Supreme Court No. 100909-7
Court of Appeals No. 54382-6-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

MIKAYLA R. BYERS, Petitioner,

and

PAUL B. BYERS, Respondent.

Amended PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Mikayla Byers, Appellant in the Court of Appeals, is the Petitioner before this Court in the above-captioned dissolution of marriage. She asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part II of this Petition.

II. DECISION BELOW

The Petitioner requests review of the Court of Appeals, Division II, opinion in case number 54382-6-II filed on April 5, 2022. A copy of the decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

This Court should accept review under Rule of Appellate Procedure 13.4(b)(1)-(2), for the following reasons:

1) Whether and to what extent the community has interest in real property that was paid for almost entirely by the community, maintained and improved by the community, altered significantly by the community, and otherwise funded by the community in an amount that eclipses both the initial value of the property as well as any minimal separate contributions made toward the property;

2) Whether the community's right to reimbursement from contributions to separate property is overcome by a technical separate property interest;

3) Whether long-held principles of community and separate property are, in effect, realized when commingling principles applied to all other forms of property are not applied to real property;

4) Whether long-held and statutorily required principles of equity in the dissolution of a marriage are, in effect, realized when the community's right to reimbursement is so substantial and unquantifiable due to intermingling/commingling but the property is nevertheless characterized as separate without any reimbursement award or apportionment of value;

5) Whether the Court of Appeals appropriately held that the mortgage rule applies when the down payment was satisfied with a debt that was transferred to a community credit card and paid off by the community.

STATEMENT OF THE CASE

Paul and Mikayla Byers began their relationship in 2001, began living together in 2002, and were married on July 19, 2003. CP 2413, CP Dec. of Mikayla Byers, dated

6/26/18; see also CP 760-66, 807-812. They separated fifteen years later on January 3, 2018, CP 2413, and their divorce case was finalized after trial on January 28, 2020. CP 2412-2418, 2419-25.

In her oral decision, it was determined that the parties' assets consisted primarily of the following:

- BCM, a community business valued at $770,000;
- Centers of Health, a community business, valued at $187,000;
- Real property located at 9003 Canyon Drive, characterized as Dr. Byers' separate property, valued at $365,000;

CP 2376. After splitting the community property and awarding Dr. Byers the Canyon Drive property, his total share of assets was $1,045,146.50, and Ms. Byers' share was $829,206. CP 2376-77.

At issue in this Petition is the community's interest in the Canyon Drive property where BCM is located.

On July 31, 2000, Dr. Byers signed a contract with John S. Huber, then owner of the property located at 9003 Canyon Drive. Trial Exhibit ("Ex.") 1, p. 17.

Payments for the Property

The contract signed by Dr. Byers specific two sums to be paid: $90,000 down with $60,000 paid in monthly installments. Ex. 1.

Regarding the $90,000 down payment, both parties testified that this initial $90,000 was paid with a Home Equity Line of Credit ("HELOC"), which was paid off during the parties' marriage. VRP 55 (Vol. 1), 367 (Vol. 5), 682. At first, Dr. Byers testified that he paid rent from Byers Chiropractic and Massage ("BCM") to the building

(himself) as a business expense, but admitted the payments were never made to a separate account until June of 2018, when he filed for divorce. VRP 372-73.

During trial, he was asked "So how do you know whether or not you were making the home equity line of credit payment with the rent if you didn't keep it separate?" VRP 377-78. His answer was "I guess I wouldn't know that." VRP 377-78.

Regarding the other $60,000 owed to the Seller, payments of $590.86 were made to the Seller until 2005, when the parties paid off the remainder using "an American Express card with a very high limit, credit limit, and a very low interest rate" and "some cashier's checks." VRP 59. While Dr. Byers testified that he paid off the American Express credit card with "rents collected," he

admitted that he collected no separate rent and that the American Express card was a business card for the parties' community business, BCM, that was paid by the parties. VRP 59-60, 83. In fact, until he filed for divorce, there were no separate bank accounts for the property or payments made from the business to the property – the business just made the payments directly. VRP 378-79 (Vol. 1).

During the marriage, a real estate holding company was created called "Living Well Properties" with 9003 Canyon Drive as its only asset. VRP 378-79 (Vol. 5). Until Dr. Byers filed for divorce, there were no bank accounts for Living Well Properties, but in June of 2018, he created a bank account for Living Well Properties and started paying it "rent" because "like I said before, you get kind of

sloppy when it's – no one's – when it comes to divorce proceedings, then it kind of matters." VRP 379 (Vol. 1).

At trial, Dr. Byers produced one financial statement for Living Well Properties dated June 30, 2018. Ex. 5. The only assets included were the building and $36,000 in rent, although the Living Well Properties bank account had no such funds. VRP 590-93 (Vol. 7); Exs. 191-92.

Despite being a separate business entity from Living Well Properties, BCM paid attorney fees for "Living Well Properties" on 11/1/18 from the same business account that paid for business expenses such as payroll, licensing, insurance, and personal expenses, such as Dr. Byers' car payment and haircuts. Ex. 169. Other building expenses and costs paid by BCM are outlined below under "Maintenance and Repairs."

Lease Agreement

At trial, Dr. Byers provided a copy of one lease between BCM Massage and Living Well Properties that fixed the rent at $6,000 per month, and it was not executed until just before the parties' separation. Ex. 4; VRP 65 (Vol. 1). During his deposition, he stated that he pays himself the $6,000 per month in rent per an "agreement that's not finalized[.]" CP 1351. At trial, he then asserted that he had a lease between the building and the business for all 20 years it had been in business, but could only produce one unsigned copy of a lease from 2017. VRP 613 (Vol. 7).

Trial Exhibit 4 contains the one commercial lease dated 9/5/2017 that was executed between Living Well Properties and BCM to pay $6,000 per month for 10 years.

Ex. 4. This lease broke down the responsibilities of the business versus the responsibilities of the building owner, requiring the building owner to pay real estate taxes, repairs, and property insurance. Ex. 4 p. 1-2. The Lease was signed by "Dr. Paul Byers." Ex. 4, p. 5.

Further, the appraiser hired by Dr. Byers determined that this property's value aside from the parties' community chiropractic business was minimal, and its Highest and Best Use was to remain the location for the parties' community chiropractic business. Ex. 1-3.

Rent Payments

Dr. Byers testified that he was "sloppy" and that his process for paying himself rent had been "muddy for the last – well, for quite a while actually." VRP 375 (Vol. 5).

According to the lease Dr. Byers provided at trial, BCM was required to pay $6,000 rent per month for 10 years from 9/5/2017. Trial Exhibit 4, p. 1.

However, Dr. Byers testified during his deposition that he never paid rent from the BCM business account to a building account or separate account. DEP 1, p 71. VRP 374-75. He further testified that the BCM business account that was paying rent was also used to pay personal expenses for the family. VRP 378. Any checks from BCM for the building were written to him and deposited into a personal account he shared with Ms. Byers. VRP 482.

Dr. Byers included the rent payments as a business expense each year. Ex. 356. During trial, Dr. Byers admitted he had not actually been paying himself rent in

2017 and 2018. VRP 590-93 (Vol. 7). He was asked if he had "any evidence whatsoever that [he] kept a separate account and didn't commingle it with Byers Chiropractic" and his answer was "From – from 2000, no." VRP 374 (Vol. 5). He was asked "Do you have any evidence at all prior to June of 2018 that you kept rent payments separate and apart from Byers Chiropractic," and his answer was "I don't think I have any evidence of that, no." VRP 374 (Vol. 5).

Then, this exchange happened during Dr. Byers' cross-examination by Ms. Byers' counsel:

Q: Dr. Byers, if I told you that I spent hours last night tabbing each transaction history for all of your bank accounts from 2015 to 2019 and I didn't see a single rent payment, would that be possible?

A: That would be possible because if they're bulk payments (unintelligible) ten grand - $10,000 deposit.

