95230-2

No. 49393-4 II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

SHANTEL P., WAZNY,

Appellant,

v.

STEVEN D. WAZNY

Respondent

APPELLANT'S BRIEF

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1. The Opinion fails to resolve the standards for post-divorce litigation of undisclosed property and motions to vacate as to spousal good faith and fiduciary duty, regarding a financially dominant spouse.
2. **The opinion fails to reverse the trial court's erroneous refusal to consider circumstantial evidence, and reconcile the *Maddix* and** *Seals* cases, all **essential to the burden of proof analysis.**
3. **The good faith duties of a spouse and the use of circumstantial evidence for undisclosed property or vacate matters is an issue of public policy this court should review.**
4. **The opinion rules the CR2A is incorporated in the decree and denies relief to the financially inferior spouse, without resolving the CR2A dispute under established interpretation rules.**
5. **The opinion is contrary to established law by denying attorney's fees to the wife and by failing to require adequate documentation and segregation of attorney's fees**

I STATEMENT OF THE CASE

A. Procedure and Opinion requested for review.

The Supreme Court is requested to review an Opinion in this matter filed September 19, 2017, attached at Appendix I, pages 1—20. Appellant

filed a timely Motion for Reconsideration on October 6, 2017, which was denied on October 19, 2017. Attached at Appendix II.

The parties signed a CR2A agreement on September 4, 2013. CP 1—8, providing that any undisclosed property shall be brought back to court and divided 50% each, the prevailing party to receive attorney's fees. CP 3.

With over a year of post-decree business and bank records of the husband, the wife moved to Enforce the Decree, *inter alia,* for "undisclosed property", for a disagreement that she did not agree to pay a Bank of America Equity line (ELOC), and other issues,[1] She claims 50% of $300,000 in community business distributions (known as AJP, which the husband received, and which owns numerous Jack-In-the-Box restaurants) hidden until after the divorce.[2] She also filed a Motion to Show Cause to vacate the CR2A agreement, regarding a debt division based on false disclosures, which was denied, and affirmed in the Opinion.

A Commissioner ruled that the CR2A had assigned the ELOC to the Wife to pay, and denied fees to the wife based on fault. CP 1019—1022.

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[1] She was successful and does not appeal the ruling as to funds owed, payment for a deck, and quit claim deed, she appealed the denial of attorneys fees and the finding that the CR2A agreement assigns the Equity Line of Credit to her to pay.

[2] Her motion to divide undivided property also included another business, NHG, however, that motion is not a subject of this petition.

Judge Nevin found the wife could have discovered the information prior to the CR 2A, rejected consideration of circumstantial evidence, did not apply a statutory good faith or common law fiduciary duty to the husband, and did not order a trial on any issue. CP 1070-1074; 1023-1043. The opinion does not address these claimed errors.

The trial court awarded fees to the husband per the CR2A incurred until 2 months *after* the date it had ruled, refusing to segregate fees.

The final judgment through offsets and by awarding fees to only the husband netted $2429.30 against the wife. CP 1114-1115.

The Court of Appeals Opinion ("Opinion") reversed the trial court's dismissal of the wife's claim on the $300,000 community distribution, and remanded, directing the trial court to use the preponderance of the evidence standard. It was silent on the wife's right to evidentiary presumptions or the husbands burden under statutory, RCW 26.16.210, and his fiduciary duty under *Seals v. Seals* 22 W. app 952, 590 P.2d 1301 (1979), and the right to have circumstantial evidence considered.

The Opinion also ruled that the wife must pay the ELOC, not because she agreed in the CR2A, but because the parties repeated the disputed phrase, that wife would pay "1st and 2nd", in the decree which she signed.

The Opinion ignores established contract interpretation and mis-applies *Mickens v. Mickens*, 62 Wn.2d 876, 881, 385 P.2d 14 (1963). It did not determine the parties' intent objectively by CR2A language and the facts and circumstances of the parties.

The Opinion affirmed the trial court denial of the wife's Motion to Vacate "sham" debt, although the husband never produced any documents that he should reasonably have, to prove the debt existed or was paid. It relied on *Marriage of Maddix* 41 Wn. App 248, 703 P.2d 1062(1985), regarding the obligation to discover debt prior to the decree, without discussing "good faith" or fiduciary duty in the husband's disclosures, or that circumstantial evidence can form "cause" to vacate.

The Opinion reversed the fee award when it remanded the "undisclosed property" issue, but provided no directions in the face of the trial court's overt refusal to segregate and demand adequately documented fees. It upheld the punitive denial of fees to the wife—who prevailed on many issues—conflicting with cases that rule this reversible error.

Statement Of The Case: evidence and facts

The financially dominant husband earns more than $16,000 per month and the wife earns less than $2500 per month. The husband disclosed only $8750 income before the September, 2013 CR2A mediation, CP 622-653.

