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Court of Appeals
Division I
State of Washington

No. 74427-5-I

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

In re the Marriage of

GINGER GALANDO
Respondent

and

EDWARD AHRENS
MATTHEW GALANDO
Appellants

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves two appeals, one by the father/husband, Matthew Galando and one by the independent trustee of a “Descendants Trust” (“Trust”), who intervened in the dissolution proceeding. Their briefs will be referred to as “Br. Galando” and “Br. Intervenor.”

The trial court entered final orders dissolving the long-term marriage of Ginger and Matthew last November and providing for their two children. The parties will be referred to by their first names. Matt has substance abuse problems, which have substantially harmed his family members, as well as himself. In the parenting plan, the court imposed limitations under RCW 26.09.191, including treatment requirements upon which Matt’s residential time depends. In its child support order, at Matt’s request, the court entered a slight upward deviation and obligated Matt for payment of all extraordinary expenses. The court also awarded maintenance and distributed 100% of the community property to Ginger, in consideration of the family wealth available to Matt. For example, a Descendant’s Trust exists for the benefit “Matt” and his heirs, of which Matt is a trustee. He is also the beneficiary of various other family trusts. The court considered, but did not distribute to Ginger any of the Galando family trusts. The trial court acted well within its authority under Washington law and should be affirmed in all respects.

II. RESTATEMENT OF THE ISSUES

Galando 1. The trial court did not err by ordering an upward deviation from the standard calculation that was proposed by the father and supported by adequate findings.

Galando 2. The trial court properly imputed income to the father based on evidence of a reliable past rate of pay.

Galando 3. The trial court did not abuse its discretion by ordering the father to pay all expenses not included in the child support transfer payment instead of paying his proportionate share when the court also deviated from the standard calculation for the basic child support obligation.

Galando 4. The trial court's order that the father pay the cost of mother's schooling was within the court's discretion.

Galando 5. The father fails to show any error in the characterization of personal property as community property and failed to show that a characterization error, if any, affected the distribution.

Galando 6. The court's valuation of Amps NW & the father's separate property were within the scope of the evidence.

Galando 7. The father fails to show any error in the court's characterization of the parties' relationship as long term, which was supported by the record.

Galando 8. The parenting plan's requirement that both parents undergo a psychological evaluation is supported by the record and within the court's authority to serve the children's best interests.

Galando 9. Substantial evidence supports the trial court's imposition of restrictions on the father's residential time based on findings of a pattern of emotional abuse of a child, history of domestic violence, abusive use of conflict, and long-term impairment from substance abuse

Galando 10. The parenting plan's conditions on residential time relating to substance abuse and alcohol use are supported by substantial evidence.

Intervenor 11. The trial court properly ordered the wife's share of community property (i.e., the "marital lien") to be paid from proceeds of the sale of the Redmond residence because there was no other reliable means by which the court could implement the equitable distribution.

Intervenor 12. Spousal maintenance was ordered on the basis of the father's ability to pay, which includes his well-established ability to tap into the trust whenever he wants to do so but also includes his history of gainful employment and investing.

Intervenor 13. The court did not specify from what source Matt must pay a portion of Ginger's attorney fees, which were excessive due in no small part because of his intransigence, as well as having to litigate

against both the father and the Intervenor. Moreover, contrary to the Intervenor's contention, depleting the mother's assets by making her pay these excessive fees does, in fact, affect the children's welfare.

Intervenor 14. The trial court, in accord with the law and with Matt's agreement, ordered a slight upward deviation in child support, which the statute permits where one parent possesses great wealth.

Intervenor 15. Substantial evidence supports the court's findings that Matt possesses or has access to considerable wealth, a fact the court was required by Washington law to consider in its analysis of the property distribution, maintenance award, and child support.

16. Should Ginger receive her fees and costs on appeal?

III. RESTATEMENT OF THE CASE¹

A. THE GALANDO RELATIONSHIP AND CHILDREN

In 1996, Ginger Galando met her husband, Matthew Galando, when she was 21 years old. 1RP 405. Ginger was living at home and working at a gym at the time, earning minimum wage. 1RP 405. She had not attended college, having enlisted in the Army Reserves after high school. 1RP 403. Matt was working for his parents at Sea Coast Foods, a large Washington corporation. 1RP 405. Within a few months after they

¹ 1RP refers to the verbatim report of proceedings (VRP) for 7/15 through 7/22; 2RP refers to the VRP for 7/23/15; 3RP refers to the VRP for 8/24/15 through 8/26/15, and 4RP refers to the VRP for 11/2/15. CPG refers to the clerk's papers designated by Matthew Galando; CPI refers to the clerk's papers designated by the Intervenor Trust.

met, Ginger moved in with Matt into a house he owned in Burien, and he got Ginger a job at Sea Coast Foods. 1RP 406, 411.

Less than two years later, the couple moved to California. Matt's family wanted him there because the family's business was growing in California. 1RP 411. Ginger and Matt moved into a house Matt bought; Ginger paid the household bills from her earnings and he paid the mortgage. 1RP 411, 213-14. According to Ginger, they had a nice lifestyle compared with what she was used to, having grown up living in a trailer and never owning a home. 1RP 412-13. Matt owned a nice car and motorcycles and they vacationed at his parents' summer home in Hood Canal. 1RP 141.

In 1999, they moved back to Washington after his parents sold the business to another company, Aurora Foods. 1RP 423-24. Matt and Ginger got engaged before the move, and got married in Washington in 2000. 1RP 422. They lived in Matt's parents' Hood Canal home while they were waiting for their new house to be built in Redmond. 1RP 424.

The Redmond property was purchased and built for \$1.8 million, 2RP 85, and at the time of trial, it was valued at over \$2 million. 1RP 93-94, 144. Title to the property was held by a trust set up by Matt's parents for the benefit of him and his heirs, referred to as the "JAG Descendants Trust" (hereafter "Trust"). 1RP 427. Similar trusts were established for

Matt's two brothers. Ginger was unaware at the time that the Trust owned the house; Matt later told her it was purchased by the Trust for tax reasons. 1RP 427-28.

After Aurora Foods bought the Galando family business, Ginger no longer had a job; the new company decided only to keep Matt and his brothers on. 1RP 423-44. Ginger worked full time at Costco as a clerk for a little under two years, then went back to school in 2002 at the Art Institute to study fashion design. 1RP 433. After earning her degree, she able only to find jobs in retail, working in arts and crafts stores. 1RP 433.

Matt did not continue working for Aurora Foods because he was angry that another company took over what his family had built. 1RP 434. Instead he started his own business called Home Theatre Concepts in 2001, installing home theatres for friends and family. 1RP 434. The business was mostly a hobby for Matt and did not generate much income, 1RP 442-43; the couple lived largely off of Matt's trust income.

In October 2005, Matt had an accident while out jumping his motorcycle with friends. 1RP 444-46. The accident resulted in serious injuries to Matt's ankles for which he underwent several surgeries and was prescribed painkillers. 1RP 444-46. The following June, Ginger was pregnant with their first child, G.G. 1RP 454. After he was born, Ginger took on all the parenting responsibilities. 1RP 545, Ex. 301 at 13.

Over the next several years, Matt became addicted to painkillers. 1RP 448-49, 217. Ginger was unaware at first; she filled his prescriptions, but he kept asking for more. 1RP 448. She then began noticing changes in his behavior, such as staying up all night, sleeping all day, and not engaging with her or the family. 1RP 436. Matt also continued to drink while taking his pain medication and began withdrawing from the family and household responsibilities. 1RP 449. During this time, they had their second child, M.G. 1RP 461 (born in 2008).

Matt was unable to keep a job or provide a steady income during this time. 1RP 450. He attempted to start a few businesses, but they were mostly unsuccessful or abandoned, and he was briefly employed as a mortgage broker. 1RP 219, 450-51 (started landscaping business in 2006); 2RP 16 (mortgage broker from 2008-2009; “let go” during the housing market crash); 1RP 452-53; 2RP 163 (started Amps NW in 2010, selling equipment for electric guitars). Instead he and the family continued to live mostly off of his trust income. See 1RP 50 (Matt admits taking out more money from the trust when he wasn’t working).

Ginger’s worst fears were finally confirmed when she discovered that Matt was having prescriptions for painkillers filled in her name without her knowledge. 1RP 438. When she confronted him, he reacted angrily, telling her to “keep her mouth shut” or she would lose the kids.

1RP 439. She turned to his family for help, but received no support. One of his brothers said she should just let him “hit rock bottom,” and not tell their parents. 1RP 435. When she told his parents, they denied his addiction, blaming instead his use of another medication (Lyrica, an anticonvulsant), which had nothing to do with the addiction. 1RP 437.

By 2013, the addiction worsened and Matt began to exhibit bizarre behavior and have hallucinations. He would wake Ginger in the night telling her there were stealth helicopters in the backyard and Ninjas scaling the side of the house. 1RP 463. It got so bad that in the summer of 2013, he insisted on keeping a loaded gun in the kitchen cabinet and had a video surveillance system installed. 1RP 464. He would spend hours up all night reviewing the surveillance tapes. 1RP 464. He withdrew from the family, leaving Ginger to handle all the parenting and household responsibilities on her own. 1RP 440-41; Ex. 301 at 13-14.

Ginger was afraid to confront him again, but lived in constant fear for her safety and that of her young children, living with a paranoid drug addict who kept loaded guns accessible in the house. 1RP 461-62. Finally, a friend of Matt’s, Sean Duncan, intervened and asked Ginger what was going on. Matt had apparently confided in Duncan about their marital problems but he had no idea about the drug abuse until Ginger told him. Duncan then helped Ginger get Matt into rehabilitation, and referred

them to a marriage counselor, Dr. Shushan. Ginger was finally able to stand up to Matt and gave him an ultimatum: that he had to go into rehab or she was going to leave him. Matt became angry and initially denied he had a problem, but through counseling, eventually admitted to his addiction and agreed to go to rehab. 1RP 478-79. After that decision was made, he told Ginger he was going to have a “massive blowout” before going away to rehab. She took the kids away for the weekend because she did not want them to be around him. 1RP 479-480.

In February 2014, Matt checked into a rehab facility in Malibu, California and returned home after two months. 1RP 481-82. He did not produce any independent proof that he successfully completed treatment. 1RP 481-82. When he returned home, he withdrew from the family and did not work. 1RP 482-84. He would disappear for hours and Ginger did not know what he was doing. When she suggested he get a job, he got very angry and “bit [her] head off.” Ex. 301 at 14.