Q: But to where?

A: Into the personal account.

Q: And what else was in your personal account? Wages, earnings, Centers for Health money, commingled …

A: Centers for Health money went to a different account.

Q: Was it commingled in your personal account with other deposits?

A: I think those are all business accounts. I think Centers for Health had its own account, Charles Schwab, I believe.

Q: So in what account were you keeping rent separate and apart from other funds?

A: Separate and apart. I don't think there would be separate – I'm not sure on that, separate and apart.

VRP 572-79 (Vol. 7). After a break, during which Dr. Byers indicated he "researched the issue," he was able to identify the account to which he paid rent in Exhibit 238,

Key Bank account x4138, and the following exchange happened:

Q: And, Dr. Byers, you testified before we broke for Mr. Low's testimony that you believe if you kept a segregated account for rental payments, it would be the 4-1-3-8 account for Key Bank?

A: 4-1-3-8, Exhibit 238.

Q: Are there any other potential accounts that you utilized? . . .

A: **No. I think the 4-1-3-8 was the one we used. From 2015 up to August 2017, it was closed. During that time frame, there was no rents being paid until May 5th or until May of 2018.**

Q: **So you didn't pay yourself any rent from what time period?**

A: **August 2017 until May 2018. . . .**

Q: Dr Byers, can you turn to Exhibit 238 . . . . And can you identify this account?

A: 4-1-3-8, KeyBank personal account.

Q: **And is this a personal account in both your name and in your wife's name?**

A: **It looks like it is, yes.**

Q: Okay. So did you keep rental payments in an account that was separate from the community?

A: For this one, no. There were multiple payments that went into that.

Q: Okay. Can you tell me where the rental payments show up to both you and to Ms. Byers who were on this account?

A: They're all – if it ends in 4-7-3-1, **they would be considered rent payments or distributions to ourselves, one of the two.**

Q: **So how can you tell the difference between rent payments and distributions?**

A: **You really can't but the – the accountant would reconcile that at the end of the year.**

Q: **The accountant reconciles it or you tell him what the number is because you don't give him any underlying data; correct?**[1]

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[1]Ex. 5, which is Living Well Properties financial statements, contains a letter from Dr. Byers' accountant with the following message: "Management has elected to omit the statement of cash flows and retained earnings and substantially all of the disclosures required by generally

A: **I would tell him what it was, yes.**

Q: **So you just made transfers from your business account to an account named for both you and your wife –**

A: **That's correct.**

Q: **-- Paul Byers and Mikayla Byers, and you did not track the amount that was paid for rent and the amount that was paid for distributions; correct?**

A: **No, it was not separated.**

Q: So when you testified yesterday that you kept rental payments separate and apart, that was not correct, was it?

A: That was not correct. It was – until we started in – until we could separate it, that's correct.

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accepted accounting principles. If the omitted statements and disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position and results of operations. Accordingly, these financial statements are not designed for those who are not informed about such matters." See also Ex. 7 financial statements for Paul B. Byers DC, Inc. (BCM's holding company) with the same message.

Q: Until June of 2018 when you filed for divorce; correct?

A: That's correct.

Q: **But prior to that, those rental payments were commingled in your community account with Ms. Byers; is that accurate?**

A: **I guess it would be – well, when we were married, yes.**

Q: Okay. Aside from your year-end taxes, which your accountant bases solely upon your word, **there is no other way to track how much was considered rent and how much was considered a distribution or wages or any other type of profit; correct?**

A: I gave them a set amount that we were paying for rents.

Q: **And you testified prior, that was just a number you picked, kind of, out of thin air; is that correct?**

A: **That's correct.**

Q: So are you asserting that you kept rental payments separate and apart in any manner?

A: Before we were married, yes; **when we were together, no**.

VRP 590-93 (Vol. 7).

Trial Exhibit 238 contains Key Bank checking x4138 account statements for a personal account in the name of Paul and Mikayla Byers. Ex. 238. Deposits into the account include transfers from BCM's Key Bank business checking x0236 as well as one of the parties' joint saving accounts, Key Bank x3399. Ex. 238. Deposits came from many other accounts as well as Groupon (for the parties' Centers of Health community business) and even ATM cash deposits. Ex. 238. Monthly deposits ranged from $29,099.08 total to $7,192.71 with varying amounts and payment sources each month. Ex. 238.

Withdrawals from this account included credit card payments, student loan payments, transfers to the parties'

other accounts, cash withdrawals, Paypal, USPS, and other miscellaneous payments. Ex. 238.

Trial Exhibit 239 contains cancelled checks for this account with payments for park entrance fees, campground fees, BCM expenses, checks to the parties, speeding tickets, Montana Fish and Wildlife, Boy Scouts, a storage unit, library fees, etc. Ex. 239. Trial Exhibits 240-243 contain similar statements for additional years in the same account.

Property Taxes for the Building

The lease agreement Dr. Byers provided, dated 9/5/2017, specifically required the landlord/Living Well Properties to "pay all real estate taxes and assessments for the Premises." Ex. 4, p. 2.

No proof of payments from Living Well Properties or a separate account holding collected rents for real estate taxes was provided. Instead, property tax invoices for the building were sent to "Byers Paul B DC INC," which is the name of the BCM corporation. Ex. 348. The parties paid these property taxes with a BCM business credit card, VRP 380, and the payments were characterized as a BCM "business expense." VRP 379-80 (Vol. 5). Profit and Loss Statements for BCM also reflect annual deductions for real estate taxes, although the parties owned no other real property than 9003 Canyon Drive at the time. Ex. 356.

Maintenance and Repairs

According to the one lease Dr. Byers provided at trial, the landlord was required to pay and be responsible for repairs to the Premises. Ex. 4, p. 2. However, Dr. Byers

testified that maintenance and repairs for the building were paid with the business credit card for BCM. VRP 379 (Vol. 5). At the time of trial, he indicated that he had not obtained a credit card for Living Well Properties. VRP 379-80 (Vol. 5).

Ms. Byers agreed with this testimony, saying that when expenses for the building came up over the years, they were typically paid by the business bank account. VRP 672-73 (Vol. 8). This same account was in her sole name for over ten years. VRP 673 (Vol. 8). Kevin Grambush, CPA, testified regarding BCM paying for building expenses:

> [T]he building is owned personally and so the type of repairs, like parking lot repairs, that would be typically paid by the . . . building owner, not the business owner. If this was a fair market rental situation, the business would not be paying for these repairs.

VRP 301 (Vol. 4). Despite this, evidence presented at trial showed that BCM regularly paid for building expenses, maintenance, and repairs, including:

1) Parking lot repair, re-striping, and re-paving. Exs. 169, 403-04, 407-07, 410, 412;

2) Gutter repair in 12/2018 for $3,602.50, Exs. 405-06;

3) Sewer Repair, Exs. 405-06;

4) Carpet Cleaning on 12/20/18 for $19,145.50, Ex. 169;

5) Landscaping and "outside maintenance" going back years before separation, Ex. 169;

6) Roof inspection and repair, Ex. 169; and,

7) Window cleaning, Trial Exhibit 167-69.

BCM paid these expenses even after Living Well Properties was created. Ex. 169. Further, the accounts

from which these expenses were paid were also regularly used to pay for personal and business expenses. Exs. 156, 167, 169.

BCM further claimed these expenses as business expenses on BCM's taxes. Exhibit 356 contains Profit and Loss Statements for BCM from 2011-2012 and 2014-2018, all of which contain deductions for building expenses.

2011 deductions: a. Landscaping/cleaning, $1,777.19; b. Windows, $200; c. Building insurance, $346.49; d. Fence, $1,193.69.
2012 deductions: a. "Outside" expenses, $391.21; b. Landscaping/cleaning, $806.77; c. Windows, $325; d. Supplies to build shed, $7,608.63; e. Insurance, $1,558.69.