Community undisclosed AJP distributions in 2012-13.

At separation, the family income pattern from AJP[3] included the husband's monthly salary *and* the community's monthly distributions. By September of 2011, the date of separation, distributions were paid monthly to Mr. Chopra, the majority partner, and the community, which owned a 10% interest. In September, October, and November, 2011, Chopra's salary ($12,500), and husband's salary ($7083.33) were paid; as were Chopra's $70,000 and the community's $7000.00 monthly distributions. CP 212; 217—235.

Beginning in January 2012, Chopra continued to receive his salary *and* $70,000 (or significantly more) in monthly distributions, but the community stopped receiving distributions. Only the salary was paid to the husband, through December of 2013—.CP 213-214; 236-287. The decree was final November 21, 2013.

AJP distributions were traced to account (#1698); the husband is a signatory, signing most of the salary and distribution checks to himself and his partner. But the only income he disclosed was on gross monthly

[3] which started with 18 Jack in the Box restaurants on September 13, 2010, and increased to 44 restaurants on April 4, 2012, CP 492,

check stubs showing no deductions, or his signature; his most recent tax return produced was 2011. CP 622-653, 665-661.

The wife's *post decree* subpoena of his bank account revealed additional, unreported income to him from cash and the AJP acct. 1698, totaling $30,945.82 in 2012 and 9 months of 2013. [4] Then, after signing the CR 2A (9/4/13), he received a bank transfer of $190,000 from the #7964, personal account *of his business partner, Chopra.* CP 283. On February 14, 2014, he received another S110, 000 wire from Chopra's account. CP 290. This is the $300,000 that the wife alleges is the 2012-2013 community distribution, secreted to the partner's account, and not reported.[5] She claims 50%, or $150,000.00.

Subpoenaed bank checks verified that regular, 10% distribution to the husband resumed after the divorce. In March 2014, AJP paid him 3

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[4] (Jan., $2318.69;CP 260, Ap., $6702;CP 267, July, $25,000; CP 271, July $1106.22; CP 272. October,2815.83, CP 282, $6500, Nov. CP 254[4]; Dec. 20 $4105.08, CP 287) and unexplained cash (Jan $1500.00;(CP 259) Feb. $1698.00;(CP 262) Aug. $1750.00 (CP 273—275); Sept. $2450.00 (CP 280)) in 2013—all prior to the dissolution. CP 214. This equals $30,945.82 of unreported income, when the $25,000 is not counted. See CHART, CP 212-216.

[5] During all of 2012 and 2013, Chopra received disbursements above his usual salary totaling at least $2,414,271.00, the community received no regular distribution. See CHART, CP 212-216 and CP 240—288. Note that the business is closely held and not all payments to partners, can be tracked i.e., for expensive vehicles, for personal tax payments. (CP 212—318)

months of retro-distributions, each $7778.00. Since then he receives a monthly salary *plus* a $7778 monthly distribution. CP 215, 292-318.

Vacate issue: Sham debt claimed to be owed by the husband

The CR2A divided "community' debt, per a list made by the husband. His total was $142,234.00 CP 7. The wife's total--about $300,000.00—was $51,163 in personal and $247,070 in mortgage debt. CP 6-7.

SHAM DEBT #1: A pre-2012 purportedly community "personal loan" of $25,000 to AJP, CP 968, never existed or never was repaid.[6]

SHAM DEBT #2 there is no record of any payments by the husband on a "Milage Plus United" card, on husband's debt list for $14,961.00. CP 7. If that account existed, it was paid through the business.

SHAM DEBT #3: Loan, Trophy Boat, $18,000. No payment or proven boat loan. CP 319—409, not denied by husband CP 806-809.

SHAM DEBT #4: loan on Lexis for $19,000. CP 7. The *business accounts* regularly paid Lexus, with a lump sum pay-off when the dissolution was finalized. CP 214-215, (column on far right.) Title release papers show a lien on the Lexis was purchase money for the jeep

[6] (There was a $25,000 "loan" from July 2013, per Mr. Chopra. CP 336-339, which was paid in full in December 2013 using business proceeds. Bank records prove there were no payments from 2011 through November 2014, CP 319—409, to AJP or Mr. Chopra on the supposed community loan).

for the daughter. CP 422—424. The husband argued that he had "both" a jeep and a Lexis loan, CP 810, however, he produced no documents. Financial documents verify that AJP paid off the Lexis.

Combined with the Opinion that affirmed the wife must pay the ELOC, instead of $142,234—husband's CR2A *listed* debt--the husband actually has paid only $22,737. The wife is left to pay her CR2A *listed* debt of $300,000.00, *and* the $42,319 ELOC.

