained documents protected from discovery by the attorney-client privilege and requesting its immediate return. CP3244.

Hall claimed Jim's attorney-client privilege had been waived, but proposed that Jim prepare a privilege log before submitting a motion to Judge Inveen to determine "the degree to which [Hall] may have access to the contents of the red folder." CP 3226-3228.

³⁰ Although Barbara contests this finding, she failed to present any argument why it is not supported by the evidence or cite to the record to support her argument. Hence, it is a verity on appeal, and need not be considered. *Buck Mountain Owner's Ass'n v. Prestwich*, *supra*.

Jim's attorney provided Hall with that privilege log, and again requested the immediate return of the privileged documents. CP 3220-3223. Once again, Hall refused to return those documents.

Hall's refusal was unethical. As the Court held in *Richards v. Jain*, 168 F.Supp.2d 1195, 1200-1201 (2001):

An attorney who receives privileged documents has an ethical duty upon notice of the privileged nature of the documents to cease review of the documents, notify the privilege holder, and return the documents. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-382 (1994).

See also, RPC 4.4. As a consequence, Jim was required to file a motion to obtain the return of these privileged documents. CP 3211- 3233, 3303-3341, 3342-3346, 3359-3361. Hall's refusal to return Jim's privileged documents constituted intransigence.³¹

6. Barbara And Hall "Sandbagged" Jim With Her Untimely Disclosure of Frivolous Expert Opinions.

a. **Vicki Boyd, Ph.D.**

Barbara's disclosure of Vicki Boyd, Ph.D, as a possible witness who "may testify concerning petitioner's subjection to

³¹ The WSBA did not even address this grievance. It should. This Court should indicate that it agrees with the Court's holding in *Richards v. Jain, supra*.

domestic abuse by respondent and other related domestic abuse issues,” CP 4780, was completely contrary to what she had represented to Judge Amini when she obtained a Protective Order prohibiting Jim from obtaining Dr. Gentry’s medical records.

No “summary of the expert’s opinions and the basis therefore and a brief description of the expert’s qualifications” was provided, as required by KCLR 26(k)(3)(B).

Hall did not provide Dr. Boyd’s “Psychological Evaluation of Mrs. Klavano” to Jim’s attorney until October 6, 2014, CP 4767, just a week before the discovery cut off of October 13, 2014. CP 4765. Dr. Boyd’s report was untimely. KCLR 37(g). She was not available to have her deposition taken until October 30, 2014. CP 4767.

Even though there was no allegation that Barbara had ever been in life-threatening situation, or that Jim had ever struck Barbara or had even threatened to do so, RP 625-628, Dr. Boyd opined that she suffered from PTSD and Battered Woman’s Syndrome at the conclusion of her first 30 minute interview with Barbara on January 20, 2014, because “to do insurance billing, we have to have a working diagnosis and that was my first working

diagnosis.” RP 623-624.³²

She never spoke with Dr. Gentry, nor obtained any of Barbara’s psychiatric records to form her opinions. RP 622-623, Barbara admitted at trial that Dr. Gentry had never diagnosed her with PTSD---much less, Battered Woman’s Syndrome. RP 374.

Significantly, Dr. Boyd testified that none of the domestic abuse alleged by Barbara affected her present employability and prospective earning capacity. FF 2.12(1), CP 2336.

b. Ben Hawes

When Barbara disclosed Ben Hawes as a possible primary witness she did not provide a summary of his opinions or the basis therefore, as required by KCLR 26(k)(3)(B), claiming that she lacked the resources to pay him and because Jim had refused to provide discovery. CP 4779. But, Barbara’s contention that she lacked the resources to pay Mr. Hawes was patently untrue. In addition to the money which Jim had provided to Barbara for temporary attorney fees, Barbara had other assets available to her to pay her legal and experts’ expenses. RP 1465-2466, 1471-1472.

³² Dr. Boyd also testified that she did not know Barbara had commenced divorce proceedings when she met with her, RP 639, even though Barbara had been referred to her by Hall, RP 602. Her testimony was not credible.

Hall did not provide a copy of Mr. Hawes' report to Jim's attorney until October 2, 2014, 11 days before the discovery cutoff. CP 4769. On October 14, 2014---the day after the discovery cut-off-- Hall sent Jim's attorney another report from Mr. Hawes, purporting to opine about Jim's retirement accounts. CP 4769-4770; RP 868. Both reports were untimely. KCLR 37(g).