2014 deductions:

a. Landscaping/cleaning: $121.23;
b. Windows, $325;
c. LED Sign Repair, $1,050;
d. Insurance, $1,847.13.

2015 deductions:

a. Landscaping/cleaning, $95.02;
b. Windows, $400;
c. "Repairs," $3,245.95;
d. LED sign repair, $506.33;
e. Insurance, $1,371.13.

2016 deductions:

a. Landscaping/cleaning, $140.55;
b. Windows, $450,
c. New sign, $13,749.36.

2017 deductions:

a. Landscaping/cleaning, $315.36;
b. Windows, $302;
c. Security System, $1,832.95;
d. Insurance, $1,572.52;
e. Intercom, $330;
f. New Sign, $8,602;
g. "Repair," $709.

2018 deductions:

a. Landscaping/cleaning, $3,356.69;
b. Windows, $409;
c. Sewer repair, $12,642.10;
d. "Legal work," $24,336.44;
e. Parking lot repair, $31,428.97;
f. Roof repair, $800;
g. Paint, $1,119.95;
h. Home Depot, $4,739.60;
i. New gutter installation, $3,602.50;
j. Lunas Construction, $19,145;
k. Striping/cement blocks for parking lot, $1,411.19;
l. Molding/supplies, $19.

Ex. 356. Regarding the LED sign on the building, Ms. Byers testified that it was purchased with a credit card in her name. VRP 661 (Vol. 8).

Trial Court's Decision

In the trial court's oral decision, she stated, "[i]n regards to the Canyon Road building, I am not finding that commingling has been proved; $365,000 will be awarded to Mr. Byers. That brings his total assets to

$1,045,146.50." CP 2377. No reimbursement or shared value was provided to the community for the extensive funds spent on the property.

On Appeal

Ms. Byers timely appealed this decision, and on April 5, 2022, the Court of Appeals issued its decision affirming the trial court's decision regarding the 9003 Canyon Drive property. P. 13-18. Ms. Byers timely filed this Petition for Review.

STANDARD OF REVIEW

Trial court decisions regarding the characterization of property are reviewed *de novo*. *In re Marriage of Neumiller*, 803 Wn. App. at 921 (citing *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003)).

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ARGUMENT

Under RCW 26.09.080, the trial court in a dissolution matter must dispose of both community and separate property as is just and equitable. The reasoning behind this distinction, dating back to the 1800s, is that both spouses should share in the interest of property when "both spouses contribute to property acquisitions in a joint effort to promote the welfare of the relationship. Hence, an asset acquired onerously during the marriage is presumptively community property whereas one lucratively acquired ordinarily is not." Harry M. Cross, *The Community Property Law*, 61 Wash. L. Rev. 13, 28 (1986). "Onerously acquired" property is "by labor or industry or other valuable consideration," while "lucratively acquired"

property is "by gift, succession, inheritance, or other nonvaluable means." *Id.* at 27-28, n. 69-70.

Traditionally, this distinction is respected by determining the characterization of the asset at the "time of acquisition." *Id.* at 39. However, numerous exceptions and variations have been carved into this general principle ever since. *Id.* at 40-45. *Estate of Buchanan*, 89 Wn. 172, 154 P. 129 (1916); *Ball v. Woodnurn*, 190 Wn. 141, 66 P.2d 1138 (1937); *Binge v. Mumm*, 5 Wn.2d 446, 105 P.2d 689 (1940); *In re Carmack's Estate*, 133 Wn. 374, 233 P. 942 (1925); *Cummings v. Anderson*, 94 Wn.2d 135, 614 P.2d 1283 (1980); *Doyle v. Landron*, 80 Wn. 175, 141 P. 352 (1914); *Estate of Finn*, 106 Wn. 137, 179 P. 103 (1919); *Finley v. Finley*, 47 Wn.2d 307, 287 P.2d 475 (1955); *Heintz v. Brown*, 46 Wn. 387, 90 P. 211 (1907); *Jacobs v. Hoitt*, 119

Wn. 283, 205 P. 414 (1922); *Main v. Scholl*, 20 Wn. 205, 54 P. 1125 (1898); *Marriage of Bepple*, 37 Wn. App. 881, 683 P.2d 1131 (1984); *Salisbury v. Meeker*, 152 Wn. 146, 277 P. 376 (1929); *Van Moss v. Sailors*, 180 Wn. 269, 39 P.2d 397 (1934); *Yesler v. Hochstettler*, 4 Wn. 349, 30 P. 398 (1892).

The law favors characterization of property as community property "unless there is clearly no question of its [separate] character." *In re Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Property is not characterized by title or the name under which it is held. *In re Marriage of Skarbek*, 100 Wn. App. 444, 448, 997 P.2d 447 (2000); *In re Marriage of Hurd*, 69 Wn. App. 38, 848 P.2d 184 (1993).

When the character of property is in dispute, "the question of whether property is community or separate is

retrospectively determined by its character at the date the property was acquired." *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999) (citing *Baker v. Baker*, 80 Wn.2d 736, 745, 498 P.2d 315 (1972). "Where direct and positive evidence is proffered to the contrary, however, this presumption can be rebutted." *In re Marriage of Zahm*, 138 Wn.2d at 223 (citing *In re Marriage of Olivares*, 69 Wn. App. 324, 326, 848 P.2d 1281 (1993). Ultimately, the "test of character is 'whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof.'" *In re Marriage of Sedlock*, 69 Wn. App. 484, 506, 849 P.2d 1243 (1993) (citations omitted).

When the property to be characterized is real estate, this Court has adopted the mortgage rule, which is a

"legal tool used to characterize property acquired, using both community and separate funds, over a period of time," which analyzes the community's obligation and funds contributed toward the asset. *In re Marriage of Zahm*, 138 Wn.2d 213, 224, 978 P.2d 498 (1999). When the real estate (or business) has been combined with personal services belonging to the community, "the rule is that all the income or increase will be considered as community property *in the absence of a contemporaneous segregation of the income between the community and the separate estates*." *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954) (citing *Salisbury v. Meeker*, 152 Wn. 146, 277 P. 376 (1929)).

For example, in *Buchanan*, stock acquired by the husband before marriage with separate funds was

characterized as community property. *In re Buchanan's Estate*, 89 Wn. 172, 154 P. 129 (1916). There, before marriage, the husband and another man created a lumber company, from which the husband purchased six shares of its capital stock. *Id.* at 174.

After marriage, additional shares of stock were purchased, and the husband continued to work for the company in exchange for a small salary. *Id.* at 174-75. Community credit and funds paid to that credit were used to expand, repair, and rebuild the company. *Id.* As the company's value increased, dividends were paid to the husband, which he deposited into the same bank account as his salary, which was an account used by both spouses for community expenses. *Id.* For these reasons, this Court held that the company was entirely community property

even though the husband had purchased some stock before marriage because his separate contribution was insignificant compared to the community contribution. *Id.*

Buchanan is far from the only case where an asset was deemed a community asset for the purpose of property division despite its separate property characteristics. This Court has recognized multiple times that when it is impossible to determine what percentage of an asset resulted from separate or community contributions, the asset should be deemed "community." *See, e.g.*, *Binge v. Mumm*, 5 Wn.2d 446, 105 P.2d 689 (1940).

In this case, the property located at 9003 Canyon Drive should also be characterized as community property for the same reasons as *Buchanan*. First, the property at

9003 Canyon Drive was largely obtained and improved with community credit and funds. Dr. Byers signed the real estate contract shortly before the parties' relationship began, and it was undisputed that the community paid the $90,000 during the marriage with community funds. It was also undisputed that the monthly amounts due to the seller were paid with community business funds and with a community credit card, for which Ms. Byers was also obligated. Further, the Statement of Facts above contains a laundry list of expenses paid from community funds, community credit, and the community business accounts. Dr. Byers was even held in contempt for some of these expenses as they violated the financial restraints in place, and he later used those same expenses to justify his request to lower child support and maintenance on

the basis that his income was lower because of these additional "business expenses."