The wife did not agree to pay the ELOC

The CR2A debt list says husband will pay the ELOC, $42,319; ("Buy-in to AJP", CP 7.) But a last minute interlineation in the CR2A, "wife takes 1st and 2nd," CP6, not initialed by the wife, is claimed by the husband to mean she agreed to pay the ELOC. CP 919. When the wife realized this issue, she promptly e-mailed him on 12/29/13 that the personal ELOC is not the same as a "second mortgage" and she did not agree to pay it. CP. 985. The ELOC stayed on Mr. Wazny's debt list, CP7, *not* moved to the wife's debt list, or subtracted from her equity calculation.

. Attorney fee issues.

Denial of fees for wife's successful motions

The wife requested fees for the motion to clarify the CR 2A regarding the ELOC, quit claim deeds, payment of certain living expenses by the

husband, and building a deck on the family home. CP 903—911. These were denied based on fault. CP 1019—1022

The wife's fee motion was based on need and ability to pay. CP 910. Her income of $1092 was less than expenses, and she lived by exhausting a post-dissolution inheritance (a trust account worth $220,000) CP 765; the husband nets over $16,000 per month. CP 763—769, 544-594,211.

Fees granted to husband.

The husband moved for his *un*segregated fees per the CR2A. CP 1075. He requested fees, costs and expert costs totaling $34,133.95. CP 1078.—1080. Per his attorney: "There is no way for me or my office staff to segregate the work. . . "CP 1077.

The wife objected to fees not segregated, to clerical time charged at $120 per hour, to $4,425 in un-itemized "research" from March 22—June 1, and to lack of qualification. CP $1081—1089.

Judge Nevin, who had orally ruled on April 22, CP 1023, awarded *un*segregated fees incurred to June 22, ROP 14; The Court reduced the un-itemized $4,425 to $1,000, denied expert fees, and awarded $20,058. ROP 17-19, stating the CR2A was "inextricably intertwined" with all issues, and that property issues are "the bulk of the case", ROP 14-16.

I.THE OPINION FAILS TO APPLY SPOUSAL GOOD FAITH AND FIDUCIARY STANDARDS FOR POST-DIVORCE LITIGATION OF UNDISCLOSED PROPERTY AND MOTIONS TO VACATE. RAP 13.4 (B) (1) AND (2).

Undisclosed property cases and vacate cases invariably call into question the good faith of a spouse. Burden of proof is shifted:

> In every case where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of a third person or persons, the *burden of proof shall be on the party asserting the good faith.* RCW 26.16.210.

The statute is fortified by the common law fiduciary relationship between husband and wife, which does not cease upon contemplation of divorce. *Seals v. Seals* 22 W. app 952, 590 P.2d 1301 (1979) (husband, who managed business, had fiduciary duty to update interrogatories and disclose assets.) This duty of good faith and fair dealing extends to the settlement agreement. In re *Marriage of Sievers*, 78 Wn.App. 287, 897 P.2d 388 (Div. 1 1995).

There are few cases applying these principles to post divorce cases, and the Opinion does not do so. Although it remanded the undisclosed property for consideration by the preponderance of the evidence, it conflicts with the above authorities by failing to articulate that the wife could rely upon the false income reported prior to the CR2A and that the husband, whose good faith is questioned, has a burden to prove produce

evidence of good faith. He cannot prevail by merely stating, along with his partner Chopra, that the $300,000 is a "loan" without coming forward with evidence that reasonably should be in his possession. If the trial court does require the husband to prove his good faith, then the wife will lose her motion on any burden of proof in the face of his bare denial.

Failure to order the trial court to consider the husband's fiduciary duty and burden of proof is also an error by the Opinion that affirms dismissing the wife's motion to vacate the "sham" debt division. A CR 2A agreement may be vacated because of fraud. *DeLisle v. FMC Corp* 42 Wn. App 576, 705 P.2d 283 (1985), CR 60. Yet, the Opinion cites *Marriage of Maddix* 41 Wn. App 248, 703 P.2d 1062 (1985), placing the burden on the wife to have discovered her debt prior to the decree. Here, the husband affirmatively reported the listed debt, but he escaped paying over $100,000 of the debt on his CR2A list.

Seals and *Maddix* have not been, but should be, reconciled as to undisclosed property cases and vacate cases, where a common theme is the lack of disclosure by a spouse. The obvious defense, that the wronged spouse should have done better discovery, is embodied in *Maddix.* This ruling, sandwiched in date between *Seals* (1979) and *Sievers* (1995), does not mention or consider a spousal duty to disclose property, and appears to

bar recovery regardless of a spouse's disclosure duty if a spouse *could have* pursued discovery. The Opinion, citing *Maddix,* erroneously denies the vacate motion, assigns no burden—of minimal production or good faith—on the husband, and fails to apply the contours of the spousal fiduciary duty and burden of proving good faith in vacate motions.