Matt would not share with Ginger any details about his aftercare program, telling her it was “none of her business.” 1RP 483-484. In fact, his after care program consisted of seeing a nurse practitioner once a month who prescribed medication to help stay off pain medication and

provided cognitive behavior therapy. Ex. 301 at 26.² Matt also participated in “Smart Recovery,” a self-directed support group that involved attending monthly meetings or participating online. 2RP 13-16.

Ginger related her concerns to Dr. Shushan, but Matt refused to continue counseling sessions with Shushan and chose a different counselor, Marlon Familton. 1RP 484.³ Matt was not honest with Familton about his drug use, blamed Ginger for everything, and told her she just needed to “get over” his drug use. 1RP 484-85. Ginger did not feel the sessions with Familton were productive and was reluctant to participate further. 1RP 484-85; 3RP 334. She continued to sleep in a separate room from Matt, as he was up all hours of the night, playing guitar, watching TV, etc., and she needed her sleep to be able to get up with the kids in the morning. 1RP 486.

In June 2014, Matt asked for a divorce. 1RP 486. They initially tried collaborative divorce counseling with Dr. Shushan, who was also a collaborative divorce coach. 1RP 487-88. After attending only two sessions with Shushan to learn about the process, Matt decided not to continue and unilaterally hired a different mediator. 1RP 488-89. Ginger felt pressured to go along with him and in July 2014 they met with the

² The GAL report notes that he only saw her monthly, but her testimony indicated that she saw him weekly. 1RP 364.

³ The VRP mistakenly refers to him as Dr. Hamilton. See 3RP at 133.

mediator. 1RP 489. The mediator referred them to a child specialist in collaborative divorces, with whom they met once in July 2014. Ex. 301 at 23. They had also scheduled a home visit with the child specialist, but it was canceled at the last minute because Matt was out getting a tattoo and unable to make it. Ex. 301 at 23; 1RP 347-48.

Ginger also met with the mediator separately and told her she wanted to have a lawyer with her going forward. 1RP 489. When she told Matt she needed time to find a lawyer, he accused her of not working with him in good faith. He then shut down their joint bank accounts without any notice to her. 1RP 490.

Ginger obtained counsel and in August 2014, filed a petition for dissolution. 1RP 486; CPG 1-5. Matt told Ginger to take the kids “and get the hell out,” and put a lock on his bedroom door and the children’s playroom. Ex. 301 at 14. Ginger began packing but had no place to go and no income of her own. Ex. 301 at 14. On her lawyer’s advice, she remained at the home until the court issued temporary orders. 1RP 493.

On the day of the court hearing for temporary orders, Matt realized he had left papers in his room but could not get in because he had locked himself out. He grabbed a large ladder and asked his 8-year-old son to hold it for him while he climbed to the second story window. While he was attempting to get in, the ladder fell and he was left hanging from the

roof. Ginger heard the children screaming and came outside, grabbed the ladder and tried to put it up. She was trying to latch the ladder in place, but he kept swinging his legs, trying to wrap his legs around it. She yelled at him to stop because she could not get the ladder latched; while she struggled with the ladder, he fell to the ground. She immediately called 911; Matt was taken to the hospital and treated for a concussion. 1RP 502-504, 228-29; Ex. 301 at 15. Matt later retrieved a video of the incident from his home surveillance camera, posted it on Facebook and showed it to the children, telling them the fall was their mother's fault. 1RP 231, Ex. 301 at 15. After seeing the video, M.G. came to Ginger in tears telling Ginger it was not her fault. Ex. 301 at 15.

In September 2014, the court issued temporary orders for child support and maintenance, ordered Matt move out and Ginger and the children remain in the family residence, appointed a GAL, and barred the parties from withdrawing funds from the parties' accounts without consent of the other party. Ex. 545, Ex.526, Ex. 540; CPG 1-4. (Matt had previously withdrawn over \$52,000 from their life insurance policy without Ginger's knowledge. 1RP 62; 2RP 101-07). The court gave Matt 12 days to move out, but he did not do so by the deadline and asked Ginger for more time. When she refused, he told her "this is my house and I can fucking come and go as I please." Ex. 301 at 16; 1RP 623.

Ginger then called the police who advised changing the locks and getting a restraining order. The next day she found Matt at her house with a locksmith. Ginger called the police and obtained a restraining order that day. Ex. 301 at 16; 1RP 624-25. Matt moved into a rental home paying \$4300 in monthly rent. 2RP 148.

The GAL filed a report in February 2015. Ex. 301. The GAL recommended that Ginger remain the primary residential parent, Ex. 301 at 50, noted that the marital conflict is detrimental to the children and expressed concerns about Matt's behaviors that "appear to be designed to manipulate the children or the situation and he often appears insensitive or oblivious to the damage he is doing to the children." Ex. 301 at 42. The GAL further noted that Matt had introduced his new girlfriend to the children despite the counselor's recommendation he wait a year to do so (in fact, he introduced her to them at their very first visit with him post-separation); at that time, the children "were clearly struggling with all the changes they were experiencing," yet Matt also told them girlfriend would be moving into the family home with him and they would be changing schools (despite lacking Ginger's agreement to or resolution of the school choice issue). Ex. 301 at 17, 20, 39, 41. The GAL further noted that the family friend, Sean Duncan, interviewed as part of the GAL's

investigation, reported that Matt called him and threatened to “get him” after he spoke with the GAL Ex. 301 at 36.

In March 2015, a new independent trustee of the Trust was appointed, and, on his motion, was permitted to intervene in the dissolution proceeding. 1RP 136-138. (See, also, CPI 16-23.) The trustee sought to remove Ginger from the family home because it was a Trust asset and she was not a Trust beneficiary; he also said the house would need to be sold to protect the interests of the Trust. CPI 19, 27. The trustee also sought to prohibit Ginger from collecting spousal maintenance from Trust assets. CPI 16-23. In May 2015, the court granted the motion in part, revoking the temporary order granting Ginger exclusive occupancy of the family home; Ginger then agreed to voluntarily move out. CPG 15-17; 1RP 141. The court denied the request to change the temporary maintenance order to prohibit collection from the Trust assets. CPG 17.

Matt moved back into the family home, but refused to comply with the temporary maintenance order, forcing Ginger to move for contempt. 1RP 534, Ex. 42 at 2. Matt was held in contempt of court and ordered to pay Ginger’s attorney fees. Ex. 42.

The parties proceeded to trial in July 2015. On November 18, 2015, the court entered the final dissolution decree. CPG 111-118. The court awarded all of Matt’s separate property to him, including \$8 million

held in his Trust, other trusts, family businesses, and real property. CPG 84. The court characterized as community property various items acquired during the marriage (e.g., personal property, an IRA, a business), totaling \$1,059,445. CPG 85. The court awarded the total value (100%) to Ginger, though allowing Matt to keep much of the personal property (guns, vehicles) and his business (Amps NW), resulting in a marital lien of \$756,295 owed to Ginger. CPG 85. The court also ordered that Matt pay Ginger maintenance and pay for her schooling so she could obtain a four-year degree. CPG 113-14.

As proposed by Matt, the order of child support set the transfer payment at \$1800/month, a deviation upward from the standard calculation of \$1635. CPG 60. The court also ordered him to pay 100% of private school tuition and other expenses not included in the transfer payment. CPG 63-64. The final parenting plan imposed restrictions on Matt's residential time under RCW 26.09.191 and provided for a phase-in of more time depending on his compliance with several conditions, some of which related to his alcohol use. CPG 90-92. Matt appealed the court's orders.

While this appeal was pending, Matt was twice found in contempt for failing to pay child support and maintenance, and failing to comply with the treatment and residential conditions of the parenting plan. Supp.

CPG ____ (sub 312, 367). Matt was also ordered to pay interim fees to Ginger in the amount of \$25,000. Supp. CPG ____ (sub 376).

B. THE DESCENDANT'S TRUST AND FAMILY WEALTH.

Matt's family has considerable wealth. His parents, Joseph and Barbara, created a number of trusts, from which Matt benefits (as do his two brothers). See 1RP 67-70, 122-24, 128. The JAG Descendants Trust f/b/o/ Matthew Galando (hereafter, "Trust") has a complex history, largely irrelevant here. 1RP 66-68. In short, multiple family trusts were consolidated, so each son has a separate trust for his benefit and the benefit of his children and grandchildren. 1RP 78; Exhibit 501. There are additional trusts in the family, as well (e.g., JAG Gift Trust, SDM, etc.).

The Trust is available to the beneficiaries for support, maintenance, education, and health costs, what the Intervenor calls the "ascertainable standard." 1RP 82. Matt is a trustee, and there is an independent trustee. 1RP 85. For years, the independent trustee was Don Scott, who played little to no actual oversight role. 1RP 165. Rather, Matt drew upon the Trust whenever and for whatever he wished. See 1RP 166-67 (independent trustee has no authority to limit him); 1RP 174-77 ("Mr. Galando himself" is in control of decision making regarding distributions under the ascertainable standard); 2RP 121 (Trust assets used to fund Amps NW business); 2RP 84 (used Trust assets to build family home);

2RP 139-42 (invested Trust funds, then spent \$118,000 return in Trust on “stuff,” including buying illegal drugs).

Both Matt and Ginger worked at times during their relationship, including Matt starting several businesses. 2RP 160 (Home Theatre Concepts); 2RP 162 (mortgage broker); 2RP 163 (landscape business); 2RP 163, 453 (Amps NW). Mostly, they lived off the trusts, and they lived well. They acquired a great deal of expensive personal property, e.g., vehicles, guns, entertainment equipment. 1RP 606-10, 628. Their children attended private school. 1RP 468-69. In 2001, they had a \$1.8 million house built to order for them in Redmond. 2RP 84-85. At closing, Matt, paid the entire cost in cash. 2RP 84-85. He did not consult with the independent trustee regarding the purchase. 2RP 85. Ginger did not know the Trust held title to the property; she thought they were buying the house themselves when they signed the paperwork. 1RP 427. Later, Matt told her the Trust purchased the house for tax advantages. 1RP 427-428.