Second, there was no separation between the community and the property until Dr. Byers filed for divorce in June of 2018. Before that time, Dr. Byers admitted there was no separate bank account used to collect rent and pay building expenses. Even after he created Living Well Properties, the community BCM continued to pay expenses for the building without reimbursement, and even after he created a separate bank account to collect rent for Living Well Properties, BCM continued to pay thousands in building and property repairs from BCM accounts as a BCM business expense.

At trial, Dr. Byers acknowledged that even the lease he created just before separation was not finalized or

followed. That lease required BCM to pay Living Well Properties $6,000 per month, but at trial, Dr. Byers testified that he had not been paying rent in 2017 and 2018, and that any rent that was paid was not for a $6,000 monthly amount and was indistinguishable from dividends and his salary in the parties' joint personal account.

The lease also required the landlord to pay property taxes, repairs, and property insurance, but as described above, BCM paid for those things. Dr. Byers testified that he basically gave his accountant the numbers to reconcile at the end of the year so he could file two separate tax returns, but otherwise, there was no separation between BCM, the parties, and the property.

Finally, and on many of the same bases as outlined above, the parties treated the property as theirs. Ms. Byers testified about how they purchased a sign with her personal credit card. Any rent paid was deposited into their joint account along with deposits from BCM far exceeding any rent as well as funds from their Groupon business, and they used that account for personal expenses. Even after Dr. Byers filed for divorce, he described the property as their property.

Overall, the property was obtained and improved with community funds and community effort, and any contribution Dr. Byers made before marriage is insignificant considering the extensive contributions made by the community. Therefore, it should be held that it was an abuse of discretion to determine the property is

separate on the basis of "no commingling", especially since Dr. Byers specifically admitted the funds were commingled. VRP 590-93.

In the instant case, the Court of Appeals' determined that the property was separate due to the mortgage rule, but did not address the very real facts that 1) the contract was signed just before the parties' relationship began, 2) there was no cash down payment – there was a loan that was made a community obligation and was paid by the community, and 3) the community paid almost entirely for the property and all associated expenses.

Further, it is not just and equitable to award this property to Dr. Byers with no community reimbursement or apportionment. In each of the cases cited herein, there

was recognition of the community's right to reimbursement, and when it was impossible to calculate the amount of reimbursement because the amounts were hopelessly confused, then the property was deemed community. It is not just or equitable to award the entire value to Dr. Byers without any recognition of the community interest in this property.

CONCLUSION

For the reasons set forth above, Ms. Byers respectfully requests that this Court accept review under RAP 13.4, reverse the Court of Appeals, and hold that an equitable division of the assets and debts in this case warrants reflection of the community interest in the 9003 Canyon Drive property.

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PROOF OF SERVICE

Laura A. Carlsen certifies as follows:

On May 13, 2022, I served upon the following persons a true and correct copy of this Petition via electronic service to:

Stephen Burnham
Hillary A. Holmes
Campbell Barnett PLLC
317 South Meridian
Puyallup, WA 98371
253-848-3513

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED AND DATED this 13th day of May, 2022, at Tacoma, WA.

Laura A. Carlsen, Attorney

I certify under RAP 18.17(c) that the number of words contained in this document is 4940.

DATED: May 13, 2022

CARLSEN LAW OFFICES, PLLC

Laura A. Carlsen, WSBA No. 41000
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Appendix A

Filed
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Division Two

April 5, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of PAUL BRUCE BYERS, Respondent, And MIKAYLA ROCHELLE BYERS, Appellant.	No. 54382-6-II UNPUBLISHED OPINION

CRUSER, J. — Mikayla Byers appeals the final divorce order, findings of fact and conclusions of law about a marriage, and the order denying her motion for reconsideration entered following her divorce from Paul Byers. Mikayla[1] argues that (1) the trial court abused its discretion when it allocated the parties' property, (2) the trial court erred when it characterized real property as Paul's separate property, (3) the trial court abused its discretion in limiting her spousal maintenance to two years of decreasing maintenance beginning at $2,500, and (4) the trial court abused its discretion in denying her request for attorney fees.

We hold that (1) the trial court abused its discretion when it allocated the parties' property, (2) the trial court properly characterized the real property as Paul's separate property, (3) the trial

[1] For clarity, we refer to Mikayla and Paul Byers by their first names. No disrespect is intended.

court abused its discretion when it awarded two years of decreasing spousal maintenance, and (4) the trial court abused its discretion when it denied Mikayla's request for attorney fees.

Accordingly, we reverse in part and affirm in part and remand for further consideration.

FACTS

I. PAUL AND MIKAYLA'S MARRIAGE

Mikayla and Paul Byers were married in 2003. They had a daughter during their marriage. Mikayla and Paul separated after a 16-year marriage.[2]

When Paul and Mikayla met, Mikayla was a student at the University of Washington working on obtaining two bachelor's degrees, one in biology and another in aquatic and fishery sciences. Paul was self-employed in his own chiropractic practice, Byers Chiropractic and Massage (BCM).

After graduating with her bachelor's degrees, Mikayla was offered an internship in her field of study, but she rejected the internship to assist Paul with his practice. Mikayla continued to assist Paul in developing his practice after they married, with her tasks ranging from establishing marketing programs, filling in for staff members, billing, renovations, and others. Mikayla did not receive a salary or payment for her work in Paul's practice, because she "never technically worked there." 8 Verbatim Report of Proceedings (VRP) at 662. However, she was "very involved for the whole marriage," and never pursued her own career independent of Paul's practice. *Id.* In addition, Mikayla homeschooled their daughter.

[2] The length of the marriage is based on the trial court's Finding of Fact 13, which is unchallenged. *In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011) (unchallenged findings are verities on appeal).

Since starting his practice in 1996, Paul operated his business from a rented location in Kent, Washington. In 2000, several years before Paul married Mikayla, Paul purchased the real property on which his business was located. Paul purchased the property using a home equity line of credit to make the down payment and entered into an agreement to pay the remaining purchase price directly to the seller. The house that served as collateral for the home equity line of credit was a house that Paul purchased in 1988 and owned free and clear of any mortgage.

The loan on the business property was paid off in 2005, after the parties were married, with a credit card that was a business card for BCM, and with rent payments collected from BCM. In addition, the home equity line of credit used for the down payment was paid from accounts and with credit cards that belonged to both Paul and Mikayla as well as rent collected from BCM. Rent payments from BCM were kept in a personal account that belonged to both Paul and Mikayla. Paul received a statutory warranty deed after repaying the obligation on the business property to the seller. The statutory warranty deed stated that the property was conveyed to Paul as his separate estate.

Repairs and maintenance for the business property were paid using a BCM account. The BCM account was also often used to pay for Paul and Mikayla's personal expenses, such as gas, insurance, travel, and car payments. For at least five or six years, Mikayla's name was the sole name on the BCM business account.

In 2017, Paul formed Living Well Properties LLC, to act as a real estate holding company with the business property as its only asset. Paul was the sole member of the LLC. Mikayla was not a member of Living Well Properties or otherwise involved in the LLC. Living Well Properties and BCM executed a commercial lease wherein BCM would pay rent to Living Well Properties.

Rent payments made by BCM to Living Well Properties were also kept in an account that Paul and Mikayla shared.

II. DISSOLUTION PROCEEDINGS

Several months after the parties separated in 2018, Paul filed for dissolution. Under an informal agreement, Paul paid Mikayla a monthly payment of $6,000 following their separation in January 2018. The trial court later entered a temporary order that required Paul to pay spousal maintenance of $4,500 per month.

The trial court proceedings were heavily contentious. The trial court remarked that "at various times during this litigation both of the parties have been intransigent resulting in unnecessary delays, misuse of community funds, and noncompliance of valid court orders." Clerk's Papers (CP) at 216.