II. THE OPINION FAILS TO REVERSE THE TRIAL COURT'S ERRONEOUS REFUSAL TO CONSIDER CIRCUMSTANTIAL EVIDENCE, CONFLICTING WITH CURRENT AUTHORITY, AND ESSENTIUAL TO THE BURDEN OF PROOF ANALYSIS. RAP 13.4 (B) (1) , (2), and (3)

The Opinion did not address the trial court's refusal to consider circumstantial evidence; the wife's evidence, while strong, is financial records which are circumstantial evidence. The opinion is in conflict with a long history regarding circumstantial evidence, when good faith is questioned. The concept is recognized as essential to proving common law fraud. *Osawa v. Onishi* 33 Wn.2d 546, 206 P.2d 498 (1949), a case decided soon after the 1945 adoption of UFTA (Uniform Fraudulent Transfers Act) observes that a fraudulent intent in most cases "can only be proved by circumstantial evidence" such as when, on the eve of suit, a debtor transfers property beyond reach of his creditor. Id. at 555.

UFTA codified three scenarios of "presumptive fraud," defining suspect circumstances. RCW 19.40.051 (a); RCW 19.40.041(a); RCW

19.40.041(b). The wife's evidence herein is closely similar: Mr. Washy transferred community distributions to his partner's personal account, he knew he imminently owed his wife community property if disclosed; the transfer not in the ordinary course of business; it was not for value, there were no loan documents or payments; the transfer hindered his obligations, and he reported debt that was either not owed or was being paid by the business. Under UFTA, when these circumstances apply, "presumptive fraud" is created, and reduces the burden of proof to "substantial evidence." *Sedwick v. Gwinn* 73 Wn.App at 885. Yet, the Opinion ignored the trial court error rejecting circumstantial evidence, assigned no presumptions for the wife, and no burden of proof or good faith production to the husband. (Community obligations are subject to UFTA, *Clayton v. Wilson*, 168 Wn.2d 57, 227 P.3d 278 (2010), but no cases comment upon protections spouses receive from each other. Yet the statutory and *Seals* provisions create a strong and at least equal basis to modify presumptions in vacate and undisclosed property actions.)

The Opinion erred because the trial court based its rejection of circumstantial evidence independently of the burden of proof it assigned, and because both under UFTA and case law, circumstantial evidence can create presumptive fraud, sufficient for clear, cogent, and convincing evidence. *Dept. Labor and Industries v. Rowley* 340 p.3d 929, 185 W.App

154 (2014) (evidence burden was clear, cogent and convincing; the court erred accepting only direct evidence.) ; *Tan v. Le* 177 Wn.2d 649, 300 P.3d 356 (2013) (circumstantial proof can support finding of malice by clear, cogent and convincing evidence.)

The fiduciary duty of the husband to affirmatively show good faith, and to truthfully disclose debts and income, walks hand in hand with the wife's right to present circumstantial evidence to support her claims that the husband has made secret business deals and misrepresented debt. This court should accept review to define the relative contours of *Maddix* and *Seals*, and express the duties in context with the use of circumstantial evidence when good faith is questioned, as done in UFTA.

III. THE GOOD FAITH DUTIES OF A SPOUSE AND THE USE OF CIRCUMSTANTIAL EVIDENCE FOR UNDISCLOSED PROPERTY OR VACATE MATTERS IS AN ISSUE OF PUBLIC POLICY THIS COURT SHOULD REVIEW. RAP 13.4 (3)

Since both *Maddix* and *Seals,* mandatory filing of source documents without discovery requests and "good faith" language is incorporated in some court rules, i.e. King County local Family Rule 10 and 16, first adopted, 2004). This court should update and clarify the application of these cases, which seem to contradict each other, in light of the evolution of domestic relations discovery to require transparency.

A current analysis is important since lack of disclosure or claimed dishonesty is a common post dissolution issue, clear delineation of duties and presumptions will assist attorneys to evaluate these cases, the subject is highly amenable to clear standards, and the benefit will be great for vulnerable spouses. *In re Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002); *In re Post-Sentence Petition of Combs*, 353 P.3d 631, (2015)

THE OPINION CONFLICTS WITH AUTHORITIES BY RULING THE CR2A IS INCORPORATED IN THE DECREE WITHOUT RESOLVING THE DISPUTE REGARDING WHICH SPOUSE AGREED TO PAY THE ELOC. RAP 13.4 (1), (2), and (3)

The CR2A is a Contract and Contract law applies. To be enforceable, it must be signed by the person being bound by it. *Bryand v. Palmer Coking Coal Co.* 67 Wn. App 176, 834 P.2d 662 (1992). It is uncontested the wife never signed the interlineation "2nd"in the Cr 2A, although she signed the decree which incorporated the CR2A by reference and which stated she took the "1st and 2nd mortgage."