As discussed more fully above, Matt developed chemical addictions and his spending became profligate. See § III.A. Worse, his relationship to his wife and children suffered. *Id.* Finally, Ginger petitioned for dissolution. CPI 1-5.

As the independent trustee admitted, there were “concerns” with Matt’s handling of distributions from the Trust. 1RP 136. But it was only

after the court entered temporary orders for family support and placed restrictions on uses to which the parties could put their property, that the Galando family acted. See, e.g., 1RP 134 (Joseph was Galando concerned about the September 2014 court order allowing Ginger and the children to occupy the house without paying rent). In March 2015, several months shy of the trial date, Joseph Galando appointed a successor to the independent trust; Edward Ahrens replaced Don Scott, but only for the limited purposes of the Trust's ownership interest in the Redmond residence and the dissolution. 1RP 78, 133, 136-138. Immediately, the independent trustee moved to intervene in the dissolution, asserting that the Trust is an interested party because it owns real property subject to the court's temporary orders and owns "other property that may be affected thereby." CPI 16-23. The court permitted intervention, obtaining personal jurisdiction over the trustee. CPI 61-63.⁴

While Ahrens is the independent trustee for the limited purposes described above (the residence and the dissolution), Matt remains the trustee. 1RP 85. In other words, he decides when and for what purpose to distribute Trust funds (i.e., decides whether the purpose satisfies the "ascertainable standard"). 1RP 85, 147. The express purpose of the Trust

⁴ The Intervenor also sought to have Ginger removed from the home because she is not a beneficiary (effectively evicting the children or leaving them in the home with the drug-addicted father) and to terminate temporary maintenance. CPG 21; CPI 68-73, 207-208..

is to provide “[a]mounts of income or principal for the ascertainable standard,” meaning for support, maintenance, health and education. 1RP 81-82; Exhibit 501, p.13. The trustee may distribute funds to the Trust beneficiaries, but the beneficiaries may also compel distribution of funds, subject to meeting the “ascertainable standard,” which Ahrens conceded was not very “clear cut.” 1RP 82-83. For example, Ahrens agreed it was possible the Trust distributed funds to Matt to pay his attorney fees, which Ahrens opined would fall within the “ascertainable standard.” 1RP 154. Trust funds have paid for private school tuition for Matt’s and Ginger’s children (1RP 149), the marital residence (2RP 84-85), furnishings for the residence, including entertainment items essentially built into the house (e.g., \$42,000 Cinema tech chairs, electronics, pool table) (1RP 193; 2RP 61-62, 66), guns and an electronics business (3RP 161-172). All told, in 2014, Matt received \$245,900 in distributions from the Trust. 1RP 177.⁵

The Trust also includes a “standard spendthrift” provision, preventing Matt from selling, assigning, or transferring his interest in the Trust. 1RP 87. This provision seeks to protect the assets against creditors. 1RP 88. Ahrens opined this provision also prevented Matt from using Trust money to pay support obligations to Ginger. 1RP 89-90.

⁵ Matt also received other income, for example, from his Amps NW business, which he claims to have spent on expenses. 3RP 170-173. However, no accurate figures are available because he did not report the income on any tax returns. *Id.*

The availability of the Trust was further disputed. Ahrens and Matt claimed there was little liquidity in the Trust, except for the home, which he valued at \$2.3 million. 1RP 93-94; 2RP 53. Ahrens noted that distributions from the Trust (estimated by him at \$16,000/monthly) exceeded income (estimated by him at \$12,500, or \$150,000/annually). 1RP 105, 111; 2RP 7-11 (CPA Grambush testimony regarding income/distributions). However, Matt historically took disbursements above the income, as the CPA who testified confirmed. 2RP 8-9 (additional distribution of \$98,349); 2RP 10 (2013 has similar pattern). Furthermore, CPA Grambush noted the proceeds of the house sale would generate additional income and reduce multiple current expenses (e.g., property tax, etc.). 2RP 14-20.

Matt testified about the Trust, at times inconsistently with the testimony of Ahrens. For example, he claimed he has to talk to the independent trustee and financial advisors (Filament LLC) in order to get money. 2RP 53. He claims he has no access to the other family trusts (e.g., SDM with assets exceeding \$9 million, 1RP 124, and the JAG Gift Trust, with approximately \$3.9 million in assets, 1RP 178-79). 2RP 59, 64. For good reasons, the court disagreed. See § IV.D(2) below.

Matt also has access to other assets, for example, life insurance. 2RP 105-106. Post separation he cashed out \$52,000 from a community

property policy without Ginger's knowledge. 1RP 62, 2RP 101-107.

Additionally, the parties accumulated personal property and an IRA. See, e.g., 1RP 606-610 (vehicles); 1RP 453 (electric guitars); 1RP 628 (\$50,000 worth of guns and an expensive a gun safe). The property acquired during the marriage totaled \$1,059,445 net. CPI 1138-1140.⁶

The court characterized this property as community property. CPI 1131. In light of the long-term duration of the marriage (20 years, including four premarital years), the limited amount of community property, and Matt's "extremely significant amount of separate property" (over \$7 million, CPI 1138-1140), the court divided the community property resulting in a marital lien of \$756,295 in favor of Ginger, which the court ordered Matt to pay from the sale of the marital residence. CPI 1131-32. The court also awarded Ginger tuition toward completion of a degree. CPG 113-114.

The court also found Ginger unable to meet her needs independently and other factors favoring an award of maintenance. CPI 1133. The court ordered \$4000/month for six years, allowing Ginger, now a single mother. CPI 1143-42, 1144 (Decree ¶ 3.7). The court ordered child support in the amount of \$1800, a slight upward deviation, as proposed by Matt. CPI 1114.

⁶ The only item on this list disputed as to value is Amps NW, which Matt claims is worth \$10,000 while Ginger testified the inventory is worth \$150,000. See § IV.D(2).

Finally, the court awarded fees to Ginger on the basis of Matt's intransigence and on the basis of Ginger's need and Matt's "ample resources." CPI 1134. The court noted that throughout the proceedings, Matt "has displayed a pattern of intransigence, violation of court orders, and dissipation of assets." Id. His behavior, including his refusal to disclose financial information and admit to violation of court orders, "resulted in unnecessary fees and costs" to Ginger. Id. The court ordered Matt to pay part of the fees from funds he borrowed from the community property life insurance policy. Id. The court also noted Matt "has substantial financial resources available to him, including from trust income, investment income, family gifts, and the prospective proceeds from sale of the Redmond residence, which the independent trustee testified was in the works. CPI 1134; 1RP 94. In its final orders, noting little progress had been made in the sale, the court ordered a schedule for the sale and appointment of a special master, in order "to protect the interests of the beneficiary children." CPI 1132.

Matt and the Intervenor appealed. CPI 1170-1237.

IV. ARGUMENT

A. THE STANDARD OF REVIEW AND GENERAL PRINCIPLES GOVERNING THE TRIAL COURT'S DECISION.

Nearly all the appellants' issues are reviewed for an abuse of discretion. *Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990)

(child support); *Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012) (parenting plan); *Marriage of Konzen*, 103 Wn.2d 470, 477-478, 693 P.2d 97 (1985) (maintenance); *Marriage of Rockwell*, 141 Wn. App. 234, 242-43, 170 P.3d 572 (2007) (property distribution, characterization, valuation). Where another standard of review applies, it will be noted.

In the distribution of property and liabilities at dissolution, what controls is the statutory mandate to be just and equitable. RCW 26.09.080. The court's paramount concern when distributing property is the economic condition in which the decree leaves the parties. *Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). "The key to equitable distribution of property is not mathematical preciseness, but fairness." *Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989) (citation omitted). A court awards maintenance "in such amounts and for such periods of time as the court deems just." RCW 26.09.090(1).

Thus, the appellants bear a "heavy burden." *Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). They must show that "no reasonable judge would have reached the same conclusion" as did the judge here. *Id.*, at 809-810. Moreover, they must carry this burden without retrial of the factual issues, since the trial court's findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence. *Marriage of Thomas*, 63 Wn. App. 658, 660, 821

P.2d 1227 (1991). It is the trial court's role to resolve conflicts in testimony, weigh the evidence, and to assess the credibility of witnesses. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

For all these reasons, decisions in family law proceedings will seldom be changed on appeal, where “[t]he emotional and financial interests affected by [dissolution] decisions are best served by finality.” *Landry*, 103 Wn.2d at 809. All of these principles apply here to require the trial court be affirmed.

B. CHILD SUPPORT ISSUES.

Despite his express agreement that his children should enjoy a lifestyle comparable to his own, Matt challenges numerous aspects of the child support order; all fail for lack of legal and factual basis.

1) Upward Deviation

The court ordered a small deviation upward from the standard calculation of \$1635 to a transfer payment of \$1800. 4RP 60; CPG 60. Matt proposed the deviation and agreed his children should enjoy in both homes a life style comparable to their historic lifestyle. CPG 61 (“Obligor proposed an upward deviation ... to attempt to balance the vastly disparate living situations and resources in the parents’ respective households and provide for the established needs of the children”).

Now he challenges the court's order. Generally, there can be no appeal from a consent decree, absent an allegation of fraud, mistake, or want of jurisdiction. *Fite v. Lee*, 11 Wn. App. 21, 25-26, 521 P.2d 964 (1974); *Seely v. Gilbert*, 16 Wn.2d 611, 134 P.2d 710 (1943); *Winton Motor Carriage Co. v. Blomburg*, 84 Wash. 451, 147 Pac. 21 (1915). See, also, *Washington Asphalt Co. v. Kaeser Co.*, 51 Wn.2d 89, 91, 316 P.2d 126 (1957) (stipulated judgment treated like contract). Nonetheless, Matt argues the statute forbids reliance upon an agreement, citing RCW 26.19.075(5). Br. Galando, at 12. Actually, the statute merely forbids agreement being the sole basis for a deviation: "Agreement of the parties is not by itself adequate reason for any deviations from the standard calculation." RCW 26.19.075(5) (emphasis added). It hardly makes sense to forbid a parent's voluntary increased contribution to his child's welfare and, fortunately, that is not the policy of the state. Matt agreed the parties' households were unequal in resources available to the children and agreed the children should enjoy a comparable lifestyle in both households. This additional reason supports the deviation. *Marriage of Casey*, 88 Wn. App. 662, 666-67, 967 P.2d 982 (1997) ("comparative economic circumstances of the parents remains an essential factor in allocating the responsibility for child support"); *Marriage of Glass*, 67 Wn. App. 378, 385-86, 835 P.2d 1054 (1992) (affirming a trial court's upward deviation based on

wealth and the income of a new spouse in part because the obligor “remained relatively comfortable” while the custodial parent and the children “were struggling to make ends meet”).