During trial, the parties addressed an Ally Bank account that had belonged to the community during their marriage and that contained $319,914 at the date of separation. Paul withdrew approximately $80,000 from of that account after separation but prior to trial. He asserted that these withdrawals were made for the benefit of the community and should not be considered a distribution in his favor. Mikayla argued that those withdrawals should be characterized as a pre-distribution of community property to Paul. Both parties agreed that Mikayla should retain the funds in that account. Mikayla also withdrew funds the Ally Bank account to pay for legal expenses related to the dissolution.

In addition, Paul and Mikayla disputed the character of the business property on which BCM was located. Paul asserted that the real property was his separate property and remained so,

while Mikayla contended that the property had transmuted to community property because the property had become extensively commingled into the community.

Mikayla requested spousal maintenance, proposing that Paul pay her $6,000 per month. Mikayla argued that the award was reasonable given her need and Paul's ability to pay that amount based on his income. She also requested that the trial court award her attorney fees based on her need under RCW 26.09.140 and Paul's intransigence during the trial court proceedings.

III. FINAL ORDERS

With regard to the Ally Bank account, the trial court ruled that $80,000 should be awarded to Paul and $239,914 should be awarded to Mikayla. In the trial court's findings, the trial court found that the value of the account was $319,914. In discussing Paul's separate property, with regard to the Ally Bank account, the trial court stated that Paul would be awarded "[t]he sum of $80,000," and that Mikayla would retain "[a]ll the funds in the Ally Bank" account "after the payment of $80,000" to Paul. CP at 2420, 2422.

The trial court found that BCM was community property, and it ordered Paul to pay Mikayla 50 percent of the value of that business within one year of its entry of final orders. The trial court provided further that the amount due to Mikayla for her share of BCM's value should be offset by the $80,000 that was due to Paul from the Ally bank account.

The trial court characterized the real property in which BCM was located was Paul's separate property. It found that the property had a value of $385,000.

The trial court also determined that Mikayla had retained a $12,000 tax refund from the parties' joint tax filing in 2017. It ordered Mikayla to pay Paul $6,000 of that refund. However,

Mikayla and Paul did not receive a refund on their taxes from the Internal Revenue Service (IRS) in 2017. Instead, they were required to pay $2,904 to the IRS.

Finally, the trial court agreed with Mikayla that an award of spousal maintenance was appropriate. However, it found that Mikayla had marketable skills, and that "[h]er efforts of seeking employment have been less than credible." *Id.* at 2416. The trial court referred to its finding in the child support calculation that Mikayla was voluntarily underemployed. The trial court considered Mikayla's age and health, finding that Mikayla was 39 years old at the time and that she was in good health. The trial court further found that the parties had a "middle-class standard of living during the marriage" and that the marriage was 16 years long. *Id.* Due to the allocation of the parties' property, the trial court found that the "financial resources" of the parties was about equal on dissolution. *Id.* The trial court further noted that Mikayla had already received maintenance for two years prior to entry of final orders. Based on the foregoing, the trial court awarded Mikayla two years of maintenance, with $2,500 per month payment for the first year, and $1,500 per month payment for the second year.

In the trial court's order imposing a child support payment obligation on Paul, the trial court imputed income to Mikayla based on her rate of pay as a part time employee at her daughter's school. The trial court determined that Mikayla's monthly income, including her spousal maintenance of $2,500 per month, was just under $6,000. Paul's net monthly income, according to the child support worksheet, was over $21,000.

The trial court also denied Mikayla's request for attorney fees. It explained that because both parties had been intransigent, they would each be responsible for paying their own fees. The trial court did not address Mikayla's argument requesting fees under RCW 26.09.140.

In total, the trial court awarded Paul $680,146.50 in community assets, plus the real property on which BCM was located which had a value of $365,000. Thus, including both community and separate property, Paul was awarded $1,045,146.50 in total assets.

The trial court awarded Mikayla a total of $829,206 in community assets. That total was based on the trial court's determination that Mikayla would receive $239,914 from the Ally bank account. The trial court also did not include in its calculation various funds from the community that were pre-distributed to Mikayla after separation but before trial. Factoring in the pre-distributed funds, Mikayla's total award was $854,213.

Mikayla moved for reconsideration of the trial court's order awarding Paul a future payment of $80,000 as an offset related to his portion of the Ally Bank account funds. Mikayla also argued that the trial court made a clerical error in distributing the $12,000 tax refund because the parties did not receive a refund on their 2017 return. The trial court denied Mikayla's motion without comment.

Mikayla appeals the trial courts final orders and findings of fact and conclusions of law, as well as its order denying her motion for reconsideration.

DISCUSSION

I. STANDARD OF REVIEW

At issue before us are several aspects of a trial court's decision in a marriage dissolution action. With regard to review of dissolution proceedings, the supreme court has observed that "[t]he emotional and financial interests affected by such decisions are best served by finality." *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). Accordingly, "[t]he spouse

who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court." *Id.*

The trial court has abused its discretion where its decision is manifestly unreasonable or is based on untenable grounds or reasons. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005).

> "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Where, as here, the trial court has weighed the evidence, our role on review is to determine whether substantial evidence supports the findings of fact, and in turn, whether the findings support the trial court's conclusions of law. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). "'Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.'" *Id*. at 242 (quoting *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002)). We do "'not substitute [our] judgment for the trial court's, weigh the evidence, or adjudge witness credibility.'" *Id.* (alteration in original) (quoting *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999)). If a trial court's decision is based on unsupported findings, or if the findings do not satisfy the applicable legal standard, the trial court's decision amounts to an abuse of discretion, warranting reversal. *Muhammad*, 153 Wn.2d at 803; *Littlefield*, 133 Wn.2d at 47.

II. DIVISION OF COMMUNITY PROPERTY

Mikayla argues that the trial court abused its discretion in allocating the parties' community property when it awarded Paul a second payment of $80,000 from the Ally bank account and when it distributed a $12,000 tax refund.[3] We agree.

A. LEGAL PRINCIPLES

In a marriage dissolution proceeding, a trial court is tasked with disposing the parties' property and liabilities, "'either community or separate, as shall appear just and equitable after considering all relevant factors.'" *Muhammad*, 153 Wn.2d at 803 (quoting RCW 26.09.080). The trial court must consider a list of nonexclusive factors set forth in RCW 26.09.080, including "(1) [t]he nature and extent of the community property; (2) [t]he nature and extent of the separate property; (3) [t]he duration of the marriage . . . ; and (4) [t]he economic circumstances of each spouse . . . at the time the division of property is to become effective." RCW 26.09.080; *In re Marriage of Zahm*, 138 Wn.2d 213, 219, 978 P.2d 498 (1999).

Trial courts are vested with "broad discretion" to determine a just and equitable allocation of property based on the particular circumstances in a case. *Rockwell*, 141 Wn. App. at 242. Mathematical precision is not required in a just and equitable distribution; instead, a trial court must ensure "'fairness, based upon a consideration of all the circumstances of the marriage, both

[3] Mikayla did not assign error to any of the trial court's findings as required under RAP 10.3(g), which states that "[a] separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number." Paul contends that we must therefore accept the entirety of the trial court's findings as verities. Despite Mikayla's technical flaw, we exercise our discretion to address her challenges to the trial court's factual findings. Mikayla has made a sufficiently detailed challenge to the trial court's factual findings and has clearly described her challenge in her statement of the issues and her argument to warrant review. RAP 10.3(g); *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

past and present, and an evaluation of the future needs of parties.'" *Zahm*, 138 Wn.2d at 219 (quoting *In re Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (1996)).

