

FILED
SUPREME COURT
STATE OF WASHINGTON
12/27/2023
BY ERIN L. LENNON
CLERK

FILED
Court of Appeals
Division I
State of Washington
12/27/2023 12:48 PM

102677-3
No. 84720-1-I

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

In re the Marriage of:

ROBERT W. COONEY,

Respondent,

and

HILLARY A. BROOKS,

Petitioner.

PETITION FOR REVIEW

Gary W. Manca
WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorney for Petitioner
Hillary A. Brooks

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iv-vi
A. INTRODUCTION	1
B. IDENTITY OF PETITIONER.....	1
C. COURT OF APPEALS DECISION.....	1
D. ISSUES PRESENTED FOR REVIEW	2
E. STATEMENT OF THE CASE.....	2
(1) <u>The Husband Hid His Beneficiary Interest in a Trust</u>	2
(2) <u>The Wife, Suspecting the Husband Had a Beneficiary Interest in a Trust, Negotiated a Warranty of Disclosure in Their Dissolution Settlement Agreement</u>	3
(3) <u>Division I Upheld the Trial Court’s Denial of the Wife’s Motion to Vacate the Dissolution Decree After She Uncovered the Husband’s Beneficiary Interest in a Probate Proceeding</u>	5
F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	7

(1)	<u>This Court Should Decide for The First Time How to Characterize Beneficiary Interests in Trusts</u>	7
(a)	<u>This Issue Carries Sweeping Importance Because It Allows Spouses Who Come from Wealthy Families to Hide Financial Resources</u>	7
(b)	<u>This Issue Is of Surpassing Public Importance Also Because It Requires this Court to Define, for the First Time, the Dissolution Chapter’s Terminology for the Parties’ Economic Assets</u>	11
(c)	<u>Division I’s Resolution Conflicts with the Governing Principles Laid Out in Other Cases</u>	14
(2)	<u>This Court Should Review Division I’s Decision on the Obligations and Rights that Attend Spouses’ Fiduciary Duty to Each Other</u>	20
(a)	<u>Spouses’ Fiduciary Duty to Each Other Presents a Broadly Important Issue That This Court Should Decide</u>	20
(b)	<u>Division I Narrowed Spouses’ Fiduciary Duty in Conflict with this Court’s Cases, with Other Divisions’ Decisions, and with RCW 26.16.210</u>	24

(3)	<u>This Court Should Address the Duty of Disclosure that Litigants Owe to the Dissolution Court</u>	27
(4)	<u>This Case Is An Appropriate Vehicle for Deciding These Important and Unresolved Issues</u>	28
G.	CONCLUSION	30
	Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Bowman v. Webster</i> , 44 Wn.2d 667, 269 P.2d 960 (1954)	26
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 494 P.2d 208 (1972)	24, 25, 29
<i>Grant v. Grant</i> , 199 Wn. App. 119, 397 P.3d 912 (2017)	28
<i>In re Marriage of Bresnahan</i> , 21 Wn. App. 2d 385, 505 P.3d 1218 (2022)	<i>passim</i>
<i>In re Marriage of Burkey</i> , 36 Wn. App. 487, 490, 675 P.2d 619 (1984)	21
<i>In re Marriage of Cohn</i> , 18 Wn. App. 502, 569 P.2d 79 (1977)	25
<i>In re Marriage of Estes</i> , 84 Wn. App. 586, 929 P.2d 500 (1997)	13, 15, 16
<i>In re Marriage of Hadley</i> , 88 Wn.2d 649, 565 P.2d 790 (1977)	23, 24
<i>In re Marriage of Hall</i> , 103 Wn.2d 236, 692 P.2d 175 (1984)	<i>passim</i>
<i>In re Marriage of Harrington</i> , 85 Wn. App. 613, 935 P.2d 1357 (1997)	11
<i>In re Marriage of Hurd</i> , 69 Wn. App. 38, 848 P.2d 185 (1993)	9
<i>In re Marriage of Kraft</i> , 119 Wn.2d 438, 832 P.2d 871 (1992)	8, 18
<i>In re Marriage of Langham & Kolde</i> , 153 Wn.2d 553, 106 P.3d 212 (2005)	14, 15
<i>In re Marriage of Lukens</i> , 16 Wn. App. 481, 558 P.2d 279 (1976)	18

<i>In re Marriage of Lutz,</i> 74 Wn. App. 356, 873 P.2d 566 (1994)	20
<i>In re Marriage of Matson,</i> 107 Wn.2d 479, 730 P.2d 668 (1986)	23
<i>In re Marriage of Sievers,</i> 78 Wn. App. 287, 897 P.2d 388 (1995)	20
<i>In re Marriage of Zahm,</i> 138 Wn.2d 213, 978 P.2d 498 (1999)	8, 18
<i>In re Parentage of A.L.,</i> 185 Wn. App. 225, 340 P.3d 260 (2014)	29
<i>Marriage of Maddix,</i> 41 Wn. App. 248, 703 P.2d 1062 (1985)	25
<i>Matter of Marriage of Leland,</i> 69 Wn. App. 57, 847 P.2d 518 (1993)	9, 16
<i>Seals v. Seals,</i> 22 Wn. App. 652, 590 P.2d 1301 (1979)	21, 24, 25, 27
<i>Taylor v. Shigaki,</i> 84 Wn. App. 723, 930 P.2d 340 (1997).....	16
<i>Wagner v. Wagner,</i> 95 Wn.2d 94, 621 P.2d 1279 (1980)	27
<i>Washburn v. Washburn,</i> 101 Wn.2d 168, 677 P.2d 152 (1984)	8, 29-30

Statutes

RCW 26.09	8, 9
RCW 26.09.004	11
RCW 26.09.070	2, 14
RCW 26.09.070(3)	<i>passim</i>
RCW 26.09.080	<i>passim</i>
RCW 26.09.080(4)	11
RCW 26.09.090	2, 30
RCW 26.09.090(1)	7, 9
RCW 26.09.090(1)(f)	11
RCW 26.16.210	24, 25

Rules

CR 26..... 27
CR 60(b)..... 6, 28
GR 14.1(a)..... 7, 9
RAP 12.1 27
RAP 13.4(b)(1)..... *passim*
RAP 13.4(b)(2)..... *passim*
RAP 13.4(b)(4)..... *passim*
RPC 1.16(a)(3) 16
Restatement (Third) of Property § 25.1 cmt a. 17

A. INTRODUCTION

This case concerns crucial legal questions about the duties of disclosure that spouses owe to each other and to the court during marital dissolution proceedings. Because the undisclosed asset in this case was a beneficiary interest in a trust, this case provides this Court with the opportunity—for the first time—to decide how to characterize such an interest under the dissolution chapter’s sections regulating property distributions, spousal maintenance awards, and settlement agreements in divorce cases. Given the sweeping implications of Division I’s decision for all divorce cases statewide, this Court should grant review.

B. IDENTITY OF PETITIONER

The petitioner is Hillary Brooks, the appellant below.

C. COURT OF APPEALS DECISION

Brooks asks this Court to review the decision of the Court of Appeals, Division I, filed on November 27, 2023 (“Op.”) and reproduced in the appendix. While unpublished, it is accessible also at 2023 WL 8185931.

D. ISSUES PRESENTED FOR REVIEW

1. When a dissolution court makes a property distribution under RCW 26.09.080, a spousal maintenance award under RCW 26.09.090, or a settlement approval under RCW 26.09.070, does a beneficiary interest in a trust count as “property” or as an otherwise relevant “economic circumstance” within those statutes’ meaning?

2. Is a husband’s fiduciary duty to his wife broad enough to give her the right to rely on the statements that he makes about his assets in a settlement agreement, or does his wife instead have an overriding duty of due diligence requiring her to engage in discovery to uncover concealed assets?

3. Does a husband owe a duty to the dissolution court requiring him to disclose a beneficiary interest in a trust?

E. STATEMENT OF THE CASE

(1) The Husband Hid His Beneficiary Interest in a Trust

Robert Cooney and Hillary Brooks married in Washington in 1991 and divorced in Washington in 2021. CP 1, 396, 633.

While Cooney studied medicine, Brooks supported Cooney and their children as the primary parent and breadwinner for 20 years. CP 658-60. Eventually, Cooney’s medical career took off, and he started out-earning Brooks by several multiples. CP 448, 660.