In any case, if the court erred by providing the children an additional \$165/month, then Matt invited the error. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990) (party who sets up an error at trial precluded from claiming that error on appeal).

Matt further contends that the trial court’s findings do not justify an upward deviation under *Marriage of Daubert*, 124 Wn. App. 483, 99 P.3d 401 (2004), and *Marriage of McCausland*, 159 Wn.2d 607, 152 P.3d 101 (2007). Br. Galando, at 10-12. This argument compares apples to oranges. Here, the court ordered a deviation based on the factors in the statute on deviations. RCW 26.19.075 (e.g., wealth, disparity in living costs of parents, debts/liabilities). Matt’s authorities and argument pertain to an entirely different context: exceeding the child support table for purposes of the standard calculation; they do not address the entirely separate question of deviation. *McCausland* put a stop to the practice of “extrapolating” where combined family income exceeded the maximum amount in the child support table (then \$7000). 159 Wn.2d at 620. Trial courts were simply building out the table when faced with larger incomes; *McCausland* declared courts could not exceed the table without fact-

finding on the children's needs (i.e., could not be based on more income alone). *Id.* n.6 (amount of child support must be based on "the correlation to the child's or children's needs"). *See Daubert*, 124 Wn. App. at 499 (for factors to consider in the analysis). That is not what happened here. The court's authority to order a deviation derives from a different part of the statute and, here, the court acted completely within that authority.

2) Imputed Income

Matt challenges the court imputing his earned income at \$8333, contending the court did not properly apply RCW 26.19.071(6). Br. Galando, at 12. In fact, the court did. The statute provides the "court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed." RCW 26.19.071(6). *Marriage of Goodell*, 130 Wn. App. 381, 390, 122 P.3d 929 (2005) (imputation mandatory).

The court determines whether the parent is voluntarily unemployed "based upon that parent's work history, education, health, and age, or any other relevant factors." RCW 26.19.071(6). Here, the trial court found Matt to be "voluntarily unemployed," rejecting his argument that he is unemployable. CPG 59 (¶ 3.2(C)). Simply, Matt is choosing not to work. Matt claims the court did not consider his health. Br. Galando, at 13. Actually, the court found Matt produced no evidence to support his claim (e.g., did not show he had applied for disability); other evidence showed

him capable of working (e.g., started and ran businesses, performed physical labor such as draining ponds, pressure washing climbing ladders, landscaping, home maintenances: 1RP 452-53; 2RP 163; 3RP 157-58; he also continues his recreational activities, such as golf, 2RP 75). The record also supports the court’s finding that he has not made any effort to apply for a job. 2RP 79-80 (admitting that he has not applied for jobs; “can’t find the right fit”). Substantial evidence supports the court’s finding of voluntary unemployment.

Matt also challenges the amount of income imputed to him, which is \$8333/month, based on reliable historical rate of pay, as the statute requires. CPG 59; RCW 26.19.071(6)(b) (“Full-time earnings at the historical rate of pay based on reliable information”).⁷ Matt claims no evidence supports this finding (Br. Galando, at 14), but he testified that his past full-time earnings were \$100,000/year. 2RP 16. Matt argues the court should have used his earnings from more recent work as a mortgage broker, but the court did not find that information reliable. Indeed, Matt acknowledges that the court could have used a past rate of pay, such as the

⁷ RCW 26.19.071(6) sets forth the hierarchy of methods for imputation: (a) Full-time earnings at the current rate of pay; (b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data; (c) Full-time earnings at a past rate of pay where information is incomplete or sporadic; (d) Full-time earnings at minimum wage if the parent has a recent history of minimum wage earnings or (e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census.

\$100,000 for his job at Aurora Foods, *see* RCW 26.19.071(6)(c) (“Full-time earnings at a past rate of pay where information is incomplete or sporadic”), but contends that the court could not do so here because there was no evidence that his earnings were “incomplete or sporadic.” Br. Galando, at 14. But the evidence did show his work history was “sporadic.” After quitting his full time job at Aurora Foods, he bounced from one job to the next: landscape business, home theatre business, Amps NW; his mortgage broker job barely lasted a year due to 2008 market conditions. Substantial evidence supports the trial court’s reliance on the reliable historic rate of pay to impute his income at \$8333.

Matt further contends that the court improperly imputed \$15,233 per month in trust income, noting that this was based on 2014, whereas the independent trustee testified that the trust could only safely pay out \$12,500/month. Br. Galando, at 15 (citing CPG 59). Matt misreads the court’s order; the court did not impute trust income at all.

RCW 26.19.071(1) requires the court consider all sources of income. Properly, the court considered trust income, identifying it as such on the worksheet. CPG 70. Matt looks only at the finding, where the mandatory form requires the court to indicate whether income is imputed which the court did, and incorporated the other income. CPG 59. Both of these must be included in the calculation. RCW 26.19.071(3). Perhaps

the mandatory form could use some clarification, but Matt certainly understands what the court based the income on. Moreover, whatever the income figure and whatever the standard calculation, Matt agreed to an upward deviation, leaving unclear what point he is now trying to make.

3) Expenses Not Included in the Transfer Payment

Matt next challenges the provision in the child support order requiring that he pay 100% of expenses for the work-related daycare, private school tuition, extracurricular activities, and uninsured medical expenses. CPG 63-64, 67. He contends RCW 26.19.080 requires the trial court to order that both parents pay their proportional share of “extraordinary expenses.” He would be right if the court had not ordered a deviation in the basic support obligation. RCW 26.19.080(3) requires that “reasonable and necessary” expenses outside the child support table “shall be shared by the parents in the same proportion as the basic child support obligation.” But where the court deviates in the basic support obligation, it may deviate in extraordinary expenses. *Marriage of Yeamans*, 117 Wn. App. 593, 601, 72 P.3d 775 (2003); *see, also, Casey*, 88 Wn. App. 662 at 666-67 (court may allocate all extraordinary costs to one parent where court also found grounds to deviate from basic support obligation). Because the trial court deviated from the basic support, the court had discretion to deviate for these other expenses.

Matt further asserts that “inability to pay is a complete defense to the imposition of private school tuition costs,” Br. Galando, at 16, but does not cite any factual basis for his alleged inability to pay. Rather, the record shows he has separate assets of approximately \$8 million, CPG 84, a net income of \$13,743 per month, CPG 70, and shows the trust has been making tuition payments. 2RP 9, 145 (trust paid approximately \$23,000 for private school tuition in 2014); see also 3RP 50 (Matt admits that he has taken out more from the trust in the past when the need arose). This substantial evidence supports the court’s tuition order.

C. THE EVIDENCE AND THE LAW SUPPORT THE PARENTING PLAN RESTRICTIONS.

The court entered findings under RCW 26.09.191 that Matt was subject to restrictions based on findings of emotional abuse of a child, domestic violence, substance abuse, and abusive use of conflict. CPG 88. Matt challenges the factual basis for these findings, but all are supported by substantial evidence. Moreover, the court properly, in light of Matt’s conduct, imposed restrictions to protect the children. *See Marriage of Chandola*, 180 Wn.2d 632, 636, 327 P.3d 644 (2014) (restrictions must be reasonably calculated to prevent harm to child).

1) Psych Evaluations

Matt first challenges the parenting plan’s provision that “both parties shall participate in a full psychological evaluation” and “comply

with treatment recommendations.” CPG 101. The GAL recommended mother obtain an evaluation and that both parties continue in counseling. Ex. 301 at 49, 50. While Matt points out that the GAL did not specifically recommend an evaluation for Matt, “the court is also free to ignore the guardian ad litem's recommendations if they are not supported by other evidence or it finds other testimony more convincing.” *Fernando v. Nieswandt*, 87 Wn. App. 103, 107, 940 P.2d 1380 (1987); see also *Marriage of Swanson*, 88 Wn. App. 128, 138, 944 P.2d 6 (1997) (court not bound by GAL's recommendations, but must make its own assessment of child's best interests). The GAL acknowledged Matt was already in counseling, recommended he continue with counseling, and simply deferred to the court as to the need for an evaluation. 1RP 301. Matt’s therapist also testified that he Matt was diagnosed with social anxiety disorder, 1RP 376, and also had some issues with depression. 1RP 374. Given the high degree of conflict and its effect on the children, the court acted well within its discretion when it ordered psychological evaluations and treatment for both parents so they can better manage their interactions with each other and their relationships with their children.

2) Restrictions under RCW 26.09.191

The trial court imposed mandatory residential time restrictions based on “a pattern of emotional abuse of a child” and “a history of acts of

domestic violence.” RCW 26.09.191(1), (2). CPG 88. The court further found that restrictions were appropriate under RCW 26.09.191(3) based on the adverse effect of the father’s conduct on the child’s best interests because of “a long term impairment resulting from drug, alcohol or other substance abuse that interferes with the performance of parenting functions” and “the abusive use of conflict by the parent which creates the danger of serious damage to the child’s psychological development.”

CPG 88. Substantial evidence supports the trial court’s findings.

Emotional Abuse of a Child: Matt has consistently engaged the children in his conflict with Ginger, causing them distress and trying to alienate them from their mother. He showed the children the ladder video and told them their mother tried to hurt him, sending M.G. upset and crying to Ginger that it was not her fault. Ex. 301 at 15. He has thrust G.G. into the conflict, trying to align his views with Matt’s. See, e.g., Ex. 301 at 45 (“[G.G.]’s relationship with his mother appears to be fraying... It is difficult to judge [G.G.]’s concerns objectively because of the high level of conflict and manipulation going on in this case and his young age. [G.G.]’s expressions of anger towards his mother may be a product of his father’s manipulation...”); Ex. 301 at 22 (noting “[G.G.]’s efforts to talk up his father and talk down his mother” during home visit).