The meaning of a CR2A agreement is disputed if material terms are disputed. *In re Feree* 71 Wn.App 35, 856 P.2d 706 (1993). Nothing in the CR2A says The ELOC is the same as "2nd"and the wife stated it is not in her December, 2013 e-mail. CP 985.

The impact of making the wife pay the $42,000+ debt makes the financially dependent spouse pay the majority of community debt. A court has discretion to relieve a party from a stipulation in a CR 2A agreement if such relief is necessary to prevent an injustice. *Baird v. Baird* 6 Wn. App 587, 494 P.2d 1387 (1972). The opinion does not address this.

The Opinion assumes that the ELOC is the same as the "2nd mortgage." But that assumption is contrary to established law.

The *Yearout* and *Mickens* cases cited by the Opinion only apply to unambiguous agreements incorporated into a Decree.

The opinion relies on cases that rule that incorporating a separation agreement merges it into the decree. *In re Marriage of Yearout*, 41 Wn. App. 897, 900, 707 P.2d 1367 (1985); and *Mickens v. Mickens*, 62 Wn.2d 876, 881, 385 P.2d 14 (1963). (As to property settlement agreements.)

When there is any question of intent, an agreement incorporated into a Divorce Decree must be construed based upon rules of construction. In U*nited Benefit Life Insurance Company v. Price* 46 Wn. 2d 587, 283 P.2d 119 (1955), the separation contract provided that "all insurance" policies were distributed, without itemizing them The court ruled that unless the parties acted in a reasonable time to demonstrate that they intended every policy to be divided by the Decree, the beneficiary would not be deemed changed by the contract. Here, Ms. Wazny immediately objected that "2nd" was not the same as the ELOC, CP 985, clearly disputing that

assumed intent. The decree does not clarify the ambiguity of whether or not the "2nd" is the same as the ELOC

Contract interpretation principles requires the Court to resolve the ambiguity in favor of the wife.

The CR2A treats "2nd" as different from ELOC. It could have used the same name, or account numbers, or other identifying clarities, but it did not. It must be interpreted using "usual rules of contract construction' " apply. *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9th Cir.1995)); McGuire, 169 Wash.2d at 188-89, 234 P.3d 205 . A valid contract requires *mutual* assent, *Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. Yakima*, 122 Wash.2d 371, 388-89, 858 P.2d 245 (1993). Washington follows the "objective manifestation test" for contract formation. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 699, 952 P.2d 590 (1998).

A court determines focuses on objective manifestations expressed in the agreement. McGuire, 169 Wash.2d at 189, 234 P.3d 205 (citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 503, 115 P.3d 262 (2005)). It may consider extrinsic evidence as an aid in interpreting words, but it cannot import one party's unexpressed, subjective intentions into the writing. *Seaborn*, 132 Wash.App. at 270, 131 P.3d 910 (citing *Berg v. Hudesman*, 115 Wash.2d 657, 669, 801 P.2d 222 (1990)). *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn.App. 571, 271 P.3d 899, (Div. 2 2012)

We must interpret the language as a whole and give effect to all the language used and without rendering any portion meaningless. *Snohomish County Pub. Trans. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012) *Ley v. The Clark County Public Transportation Benefit Area*, 197 Wn.App. 17, 386 P.3d 1128, (Div. 2 2016)

When a different term is used in 2 parts of the document a different meaning must be assumed to be assigned to that term. *Koenig v. City of Des Moines*, 158 Wash.2d 173, 182, 142 P.3d 162 (2006) *State v. Roggenkamp*, 153 Wash.2d at 625, 106 P.3d 196) (2005); *Densley v. Department of Retirement Systems*, 162 Wn.2d 210, 173 P.3d 885, (2007)

Despite these authorities, all of which compel a ruling that the wife does not pay the ELOC, the Opinion has ruled to the contrary.

THE OPINION ERRED BY DENYING ATTORNEYS FEES TO THE WIFE AND BY FAILING TO REQUIRE ADEQUATE DOCUMENTATION AND SEGREGATION OF ATTORNEYS FEES

Wife's fee request for Decree Enforcement issues of funds due, deck on family home, quit claim deed, interpretation of CR2A"

The wife was entitled to fees for her successful motions based upon need and ability to pay; the commissioner abused her discretion in denying her fees based upon an assignment of fault. The Commissioner should also have considered the burdens of litigation in thee need analysis. *in Ovens v. Ovens,* 61 Wn.2d 6, 376 P.2d 839 (1962 Dissolution awards are an abuse

of discretion when made based on fault *Marriage of Muhammed* 153 Wn 2d 795, 108 P.3d 779 (2005) A fee award in which the court does not make its award based on consideration of need and ability to pay is abuse of discretion. *Marriage of Rideout* 150 W. 2d 337 77 P.3d 1174 (2003). If not based upon the statutory criteria of RCW 26.09.140 the fee award will be reversed. *Marriage of Steadman* 63 Wn. App 523, 821 P.2d 59 (1991). Yet, the Opinion declined to reverse the denial of fees to the wife and conflicts with this established law.