Unbeknownst to Brooks, Cooney was the sole residuary beneficiary (other than a few small cash beneficiaries) of a trust set up for his grandmother and her companion. CP 579. The trust included several assets—a duplex in Mount Vernon, the proceeds from selling a property in California, personal property, and all financial and bank accounts for which a separate beneficiary was not appointed. CP 579-81, 714.

(2) The Wife, Suspecting the Husband Had a Beneficiary Interest in a Trust, Negotiated a Warranty of Disclosure in Their Dissolution Settlement Agreement

After Cooney petitioned for divorce, he and his attorney lied several times about the beneficiary interest. Brooks served a pattern discovery request for documents for “all trusts in which you are a beneficiary,” the same request that Cooney also served.

CP 661, 671. In response, Cooney claimed under penalty of perjury that he had no such documents. CP 41-42, 780-83, 801. During his deposition, Cooney mentioned only his role as trustee, not his beneficiary interest. CP 827, 832.

As trial neared, Brooks moved for an order compelling Cooney to answer more than 50 discovery requests, including the one about trust documents. CP 37-56. In response to the motion, Cooney and his attorney misrepresented to the trial court that Cooney lacked responsive trust documents because Cooney served only as “a trustee,” not a beneficiary. CP 238, 242. Brooks suspected he might be a beneficiary too, however, and she argued so in her reply. CP 432-33, 439. The trial court granted Brooks’s motion to compel. CP 298-99.

Before Cooney’s compelled discovery responses were due, CP 298-99, he agreed to warrant that he had fully disclosed all his assets, and so Brooks decided to enter a separation contract, including a property settlement agreement, CP 633-52. The agreement listed many assets but not Cooney’s beneficiary

interest. *Id.* Section 1.9 provided, however, that “the property and obligations hereafter listed and divided are all of the property and obligations that either or both have accumulated.” CP 634. This representation contained no exceptions, nor did it state that the parties knew about other property that was unlisted in the agreement. *Id.* Section 4.2 provided that “[t]he parties acknowledge and represent under penalty of perjury that each has made a full and complete disclosure of any and all financial assets they own or control or have placed in the control of others (separate or community).” CP 643. This representation included no exceptions and did not say that the parties knew about assets other than those listed in the agreement. *Id.*

The trial court then approved the parties’ settlement and dissolved their marriage. CP 393, 396-401.

(3) Division I Upheld the Trial Court’s Denial of the Wife’s Motion to Vacate the Dissolution Decree After She Uncovered the Husband’s Beneficiary Interest in a Probate Proceeding

When Cooney’s grandmother and her companion died a

few months later, Brooks looked up the probate filings and discovered that Cooney was the sole residuary beneficiary of the trust. CP 579-80, 715. After making these discoveries, Brooks moved to vacate under CR 60(b), explaining she never would have entered that particular settlement agreement if Cooney had disclosed his trust interest. CP 402-17, 470-77, 664. In response, Cooney did not deny Brooks's estimation (at CP 581) that the trust assets owed to Cooney as beneficiary were worth at least \$1 million. CP 421-27, 436-44, 455. He did not deny that he had omitted his beneficiary interest from his discovery responses and the settlement agreement. Still, the trial court denied vacation. CP 479-81.

Division I affirmed. The court held that Cooney's beneficiary interest was not "property" and "did not affect the parties' economic circumstances because it was contingent." Op. 8-9, 13. The court also concluded that Brooks's decision not to wait for Cooney to produce the documents by the court-ordered deadline had "terminated" his fiduciary duty to her. Op. at 14.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) This Court Should Decide for The First Time How to Characterize Beneficiary Interests in Trusts

Division I's characterization of the beneficiary interest implicates an issue of surpassing public importance, and it clashes with other appellate decisions. RAP 13.4(b)(1)-(2), (4).

(a) This Issue Carries Sweeping Importance Because It Allows Spouses Who Come from Wealthy Families to Hide Financial Resources

Under Division I's opinion, a beneficiary interest in a trust now stands beyond the reach of RCW 26.09.080 (property distribution), RCW 26.09.090(1) (spousal maintenance), and RCW 26.09.070(3) (settlement approval). A spouse expecting to receive millions of dollars from a family trust can now conceal that interest or direct the dissolution court to ignore it entirely, confident that Division I's decision provides cover for such conduct. *See* GR 14.1(a). That could result in the disadvantaged spouse receiving less property and maintenance than their case would justify. So this petition concerns every spouse in

Washington who is married to a person with a secret beneficial interest in their wealthy family's trust. RAP 13.4(b)(4).

This petition concerns the public interest especially because Division I's opinion undermines the Legislature's policies for marital dissolutions. Courts should characterize assets "consistent with the statutory goals" set out in RCW 26.09. *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999). Those goals are threefold. First, property distributions must be "just and equitable." RCW 26.09.080. The dissolution court must weigh "*all the circumstances* of the marriage, both past and present, and an evaluation of *the future needs of parties.*" *Zahm*, 138 Wn.2d at 219 (quotation omitted). These circumstances include "the parties' post-dissolution economic circumstances." *In re Marriage of Kraft*, 119 Wn.2d 438, 444, 832 P.2d 871 (1992). Second, spousal maintenance awards, which are "a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time," *Washburn v. Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984), must be

“just,” RCW 26.09.090(1). Third, dissolution courts must set aside settlement agreements that are “unfair.” RCW 26.09.070(3). A dissolution court cannot achieve these statutory goals without knowing about a trust beneficiary’s interest that could be worth several million dollars. This Court should grant review to decide this issue implicating the fundamental purposes of RCW 26.09.

That Division I believed—erroneously—California law governed the trust interest’s character does not place this issue beyond RAP 13.4(b)(4). After all, the court, pointing to its prior decisions in *In re Marriage of Hurd*, 69 Wn. App. 38, 49, 848 P.2d 185 (1993), and *In re Matter of Marriage of Leland*, 69 Wn. App. 57, 71, 847 P.2d 518 (1993), thought that Washington law “aligns” with the holding in this case. Op. at 13 n.6. With that analysis, the decision births a persuasive authority for non-disclosing spouses, their lawyers, and trial courts to cite. GR 14.1(a). In any event, whether an asset governed under another state’s law counts as “property” or as an “economic

circumstance” is a question filtered through Washington’s dissolution statutes. *See* RCW 26.09.070(3), .080, .080(4), .090(1)(f).¹ While another state’s law might shed light on whether a valid contractual right exists or on whether an asset is contingent or vested, the ultimate determination of its character centers on the specific statutory uses for that asset in a dissolution case in Washington. In other words, whether an asset is “property within RCW 26.09.080’s meaning turns on the construction of this Washington statute. So too for whether it is an “economic circumstance” relevant under RCW 26.09.070(3) and .080(4). In short, this petition raises an issue “that should be determined by the Supreme Court,” RAP 13.4(b)(4), not California’s high court.

¹ The parties were married and divorced in Washington and executed their settlement agreement under Washington law. CP 633.

(b) This Issue Is of Surpassing Public Importance Also Because It Requires this Court to Define, for the First Time, the Dissolution Chapter’s Terminology for the Parties’ Economic Assets

Review is merited under RAP 13.4(b)(4) also because this Court’s analysis likely would call on this Court to finally define key undefined statutory terms. Those include “property” in RCW 26.09.080, “economic circumstances” in RCW 26.09.070(3) and RCW 26.09.080(4), and “ability” to pay in RCW 26.09.090(1)(f). The dissolution chapter “does not define the term ‘property.’” *In re Marriage of Harrington*, 85 Wn. App. 613, 624, 935 P.2d 1357 (1997). It also does not define these other terms, as they do not appear in the chapter’s definitions section. *See* RCW 26.09.004.

In this vacuum, the appellate courts have sometimes struggled to decide which assets count under the dissolution chapter and which do not. For example, *In re Marriage of Hall*, 103 Wn.2d 236, 692 P.2d 175 (1984) addressed the “goodwill” of a professional practice. *Id.* at 241. This Court held it equates

to “property.” *Id.* But in doing so, *Hall* never articulated a test for what “property” means under RCW 26.09.080. *See Hall*, 103 Wn.2d at 241-42. That gap results in confusion: this Court reasoned in *Hall*, for example, that goodwill must be property because it “directly supplements” a professional’s earning capacity. *Id.* at 241. But then this Court explained that future earning capacity is not itself an “asset” that can be divided directly under RCW 26.09.080. *See Hall*, 103 Wn.2d at 248. How can something be property if what it “supplements” is not property? *Hall* also seemed to agree that goodwill “is not readily salable.” *Id.* at 239. How can something rise to the level of property when it cannot be sold? These logical inconsistencies show the lack of clear guidance on what “property” means.