There was also evidence that Matt has subjected M.G. to emotional abuse by becoming angry with her when she cries, reaching a point where she is afraid to call Ginger while at Matt's because she knows she will cry (since she misses mom) and make him angry with her. 1RP 566. Matt also told the kids that Ginger was moving out before the issue was resolved in court and did the same by telling the kids that they are going to have to change schools before this issue was resolved by the parents and the court. 1RP 233-34; Ex. 301 at 41. He also told them that his girlfriend was immediately moving in, and imposed his new relationship on them during a time they were already experiencing instability and were not ready for any more change. 1RP 233-34; Ex. 301 at 17 (GAL report notes that Matt introduced them to his girlfriend despite their counselor's advice not to expose them to a new relationship for a year, and did so on their very first visit with him post-separation).

Domestic Violence: While Matt's abusive behavior toward Ginger never became physical, she feared for her safety and that of her children, living with a paranoid drug addict who kept loaded guns in the home. 1RP 461-62. She also described an incident when she confronted him about his drug abuse and he cornered her in bathroom and threatened she would lose the kids if she turned him in. 1RP 439, Ex. 301 at 14. Ginger further testified that Matt constantly belittled her, even in front of the kids,

and that this worsened when he was drinking. 1RP 566-67, 417. She also reported to the GAL that he was physically intimidating and that she feels threatened by him. Ex. 301 at 14. Domestic violence is defined to include “the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; ...” RCW 26.50.010(1)(a).

Even if this conduct did not rise to the level of domestic violence, this Court may affirm the lower court on any basis established by the pleadings and supported by the record. *Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003). As discussed above, the court’s finding of emotional abuse of a child is alone a basis for mandatory restrictions under RCW 26.09.191(1), (2). And as discussed below, the court’s additional findings support restrictions under RCW 26.09.191(3).

Abusive Use of Conflict: The record is replete with instances of Matt’s abusive use of conflict, as noted in the GAL report: showing the children the video of ladder incident, being uncooperative and obstructive about getting the kids into counseling, telling the kids their school will be changed without agreement or resolution of the issue, threatening a witness (Sean Duncan) who made negative statements about him to the GAL. Ex. 301 at 40-41. Matt also involved the children in litigation, Ex. 301 at 31 (Dad tells G.G. “pretty much everything,” including telling him

that mom fired her lawyer), and as noted above, the GAL expressed concerns about Matt turning G.G. against his mother. Ex. 301 at 22, 45.

Long Term Impairment from Substance Abuse: Matt had a serious opiate addiction for nearly ten years – the entirety of his children’s lives – during which he completely checked out of his parenting responsibilities, including after his return from rehab. It is hard to believe that a two month stint in rehab has resulted in complete recovery given the 50% relapse rate, see IRP 396, particularly without an effective, structured aftercare program that requires accountability.⁸ Indeed by the time of trial, Matt could not even admit he was an addict! 3RP 193. At trial, nothing about Matt’s circumstances (no job, no credibility, no upkeep on the home, etc.) persuaded the court he had put his substance abuse behind him. Quite the contrary: he proved himself a continued danger to his children. Post-trial, Matt continues to evade verification of his rehabilitation and has not undertaken the steps needed to see his children. Supp. CPG ___ (sub 312, 367).

3) Treatment for at Least 12 months & AA/NA Meetings.

Matt also challenges the parenting plan’s provision requiring him to undergo drug and alcohol treatment and participate in AA/NA. Again, the court acted well within its discretion given the ample evidence of

⁸ He did not do any treatment for ongoing drug recovery for a month after leaving rehab. IRP 371.

Matt's longstanding drug addiction, its destructive effects on his family, and the scant evidence of recovery. Indeed, as the court noted, national statistics show a relapse rate of over 50% within the first year of treatment. 1RP 396. Against these odds, Matt's after care program – lacking in substance, structure and accountability - was woefully inadequate. It consisted of meeting once a month for cognitive behavior therapy with a nurse practitioner who had virtually no experience in substance abuse treatment, 1RP 388, 394 (been in practice for just over a year, 10-15 patients), as evidenced by her lack of knowledge about the relapse rate. See 1RP 387-88, 396 (court corrected her after she testified that she believed the relapse rate was only 20%). There was concern whether his UAs were testing for all relevant substances. 1RP 383-84. The only other component of his after care program was his self reported participation in "Smart Recovery," which he described as AA without the religious component; in fact, the program involves no sponsorship, is completely self-directed, and allows for online "attendance." 3RP 14, 196. Even so, Matt admitted he has not attended the meetings "in a while." 3RP 196. The court acted in the children's best interests to direct Matt to efficacious, verifiable treatment.

4) Alcohol Related Conditions

The parenting plan provides that the residential schedule is determined by the father's compliance with several conditions related to drug and alcohol use/treatment. CPG 90 (six months of negative UAs, enrollment/compliance with NA/AA sponsorship program, alcohol treatment). After six compliant months, sobriety verification will be limited to an additional six months of negative UAs and compliance with AA/NA program. CPG 91. If Matt relapses or violates the requirements, his time with children will be suspended until he completes in-patient treatment. CPG 91. His residential time will also be suspended if he possesses alcohol or engages in conduct precipitating police contact to which Matt objects, as well as requirements for alcohol testing, which Matt claims is too expensive. Br. Galando, at 34-36; see CPG 96-97 (3.10). He further contends that suspending visitation for violation of these conditions harms the children. Br. Galando, at 37-39.

Here, again, the court has acted to protect the children in light of the substantial evidence that alcohol is a feature of Matt's substance abuse: family history of alcoholism, 1RP 375; Matt's drinking history, 1RP 409, 416, which exacerbated his emotional abuse of Ginger, 1RP 417; he drank while taking painkillers, 1RP 449, 3RP 193; Ginger had concerns about recent relapse when he didn't show up to pick up kids and she saw

alcohol bottles in recycling, 1RP 570-72; GAL recommends abstinence from alcohol, 1RP 295; GAL agrees with provision that relapse should result in suspension of residential time, 1RP 294; his current therapist says he has a history of alcohol abuse and treatment for alcohol abuse part of his rehab treatment, 1RP 377; his therapist agrees to weekly UAs, 1RP 386. In short, everyone but Matt agrees he has a problem with alcohol.

D. THE COURT PROPERLY CHARACTERIZED, VALUED, AND DISTRIBUTED THE PERSONAL PROPERTY.

1) Characterization

Matt contends that the trial court erred by characterizing certain personal property as community property. Br. Galando, at 18. For a number of reasons, this argument fails.

First, all property, whether community or separate, is before the court for distribution and its character does not control. RCW 26.09.080; *Marriage of Larson and Calhoun*, 178 Wn. App. 133, 313 P.3d 1228 (2013) (trial court may award one spouse's separate property to the other spouse if necessary "to achieve a just result"). Moreover, an error in characterization requires reversal only where characterization controlled the distribution. *Marriage of Shannon*, 55 Wn. App. 137, 142, 777 P2d 8 (1989). Finally, "mischaracterization of property is not grounds for setting aside a trial court's allocation of liabilities and assets, so long as the

distribution is fair and equitable.” *Marriage of Griswold*, 112 Wn. App. 333, 346, 48 P.3d 1018, 1025 (2002) (internal citation omitted).

Matt disputes the court’s characterization of Amps NW, a truck, some artwork, some guns, and a gun safe. Br. Galando, at 19-20. Generally, a court’s characterization of property as separate or community is a question of law reviewed de novo. *Griswold*, 112 Wn. App. at 339. Property acquires its character upon acquisition. *Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009). Separate property retains its character only if traceable and identifiable. *Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003).⁹ Most of the items were acquired during the marriage or the premarital committed intimate relationship – Amps NW, truck, artwork, most of the guns and the gun safe (a gift from Ginger!). Several guns, of unknown value, belonged to Matt before the marriage. 3RP 100-101; 1RP 628 (total gun value). He claims the truck was purchased with proceeds from the sale of a pre-relationship Corvette,

⁹ By contrast, 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. When commingling has occurred, 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, 125 P.3d 180 (2005), citing 19 Kenneth W. Weber, *Washington Practice: Family and Community Property Law* § 11.13, at 159-60.

but he fails to provide any tracing evidence. He claims Amps NW was purchased with trust income, but he does not explain why that makes it his separate property anymore than it would be if purchased with his business income. Br. Galando, at 19-20.

In any case, Matt fails to show that any error in characterization would have changed the distribution of the property. The court achieved a just and equitable distribution by dealing with the assets within reach, mostly personal property. *Tower*, 55 Wn. App. at 700 (“Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules”). The court acted within its discretion to distribute the property to achieve a fair result. Matt fails to show any mischaracterization would have changed this outcome.

2) The Valuations Were Within the Scope of the Evidence

Matt challenges the court’s valuation of Amps NW and his separate property consisting of his interests in the various trusts and Galando family entities. The court has discretion to value property and its findings will be upheld so long as supported by substantial evidence. *Rockwell*, 141 Wn. App. at 242-43. A trial court does not abuse its discretion by assigning values within the scope of evidence. *Marriage of Soriano*, 31 Wn. App. 432, 436, 643 P.2d 450 (1982). Here, the values are within the scope of the evidence.

Matt first challenges the court's valuation of Amps NW at \$150,000. CPG 84. Ginger testified that Matt had \$150,000 in Amps NW inventory. 1RP 700-701. She provided a 2011 list showing \$90,000 worth of equipment and testified more equipment was acquired since then. 1RP 700; Ex 531. Because of these acquisitions, \$150,000 was a "conservative" value. 1RP 701.

Matt contends the court abused its discretion when it accepted Ginger's "unsupported opinion" is an abuse of discretion, yet he fails to support his "estimated sale value" of \$10,000 or produce pertinent financial records for Amps NW. 2RP 119; 3RP 99. (Testimony at trial also revealed that Matt sold some of the inventory for cash and did not report the sales or explain what happened to the proceeds. See 3RP 312-15, 170.) The trial court has sole discretion to resolve disputed facts and make credibility determinations. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). The Amps NW valuation was within the scope of the evidence.

Matt also challenges the court's valuation of his separate property, specifically the value of the SDM trust, which he contends is "underwater" and has no value. Br. Galando, at 22-23. In fact, the court did not assign a specific value to the SDM trust; instead the court assigned a combined value of \$3 million for various assets including the "SDM trust, JAG gift

trust, GLP, Galando Hawaii LP, and Galando House QPRT.” CPG 84. This valuation is within the scope of the evidence. *Soriano*, 31 Wn. App. at 436. The Filament statements from June 2014-June 2015 show the Galando Hawaii LP had a value of \$9 million, making Matt’s 1/3 interest worth \$3 million. Ex. 603. This asset alone supports the valuation.