Mr. Hawes did not disagree with anything in the declarations submitted by Mike Hamblin, CP 2418-2427, or Jim Klavano, CP 2718-2724, shortly after the parties separated. RP 870-873, 985.

Instead, he opined, RP 842, 848-854, 926, 951, and Hall argued, 1/21/15 RP 130-131, for the first time at trial, that since the marital community had been undercompensated by Jim's salary from Australia Unlimited during the parties' marriage by some undetermined amount, and his undercompensation had been commingled with his separate property, that all of Jim's separate property had thereby somehow been transformed into community property.³³ No such opinion had ever been disclosed before trial.

There is no legal authority to support it.

³³ Mr. Hawes testified that he had no idea of what a reasonable salary would have been for Jim when that salary was being paid by Australia Unlimited. 1/21/15 RP 56.

Not surprisingly, the trial court rejected it.

Once again, Barbara's and Hall's untimely disclosure of Hawes' frivolous opinion and Hall's legally unsupportable argument greatly increased the costs of this litigation.

c. William Skilling

Barbara did not identify William B. Skilling until the Petitioner's Disclosure of Possible Additional Witnesses, CP 4783, even though no reason was proffered why his "knowledge did not appear relevant until the primary witnesses were disclosed", as required by KCLR 26(k)(2), much less, so late after they were disclosed. Mr. Skilling was not even contacted to render an opinion until September 4, 2014. RP 527, CP 4793-4794.

The Disclosure did not contain a summary of his opinions and the basis therefore, as required by KCLR 26(k)(3)(B). The Disclosure stated only:

Mr. Skilling may testify about petitioner's standard of living, her vocational and economic future and the issues listed in his accompanying CV.

He did not provide his Vocational Report, Ex. 25, until October 8, 2014, five days before the discovery cut off. CP 4770.

Three days after the discovery cut off, he provided a second report on October 16, 2014, opining about what a fair salary should have been for Jim while he was employed by Australia Unlimited during the parties' marriage. CP 4770; 4796. Hall did not even ask Mr. Skilling to render such an opinion until October 11 or 12, 2014, CP 4796. It was also not within the scope of his Disclosure.

Both reports were untimely, see KCLR 37(g).

Mr. Skilling testified that he based his opinion about what a fair or reasonable salary should have been paid to Jim during the marriage by concluding, after speaking with Mr. Hawes, that Jim's job responsibilities were most like those of a CEO. Mr. Skilling then plugged "Seattle CEO" into a website entitled "salary.com" to find out what a typical CEO living in Seattle might earn today. He did not consider "the earnings of the corporation during the time such a salary was paid", or any other information about Australia Unlimited. Ex 26, RP 523-526, CP 4796-4821.

Accordingly, his opinion was completely irrelevant to whether the salary Jim was paid fairly compensated the marital community for his efforts. *Hamlin v. Merlino, supra*.

In addition, leaving aside for the moment the faulty premises

upon which his vocational rehabilitation plan was based, FF 2.12(3)(b), CP 2339, his plan defied common sense. According to Mr. Skilling, Jim was supposed to pay Barbara \$167,563 over five years so she could take additional gemology courses in California. According to Mr. Skilling, when Barbara completed his plan, and she was 59 years old, she could begin work as a retail clerk in a jewelry store for \$9.83 per hour, RP 443-445, 564-565---a job Mr. Skilling conceded Barbara could do now without any additional training, RP 566---even though she was currently earning over \$46 per hour.³⁴ RP 562. According to Mr. Skilling's report, Ex. 25:

In the best case scenario, Ms. Templin could potentially earn in the range of approximately \$35,000 to \$50,000 per year as a Jewelry Designer in 2024, five years after completing her vocational rehabilitation plan, at which time she will be 65 years old.

RP 445, 565. Not surprisingly, the trial court rejected that proposed plan, as well as Mr. Skilling's other opinions.

But believing itself bound by *Jones v. Seattle*, 179 Wash.2d 322, 345, 314 P.3d 380 (2014), and *Burnet v. Spokane*

³⁴ Mr. Skilling did not know what Barbara was earning when he prepared his report. RP 561-562. By the time the court entered its Findings and Conclusions, her wages had increased to \$55.50 per hour as provided in her new contract, Ex. 573; RP 1278-1282; FF 2.12(a), CP 2338.