In this vacuum, when a Washington appellate court decides whether the dissolution chapter reaches something as property or an economic circumstance, the court often grasps at case law from other jurisdictions. This “compare and contrast” exercise never roots itself in this Court’s definitional tests

because none exist. Division I’s opinion here (Op. at 8-13) marks the latest example. *See, e.g., Hall*, 103 Wn.2d at 239, 242 (drawing on California’s case law for guidance); *In re Marriage of Estes*, 84 Wn. App. 586, 591, 929 P.2d 500 (1997) (discussing cases from Georgia, Illinois, Pennsylvania, and Oklahoma). And, as in *Hall*, the analysis is often confusing. Here, for example, Division I agreed with Brooks that this beneficial trust interest could be a “contingent interest.” Op. at 12. But Division I then created a new category of asset—a thing that is both a “contingent interest” *and* a “mere expectancy.” *Id.* at 13. No appellate court had previously mixed the two concepts together. Division I’s unprecedented blending causes confusion because the Court of Appeals had held before that a contingent interest counts as “property.” *Estes*, 84 Wn. App. at 590 (citations omitted).

Because Washington law needs tests for what counts as “property” and a relevant “economic circumstance,” this Court’s decision about beneficiaries’ trust interests would likely have

broader public importance for more than just this asset class.

Review is therefore warranted under RAP 13.4(b)(4).

(c) Division I's Resolution Conflicts with the Governing Principles Laid Out in Other Cases

While the characterization of a beneficiary interest in a trust under RCW 26.09.070, .080, and .090 presents a new issue, Division I did not write on a blank slate. Its decision conflicts with the principles evident from this Court's cases and from other Court of Appeals cases. RAP 13.4(b)(1)-(2).

Division I's decision does not reconcile with the definition of "property" adopted in *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005). That case concerned stock options. *Id.* This Court adopted a liberal test for "property," holding it is "a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition." *Id.* (quotation). Of course, *Langham* arose from a post-decree dispute, and so this Court did not cite RCW 26.09.080. But the

broad definition in *Langham* nonetheless should control because the dispute centered on an asset distributed in the divorce decree and invoked the trial court's equitable power to enforce the decree. 153 Wn.2d at 560. It is impossible to see how a beneficial interest in a trust lacks "sufficient value for judicial recognition." *Langham*, 153 Wn.2d at 564 (quotation omitted). But here, Division I did not cite *Langham*, even though Brooks invoked its definition. BA 33-34; RBA 30. RAP 13.4(b)(1) thus favors review.

None of this Court's cases or prior Court of Appeals cases support Division I's hairsplitting between "contingent interests" and "contingent interests not based on a contract," the latter of which that court deemed a "mere expectancy." Op. at 6, 13. In *Estes*, which Division I did not cite, Division III addressed *both* possibilities. It noted that "[a]n enforceable contract right is property." 84 Wn. App. at 590. But the court then wrote that "[a] contingent future interest is *also* property." *Id.* (citing omitted). The court never said that an irrevocable contract had to undergird

a contingent interest for it to be property. Nor could Division III have said that. While Division I here stressed that Cooney’s trust interest was at the “whim” of the trust settlor, that uncertainty was equally true in *Estes*. The interest there—a hope to earn contingent attorney fees from a personal-injury lawsuit—was terminable at any time at the client’s whim, RPC 1.16(a)(3), and the attorney would not earn the fee until substantially performing. *See, e.g., Taylor v. Shigaki*, 84 Wn. App. 723, 728, 930 P.2d 340 (1997) (holding that a client’s former attorney is entitled to a contingency fee on a settlement executed after discharge only upon showing “substantial performance” of their duties before termination). Yet Division III still deemed it property. *Estes*, 84 Wn. App. at 590. No logical principle supports Division I’s fine distinction here: a contingent contractual right is property “*no matter how improbable the contingency.*” *In re Marriage of Leland*, 69 Wn. App. 57, 71, 847 P.2d 518 (1993) (emphasis added). If a highly unlikely contingency does not destroy the property character of a

contingent interest, then neither should the mere possibility, no matter how unlikely, that a trust settlor might alter the beneficiary's interest. Review is warranted. RAP 13.4(b)(2).

This case's record crystallizes Division I's error. Cooney's grandmother and her companion had resigned as trustees and disclaimed "*any other interests whatsoever* we may have or had in this trust or trusts." CP 453, 456-59, 717 (emphasis added). Cooney also filed an affidavit identifying himself as both the substitute trustee and the settlor. CP 457. His beneficiary interest had thus become vested and highly probable. A future interest "is a present ownership interest in property, even though the owner's right to possession or enjoyment is postponed until some time in the future and may be contingent or vested." *Restatement (Third) of Property* § 25.1 cmt. a.

In any event, even if Division I had been right that a beneficiary interest was elusive or hard to value, Washington precedents nonetheless conflict with Division I's ultimate conclusion. In *Hall*, for example, this Court concluded that

professional “goodwill” is property despite being not being “readily salable.” 103 Wn.2d at 239. That decision approved *In re Marriage of Lukens*, 16 Wn. App. 481, 486, 558 P.2d 279 (1976), which stressed that “[t]he fact that professional goodwill may be elusive, intangible, and difficult to evaluate is not a proper reason to ignore its existence in a proper case.” The same should be true here.

Even if Division I’s decision was compatible with cases on “property,” its holding still cannot be reconciled with this Court’s cases. RAP 13.4(b)(1). This Court’s precedents show that the term “economic circumstances” is not confined solely to assets that are distributable as “property” under RCW 26.09.080. For example, in *Kraft*, this Court considered military disability retirement pay. 119 Wn.2d at 440, 445. Although federal law excludes that asset from the “property” subject to distribution, this Court held that a dissolution court may nonetheless consider it as “relevant to a determination of the parties’ ultimate economic circumstances.” *Id.* at 446. Similarly, in *Zahm*, this

Court concluded that a dissolution court may not re-distribute social security benefits but may consider them “when determining the parties’ relative economic circumstances at dissolution.” 138 Wn.2d at 222. This Court treated a doctor’s future earning potential the same—while not property, it is still counts as the parties’ economic circumstances. *Hall*, 103 Wn.2d at 248. No logical principle separates a beneficiary’s interest from these other kinds of assets.

Accordingly, Division I erred when it rejected Cooney’s beneficiary interest as not material. Op. at 15, 19. Not only do all the relevant statutes and precedents suggest that it is, but Cooney did not deny Brooks’s estimation (at CP 581) that the concealed were worth at least \$1 million. Brooks also negotiated representations in the settlement agreement, confirming that Cooney’s full disclosure was material. CP 634, 643.

This Court should grant review under RAP 13.4(b)(1)-(2) and hold that, in line with the principles in several precedents, that a beneficiary interest in a trust, even if revocable, must be

treated either as “property” or as the parties’ economic circumstances and financial ability relevant to RCW 26.09.070(3), .080, .080(4), and .090(1)(f).

(2) This Court Should Review Division I’s Decision on the Obligations and Rights that Attend Spouses’ Fiduciary Duty to Each Other

Division I’s decision also cries out for review under RAP 13.4(b)(1)-(2) because the opinion clashes with a wide body of precedents on spouses’ fiduciary duty to each other. This Court should grant review to reaffirm this duty because it creates transparency that protects disadvantaged spouses, reduces costly litigation, and fosters settlements. RAP 13.4(b)(4).

(a) Spouses’ Fiduciary Duty to Each Other Presents a Broadly Important Issue That This Court Should Decide

This issue is about the public interest. “Spouses owe each other the highest fiduciary duties.” *In re Marriage of Lutz*, 74 Wn. App. 356, 369, 873 P.2d 566 (1994) (quotation omitted). This obligation continues into a dissolution proceeding. *In re Marriage of Sievers*, 78 Wn. App. 287, 310, 897 P.2d 388 (1995)

(citing *Seals v. Seals*, 22 Wn. App. 652, 655, 590 P.2d 1301 (1979). And it applies when the parties negotiate a property agreement in a separation contract. *See, e.g., In re Marriage of Bresnahan*, 21 Wn. App. 2d 385, 405, 505 P.3d 1218 (2022). This fiduciary duty recognizes that divorcing spouses have incentives that are both personal (emotional enmity, strong feelings about who was responsible for creating assets, and the like) and financial (money influences behavior) to hide assets. It ensures that each spouse receives the information they need to protect their interests. *In re Marriage of Burkey*, 36 Wn. App. 487, 490, 675 P.2d 619 (1984).