The evidence also showed that Matt’s portion of the GLIP had a value of \$1,421,713. Ex. 603. He cannot compel distribution without getting his co-beneficiaries (his two brothers) to agree, but that value exists. 2RP 95-96. There was also testimony that the JAG gift trust had a value of \$3.9 million, of which Matt has a 1/3 interest. 1RP 178-79, 129. The court also considered as an additional asset Matt’s interest in the Galando House QPRT (Qualified Personal Residence Trust), concerning real property in Mason County, conveyed to him and his brothers by his parents in 2004. CPG 84; Ex. 561, 612, 613. The brothers then quitclaimed the property back to their parents in March 2014, but Matt never disclosed this asset in discovery and denied in interrogatories owning any real property during the marriage. Ex. 561; 3RP 142-43, 145. Without any tax records showing Matt reported a gift transaction, the court was concerned the deed back to the parents “was a strawman transaction” and, consequently, considered the property an asset before the court. 3RP

148.¹⁰ In short, the court’s valuation of \$3 million for these various interests was well with the scope of the evidence and, in fact, lower than the evidence would support.

Matt seems to suggest that the \$9 million value of the Hawaii Property LLP cannot be properly considered because it was owned by the SDM trust, which was “under water,” pointing to the fact that the trust had \$13,400,000 in liabilities (though acknowledging that at least \$2.9 million of those are owed to his Trust). Br. Galando, at 22 (citing 1RP 124-25). According to the most recent Filament statements, the SDM Trust has \$9 million in assets from the value of the Galando Hawaii LLP. Ex. 603. While the statements also show the SDM trust has a negative balance for debts owing, this does not somehow “erase” the \$9 million value of the Hawaii LLP, which in itself still has value - as clearly shown in the statements - regardless of the trust’s outstanding debts, particularly as the liabilities seem to be notes owed to Matt and other family members, a feature of the complex Galando estate planning scheme that ensures the money flows to the family members. Here, the court correctly valued Matt’s interest in this extensive scheme as \$3 million.

In any event, Matt fails to show what consequence any alleged valuation error had on the ultimate property distribution. There is no

¹⁰ According to the deed, this property had value of \$440,000. Ex. 561.

disputing he has substantial separate property worth millions of dollars, whether valued at \$8 million or \$5 million. Given this fact, Matt cannot show that the court's ultimate property distribution was an abuse of discretion. This separate property was not distributed to Ginger; rather the court simply considered the fact that Matt had these vast separate assets while Ginger did not, and equitably distributed the property accordingly, i.e. awarded the value of all the community property to Ginger. Matt fails to show that the court's valuation findings were error.

E. THE COURT PROPERLY CONSIDERED THE COMMITTED INTIMATE RELATIONSHIP.

The court did not abuse its discretion when it included the four years of the parties' committed intimate relationship to conclude theirs is a long-term marriage. Matt and Ginger moved in together in 1996, married in 2000, and divorced in 2015. Ginger has spent nearly half of her life in a relationship with Matt. During the premarital four years, they lived together and pooled their resources (e.g., she paid household bills; he paid mortgage). 1RP 412-13. They also went through two moves together and shared two homes during this time. 1RP 411, 423-24. The court found their relationship to be "long term" and considered it in making a property distribution, again, as Washington law requires. RCW 26.09.080(3). Indeed, any property acquired during the committed intimate relationship

must be considered in the distribution. *Marriage of Neumiller*, 183 Wn. App. 914, 922, 335 P.3d 1019 (2014).

Though maintenance cannot be awarded in a CIR proceeding, the parties married and the duration of the marriage is pertinent to maintenance but no specific duration controls. RCW 26.09.090(1)(d). The only limitation on the court's discretion is that it be "just." *Marriage of Wright*, 179 Wn. App. 257, 319 P.3d 45 (2013). The court could award maintenance here had the marriage been 5, 10, or 15 years, given the other factors present (e.g., wife's need, wife's lack of education/training, wife's financial obligations, standard of living during the marriage, husband's ability to pay, both parties' financial situation post dissolution, see RCW 26.09.090). See CPG 79. There is no abuse of discretion.

F. MOTHER'S TUITION PAYMENTS

Next, Matt challenges the court's order that he pay for the cost of Ginger obtaining a four-year degree at her choice of either Bellevue College or Western Washington University. CPG 113-14. He complains that this was error because it is indefinite (does not require she complete schooling within a specified time) and not modifiable because it was not ordered as maintenance. As to the first point, Ginger's request was framed in terms of completing the program within four years. 4RP 35. The court recognized the need for her to return to school. CPG 79; see, also 1RP

642-643; 4RP 34 (Ginger characterizing as “rehabilitative” and asking that Matt pay directly to school to avoid reduction for income taxes). Ginger’s maintenance is limited to six years. CPG 114. Matt fails to show any reason to think Ginger will not seek this education promptly.

As to the modifiability issue, the court separately awarded maintenance. The tuition payments are part of the property settlement, which a court may award by way of installments or payments to third parties. *Marriage of Roth*, 72 Wn. App. 566, 571-73, 865 P.2d 43 (1994); *Marriage of Edwards*, 83 Wn. App. 715, 924 P.2d 44 (1996). The court’s order here furthered its just and equitable distribution; there is no abuse of discretion.

G. THE COURT DISTRIBUTED COMMUNITY PROPERTY AND EFFECTUATED THIS ORDER FROM SALE PROCEEDS FROM THE MARITAL RESIDENCE; IT DID NOT DISTRIBUTE TRUST. IN ANY CASE, THE SPENDTHRIFT PROVISION DOES NOT APPLY HERE BECAUSE MATT CONTROLS HIS TRUST.

The Intervenor makes his first argument, regarding the property distribution, as if the court distributed trust assets. It did not, so we need not reach the question of whether it could do so (although that question is addressed below). Rather, the only issue here is whether the court could implement its property distribution by requiring Matt pay the marital lien from sale proceeds of the marital residence when the Trust holds title to

the property. As discussed below, the court has the authority to make its orders effective and that is what it did here.

As a first principle, under Washington law, all property is before the court for distribution. *Larson*, 178 Wn. App. at 137. Even where property cannot be distributed, such as where federal law prohibits it (e.g., Indian Trust Land), the court may consider the “existence and value” of the property in making its equitable distribution. *Marriage of Landauer*, 95 Wn. App. 579, 588, 975 P.2d 577 (1999).

At issue here is the distribution of the community property, valued at just over \$1 million. CPI 1138-1140. Most of this value (i.e., \$760,852) resides in Matt’s luxury items – guns, vehicles, sporting equipment, and his business (Amps NW). CPI 1138-1140. The court awarded to Ginger outright an IRA, a car, a life insurance policy, and some artwork, totaling \$303,150. *Id.* The court permitted Matt to keep possession of his luxury items and business. *Id.* However, the court awarded to Ginger the full value of the community property, all \$1 million, for good and unchallenged reasons, including that Matt has substantial separate property wealth. CPI 1131-32. In other words, to achieve an equitable distribution under the facts of this case (e.g., long marriage, vastly disparate separate property, relatively small community property estate), the court awarded all the community property value to

Ginger, but ordered a marital lien to her rather than awarding her the guns, vehicles, etc. CPI 1138-1140.

The Intervenor does not challenge any of these findings or conclusions, but seems to object to how the court implemented its order, specifically, the requirement that the marital lien be paid from the proceeds. (The Intervenor does not challenge the court's order that the residence be sold. Br. Intervenor, at 5 (Assignment of Error 1). He argues first a trust is not property but a "mere expectancy" and, thus, not before the court in a marital dissolution, citing to a case involving stock options. Br. Respondent Intervenor, at 14 (*citing Marriage of Harrington*, 85 Wn. App. 613, 935 P.2d 1357 (1997))).

In *Harrington*, the court considered whether stock options are property or whether they are a "mere expectancy," which is not property. *Id.*, at 624. The court concluded stock options are property, even unvested options, a principle later confirmed by the Supreme Court. *Marriage of Langham & Kolde*, 153 Wn.2d 553, 564, 106 P.3d 212, 218 (2005) ("there can be little doubt that stock options are property"). This case does not involve stock options, which are, in any case, considered to be property, so *Harrington* provides no support for the Intervenor; in fact, quite the contrary, since, in *Harrington*, the court distributed the wife's interest in a testamentary trust. 85 Wn. App. at 621. All *Harrington* says is that a

“mere expectancy” is not property; it does not say this Trust is a “mere expectancy.”

Nor is the Intervenor’s “mere expectancy” argument supported by other Washington law. Rather, “[a] fundamental characteristic of a trust is that legal and equitable ownership of the trust property is divided between two parties; the trustee has bare legal title and the beneficiary has the equitable or beneficial ownership.” *O’Steen v. Wineberg’s Estate*, 30 Wn. App. 923, 932, 640 P.2d 28, 34 (1982), citing 76 *Am.Jur.2d Trusts* § 2 (1975). If there is ownership, there must be something owned (property).¹¹

To support the contrary proposition, the Intervenor cites a Colorado case, where both the facts and the law are inapposite, specifically where the trust income was a “mere gratuity” in which the beneficiary had no interest or control. Br. Intervenor, at 14, citing *Marriage of Guinn*, 93 P.3d 568, 572 (Colo. App. 2004). Here, of course, Matt is a trustee and has exercised extensive control over the Trust and used his control to his substantial benefit. His Trust bears no resemblance to the trust described in *Guinn*.¹² Importantly, trust law is both complex and varied across the states, meaning that the persuasive authority of a

¹¹ There are countless kinds of trusts, so generalizations must be undertaken with caution.

¹² As discussed further below, Matt not only has “equitable and beneficial ownership” of his Trust, he has equivalent absolute ownership.

case from another state can hardly be presumed. For example, in Oregon, “[a] trust interest is a property interest and is therefore to be treated as a divisible asset in a dissolution proceeding.” *Marriage of Brown*, 219 Or. App. 475, 480, 183 P.3d 207, 210 (2008). This holding has more application here than *Guinn*.