Ambulance, 131 Wash.2d 484, 933 P.2d 1036 (1997), the trial judge did not exclude any of these so-called “experts”. RP 13-14. Nonetheless, their untimely disclosure and frivolous opinions substantially and needlessly increased the costs of this litigation.

For these reasons, if the intent of the trial court’s finding that “both parties needlessly increased the costs of this litigation” FF 2.15, CP 2340-2341, was to equate Jim’s conduct with that of Barbara and her attorney, that finding was error and is not supported by substantial evidence.

Jim is entitled to an award of his reasonable attorney fees against Barbara, and her attorney, for their intransigence throughout this proceeding. Since their intransigence “permeates the entire proceeding, the court does not need to segregate which fees were incurred as a result of intransigence and which were not.” *In re Marriage of Burrill*, 113 Wn.App. 863, 873, 56 P.3d 993 (2002), *review denied*, 149 Wash.2nd 1007(2003).

CONCLUSION

For each of the foregoing reasons, this Court should affirm the rulings of the court below, with the following exceptions:

It should hold that the \$142,173 in separate property money

Jim used to pay down the parties' mortgage when he refinanced the parties' home barely three months before the parties' separated remained his separate property, and reimburse him for that sum.

It should conclude that the parties' Post-Nuptial Agreement was substantively fair and should be enforced because it created community property for Barbara solely from Jim's separate property and credit.

In the alternative, if it concludes that the parties' Post-Nuptial Agreement was unfair, it should find and conclude that the family residence is Jim's separate property.

It should also rule that the court erred in entering a protective order prohibiting Jim from obtaining Barbara's psychiatric records after she claimed that she could not work full-time because of the domestic abuse she had suffered during the parties' marriage, and had been coerced into entering the Postnuptial Agreement.

It should also rule that the court erred by imposing sanctions against Jim for merely asking the court for leave to obtain Barbara's daily journals, and that Jim's request should have been granted. It should vacate the judgment imposing sanctions against him.

It should also conclude that the court erred in failing to grant

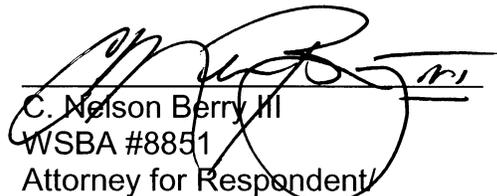
Jim's Motion to Deem Requests for Admission Admitted.

It should find that whatever Jim may have done to needlessly increase the costs of this litigation does not equate to what Barbara and her attorney did, and remand this proceeding to the court below to award Jim the reasonable attorney fees and costs he was required to incur as a result of their intransigence, the applicable Civil Rules, and the Court's Temporary Order, Ex. 38.

In particular, this Court should find that Hall's advice to Barbara to take \$90,000 from the Nothinz bank account and his refusal to return Jim's privileged personal papers were unethical.

It should also find that the issues Barbara has raised on appeal lack arguable merit and deny her request for attorney fees and costs on appeal. Finally, it should find that her appeal is frivolous and award Jim the reasonable attorney fees and costs he has thus been compelled to respond to her appeal.

Respectfully submitted this 14th day of January, 2016.


C. Nelson Berry III
WSBA #8851
Attorney for Respondent/
Cross-Appellant James Klavano

DECLARATION OF SERVICE

I certify that on the 14th day of January, 2016, I caused a copy of the foregoing Brief of Respondent and Opening Brief of Cross-Appellant, to be hand-delivered by ABC Legal Messenger Service to the attorneys for the Appellant/Cross-Respondent, at the following address:

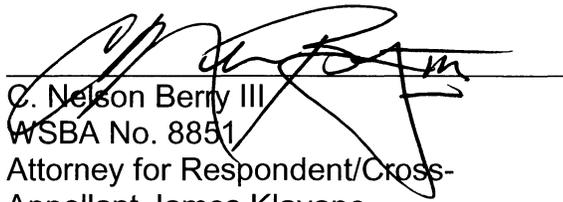
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I declare under penalty of perjury and under the laws of the State of Washington that the foregoing is true and correct.

SIGNED THIS 14th day of January, 2016 at Seattle, Washington.


C. Nelson Berry III
WSBA No. 8851
Attorney for Respondent/Cross-Appellant James Klavano