Given these purposes, this important issue should be decided by this Court. RAP 13.4(b)(4). As Division II has recognized, “requiring spouses to rely on formal discovery processes to reach reliable settlement agreements would make dissolution proceedings significantly more time consuming for the courts and unnecessarily costly for the parties involved.” *Bresnahan*, 21 Wn. App. 2d at 405. But Division I’s opinion will

result in that very nightmare. That is because Division I faulted Brooks for not following through on her motion to compel instead of doing what she chose to do—amicably resolve the case by relying on Cooney’s assurances of full disclosure in the settlement agreement. Op. at 13, 15-16. While staying silent about Cooney’s lies to her and to the dissolution court, Division I criticized Brooks as having “willfully disregarded information.” Op. at 15. The court reasoned that Cooney had no duty to disclose the trust documents because of “Brooks’s voluntary actions” in striking her motion to compel. Op. at 14. Division I insisted that its rule would not extend to a spouse who had no clue whatsoever about the asset’s existence, as in *Bresnahan*. Op. at 15-16.

But Division I’s reasoning sets up a dilemma. If spouses forgo discovery, as in *Bresnahan*, they can rely on the other spouse’s voluntary disclosures. But the other spouse is lying, they will need blind luck to uncover the concealed assets. If spouses pursue discovery, as Brooks did, they will be blamed if

they settle before discovery completes. The likely resolution of this conundrum: all spouses will protect themselves by conducting discovery to its conclusion. Thus, the decision below will prompt more litigation in divorce cases, burdening our state's busy trial courts and driving up legal expenses in these already-costly matters still further.

This Court's review is especially urgent because this Court has not addressed spouses' fiduciary duties since *In re Marriage of Matson*, 107 Wn.2d 479, 484, 730 P.2d 668 (1986) (prenuptial agreements). While this Court no longer reviews many family-law cases, this Court has historically categorized cases like this one as involving issues of broad public importance. For example, in *In re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977), which concerned the enforceability of a property status agreement, this Court took the case because it raised "fundamental and urgent issues of broad public import." *Id.* at 651 (quotation omitted). This Court should do likewise here. RAP 13.4(b)(4).

(b) Division I Narrowed Spouses' Fiduciary Duty in Conflict with this Court's Cases, with Other Divisions' Decisions, and with RCW 26.16.210

Division I's decision on this issue also demands review under RAP 13.4(b)(1) and (b)(2) because it turns the fiduciary duty upside down. The court focused on what it believed Brooks knew and could have discovered with more diligence; the court disregarded what Cooney had said under penalty of perjury and in the settlement agreement. Op. at 13-16. In this way, Division I stood the duty on its head to become a duty of inquiry requiring the spouse who lacks knowledge to perform diligence. That approach runs afoul of the principles in cases like *Bresnahan*, 21 Wn. App. 2d at 389 ("The scope of that [fiduciary] duty is not determined by the other spouse's diligence."); *Seals*, 22 Wn. App. at 655 (warning that spouses need not "resort to subpoenas to discover these assets"); *Hadley*, 88 Wn.2d at 665 (noting that spouses are "not expected to be in an arms' length relationship"); *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208

(1972) (requiring “good faith, candor and sincerity in all matters”); and RCW 26.16.210 (imposing burden on Cooney to show “good faith”). Division I overlooked that a fiduciary must impart “*full* knowledge of *all* the facts and circumstances that materially affected the contract.” *Friedlander*, 80 Wn.2d at 301 (emphasis added).² Because spouses’ fiduciary duty requires them to fully disclose their property and economic circumstances, the other spouse should have the right to rely on

² Some Court of Appeals precedent imposes a “should have known” type of notice standard on the other spouse when the property is disclosed but the value is questioned. *E.g.*, *Marriage of Maddix*, 41 Wn. App. 248, 253, 703 P.2d 1062 (1985); *In re Marriage of Cohn*, 18 Wn. App. 502, 506, 569 P.2d 79 (1977). But here, Cooney never disclosed his beneficiary interest and omitted it from the agreement despite his representations/warranties. CP 634, 643. So other cases, such as *Seals* and *Bresnahan*, serve as the standard. *Cohn* and its ilk also conflict with the duty of *full* disclosure to the other spouse and to the dissolution court. This Court should still review this issue to determine whether Washington’s fiduciary duty allows a spouse to lie but escape liability if the trial court later determines that, with the benefit of hindsight, the other spouse “should have known” more.

what the other spouse says. Division I destroyed that right and excused a fiduciary's misconduct.

Division I's opinion is especially untenable because, in a contractual provision that the court did not cite, Brooks negotiated a warranty. While Brooks settled before Cooney's deadline to comply with the order compelling disclosure, she did not disclaim any interest in the information contained in those documents. Rather, she negotiated the representations/warranties in section 1.9 and 4.2 of their settlement agreement. CP 634, 643. Even if Brooks had earlier said that she thought Cooney must have a beneficial interest, CP 432-33, Cooney's fiduciary duty to her gave her the right to rely on his later—and superseding—representations. CP 634, 643.

Any other result conflicts with the principles of waiver. RAP 13.4(b)(1). “A waiver is the intentional and voluntary relinquishment of a known right” *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). Here, Division I found Brooks waived only her right to discovery. Op. at 14. But the

right to discovery arises from court rules, not the fiduciary duty. CR 26. All spouses have a much broader right to information under their fiduciary relationship. *Bresnahan*, 21 Wn. App. 2d at 405; *Seals*, 22 Wn. App. at 655. But the vacation court never found Brooks waived that broader right. (Nor could it, given sections 1.9 and 4.2 in the agreement. CP 634, 643). Division I could not supply that missing finding. RAP 12.1. Nor could it fashion a sufficient waiver for the parties. *See, e.g., Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980) (“A court cannot ... make a contract for parties which they did not make for themselves.” (emphasis added)).

In sum, this Court should grant review because Division I’s decision conflicts with other cases—and because its logic allows an unscrupulous spouse to hide and lie about their assets. RAP 13.4(b)(1)-(2), (4).

(3) This Court Should Address the Duty of Disclosure that Litigants Owe to the Dissolution Court

For the same reasons that Division I got the law wrong on

the other issues, this Court should review its analysis of spouses' duty of disclosure to the dissolution court. "A dissolution court cannot decree a fair allocation of assets and debts without *the court* gaining thorough knowledge of the parties' property and liabilities." *Grant v. Grant*, 199 Wn. App. 119, 130, 397 P.3d 912 (2017) (emphasis added). "A settlement agreement 'must adequately identify the assets so as to permit *the court* to approve the agreement or make proper division,' and the documents submitted must at least 'put the parties and *the court* on notice that the assets exist.'" *Id.* Here, however, the trial court ignored that legal standard, saying nothing about it in the findings and conclusions incorporated into the order. CP 480. And so the court omitted a controlling legal rule.

(4) This Case Is An Appropriate Vehicle for Deciding These Important and Unresolved Issues

This case is the right case to review these issues because a ruling in favor of Brooks would result in meaningful relief. Even though a trial court ordinarily has discretion under CR 60(b), the

vacation court here necessarily abused its discretion if, as Brooks contends, it applied the wrong legal standards. *See, e.g., In re Parentage of A.L.*, 185 Wn. App. 225, 239, 340 P.3d 260 (2014). Besides, a breach of fiduciary duty of disclosure renders the disputed agreement “void in its inception.” *Friedlander*, 80 Wn.2d at 303.

This Court need not worry either that Brooks somehow is seeking a windfall. Division I suggested that the settlement agreement’s property distribution benefited Brooks disproportionately. *Op.* at 3. But passing on that factual topic was unfair to Brooks, because the settlement agreement did not value their assets and because Brooks did not have the chance to produce evidence in the trial court. CP 633-51. And by accepting a number that Cooney championed, Division I ignored the unaccounted value of Cooney’s professional goodwill and future earning capacity as a doctor. *Hall*, 103 Wn.2d at 241. Division I also overlooked that Brooks had financially supported Cooney’s education and training to become a doctor. *See Washburn v.*

Washburn, 101 Wn.2d 168, 178, 677 P.2d 152 (1984) (holding that a spouse’s support for the other’s professional schooling “is a ‘relevant factor’ which must be considered in making a fair and equitable division of property and liabilities pursuant to RCW 26.09.080, or a just award of maintenance pursuant to RCW 26.09.090”).