The Trial Court erred in failing to segregate the husband's fees, and awarding amounts for undocumented and clerical work.

Segregation of fees is mandatory. *Dice v. City of Montesano* 131 Wn.App. 675, 128 P.3d 1253 (2006). The person requesting fees has the burden of keeping adequate records to segregate his fees. An award will be reversed upon appeal unless fees have been segregated, despite the court stating that it cannot so segregate. *Smith v. Behr Process Corp.* 113 Wn.App. 306, 345, 54 P.3d 665 (2002).

Here, the trial court felt it "could not" segregate the fees (i.e., at CP 1091), contrary to *Smith.* The Opinion reversed the fees because the court's ruling was reversed, but avoided disturbing the erroneous finding of non-segregation of fees, placing the litigants again in front of a court not willing to abide by *Smith.* The trial court awarded fees for clerical

work, paid an undocumented assistant at $120 per hour, and allowed certain unspecified research hours. CP 1094 to 1098. This conflicts with *Absher Cont. Co. v. Kent School Dist. # 415* 79 W. App 841, 917 P.2d 1086 (1995) *Absher* disallowed the very clerical costs this trial court allowed; to be meaningful, this court must enforce fee standards.

Fees on Appeal

The Opinion should have awarded fees on appeal based on need and ability to pay and did not provide any basis for this denial.

VI. CONCLUSION:

The Supreme Court should accept review, clarify the burdens and fiduciary duties of spouses for undisclosed post decree property and for vacate motions, clarify the extent to which disputed settlements are incorporated into decrees, clarify public policy regarding circumstantial evidence, pronounce the relationship between the obligations under *Maddix* and spousal fiduciary duties under *Seals,,* and enforce only documented fee awards that are segregated and based on need and ability to pay.

I hereby certify that I caused a true copy of this Petition for Review to be served through the ECF system on John Miller, counsel for the husband, and whose address of record is:

Mr. John A. Miller, esq

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Respectfully Submitted this 16th day of November, 2017.

/s/Jean Schiedler-Brown

Jean Schiedler-Brown,WSBA # 7753
For Appellant Shantel Tracy-Wazny

LAW OFFICES OF JEAN SCHIEDLER-BROWN, P.S.

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Transmittal Information

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APPENDIX I

PETITION FOR REVIEW

COURT OF APPEALS OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION

Filed
Washington State
Court of Appeals
Division Two

September 19, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of: STEVEN D. WAZNY, Respondent, and SHANTEL P. WAZNY, Appellant.	No. 49393-4-II UNPUBLISHED OPINION

MAXA, A.C.J. – Shantel Wazny appeals the trial court's denial of her postjudgment motions regarding the dissolution decree that terminated her marriage to Steven Wazny. The decree incorporated a CR 2A settlement agreement that allocated community property and debts between the parties.

Steven[1] was the director of operations of and had an ownership interest in two companies that owned and operated fast food restaurants: AJP Enterprises LLC and NHG Enterprises LLC. The CR 2A agreement and dissolution decree allocated the interest in AJP to Steven and did not reference NHG, which an expert had stated had no value.

Shantel filed two motions regarding the dissolution decree and the CR2A agreement: a CR 60(b) motion to vacate the property and debt distribution portions of the dissolution decree

[1] To avoid confusion, first names are used to identify Shantel and Steven. No disrespect is intended.

and a motion to divide equally between the parties certain property that was undisclosed and undivided in the CR 2A agreement. The motions included various claims, but Shantel's primary allegation was that $300,000 in loans Steven received from the primary owner of AJP in fact were profits from AJP that Steven had concealed from her. The trial court denied both motions. A court commissioner also denied Shantel's motion to clarify that she was not responsible for the second mortgage on the community home that was awarded to her and denied her request for reasonable attorney fees.

We affirm the trial court and the court commissioner in all respects with two exceptions. First, we hold that the trial court erred by applying a clear, cogent, and convincing evidence standard rather than a preponderance of the evidence standard for Shantel's undisclosed property motion. We reverse the trial court's denial of Shantel's undisclosed property motion on one issue: her allegation that Steven concealed $300,000 of AJP profits and that those profits constituted undisclosed property under the CR 2A agreement. Second, and consistent with this ruling, we also vacate the trial court's award of reasonable attorney fees to Steven as the prevailing party under the CR 2A.