B. APPLICATION

1. $80,000 Ally Bank Payment

The trial court's decision to award Paul a second payment of $80,000 from the Ally Bank account was an abuse of discretion because it was based untenable grounds and untenable reasons. The trial court's error was more significant than mere mathematical imprecision; instead, it undermined the fairness of its property distribution. *See id.*

Prior to Mikayla and Paul's separation, the Ally Bank account had a value of $319,914. After separation, Paul withdrew approximately $80,000 from that account. Mikayla withdrew funds from that account for legal expenses related to the dissolution. The trial court ordered Mikayla to reimburse Paul half of the amount she withdrew for her legal fees.

At trial, Paul testified that the value of the Ally Bank account was "200, 214, something like that." 2 VRP at 155. In a similar recognition of the value of the Ally account at trial, Mikayla requested that the trial court divide the Ally Bank account and award the $80,000 that Paul had already withdrawn to Paul, allowing her to retain the remaining $239,914. The fact that Paul and Mikayla withdrew funds from the Ally Bank account, reducing its balance from $319,914, was not in dispute.

There was, however, a dispute at trial regarding whether Paul withdrew the funds for personal use or for the benefit of the community and whether those funds should be allocated to Paul as a pre-distribution of community assets. Mikayla asserted that the funds should be considered a pre-distribution of community assets and that Paul should be allocated those funds,

whereas Paul contended that because his withdrawals were made for the benefit of the community, they should not be considered a pre-distribution and they should not be allocated to him.

In its oral ruling regarding Mikayla and Paul's Ally Bank account, the trial court adopted Mikayla's proposal, stating that $80,000 would be allocated to Paul, while $239,914 would be allocated to Mikayla. The trial court entered a finding that the value of the Ally Bank account was $319,914, and it stated in its final order that Paul was to receive one payment of $80,000 from the Ally bank account, and that Mikayla was to retain the remainder. The sum of $80,000 plus $239,914 is $319,914.

However, the trial court also distributed an additional $80,000 to Paul from the Ally Bank account beyond that discussed in its oral ruling. Because Paul was required to pay Mikayla $385,000 representing her share of BCM's value, the court stated in its order that "[t]he $80,000 payable by [Mikayla] to [Paul] from the Ally Bank account shall be offset against this sum reducing it to $305,000." CP at 2425. Therefore, because the payment of $80,000 to Paul would offset the amount due to Mikayla at a future date, the trial court treated this $80,000 sum as a future distribution to Paul rather than, as had been discussed at trial, a pre-distribution of funds that Paul had already received from that account.

Paul contends that the trial court intended to award him a future sum of $80,000 from that account, that it deliberately valued the Ally Bank account as of the date of separation rather than as of the date of trial, and that the trial court did not agree with Mikayla or find that his $80,000 withdrawal was a pre-distribution. Paul's assertions are without merit. The trial court's finding that the value of the Ally Bank account was $319,914, and its order stating that Paul should receive

a single payment of $80,000 from the Ally Bank account was consistent with its oral ruling treating Paul's $80,000 as a pre-distribution and allowing Mikayla to keep the remaining $239,914.

The trial court, however, created an internal conflict between its findings and its order when it provided for a future distribution of $80,000 to Paul from the Ally Bank account. The undisputed facts reflect that Paul had already withdrawn approximately $80,000 and that the account balance was no longer $319,914. Therefore, the trial court's award of a future distribution of $80,000 reflected a second payment to Paul, and it left the first $80,000 Paul had withdrawn post-separation unaccounted for.

The trial court's order allocating only a single payment from the Ally Bank account to Paul, leaving the remainder to Mikayla, was thus inconsistent with its order allocating a future disbursement. Moreover, the trial court's finding that the value of the account was $319,914, the balance before Paul had withdrawn $80,000, is also inconsistent with its order awarding a future disbursement of $80,000.

Given that $80,000 represents approximately 10 percent of the total assets allocated to Mikayla in the dissolution, the amount is not insignificant and implicates the fairness of the entire property allocation. *See Zahm*, 138 Wn.2d at 219. The trial court's order granting Paul a future distribution of $80,000 was based on untenable grounds and amounted to a manifest abuse of discretion. *See Muhammad*, 153 Wn.2d at 803; *Littlefield*, 133 Wn.2d at 46-47.

2. $12,000 Tax Refund

The trial court abused its discretion when it found that Mikayla received a tax refund in 2017 totaling $12,000, and when it ordered Mikayla to pay $6,000 of that refund to Paul. The record reflects that the parties jointly filed taxes in 2017 and that they owed the IRS approximately

$3,000. Therefore, the trial court's finding that Mikayla retained a $12,000 tax refund from the 2017 joint tax filing was not supported by substantial evidence and its decision to award Paul $6,000 from that refund was based on untenable grounds. *See Littlefield*, 133 Wn.2d at 46-47.

Paul does not dispute that the trial court made an error with regard to a 2017 tax refund, but he asserts that the error is minimal and does not compel reversal of an otherwise fair distribution. First, including the temporary spousal maintenance Mikayla was awarded, her total monthly income is less than $6,000. An erroneous award of $6,000 to Paul is not necessarily a minimal error from her perspective even if it does not represent a significant share of the of the parties' total assets. Second, because the trial court erred with respect to the $80,000 Ally Bank account payment, we do not reverse the property distribution on this issue alone.

III. REAL PROPERTY CHARACTERIZATION

Mikayla argues that the trial court erred when it characterized real property in which BCM was located as Paul's separate property because the real property had become comingled with the parties' community property and paid for by community assets. We disagree.

A. LEGAL PRINCIPLES

When distributing properties and liabilities in a marriage dissolution action, the trial court must characterize the property at issue as either community property or separate property. *In re Marriage of Kile*, 186 Wn. App. 864, 875, 347 P.3d 894 (2015). A property's status as either community property or separate property is determined based on its character at the date of its acquisition. *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009) (plurality opinion).

In the context of real property, courts employ the "mortgage rule" to determine the character of the property at acquisition. *In re Marriage of Chumbley*, 150 Wn.2d 1, 7, 74 P.3d 129

(2003). Under the mortgage rule, where title to property is acquired with a down payment plus an obligation to pay the remainder of the purchase price, the property is characterized by the character of the down payment and of the legal obligation when title to the property is obtained. *Id.* at 7-8.

If a property is separate at acquisition, "a presumption arises that it remained separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property." *Borghi*, 167 Wn.2d at 484. Evidence sufficient to rebut the presumption must be "'direct and positive,'" and it must show that the spouse who owned the separate property intended to change the character of the property from separate to community property. *Borghi*, 167 Wn.2d at 484-85 (quoting *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911)).

Generally, sufficient evidence of an intent to transmute separate property into community property entails a writing such as a quit claim deed or a community property agreement. *Id.* at 485. Evidence such as "[l]ater community property contributions to the payment of obligations, improvements upon the property, or any subsequent mortgage of the property may in some instances give rise to a community right of reimbursement protected by an equitable lien, but such later actions do not result in a transmutation of the property from separate to community property." *Borghi*, 167 Wn.2d at 491 n.7.

We review a trial court's decision characterizing property de novo. *Chumbley*, 150 Wn.2d at 5. A spouse who asserts that separate property has been acquired by the community bears the burden of proving the transformation in character by clear and convincing evidence. *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000).

B. APPLICATION

Here, under the mortgage rule, the real property was Paul's separate property at its acquisition. *See Chumbley*, 150 Wn.2d at 7-8. Paul purchased the property and acquired title to it before the parties were married. He made the purchase by obtaining a home equity line of credit for the down payment against a house that Paul purchased in 1988, well before the parties were married in 2003. Paul alone was obligated for the remaining payments on the building due to the seller, and Mikayla was never on the title to the building, nor was she otherwise obligated for the payments. Therefore, the character of both the down payment and the obligation with respect to the real property was separate and belonged to Paul. *See Chumbley*, 150 Wn.2d 1, 7-8.