G. CONCLUSION

This Court should grant review.

This document contains 4,992 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 27th day of December 2023.

Respectfully submitted,

/s/ Gary W. Manca
Gary W. Manca, WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorney for Petitioner
Hillary A. Brooks

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
MARRIAGE OF,

ROBERT W. COONEY,

Respondent,

and

HILLARY A. BROOKS,

Appellant.

No. 84720-1-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, C.J. — Robert Cooney and Hillary Brooks were married in 1991 and separated in 2016. In June 2020, Cooney petitioned for dissolution. During discovery, Brooks requested that Cooney produce documents relating to any trusts that Cooney had established or of which he was a beneficiary. Cooney did not produce any documents. Soon thereafter, Cooney revealed in a deposition that he was trustee of his grandmother’s trust and Brooks moved to compel production of the trust documents. But just days before the deadline for Cooney to produce the documents, the parties settled, waiving their rights to additional discovery. The court entered final orders a month later.

Over a year later, Cooney’s grandmother passed away and Brooks discovered the trust and Cooney’s interest in it as a beneficiary via the probate court filings. She subsequently moved to vacate the settlement agreement and dissolution decree on the grounds that Cooney had misrepresented his assets,

which the trial court denied. Brooks appeals, asserting that Cooney breached his fiduciary duty to disclose all assets and arguing that the trial court abused its discretion in denying her motion to vacate on those grounds. We disagree that Cooney breached his fiduciary duty and affirm.

FACTS

Hillary Brooks and Robert Cooney were married in December 1991 and separated in October 2016. In June 2020, Cooney petitioned for dissolution.

During dissolution proceedings, Brooks sought discovery from Cooney, including a request for “[a]ll trusts [Cooney had] established and all documents showing contributions [Cooney had] made to the trust, all trusts in which [Cooney was] a beneficiary, and all documents showing any distributions [Cooney] received . . . from January 1, 2016 to the present.” Cooney did not produce any documents in response to this request.

Then, at his deposition in March 2021, Cooney disclosed that he was the trustee for his grandmother’s trust, that he held her power of attorney for finances, and that he was listed on his grandmother’s accounts. He denied receiving any compensation as trustee.

In April 2021, Brooks moved to compel discovery, claiming that Cooney’s discovery responses were evasive and nonresponsive. In her motion, Brooks states that Cooney “testified trust documents exist but has not responded to the request relating to the same or produced responsive documents. . . . Such amounts potentially go to property distribution.” And in her reply on that motion, Brooks claimed that Cooney was “a beneficiary of a trust involving Carmelina

Cooney and he needs to produce the trust documents immediately, and any others that might exist for other individuals.”

On April 30, 2021, the trial court granted Brooks’s motion to compel and ordered Cooney to produce responsive documents within 30 days. But on May 25, just days before Cooney was required to produce documents, the parties settled and signed a Civil Rule (CR) 2A separation contract and property settlement agreement. The agreement awarded 93 percent of the parties’ community property to Brooks, totaling approximately \$1.8 million. Under the terms of the agreement, both parties “warrant[ed] and agree[d]” that the agreement at the time of execution was “fair, just and equitable and that they [were] affixing their signatures hereto freely, knowingly, and voluntarily without duress or coercion of anyone.” Both parties also “acknowledge[d] that each has an understanding of the nature and extent of their property and the benefits that are derived from said property” and “that no reliance whatsoever [was] placed upon representation[s] other than those expressly set forth” in the agreement. Further, each party attested that they had been advised by counsel “of the right to conduct legal discovery, obtain asset appraisals, and take other action to determine the nature and extent of the assets, liabilities, income and expenses of the Parties related to the awards” in the agreement. And they warranted that to “the extent that a Party has not taken steps to determine the nature and extent of the assets, liabilities, income and expenses of the Parties, that Party has willingly chosen not to do so to avoid the expense and acrimony of litigation.” After they signed the settlement agreement, Brooks and Cooney submitted a notice of

settlement of all claims to the court in early June 2021.

A few weeks later, in late June 2021, Cooney moved to enforce the CR 2A agreement, claiming that Brooks had made material changes to the parties' final orders not agreed to by Cooney. Cooney claimed that Brooks added the following additional reliances in violation of the CR 2A agreement:

9. Community Personal Property

Respondent entered the Agreement in reliance on Petitioner's statements, including those made under oath in the proceedings, that he is no longer employed by any Sound Physicians entity and has no financial interest in any Sound Physicians entity.

Respondent entered the Agreement in further reliance on Petitioner's statements that he will no longer work as a hospitalist physician and will work instead at 50% of his historical income as a primary care physician.

The court granted Cooney's motion to enforce the CR 2A agreement, finding that "[n]either party raised an issue with regard to execution of the Agreement or its material terms" and that the additional findings proposed by Brooks "did not form the basis of the Agreement as written and signed by the parties." The court also found that Brooks "specifically agreed in Section 2.3 of the Agreement that she was not relying on any other representations that were not contained within the Agreement." The court then adopted Cooney's proposed findings of fact and entered final orders contemporaneously with the order to enforce.

Over a year after the court entered final orders, Brooks moved to vacate the dissolution decree under CR 60(b)(4) and (b)(11), alleging that it was procured by fraud, misrepresentation, or other misconduct because Cooney hid

that he was the “sole beneficiary” of his grandmother’s trust.¹ Brooks asserted that Cooney’s failure to divulge information about the trust was a violation of his fiduciary duty to disclose all assets to her during dissolution proceedings. She sought attorney fees, spousal support, and requested that the court compel production of the trust documents. In her declaration in support of the motion, Brooks claimed that she only signed the CR 2A agreement because Cooney sent her an e-mail stating, “I will make \$260,000 for the next four years and then have to bust my a** to make that after.” Brooks did not provide a copy of the e-mail. She also claimed that “[h]ad [she] known about the Joint Trust, the bank accounts, and Robert’s status as sole beneficiary to the estates of his grandmother and her companion, [she] would not have entered into the Agreement.”

After a hearing, the court denied Brooks’s motion. It found that Brooks failed to prove by clear, cogent, and convincing evidence that fraud, misrepresentation, or other misconduct occurred. It then found that the record clearly established that Brooks knew about the trust and Cooney’s status as beneficiary before she signed the CR 2A agreement. The court also agreed with Cooney that his contingent interest in a revocable trust was not an asset and found that the fact that Cooney was a possible beneficiary to the trust was not material to the outcome of the parties’ agreement. The court ordered Brooks to pay Cooney’s attorney fees. Brooks appeals.

¹ Cooney is not, in fact, the sole beneficiary of the trust.

ANALYSIS

CR 60(b) Motion to Vacate

Brooks asserts that the court made two legal errors when it denied her CR 60(b)(4) motion to vacate that necessitate reversal. First, she contends the court erroneously concluded that Cooney’s interest in the trust was not a “property” interest. And second, she maintains that even if the interest was not a property interest, the court erred in not considering it because it affected Cooney’s economic circumstances. We disagree. Contrary to Brooks’s contention, the trust created a “mere expectancy” rather than a property interest, and therefore, Cooney did not breach his fiduciary duty by failing to disclose it. Although Cooney should have disclosed the trust in the spirit of transparency—and was required to disclose it in response to Brooks’s initial discovery requests—Brooks’s knowledge of Cooney’s beneficiary status and her subsequent signing of the CR 2A agreement days before Cooney’s deadline to produce the trust documents eliminated the requirement that Cooney disclose his interest in the trust. Moreover, the court did not err by not explicitly considering whether the trust interest affected Cooney’s economic circumstances because the court found that the interest was immaterial to the parties’ settlement agreement.

1. Duty of Disclosure

Spouses owe each other the highest fiduciary duty. Peters v. Skalman, 27 Wn. App. 247, 251, 617 P.2d 448 (1980). This duty does not cease during dissolution. Seals v. Seals, 22 Wn. App. 652, 655, 590 P.2d 1301 (1979). “The

full disclosure mandated by the fiduciary relationship assumes that one party has information which the other needs to know to protect [their] interests.” In re Marriage of Burkey, 36 Wn. App. 487, 490, 675 P.2d 619 (1984). Thus, spouses have a specific fiduciary duty to disclose all community and separate property before dissolution. Seals, 22 Wn. App. at 656. This duty to disclose does not require spouses to make use of formal discovery or “resort to subpoenas to discover these assets.” Seals, 22 Wn. App. at 655; see also In re Marriage of Bresnahan, 21 Wn. App. 2d 385, 405, 505 P.3d 1218 (2022) (wife could rely on husband’s asset disclosures without conducting discovery). But spouses are not required to know the exact financial status of the other spouse. Friedlander v. Friedlander, 80 Wn.2d 293, 302, 494 P.2d 208 (1972). Rather, the requirement that spouses have full knowledge of the other’s property interests functions to ensure the parties “can intelligently determine” whether to enter into settlement agreements and so that they will not be “prejudiced by the lack of information.” In re Marriage of Cohn, 18 Wn. App. 502, 507, 569 P.2d 79 (1977).