We remand for the trial court to consider, using the preponderance of the evidence burden of proof, Shantel's claim that Steven concealed $300,000 of AJP profits and that the $300,000 was undisclosed property under the CR 2A agreement.

FACTS

Steven and Shantel were married in 1997 and separated on October 23, 2011. Steven subsequently filed a dissolution petition.

At mediation on September 4, 2013, Steven and Shantel reached a settlement and signed a CR 2A agreement that memorialized the settlement terms. On November 21, the trial court entered a decree of dissolution and findings of fact and conclusions of law. Both pleadings incorporated the CR 2A agreement.

Business Assets

Steven paid $75,000 for the 10 percent equity interest in AJP, which was formed in September 2010. AJP's primary owner was Ajay Chopra. Steven was the director of operations/operating partner and was entitled to receive guaranteed payments as well as five percent of the company's net cash flow. AJP owned a number of fast food restaurants.

Steven also owned a 10 percent interest in the equity and profits of NHG. Chopra also was the primary owner of this company. As of December 31, 2012, NHG owned a single fast food restaurant that had opened on December 17, 2012. The record is unclear when NHG was formed, but the evidence suggests a formation date of around October 2012.

Before entering into the settlement, Steven and Shantel jointly retained a CPA to perform business valuations of AJP and NHG. The CPA prepared reports on these valuations in July 2013. He estimated that Steven's interest in AJP was worth between $150,000 and $300,000 on December 31, 2012. He estimated that Steven's interest in NHG had little or no current value on December 31, 2012 because its recently opened restaurant was operating at a loss and the company had approximately $400,000 of debt.

The parties did not ask the CPA to update his valuations before the mediation.

CR 2A Agreement and Dissolution

The CR 2A agreement incorporated a worksheet showing the property and debt allocation between Steven and Shantel. The property division showed that Shantel would receive the family home. A handwritten interlineation added that "wife takes 1st and 2nd" mortgage. Steven, Steven's attorney, and Shantel's attorney all initialed the interlineation, but Shantel did not. The 10 percent interest in AJP was valued at $44,500 after loan repayment and was allocated to Steven. NHG was not listed on the property worksheet.

The debt division showed that "B of A Equity Line of Credit for Buy-in to AJP" in the amount of $42,319 was allocated to Steven. Clerk's Papers (CP) at 7. Steven also was assigned debts in the amount of $25,000 for a loan from AJP, the balances on three credit cards, $18,000 for a loan on a boat, and $19,000 for a loan on a car.

The CR 2A agreement included an undisclosed property provision that stated, "Any undisclosed property shall remain 50% each to the parties as tenants in common and may be brought back to Court. Prevailing party entitled to attorney fees and costs on court ruling." CP at 3.

The trial court's findings of fact entered with the dissolution decree incorporated the CR 2A agreement by reference. The findings also provided a list of the parties' real and personal community property, which did not include NHG.

The dissolution decree sections for property and liabilities allocated to the two parties all stated, "See CR 2A Agreement on file and incorporated herein by this reference." CP at 707. However, the section on liabilities to be paid by Shantel also stated, "Wife shall be responsible for payment of . . . the 1st and 2nd mortgages on the family home awarded to her." CP at 707.

Motion to Vacate and Post Decree Motions

On February 17, 2016 Shantel filed two related motions regarding the dissolution decree that had been entered over two years earlier. First, she filed a motion to vacate the portions of the CR 2A agreement and dissolution decree relating to the valuation of AJP and the distribution of debt. This motion to vacate was brought under CR 60(b) based on Steven's alleged fraud in (1) concealing more than $300,000 in profits from AJP, resulting in a low valuation of the interest in AJP allocated to him; and (2) claiming as community debts allocated to him certain sham debts and the second mortgage that he later claimed Shantel was responsible for, resulting in a disproportionate debt distribution.

Second, Shantel filed "post decree motions" on various issues. She alleged that the following property was "undisclosed" in the CR 2A agreement: (1) $300,000 in concealed profits from AJP, (2) a $31,733.33 distribution from NHG, and (3) the value of Steven's interest in NHG.[2] Shantel claimed that she was entitled to 50 percent of this property under the undisclosed property provision of the CR 2A agreement. Shantel also requested that the trial court rule that she was not responsible for the second mortgage on the family home that had been awarded to her.[3] She noted in a declaration that the second mortgage was the same debt that had been allocated to Steven as an equity line of credit in the CR 2A agreement.

[2] Shantel also argued that Steven misrepresented that NHG had no value and should have updated Deaton's valuation before the mediation.

[3] Shantel's motion also raised other issues regarding enforcement of the dissolution decree that are not at issue on appeal.