Mikayla contends that the character of the property transformed to community property because funds used to pay for various expenses related to the property came from community accounts, profits from rents paid on the property were collected in community accounts, and the community contribution to the property rendered any separate contribution by Paul prior to marriage insignificant. Moreover, Mikayla asserts that Paul intended that the property belong to the community, that the parties regarded the property as community property, and that Paul described the property as belonging to both of them in a declaration that he filed during the dissolution proceedings. These arguments fail.

The use of common or commingled funds to pay expenses related to a property does not transform the separate property to community property. Under the mortgage rule, "'that funds of a different character are subsequently used to pay the obligation,'" does not change the character of real property. *Id.* (quoting Harry M. Cross, *The Community Property Law in Washington* (Revised 1985), 61 WASH. L. REV. 13, 40 (1986)). In addition, improvements made by the

community or additional mortgages taken out on the property by the community likewise do not transform its character. *Borghi*, 167 Wn.2d at 491 n.7. Thus, the fact that the community was invested in the business property in various respects did not transform its character from Paul's separate property to community property. *See Chumbley*, 150 Wn.2d at 7-8; *see also Borghi*, 167 Wn.2d at 491 n.7.

Mikayla relies on *In re Estate of Buchanan*, 89 Wash. 172, 154 P. 129 (1916), to argue that extensive community contributions to separate property can transform the character of that property where the contributions eclipse the separate investment. Her reliance on *Buchanan* is unavailing.

The disputed property in *Buchanan* began as a small stock investment of separate funds by one spouse into a newly incorporated lumber company that, after the personal efforts of the other spouse who formed the lumber company, increased substantially in value. 89 Wash. at 179. The court noted that the personal property underwent "many changes" after it was initially acquired. *Id.* at 180. As a result, the court held that the general rule, which provides that "specific real or personal property, once becoming separate property, remains so, unless by voluntary act of the spouse owning it its nature is changed," was of limited assistance in determining the character of the property involved in that case. *Id*. at 179. The court delineated the issue before it as pertaining to "when profits or gains" in the value of the disputed property, "resulting largely from personal efforts of one of the spouses becomes separate or community property." *Id.* It reasoned that the gains and profits from that initial investment were community property, and because the original funds invested had "become so intermingled with community property," they lost their separate identity and became subsumed by the community. *Id.* at 181.

Buchanan is therefore distinguishable because, as the court took pains to note, the property at issue in that case was personal as opposed to real property. *Id.* at 179-80. Unlike in *Buchanan*, any increase in the value of the real property in this case was not so transformative of the business property's original character that it caused the property to lose its separate identity in a manner similar to a stock investment. *See id.* at 181. Given that the character of the real property itself is at issue here, and not only the increased value derived therefrom, the traditional rule that requires direct evidence of intent to transform the character of the property applies. *See id*. at 179.

To rebut the presumption that separate property remains separate, Mikayla was therefore required to present "'direct and positive'" evidence that Paul intended to transform the character of the property to community property. *See Borghi*, 167 Wn.2d at 484 (quoting *Guye*, 63 Wash. at 352). Mikayla has not identified any such evidence. To the extent that she relies on Paul's declaration wherein he stated, "[*w*]*e* own the real estate on which the business is located," as evincing Paul's intent that the property belong to the community, that evidence was insufficient. CP at 707 (emphasis added). This single remark does not address Paul's intent to transform the character of his separate property.

In addition, the record indicates that Paul intended to keep the business property as his separate property. For example, after the parties married, Paul received a statutory warranty deed, reflecting that he paid off the mortgage obligation in full. The deed stated that the property was conveyed to "Paul B. Byers, as his separate estate." Ex. 2. In addition, in 2017, before the parties separated, Paul formed Living Well Properties LLC to serve a real estate holding company for the business property. Paul was the sole member of that LLC, and Mikayla was never a member of that LLC. The fact that the community business paid rent for the property to the LLC, or that rent

proceeds collected by Living Well LLC were kept in a community account, did not evince Paul's intent to transform the character of the real property itself.

Even assuming, arguendo, that the funds expended and acquired in relation the property were extensively commingled, such evidence does not satisfy the standard for demonstrating transmutation of real property as required by the supreme court in *Borghi* because it did not establish Paul's intent. 167 Wn.2d at 484-85. Consequently, Mikayla has not satisfied her burden of setting forth evidence demonstrating Paul's intent to transform the character of his separate property to community property. The trial court properly characterized Paul's business property as separate property.

IV. SPOUSAL MAINTENANCE

Mikayla argues that the trial court abused its discretion when it limited her spousal maintenance award to two years of decreasing maintenance. We agree.

A. LEGAL PRINCIPLES

Trial courts have broad discretion to award spousal maintenance in accordance with RCW 26.09.090. *In re Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). The court must consider each of the factors listed in RCW 26.09.090(1), including:

> (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;
>
> (c) The standard of living established during the marriage or domestic partnership;
>
> (d) The duration of the marriage or domestic partnership;

> (e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and
>
> (f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

While the trial court is required to consider each factor, the list in RCW 26.09.090(1) is nonexclusive, and the trial court is not required to make specific factual findings with regard to each factor. *In re Marriage of Anthony*, 9 Wn. App. 2d 555, 564, 446 P.3d 635 (2019). Under RCW 26.09.090, "the only limitation placed upon the trial court's ability to award maintenance is that the amount and duration, considering all relevant factors, be just." *Washburn*, 101 Wn.2d at 178.

Because the "duration of the marriage and the standard of living established during the marriage must also be considered," spousal maintenance "is not just a means of providing bare necessities." *Id.* Whether the spouse seeking maintenance is capable of independently meeting his or her need "is only *one* factor to be considered." *Id.* at 179. Instead, spousal maintenance is "a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *Id.* at 179. We review a trial court's award of maintenance for abuse of discretion. *Id.*

B. APPLICATION

The trial court awarded Mikayla two years of decreasing spousal maintenance in its final order. Mikayla was set to receive a monthly payment of $2,500 in the first year, and a $1,500 monthly payment in following second year. This spousal maintenance award was an abuse of the trial court's discretion because it was unjust under the circumstances. *Id.* at 179.

Mikayla challenges the trial court's finding that she did not make a credible effort at obtaining employment post dissolution and asserts that she requires additional time to establish her independence. Mikayla contends that although she has two bachelor's degrees, she has never been employed in her very specific field of study, and she has been a stay-at-home mom, focusing her energy toward building Paul's chiropractic practice and raising their daughter. We agree.

The record reflects that Mikayla sacrificed opportunities to pursue an independent career or source of income, and instead assisted Paul in building his successful practice, while raising their daughter. The trial court's ruling shows that it disregarded, without addressing in its findings or oral ruling, the difficulty an individual might face in obtaining employment where that individual has been out of the workforce and focused on providing childcare for nearly 20 years.

In addition, according to the final child support worksheets, Paul earns a net monthly income of over $21,000 from the business that the parties cultivated during their marriage. Mikayla's net monthly income, meanwhile, is reduced to only $4,000, including the income imputed as a result of her voluntary unemployment but excluding the spousal maintenance. The trial court's decision to award Mikayla only two years of decreasing spousal maintenance was unjust when considered with respect to the parties' 16-year marriage and Mikayla's role within in that marriage. Consequently, the trial court abused its discretion in awarding only two years of decreasing spousal maintenance. *Id.*

V. ATTORNEY FEES AT TRIAL

Mikayla argues that the trial court abused its discretion when it declined her request for attorney fees. We agree.

A. LEGAL PRINCIPLES

Need, ability to pay, and equity are the primary considerations for the award of attorney fees in a dissolution action. *In re Marriage of Van Camp*, 82 Wn. App. 339, 342, 918 P.2d 509 (1996). Under RCW 26.09.140, a court may order attorney fees in a dissolution proceeding. This statute provides that a court may order one party to pay reasonable attorney fees, costs, or other professional fees related to the dissolution litigation to the other party "after considering the financial resources of both parties."