“Spouses also have a duty to inform the court of their assets.” Bresnahan, 21 Wn. App. 2d at 404. In dissolution proceedings, the trial court has broad discretion to make a “just and equitable” distribution of property based on the factors set out in RCW 26.09.080. In re Marriage of Wright, 179 Wn. App. 257, 261, 319 P.3d 45 (2013). However, the court cannot make a fair allocation of assets and debts without first gaining “thorough knowledge of the parties’ property and liabilities.” In re Marriage of Grant, 199 Wn. App. 119, 130, 397 P.3d 912 (2017). A settlement agreement or dissolution decree “must

adequately identify the assets so as to permit the court to approve the agreement or make proper division.” Yeats v. Yeats’ Estate, 90 Wn.2d 201, 206, 580 P.2d 617 (1978). “At a minimum, the documents must put the parties and the court upon notice that the assets exist.” Yeats, 90 Wn.2d at 206. If parties in a dissolution enter into a separation contract, that contract “shall be binding upon the court unless it finds, after considering the economic circumstances of the parties . . . that the separation contract was unfair at the time of its execution.” RCW 26.09.070(3).

a. Whether the Trust Created a Property Interest

In order to determine whether Cooney breached his fiduciary duty to Brooks, we must first consider whether the trust created a property interest, disclosure of which would affect the property distribution. We conclude that it did not.

As a preliminary matter, we must establish whether California or Washington law applies to this inquiry. The trust states that it shall be construed in accordance with California law. Neither party appears to dispute that California law applies.² Absent a conflict between California and Washington law, we defer to the trust’s choice-of-law clause. Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 694-96, 167 P.3d 1112 (2007). Thus, we apply California law to determine the trust interest.

Under California law, we interpret de novo a trust instrument, unless there

² Cooney states that California law applies and cites to both California and Washington law to interpret the trust interest. Brooks claims that the interest created is the same under either California or Washington law.

is ambiguity and conflicting extrinsic evidence as to the meaning of the ambiguous terms. Pena v. Dey, 39 Cal. App. 5th 546, 551, 252 Cal. Rptr. 3d 265 (2019). In interpreting a trust document, “the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it.” Scharlin v. Superior Court, 9 Cal. App. 4th 162, 168, 11 Cal. Rptr. 2d 448 (1992). “Ordinary words must be given their normal, popular meaning and legal terms are presumed to be used in their legal sense.” Scharlin, 9 Cal. App. 4th at 168.

Trust instruments typically create either present interests, entitling a beneficiary to immediate enjoyment of the trust property, or future interests, giving a beneficiary rights to receive trust assets at a later time. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, LAW OF TRUSTS AND TRUSTEES § 181 (3d ed. 2012). These interests may be contingent or vested. A vested interest is absolute—the occurrence of any future event will not diminish nor destroy it. RESTATEMENT (THIRD) OF PROPERTY § 25.3 (2010).³ A contingent interest is more fragile—it may be subject to a condition precedent and may not take effect in possession or enjoyment. RESTATEMENT § 25.3. The determining factor for a contingent interest “is the possibility, not the probability, that the interest will not take effect in possession or enjoyment.” RESTATEMENT § 25.3. If a gift depends on a future event, such as a beneficiary’s survival, it is usually determined to be contingent. BOGERT & BOGERT, supra, § 182.

³ California courts look to the Restatement (Third) of Property for guidance in interpreting trusts and the interests they create. Dudek v. Dudek, 34 Cal. App. 5th 154, 165-66, 246 Cal. Rptr. 3d 27 (2019).

Whether an interest is vested or contingent is not entirely determinative of whether the interest is “property” subject to division in a dissolution action. Contingent interests can be property interests, “no matter how improbable the contingency.” In re Marriage of Brown, 15 Cal. 3d 838, 846 n.8, 544 P.2d 561 (1976). Contingent interests are property interests when they are derived from an enforceable, contractual right. See, e.g., Brown, 15 Cal. 3d at 841-42 (unvested pension and contingent retirement benefits are property rights because they represent a contractual right derived from an employment contract); In re Marriage of Moore, 226 Cal. App. 4th 92, 102, 171 Cal. Rptr. 3d 762 (2014) (accrued vacation benefits are property interests that, if earned during marriage and before separation, are divisible community property); In re Marriage of Kilbourne, 232 Cal. App. 3d 1518, 1524, 284 Cal. Rptr. 201 (1991) (attorney’s contractual right to receive legal fees for services rendered on contingency basis is a property interest even if contingency does not ripen until after separation).

In contrast, “mere expectancies” are not interests of any kind. Brown, 15 Cal.3d at 844, 846 n.8. “The term expectancy describes the interest of a person who merely foresees that [they] might receive a future beneficence, such as the interest of an heir apparent . . . or of a beneficiary designated by a living insured who has the right to change the beneficiary.” Brown, 15 Cal.3d at 844-45, n.6 (“ ‘The interest of a beneficiary designated by an insured who has the right to change the beneficiary, is like that of a legatee under a will, a mere expectancy of a gift.’ . . . But if the holder acquires a contractual right to be named as beneficiary . . . [their] interest is no longer an expectancy, but a property right.”

(quoting Grimm v. Grimm, 26 Cal. 2d 173, 175-76, 157 P.2d 841 (1945)); see also In re Estate of Giralдин, 55 Cal. 4th 1058, 1065-66, 290 P.3d 199 (2012) (beneficiary’s interest in property transferred into a revocable trust is “merely potential and can evaporate in a moment at the whim of the [settlor].” (alteration in original) (internal quotation marks omitted) (quoting Steinhart v. County of Los Angeles, 47 Cal. 4th 1298, 1319, 223 P.3d 57 (2010))); Marriage of O’Connell, 8 Cal. App. 4th 565, 577, 579, 10 Cal. Rptr. 2d 334 (1992) (absent evidence that beneficiary is an irrevocable beneficiary of the insurance policy, they have no property interest in the proceeds until the insured’s death). “[T]he defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence.” Brown, 15 Cal. 3d at 845 (emphasis omitted) (alteration in original).

Here, the trust states in pertinent part:

FIFTH AMENDMENT TO THE
PETER F. HENNINGSEN AND CARMELINA COONEY
2004 REVOCABLE TRUST

.....

D: Distribution on Death—Property. On the death of the Surviving Settlor, any property not effectively appointed by the Surviving Settlor shall be distributed as follows:

.....

The residual Estate property is to be distributed to ROBERT W. COONEY, M.D. If DR. COONEY fails to survive the surviving settlor by 30 days, his gifts shall be distributed to his issue by right of representation.

This language creates a contingent interest.⁴ The trust is revocable and Cooney’s right to receive the estate property hinges on a future event—the death of his grandmother, Carmelina Cooney, and her partner, Peter Henningsen. This characterization is also supported by the limitation in the last sentence—if Cooney dies before the testators, his interests will pass to someone else. See BOGERT & BOGERT, supra, § 182 (if beneficiary is required to survive, the gift is subject to a condition precedent and therefore, contingent).