To the extent Washington authority on this subject exists, as discussed above (i.e., *Harrington*, *Langham* by analogy to vested and unvested stock options) it appears to support the view that an interest in a Trust such as Matt’s would be a property interest. But this issue need not even be reached because the court did not award to Ginger any trust property; it awarded her community property effectuated by means of a marital lien. Thus, the authority at issue here is the court’s authority to effectuate its orders. The marital residence was built at Matt’s direction (the Trust paid \$1.8 million cash) and for his family’s benefit but is titled in the name of the Trust. 2RP 85. The question is not whether the Trust is property or a “mere expectancy,” but whether the court can order Matt to use a portion of the sale proceeds of a Trust asset to satisfy the marital lien. Here, the court had good reason to choose this mechanism. The court wisely did not burden Ginger by awarding her guns and vehicles (pretty useless to her as she tries to care for herself and two children, which does not leave her much time to convert these items into cash), yet

the court also had every reason to expect Matt would simply ignore the marital lien, given his history of financial irresponsibility, noncompliance with court orders (including family support), unauthorized liquidation of community property (e.g., life insurance), etc. CPI 1134. Indeed, the court noted little progress had been made toward selling the property. CPI 1132. (This conduct has continued post-trial, resulting in contempt orders for failing to facilitate sale of the Redmond residence, to pay tuition, etc. Supp. CPG __ (sub. 332, 367). To ensure its equitable distribution order would have the intended effect, the court ordered a portion of the sale proceeds applied to satisfy Matt's marital lien. "A court may order a party to perform an act to effectuate the court's resolution of a dispute." *Marriage of Mathews*, 70 Wn. App. 116, 126, 853 P.2d 462, 468 (1993). What the Intervenor instead proposes has been declared "inconceivable," that is, "that a court in a divorce proceeding can divide the property between the parties and yet have no power to make that division effective if the parties are recalcitrant." *Marriage of Peacock*, 54 Wn. App. 12, 17, 770 P.2d 767, 769–70 (1989). Here, the trial court knew what to expect from Matt and sought to avoid protracted post-trial actions. Unfortunately, this strategy has not been entirely successful, as it has been necessary to compel through the court's contempt powers Matt's compliance with the court's orders. Supp. CPG __ (sub 332, 367). In

any case, contrary to the Intervenor’s argument, not only does the court have the authority to act as it did for the benefit of Ginger and the children, arguably it had the duty to do so. Certainly it did not abuse its discretion.

Nor can the Intervenor undermine this conclusion by relying on the trust’s spendthrift provision because Matt essentially controls the distributions from the Trust. Generally, and apart from statutory exceptions discussed in the sections below, the spendthrift statute, RCW 6.32.250, protects against attempts by creditors of a beneficiary to reach his or her interest in the trust by legal process. *Seattle First Nat’l Bank v. Crosby*, 42 Wn.2d 234, 243, 254 P.2d 732 (1953). However, this protection evaporates if the beneficiary acquires the power to compel distributions from the Trust, called the “equivalent of ownership.” RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. on subsection (1) (2003).¹³ Matt is the trustee. 1RP 85. For years, he has been the judge of the “ascertainable standard” – making whatever distributions he deems

¹³ The Restatement’s comment provides:

b(1). Absence of ownership equivalence. An intended spendthrift restraint is also invalid with respect to a nonsettlor's interests in trust property over which the beneficiary has the equivalent of ownership if an income beneficiary also holds a presently exercisable general power of appointment (that is, a power currently to compel distribution of trust property to the power holder), a spendthrift restraint will not prevent the beneficiary's creditors or transferees from reaching the property that is subject to the power.

“reasonable” for the beneficiaries’ support, maintenance, health, and education – mainly for himself, from which his wife and children have also benefitted. Ex. 306/501, p. 32 (cited at Br. Intervenor, 15). He has his hand on the spigot, or has had, until his father appointed an independent trustee in 2015, which he did only when the Galando marriage went sideways, raising the potential for Ginger and the children to receive family support (and then only with limited powers). 1RP 133-36. But the facts are the facts. Matt has had unlimited access to huge sums: he paid \$1.8 million in cash for a house, started businesses, bought expensive toys, tried his hand at investing, developed an expensive drug habit, etc. 1RP 453, 606-610, 628; 2RP 84-85, 121, 139-42. The spendthrift protection does not apply to the facts here because of Matt’s ownership equivalence.

Finally, invoking the spendthrift provision in this case violates important public policies. Generally, Washington will enforce a spendthrift provision. *Erickson v. Bank of California, N. A.*, 97 Wn.2d 246, 249, 643 P.2d 670, 673 (1982). But doing so here makes no sense. For example, spendthrift provisions favor an owner’s right to dispose of property as she or he wishes, but also assume a creditor will be aware (actually or constructively) of a debtor’s spendthrift protections. *See, e.g., Sligh v. First Nat’l Bank of Holmes County*, 704 So. 2d 1020, 1027 (Miss.

1997). In *Sligh*, the court collects authorities discussing how that principle does not apply to involuntary creditors, e.g., the beneficiary's tort victims. 704 So. 2d 1027-1028 (“a tort creditor has had no chance to choose his debtor and cannot be said to have assumed the risk of the collectability of his claim” [internal citation omitted]).

Here, Ginger is not a creditor at all, let alone one who would take an arms-length approach to financial dealings with her husband. After all, the relationship between the spouses is one of trust and confidence, with each spouse bearing the other “the highest fiduciary duties,” which continue until the marriage is terminated. *Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972); *Peters v. Skalman*, 27 Wn. App. 247, 251, 617 P.2d 448 (1980). In fact, when the Galandos bought the marital residence, she thought they owned it. 1RP 427.

In short, it does not serve the underlying policies of the spendthrift statute to invoke it here. However, it does violate other important public policies, including ones related to the protection of marriage, to the imposition of certain duties upon spouses, and, of course, the policy of providing for one's dependents. As the court found, the Galandos lived large and Matt will continue to do so. In complete accord with Washington law, the court has made provision for the support and benefit

of Ginger and the children, to which effort the spendthrift provision presents no obstacle. There was no abuse of discretion.

H. THE TRIAL COURT PROPERLY AWARDED MAINTENANCE.

The Intervenor again relies on the spendthrift provision to help Matt evade his obligation to pay maintenance to his wife of two decades. Br. Intervenor, at 16-18. Mainly, he relies on the statute expressly permitting “execution” upon trust income to enforce a child support order (Id., citing RCW 11.96A.190) and argues the lack of a similar provision for maintenance means the Legislature did not intend to allow “execution” upon the trust to enforce a maintenance order. This argument does not work.

First, this is not an enforcement action (i.e., execution), but a dissolution. The court’s maintenance order does not require Matt to pay maintenance from his trust income or invade the principal of his trusts. He could pay maintenance from salary or business income or the sale of his many luxury items. The point is to provide the needed support to Ginger.

Second, the Intervenor does not challenge the court’s findings about the relative financial circumstances of the parties (her need/his ability). Rather, the Intervenor seems to argue the court cannot consider all the facts pertaining to Matt’s financial circumstances, but must turn a

blind eye to Matt's trust benefits. There is no Washington authority for this proposition.

For purposes of determining maintenance, the court must consider "all relevant factors" set forth in the appropriate statute (RCW 26.09.090). Under the statute, the only limitation on the court's ability to award maintenance is that the amount and duration be "just," considering all the relevant circumstances. *Marriage of Washburn*, 101 Wn.2d 168, 178, 677 P.2d 152 (1984). Expressly, our Court has approved maintenance as "a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." 101 Wn. 2d at 179. If the legislature wishes to narrow the "relevant factors" the trial court considers, it may do so, but there is no reason for the court to trench upon the flexibility of maintenance as a tool for achieving a just outcome at dissolution of a marriage. *See, e.g., Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989) (compensatory maintenance justified where a husband had converted community property to his own purposes, depriving the wife of her vested interests in the property); *see, also, Landauer*, 95 Wn. App. at 587 (court could consider existence and value of trust property in marital dissolution).

Here, Ginger and Matt lived an affluent life for close to 20 years. Matt could expect that lifestyle to continue. Ginger, on the other hand,

had little means to provide for herself and the children, at least until she could acquire the necessary job skills to earn more than \$2,600 a month. CPI 1133. The court's award of maintenance on these facts falls easily within the court's discretion under Washington law. See *Konzen*, 103 Wn.2d at 477-478; *accord Washburn*, 101 Wn.2d at 179.

Nor does the spendthrift provision apply here, not only because the court does not care where the maintenance payment comes from (Trust or elsewhere), but because Matt has control of the Trust and his equivalence of ownership invalidates the spendthrift protection, rightly so, as discussed in the preceding section. This fact alone distinguishes the cases cited by the Intervenor (Br. Intervenor, at 17), as does the fact that in each of the cases it is the trust beneficiary who is the potential recipient of maintenance (i.e., the other party is trying to disprove the need for maintenance by pointing to the trusts).

For example, in the Iowa case, the court disapproved the lower court considering the undistributed trust income when deciding not to award maintenance to the wife (potential recipient of the trust income). *Marriage of Rhinehart*, 704 N.W.2d 677 (Iowa 2005). That is, the wife's need for support was current and unmet by the potential for trust distributions in the future. Also, the trust in *Rhinehart* was revocable (a "mere expectancy," you might say), while the trust here is not. Br.

Intervenor, at 15 (Intervenor describing as irrevocable). Finally, *Rhinehart* has no application to income distributed to Matt, only to undistributed income. For what it's worth, the Iowa court did allow consideration of the trust when it came to distribution of the property before it. 704 N.W.2d at 683.

The New Jersey case is similar. *Tannen v. Tannen*, 3 A.3d 1229 (N.J. Super. 2010). There, the wife proved a need for support despite that she was a trust beneficiary because she had no means (given the trust's structure) to compel distributions to her. In this case, as compared to both these cases, the shoe is on the other foot: it is Ginger's need that is at issue. Moreover, Matt has had complete discretion over when and how to use the trust, completely unlike the wife in *Tannen*. In any case, the New Jersey court declined to adopt the position of the Restatement Third of Trusts, cited above and consistent with our existing case law (e.g., *Erickson*). In any case, the question here is whether Matt has the ability to meet that need, from whatever source – business, investment, or trust. The court properly considered the Trust as pertinent to that question.