The decision to award fees pursuant to RCW 26.09.140 is discretionary. *In re Marriage of Urbana*, 147 Wn. App. 1, 16, 195 P.3d 959 (2008). In determining whether to award fees, the court must "'balance[ ] the needs of the spouse seeking fees against the ability of the other spouse to pay." *Id*. (quoting *In re Marriage of Moody*, 137 Wn.2d 979, 994, 976 P.2d 1240 (1999). "A lack of findings as to either need or ability to pay requires reversal." *In re Marriage of Scanlon*, 109 Wn. App. 167, 181, 34 P.3d 877 (2001).

In addition, a court may award attorney fees based on a party's intransigence, which "is an equitable as opposed to statutory basis for awarding fees." *In re Marriage of Chandola*, 180 Wn.2d 632, 656, 327 P.3d 644 (2014). "'Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in "foot-dragging" and "obstruction". . . or simply when one party made the trial unduly difficult and increased legal costs by his or her actions.'" *Id.* at 657 (alteration in original) (internal quotation marks omitted) (quoting *In re Marriage of Katare*,

175 Wn.2d 23, 42, 283 P.3d 546 (2012)). The party alleging intransigence of another must demonstrate that the opposed party acted in a way that increased the costs of litigation. *In re Marriage of Pennamen*, 135 Wn. App. 790, 807, 146 P.3d 466 (2006).

A court need not consider the parties' resources where intransigence is established. *In re Marriage of Larson*, 178 Wn. App. 133, 146, 313 P.3d 1228 (2013). We review a trial court's "discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award for an abuse of discretion." *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

B. APPLICATION

Here, the trial court denied Mikayla's request for fees, ruling that each party will be responsible for its own attorney fees. The court found that "the evidence shows that at various times during this litigation[,] both of the parties have been intransigent[,] resulting in unnecessary delays, misuse of community funds, and noncompliance with valid court orders." CP at 2416.

Mikayla requested attorney fees under RCW 26.09.140. But the trial court did not enter any specific findings regarding Mikayla's need for attorney fees or Paul's ability to pay attorney fees. The trial court's oral ruling was focused only on the parties' respective intransigence and likewise did not address Mikayla's need for fees or Paul's ability to pay them. Consequently, reversal on this issue is necessary so that the trial court can make the requisite factual findings. *See Scanlon*, 109 Wn. App. at 181.

Relying on *In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989), Paul contends that because the trial court found Mikayla intransigent, her financial status was irrelevant

and findings under RCW 26.09.140 are unnecessary. This assertion lacks merit and reflects an overly broad reading of *Morrow*.

In *Morrow*, the court explained that intransigence caused by the spouse from whom an attorney award is sought is "[a]n important consideration apart from the relative abilities of the two spouses to pay." 53 Wn. App. at 590. In such circumstances, whether the spouse seeking an attorney fee award has a financial need for payment is irrelevant. *Id.* That is, the trial court may, within its discretion, award attorney fees to a spouse where the other spouse was intransigent even if the spouse seeking the award had sufficient resources to afford the attorney fees on his or her own. *Id.* The court did not suggest that if the party seeking an award under RCW 26.09.140 has been intransigent during the dissolution proceedings, that spouse is rendered ineligible for a need-based award.

In addition, an award of fees based on intransigence requires a showing that the cost of litigation was needlessly increased by one party's acts during the proceedings. *Pennamen*, 135 Wn. App. at 807. Therefore, even if Paul or Mikayla or both had been intransigent and increased the cost of litigation, that fact does not address whether Mikayla may have been entitled to attorney fees based on need for attorney fees up to the unnecessary expenditure.

Because Mikayla requested fees under RCW 26.09.140, the trial court abused its discretion when it did not enter findings or otherwise address Mikayla's need for fees or Paul's ability to pay the fees.

VI. ATTORNEY FEES ON APPEAL

Mikayla and Paul request attorney fees on appeal. We grant Mikayla's request for attorney fees and deny Paul's request.

A. MIKAYLA'S REQUEST FOR ATTORNEY FEES

In her conclusion, Mikayla requests attorney fees on appeal under RAP 18.1. In seeking an award of attorney fees on appeal, a party is required to include a separate section in their brief devoted to the request. RAP 18.1(b). The section in the brief must provide argument and citation to authority to apprise us of the appropriate grounds on which we may award attorney fees. *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). However, the Rules of Appellate Procedure call for a liberal interpretation, allowing us to waive provisions of the rules "in order to serve the ends of justice." RAP 1.2(a), (c). Therefore, we exercise our discretion to consider Mikayla's request on its merits.

Under RAP 18.1(a), a party may request attorney fees if "applicable law" grants them the right to recover the fees. RCW 26.09.140 grants us discretion to grant attorney fees on appeal in dissolution proceedings. An award of attorney fees under RCW 26.09.140 is based on a consideration of " 'the parties' relative ability to pay' and 'the arguable merit of the issues raised on appeal.' " *In re Marriage of Muhammad*, 153 Wn.2d 795, 807, 108 P.3d 779 (2005) (quoting *In re Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998)).

Mikayla has successfully argued several issues on appeal. In addition, her financial affidavit reflects the need for fees because her monthly expenses exceed her monthly income, even accounting for monthly support payments from Paul. Paul has significant monthly expenses, including monthly payments on a loan that he obtained to pay Mikayla half of BCM's value.

However, Paul also has a considerable net monthly income that exceeds his expenses, and his financial affidavit shows an ability to pay Mikayla's fees. Based on this review, we grant Mikayla's request for attorney fees in an amount to be determined by the court commissioner.

B. PAUL'S REQUEST FOR ATTORNEY FEES

Paul argues that he is entitled to attorney fees on appeal under RCW 26.09.140 in light of his need and Mikayla's ability to pay. He further argues that he is entitled to fees under RAP 18.9(a) because Mikayla's appeal was frivolous. We disagree.

Under RCW 26.09.140 an appellate court may award attorney fees for costs incurred in maintaining an appeal based on "the financial resources of both parties." When a request for fees and costs is made in accordance with RCW 26.09.140, "courts will consider 'the parties' relative ability to pay' and 'the arguable merit of the issues raised on appeal.'" *Muhammad,* 153 Wn.2d at 807 (quoting *In re Marriage of Leslie*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998)).

Here, according to Paul's financial need certificate, he has limited need because of his substantial net monthly income and assets. Although Paul's monthly expenses are high, owing in large part to his repayment obligation on the commercial loan he obtained to pay Mikayla her half of BCM's value, he has not established a need for attorney fees. Nor has Paul shown that Mikayla has an ability to pay his attorney fees. Although Mikayla likewise has significant assets following the dissolution, her monthly expenses exceed her monthly income. Therefore, Mikayla's ability to pay attorney fees is not greater than Paul's. In addition, Mikayla has raised issues of merit on appeal. *See id*. We therefore decline Paul's request for fees under RCW 26.09.140.

Paul is also not entitled to fees under RAP 18.9(a) because Mikayla's appeal was not frivolous. An appeal is frivolous if there are no debatable issues on which reasonable minds could

differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). Mikayla prevails with respect to several issues on appeal and raised debatable issues on others. Accordingly, we deny Paul's request for fees under RAP 18.9(a).

CONCLUSION

We hold that the trial court abused its discretion in allocating the parties' property when it awarded Paul a second $80,000 payment from the Ally Bank account and when it distributed a $12,000 tax refund that never existed. We further hold that the trial court properly characterized the real property on which Paul's business was located as his separate property. In addition, we hold that the trial court abused its discretion when it awarded Mikayla only two years of decreasing spousal maintenance after a 16-year marriage. Finally, we hold that the trial court abused its discretion when it did not consider or enter findings addressing Mikayla's need or Paul's ability to pay when it denied Mikayla's request for attorney fees.

Accordingly, we reverse in part and affirm in part and remand for further consideration.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

WORSWICK, J.

LEE, C.J.

CARLSEN LAW OFFICES

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