But the fact that Cooney’s interest is contingent does not mean that it is automatically a “property” interest. Here, the interest created by the revocable trust is analogous to that held by a legatee under a will or a beneficiary designated by an insured who retains the right to change the beneficiary—both are expectancies of a gift. Neither creates an enforceable right to the benefit—both are “ ‘merely potential’ ” and “ ‘can evaporate in a moment at the whim of the [settlor]’ ” or insured. Giraldin, 55 Cal. 4th at 1066 (alteration in original) (quoting Steinhart, 47 Cal. 4th at 1319) (beneficiaries of trusts); O’Connell, 8 Cal. App. 4th at 577, 579 (beneficiaries designated by insured). Likewise, Cooney’s

⁴ Brooks argues on appeal that Cooney’s interest had vested because he later became sole trustee and “settlor.” Brooks appears to rely on a single sentence from an affidavit of change of trustee, which states,

The name(s) of the settlor(s) of the Trust is (are): Robert W.
Cooney, Successor Trustee

But the document also refers to Carmelina and Peter as “previous trustees”—not “previous settlors”—and Brooks does not explain how Cooney could become a co-settlor of the trust without a modification of the trust instrument. We disagree with Brooks’s argument that a change in successor trustee resulted in a vested interest.

interest in the trust was “merely potential”; it could change at any moment on the whim of his grandmother and her partner. And unlike retirement benefits, which are property interests despite being unvested and contingent, Cooney possessed no contractual right to enforce the benefit created by the trust.⁵ Only upon the death of Carmelina and Peter would the trust become irrevocable and Cooney’s rights enforceable. Because Cooney’s interest was uncertain to vest and he had no contractual right to enforce it, we conclude that Cooney’s contingent interest in the trust was an expectancy and not a property interest.⁶

b. Whether Cooney Breached his Fiduciary Duty

Even if Cooney’s interest in the trust was not “property,” Brooks still contends that Cooney was required to disclose his interest because it affected his economic circumstances, and thus, could affect the parties’ property distribution or maintenance awards. We disagree. The interest did not affect the parties’ economic circumstances because it was contingent. And because the interest was not a property interest, Cooney did not breach his fiduciary duty to

⁵ This conclusion makes sense considering the lack of enforceable rights contingent beneficiaries have in other contexts. See, e.g., Babbitt v. Superior Court, 246 Cal. App. 4th 1135, 1143-44, 1146, 201 Cal. Rptr. 3d 353 (2016) (beneficiaries of revocable trusts lack standing to petition probate court for accounting of assets while settlors are alive; even upon death of co-settlor, beneficiary did not have any right to obtain information about disposition of assets while trust was revocable).

⁶ This outcome aligns with Washington law, too, which is important for conflict-of-law purposes. Washington courts also do not treat potential inheritance as property to be divided or considered in dissolution proceedings. See In re Marriage of Hurd, 69 Wn. App. 38, 49, 848 P.2d 185 (1993) (concluding that anticipated inheritance is a mere expectancy); In re Matter of Marriage of Leland, 69 Wn. App. 57, 71, 847 P.2d 518 (1993) (approving of Brown and holding that mere expectancies are not divisible property).

Brooks.

Spouses in dissolution proceedings have “a specific fiduciary duty to disclose all community and separate property before dissolution.” Bresnahan, 21 Wn. App. 2d at 403.

Here, Brooks’s actions terminated Cooney’s fiduciary duty. After Brooks learned of the trust, she moved for an order compelling Cooney to produce the relevant trust documents. She specifically stated in her motion that Cooney had acknowledged the existence of a trust, for which he was the trustee, and that Cooney was “a beneficiary of a trust involving Carmelina Cooney and he need[ed] to produce the trust documents immediately.” The court granted her motion and ordered Cooney to produce trust documents within 30 days of the court’s order. Then, just days before Cooney’s deadline to produce documents, and while she was represented by counsel, Brooks—who is a lawyer—voluntarily chose to sign the settlement agreement. In doing so, Brooks warranted that she had not been coerced into signing the agreement and that she was knowingly waiving all rights to future discovery. Brooks’s voluntary actions before the discovery deadline eliminated any further duty on Cooney’s part to produce the trust documents. Because she had the opportunity to examine the trust documents and chose to sign away her right to do so, Brooks cannot now argue that she is entitled to discovery of those same trust documents. Similarly, because Brooks expressly warranted that she was not coerced into signing the agreement, she cannot now claim that she was coerced into signing the agreement absent any evidence of coercion or force.

And in any event, the court did consider the interest's potential impact on the parties' economic circumstances and their settlement agreement by finding that the interest was "not material to the outcome of [the parties'] agreement."

In supplemental briefing, Brooks contends that even if she had notice of the trust, under Bresnahan, this notice did not impose upon her a duty of due diligence to conduct further discovery. Though we agree that there is not a duty of due diligence, Brooks's reading of Bresnahan is overbroad. In Bresnahan, the wife discovered a hidden bank account several months after the dissolution was finalized and moved to vacate the dissolution decree. 21 Wn. App. 2d at 391-92. The parties then stipulated that any previously undisclosed or omitted assets discovered in the future would be divided following the division in the parties' original settlement agreement. Bresnahan, 21 Wn. App. 2d at 393. A year later, the wife discovered several other previously undisclosed accounts and again moved to vacate. Bresnahan, 21 Wn. App. 2d at 393-95. On appeal, this court rejected the husband's argument that the wife should have exercised due diligence in looking for other hidden assets because she was on notice that more assets might exist after uncovering the first account. Bresnahan, 21 Wn. App. 2d at 409.

The facts of Bresnahan are readily distinguishable from the present case. Here, Brooks knew of the trust documents while the wife in Bresnahan had no prior knowledge that other assets existed before she signed a settlement agreement. 21 Wn. App. 2d at 390-95. And contrary to Brooks's urging, Bresnahan does not protect parties that willfully disregard information uncovered

in discovery when that information becomes useful later on.

We conclude that Cooney did not breach his fiduciary duty.

2. CR 60(b)(4)

Having determined that Cooney did not breach his fiduciary duty, we turn now to whether the court abused its discretion in denying Brooks's motion to vacate on the basis of fraud. Brooks contends that the court erred in denying her motion because the court's findings are unsupported by substantial evidence. She specifically challenges the court's findings that (1) she knew of the trust before signing the settlement agreement, and (2) that the trust interest was immaterial to the parties' settlement agreement. Cooney counters that Brooks is estopped from arguing fraud on appeal because she did not appeal the court's final orders.

We disagree that Brooks is estopped from arguing fraud on appeal. However, because the court's findings are supported by substantial evidence and because Brooks failed to meet her burden of proving by clear and convincing evidence that Cooney committed misconduct, we conclude that the court did not abuse its discretion in denying the motion to vacate.

a. Estoppel

We first address Cooney's claim that Brooks is estopped from arguing fraud on appeal because she should have appealed the final orders rather than filing a motion to vacate. As Brooks raised the issue of fraud in her motion to vacate, we disagree that she is precluded from arguing it on appeal.

CR 60(b)(4) does not allow a party "to relitigate an issue of fraud placed

squarely before and decided by the trial court.” Guardianship of Adamec, 100 Wn.2d 166, 178, 667 P.2d 1085 (1983). Thus, an appeal from a denial of a CR 60(b) motion is “limited to the propriety of the denial not the impropriety of the underlying judgment.” Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

Contrary to Cooney’s assertions, Brooks did not argue fraud before the final orders were entered. Her arguments in opposition to Cooney’s motion to enforce the settlement agreement concerned Cooney’s representations about his employment and future earning potential. Brooks first raised the possibility of fraud in her motion to vacate and is not estopped from arguing it on appeal.

b. Denial of Motion and Challenged Factual Findings

We next turn to whether the court abused its discretion in denying Brooks’s motion because its findings of fact are unsupported by substantial evidence. We conclude that the court did not abuse its discretion.

We review a trial court’s decision on a CR 60(b)(4) motion for an abuse of discretion. Lindgren v. Lindgren, 58 Wn. App. 588, 595, 794 P.2d 526 (1990). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Lindgren, 58 Wn. App. at 595. We do not substitute our judgment for the trial court’s or weigh the evidence on appeal. In re Marriage of Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

CR 60(b)(4) permits a court to vacate a final judgment for fraud, misrepresentation, or other misconduct of an adverse party. “The rule is aimed at judgments unfairly obtained, not factually incorrect judgments.” Sutey v. T26

Corp., 13 Wn. App. 2d 737, 756, 466 P.3d 1096 (2020). To prevail on a CR 60(b)(4) motion, the moving party must establish by clear and convincing evidence that the adverse party's fraudulent conduct or misrepresentations caused the entry of the judgment. Bresnahan, 21 Wn. App. 2d at 406. "Clear and convincing evidence is evidence showing that a fact is 'highly probable.'" Bresnahan, 21 Wn. App. 2d at 406 (quoting In re Vulnerable Adult Petition for Winter, 12 Wn. App. 2d 815, 830, 460 P.3d 667 (2020)). "A trial court may vacate a judgment based on fraud and enter findings and conclusions establishing the nine elements of common law fraud" or it may vacate based on misrepresentations or other misconduct without entering such findings. Bresnahan, 21 Wn. App. 2d at 406. The misrepresentation or misconduct does not need to be intentional, it may be merely careless. Hor v. City of Seattle, 18 Wn. App. 2d 900, 912, 493 P.3d 151 (2021).