Nor does the “ascertainable standard” offer any protection from the court considering the Trust in making its maintenance award, contrary to the Intervenor's argument. Br. Intervenor, at 17-18. The Intervenor argues Matt may distribute all the wealth he wants to himself, for his own

“support, maintenance, health and education,” but cannot pay one dime to Ginger for her “support, maintenance, health and education.” Fortunately, this is not the law in Washington. Rather, it has long been the law of our state that “[e]ven a spendthrift trust may be subjected to the support of a wife or child, or for alimony awarded to the divorced wife of the beneficiary.” *Knettle v. Knettle*, 197 Wash. 225, 228, 84 P.2d 996, 998 (1938). This common law principle remains unaffected by the statute on execution cited by the Intervenor. *See, Erickson*, 97 Wn.2d at 251 (statute on execution not meant to restrict the common law as it relates to spendthrift trusts).

Furthermore, the Washington courts have supported creditors in their efforts to recover from trust income debts owed for “necessities of life” supplied to trust beneficiaries. *See, e.g., Erickson*, 97 Wn.2d at 253. This policy allows such creditors to “step into the shoes” of the beneficiary and invade the trust. *Id.*, at 253. As the *Erickson* court observed, this applies as well to recipients of maintenance and child support. *Id.* *See, also*, RESTATEMENT (SECOND) OF TRUSTS § 157(a) (allowing a child support or maintenance claim to reach a beneficiary’s interest in an express spendthrift trust).¹⁴ Here, the court

¹⁴ The Restatement provides:

awarded maintenance to Ginger to meet her necessities of life, i.e., for purposes of health, education, support, and maintenance. With the support of Washington law, the trial court provided for Ginger to step into Matt's shoes. Washington law does not support the effort here to leave Ginger without the means she needs to live, especially as she has two children residing exclusively with her – children who are also Trust beneficiaries.

I. THE COURT ACTED PROPERLY FOR THE BENEFIT OF THE CHILDREN.

The Intervenor argues the court acted in derogation of the children's interests when it awarded Ginger attorney fees and ordered that the residence sale proceeds be made to satisfy the marital lien. Br. Intervenor, at 18-19. The Intervenor cites no authority for this proposition. *See* RAP 10.3(a); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990) (insufficient argument); *Saunders v. Lloyd's of*

Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

- (a) by the wife or child of the beneficiary for support, or by the wife for alimony;
- (b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;
- (c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;
- (d) by the United States or a State to satisfy a claim against the beneficiary.

London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority).

As a matter of record in this case and a matter of common sense, the interests of Ginger and the children cannot be divided here, nor can they be put off to some future when they will benefit from the trust. All three of them need support. The children cannot live with Matt, given his many limitations. Accordingly, Ginger alone must ensure they are housed, fed, educated, kept healthy and happy. How is she supposed to do this without money? She already has been forced to spend excessive funds on litigation because of the intransigence of Matt. CPI 1134. She already has felt the threat and fear of financial need, when Matt ignored the court's orders to pay temporary support, driving Ginger into debt. CPI 1133. The Intervenor appears to think the children are better off if their mother is impoverished, but this is not the view of Washington law. Here, Ginger is the means by which the children are protected and nurtured. The court acted through her to fulfill its duty to the children's welfare.

J. THE TRIAL COURT PROPERLY AWARDED CHILD SUPPORT LARGELY IN ACCORD WITH THE PARTIES' AGREEMENT.

The trial court ordered Matt to pay child support for the two children in the amount of \$1800 total (\$900x2), representing a slight

deviation above the standard calculation of \$1636. CPI 1114. The court supported this deviation with the following findings:

Obligor has assets valued in excess of \$8 million. Obligor receives substantial financial support from his trusts/investments and has limited living expenses. Obligor proposed an upward deviation to \$1,800 transfer payment. Obligee agrees with the proposal to attempt to balance the vastly disparate living situations in the parents' respective households and provide for the established needs of the children.

CPI 1115. Matt tries to do the right thing for his children and the Intervenor objects! The Intervenor again makes the argument about the execution statute (RCW 11.96A.190) limiting what the court can consider, which, as discussed above, does not apply here. Nor does the other statute cited by the Intervenor, RCW 26.19.071, which lists sources of income that may be considered in the process of determining the standard calculation. The Intervenor has not assigned error to the standard calculation (or to the other findings of the court pertinent to this issue).

The statute pertinent to the Intervenor's issue is the one governing deviations from the standard calculation, RCW 26.19.075, which allows the court to deviate for a number of reasons, including "[p]ossession of wealth, including but not limited to savings, investments, real estate holdings and business interests, vehicles, boats, pensions, bank accounts, insurance plans, or other assets;..." RCW 26.19.075(1)(a)(vi). The statute permits the court to consider wealth as a basis for deviation.

The Intervenor also disputes the court's calculation of Matt's wealth (again, without assigning error to those findings), arguing it is \$5 million, not \$8 million. Br. Intervenor, at 20. He fails to show how this discrepancy, taking him at his word, makes any difference. *See* RCW 4.36.240 ("The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."). As the record made clear, Matt has access to a lot of wealth. He agrees his children should enjoy a standard of living similar to his own. The Intervenor cites no authority for the proposition that the court cannot consider these assets for the purpose of deviating from the standard calculation. *See Marriage of Scanlon and Witrak*, 109 Wn. App. 167, 179, 34 P.3d 877 (2001) (where one parent wealthy and one is not, appropriate for court to attempt to lessen the disparity between the standard of living of the child and the wealthy parent). There simply is no reason the court had to ignore Matt's interest in the Galando trusts, especially as Matt, a trustee of one Trust (for the benefit of himself and his children), agreed to the downward deviation in recognition of this wealth.

K. SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDINGS REGARDING THE TRUSTS.

The Intervenor challenges the court's factual findings pertaining to the multiple trusts of which Matt is a beneficiary. It does not appear the Intervenor has standing to represent any interests but those of the independent trustee for the "Descendant's Trust," the one dedicated to Matt and his heirs. At trial, the Intervenor represented only the interest of Mr. Ahrens (the independent trustee) of "Matthew's Trust." CPI 16-23; see, also, CPI 602-609. The other trusts are unrepresented in this proceeding. Yet, in his brief, the Intervenor focuses almost exclusively on these five other trusts. Br. Intervenor, at 20-23.

Assuming for the sake of argument that these challenges can be raised by the Intervenor, they still do not get anywhere. The five trusts were considered by the court as part of Matt's wealth, with the court valuing his interest at \$3 million on the spreadsheet. CPI 1138-1140. The Intervenor fails to show the court's valuation was an abuse of discretion. Rather, the court's assignment of this value is within the scope of the evidence, as discussed above at §IV.D(2) (responding to Matt's valuation argument), and should be upheld. *Soriano*, 31 Wn. App. at 436 (1982) (no abuse of discretion for assigning values within scope of evidence).

Overall, if anything, the court underestimated the wealth available to Matt, perhaps because of the considerable complexity of the Galando

estate-planning scheme, with its multiple loans back and forth between the different entities. See, e.g., 1RP 95 (Ahrens describing how Matt owns a note from the SDM Trust with annual interest payments owed him and a principal payment due in 17 years).

Again, assuming for the sake of argument, that there was no evidence to support counting this \$3 million as part of Matt's wealth, that leaves the rest of his wealth -- \$5 million or so (not counting his luxury items and business). CPI 1138-1140. The Intervenor fails to explain how the court's supposed error regarding the other five trusts affects the outcome of this case -- Matt remains wealthy and Ginger remains poor. Again, any error, whether or not properly raised here, is harmless. RCW 4.36.240 The Intervenor cites no authority for any other conclusion (apart from recycling the argument about the spendthrift provision, already addressed above: Br. Intervenor, at 25).

The Intervenor's final pitch claims the Court imposed unrealistic burdens on Matt, ones he could not meet without liquidating Trust assets, which he cannot do because they are illiquid, and that it violates the Trust's "ascertainable standard" to require him to distribute Trust assets for anyone's benefit but his own. As before, the spendthrift provisions do not protect the Trust because Matt has equivalent ownership, as previously described. He has had no trouble historically with the flow of funds to

whatever purpose he, as trustee, chose – house, business, cars, trucks, guns, etc. Yet, the Intervenor asks this Court to find no funds can flow to Matt’s children or to their mother who must, in light of Matt’s effective abandonment, provide all of their hands-on care. Here, again, the children and Ginger step into Matt’s shoes, even without going the route of acknowledging the children are beneficiaries of the trust, too. (A fact the Intervenor argues only in support of not spending money on them now so they can enjoy that money later. Br. Intervenor, at 18-19.) The children have present needs, as does Ginger, and the court does not care what source Matt uses to meet them. He can work or not work, invest or not invest, use Trust funds or not use Trust funds. What he cannot do is fail to meet his obligations to his ex-wife and the children of their marriage.

L. GINGER REQUESTS HER FEES ON APPEAL

Post-trial, the trial court ordered Matt to pay interim attorney fees to Ginger so that she could have representation in the appellate court. Supp. CPG__ (sub 376). It is presently unknown whether that award will suffice, but, in any case, Ginger seeks an award of fees specifically for having to respond to the Intervenor. This Court should award her fees on the authority of RAP 18.1 and RCW 26.09.140, given her need and the ability of the Intervenor to pay her fees. The statute provides that:

The court from time to time after considering the financial resources of both parties may order a party to pay a

reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

This statute has as its purpose "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." 20 Kenneth W. Weber, Wash. Prac., *Family and Community Property Law* § 40.2, at 510 (1997). It is hard to dispute that a parent with vastly inferior resources "is at a distinct and unfair disadvantage in proceedings" pertaining to a child. *King v. King*, 162 Wn.2d 378, 417, 174 P.3d 659 (2007) (Madsen, J., dissenting). Ginger is disadvantaged in this litigation, including because she must litigate on two fronts – Matt and the Intervenor (representing the power and wealth of the Galando family). This David-and-Goliath scenario is precisely the kind of disparity the statute seeks to redress. Accordingly, Ginger requests her fees.

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IV. CONCLUSION

For the foregoing reasons, Ginger Galando respectfully asks this Court to affirm the trial court's orders and award her fees for having to respond to this appeal.

Respectfully submitted this 14th day of October 2016.

/s Patricia Novotny, WSBA #13604

/s Nancy Zaragoza, WSBA #23281

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