We review the trial court's factual findings for substantial evidence, which is evidence " 'sufficient to persuade a rational fair-minded person the premise is true.' " Winter, 12 Wn. App. 2d at 830 (quoting Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). Unchallenged findings of fact are verities on appeal. In re Marriage of Akon, 160 Wn. App. 48, 57, 248 P.3d 94 (2011).

Brooks contends that the court's finding that she had knowledge of the trust is unsupported by substantial evidence because Cooney "did not say that he had ever spoken with Brooks about the trust or his beneficiary interest in it." She also contends that the court's finding that the interest was "immaterial" to the

settlement agreement is both unsupported by substantial evidence and an error of law. We are unpersuaded.

Substantial evidence supports the court's finding that Brooks knew about the trust. Cooney testified in his deposition that he was a trustee and Brooks relied on this disclosure when she moved to compel discovery of the trust documents. Brooks also stated in her reply on that motion that Cooney "is a beneficiary of a trust involving Carmelina Cooney and he needs to produce trust documents immediately, and any other that might exist for other individuals." Given that Brooks explicitly asked about Cooney's grandmother's trust, a rational fair-minded person would believe that she knew the trust existed.

Substantial evidence also supports the court's finding that the trust interest was immaterial to the parties' settlement agreement. Cooney testified that his grandmother was using the assets in the trust to pay for "her care, for maintenance, for housing, insurance, taxes, et cetera." There was no guarantee that assets or funds would left in the trust when Cooney's grandmother and her life partner passed. The trust also provided that money was to go to other individuals and that Cooney's parents would have a life estate in one of the properties. Above all, the trust was revocable—Cooney's interest could have been extinguished at any time. Given the nebulous nature of the trust, the fact that Cooney's interest was not a "property" interest under the law, and the parties' agreement that Brooks would receive 93 percent of their community property, substantial evidence supported the court's finding that the trust interest was immaterial to the parties' settlement agreement.

Because substantial evidence supported the court's findings and Cooney did not breach his fiduciary duty, we conclude that the court did not abuse its discretion in denying Brooks's motion to vacate.

3. CR 60(b)(11)

Brooks maintains that the court erred in denying her motion to vacate the decree under CR 60(b)(11) because Cooney should not be permitted "to breach his duties and his warranty in the agreement without consequences." We disagree that the facts of this case constitute the type of "extraordinary circumstance" warranting vacation under CR 60(b)(11).

Under CR 60(b)(11), a court may vacate a judgment for "[a]ny other reason justifying relief from the operation of the judgment." But the rule is not a "blanket provision" authorizing relief for all conceivable reasons. State v. Keller, 32 Wn. App. 135, 141, 647 P.2d 35 (1982). Rather, we apply CR 60(b)(11) only "to serve the ends of justice in extreme, unexpected situations." In re Det. of Ward, 125 Wn. App. 374, 379, 104 P.3d 751 (2005); see, e.g., In re Marriage of Flannagan, 42 Wn. App. 214, 222-23 709 P.2d 1247 (1985) (substantial change in the law constituted extraordinary circumstances); cf., In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (complaints about separation agreement's unfairness do not constitute extraordinary circumstances). The reasons for vacation under CR 60(b)(4) must relate to "irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceeding." Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc., 68 Wn.2d 756, 758, 415 P.2d 501 (1966).

As discussed, Cooney did not breach his fiduciary duty to Brooks during the dissolution. Because Brooks's CR 60(b)(11) argument rests wholly on this premise, and she does not identify any irregularity on the part of the court, we conclude that the court did not err in denying her motion to vacate.

Attorney Fees at Trial

Brooks contends that the trial court erred in awarding Cooney fees because neither Cooney nor the court supplied a basis for doing so. She also argues that she should be awarded attorney fees for Cooney's alleged intransigence. Cooney counters that the court properly awarded him fees because, as the prevailing party, he was entitled to fees under the settlement agreement. He also claims that the court correctly awarded him fees for Brooks's intransigence. We agree with Cooney that the settlement agreement provides a basis for the court to award him fees but disagree that the court awarded fees for intransigence.

Whether a party is entitled to attorney fees is a question of law that we review de novo. Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 86, 104-05, 285 P.3d 70 (2012). "The general rule in Washington is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity." Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). If attorney fees are authorized, we will uphold an attorney fee award unless the court abused its discretion. Workman v. Klinkenberg, 6 Wn. App. 2d 291, 305, 430 P.3d 716 (2018). "A trial court abuses its discretion if its decision is manifestly

unreasonable or based on untenable grounds or untenable reasons.” In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). We may affirm on any basis supported by the record. Bavand v. OneWest Bank, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

Here, the parties’ CR 2A agreement provides that “[i]n any action or proceeding related to this Agreement, whether for specific enforcement, damages or other remedy, the prevailing Party shall be entitled to an award of reasonable attorney fees, expert fees, or other costs reasonably incurred in such action or proceeding.” Because Cooney prevailed before the trial court on an action to enforce the agreement, the court did not err in awarding him his reasonable attorney fees on this basis. We note, though, that Cooney’s argument that the fee award was based on intransigence is unsupported by the record. The court did not mention intransigence, or anything similar to it in its order denying the motion to vacate. Nor did Cooney request fees on the basis of intransigence. Because the fee award is proper under the CR 2A agreement, we affirm the award.

Attorney Fees on Appeal

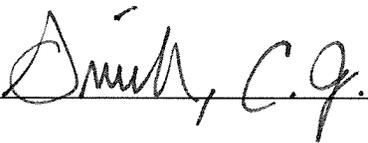
Both parties warrant that they are entitled to attorney fees on appeal. Brooks requests fees due to Cooney’s alleged intransigence and Cooney requests fees under the parties’ settlement agreement. Because Cooney prevails on appeal, we award him attorney fees on appeal.

RAP 18.1 permits a party to request attorney fees on appeal where applicable law grants them that right. Intransigence on appeal or before the trial

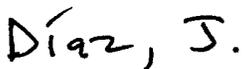
court may support an award of attorney fees on appeal. In re Marriage of Mattson, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). “Intransigence includes foot dragging and obstruction, filing repeated unnecessary motions, or making the trial unduly difficult and costly by one’s actions.” In re Marriage of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Willful misrepresentation or willful mischaracterization of community property during dissolution proceedings may constitute intransigence. Bresnahan, 21 Wn. App. 2d at 411-12.

Here, Brooks has not shown that Cooney’s actions rose to the level of intransigence. Although Cooney should have been more forthcoming about his interest in the trust, Brooks had the opportunity to discover the trust documents before signing the settlement agreement and chose not to. Any additional cost of litigation she occurred was thus self-inflicted. We therefore decline to award Brooks fees on this ground. And because Cooney prevails on appeal and the parties’ settlement agreement provides for fees for the prevailing party, we award him his reasonable attorney fees.

Affirmed.



WE CONCUR:





DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Petition for Review* in Court of Appeals, Division I Cause No. 84720-1 to the following:

Frances Turean
Wechsler Becker, LLP
701 Fifth Avenue, Suite 4550
Seattle, WA 98104

Valarie A. Villacin
Catherine W. Smith
Smith Goodfriend PS
1619 8th Ave N
Seattle, WA 98109-3007

John C. Andrews
Bishop, Cunningham & Andrews, Inc., P.S.
Attorneys at Law
3330 Kitsap Way
Box 5060, West Hills Station
Bremerton, WA 98312

Original electronically delivered via appellate portal to:
Court of Appeals, Division I
Clerk's Office

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

DATED: December 27, 2023, at Seattle, Washington.

/s/ Brad Roberts _____
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

December 27, 2023 - 12:48 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 84720-1
Appellate Court Case Title: Hillary A. Brooks, Appellant v. Robert W. Cooney, Respondent

The following documents have been uploaded:

- 847201_Petition_for_Review_20231227124717D1275685_4266.pdf
This File Contains:
Petition for Review
The Original File Name was 2023-12-27 Petition for Review.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- brad@tal-fitzlaw.com
- cate@washingtonappeals.com
- christine@tal-fitzlaw.com
- ftt@wechslerbecker.com
- jandrews@bcalawyers.com
- matt@tal-fitzlaw.com
- valerie@washingtonappeals.com

Comments:

Petition for Review

Sender Name: Brad Roberts - Email: brad@tal-fitzlaw.com

Filing on Behalf of: Gary Manca - Email: gary@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20231227124717D1275685