The trial court heard argument on the motions and made an oral ruling on April 22. The court ruled that Shantel had failed to show by clear, cogent, and convincing evidence that Steven committed fraud or misrepresentation to warrant redistributing AJP's profits or reallocating the community debt. The trial court sent for consideration by a trial court commissioner the issue of whether Shantel was responsible for the second mortgage on the community home under the terms of the CR 2A agreement and other issues regarding enforcement of the dissolution decree provisions not at issue in this appeal. The trial court deferred consideration of attorney fees until after the commissioner ruled on the other issues.

On June 28, the commissioner heard arguments and ruled that "[t]he CR2A is clarified to state that the wife is responsible for the Bank of America Equity Loan line of credit on the family residence." CP at 1017. The commissioner ruled in favor of Shantel on her other claims, including Steven's obligation to execute a quit claim deed for the community home, to pay for the replacement of a deck on the home, and pay certain pre-dissolution household expenses. However, the commissioner declined to award Shantel attorney fees.

Motion for Reconsideration

On May 19, Shantel filed a motion for reconsideration, arguing that the trial court's ruling had addressed only her motion to vacate and not her undisclosed property motion. She emphasized that the court's application of the clear, cogent, and convincing standard applied only to the motion to vacate and not to her motion on undisclosed property under the CR 2A agreement, for which a preponderance of the evidence standard applied. On July 1, the trial court heard argument on Shantel's motion for reconsideration. In an oral ruling, the trial court denied reconsideration and declined to clarify its ruling. The court emphasized that the clear,

cogent, and convincing standard was proper for all of Shantel's motions. The court entered findings of fact and conclusions of law regarding Shantel's motion to vacate and undisclosed property motion and the motion for reconsideration.

The trial court subsequently awarded Steven reasonable attorney fees based on the attorney fee clause in the "undisclosed property" provision of the CR 2A agreement.

Shantel appeals the trial court's denial of her motion to vacate, undisclosed property motion, and motion for reconsideration, and the award of attorney fees to Steven.

ANALYSIS

A. MOTION TO VACATE

Shantel argues that the trial court erred by denying her CR 60(b) motion to vacate the AJP valuation and division and the distribution of debt. We disagree.

1. Legal Principles

CR 60(b)(4) authorizes a trial court to vacate a judgment for "[f]raud . . . , misrepresentation, or other misconduct of an adverse party." The rule is aimed at judgments that were unfairly obtained. *Dalton v. State*, 130 Wn. App. 653, 668, 124 P.3d 305 (2005). A party seeking relief under CR 60(b)(4) must show fraud, misrepresentation, or misconduct by clear, cogent, and convincing evidence. *Id.* at 665.

The decision to grant or deny a motion to vacate a judgment under CR 60(b) is within the trial court's discretion. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013). Therefore, we review CR 60(b) orders for abuse of discretion. *Tamosaitis v. Bechtel Nat'l, Inc.*, 182 Wn. App. 241, 254, 327 P.3d 1309 (2014). A trial court abuses its discretion if its decision is based on untenable grounds or reasons. *Id.*

2. Analysis

a. $300,000 of Concealed AJP Profits

Shantel argues that Steven fraudulently concealed $300,000 of AJP profit distributions, and that the CPA would have given a significantly higher valuation of Steven's interest in AJP if he had known that AJP had those additional profits. She asserts that AJP must be revalued and that community property must be reallocated to reflect the higher value going to Steven.

Shantel argued in the trial court that Steven concealed the $300,000 in AJP profits by having Chopra hold the money in his account and transfer it to Steven after the dissolution. She claimed that the $300,000 represented a profit distribution and not a loan. Her position was based on an analysis of amounts Chopra received from AJP and of AJP's profits compared with distributions to Steven during 2012 and 2013.

However, Chopra stated in a declaration that the $300,000 he gave Steven was a loan, not Steven's income from AJP. Further, the trial court found that the evidence Shantel presented did not explain why Steven was entitled to more money from AJP than he received. Therefore, the trial court concluded that there was not clear, cogent, and convincing evidence that Steven had concealed $300,000 of AJP profits. Substantial evidence supports that finding.

Shantel also argues that Steven's "transfer" of $300,000 to Chopra before that amount was returned to him as a loan was fraudulent under the Uniform Fraudulent Transfer Act (UFTA), chapter 19.40 RCW, and as a result she met her burden to prove clear, cogent, and convincing evidence of fraud.[4] Under the UFTA, a creditor can avoid a property transfer

[4] Shantel argued for the first time on reconsideration in the trial court that the court should have applied a presumptive fraud standard based on the UFTA instead of requiring clear, cogent, and convincing evidence of fraud.

deemed to be fraudulent to the extent necessary to satisfy the creditor's claim. RCW 19.40.071(a)(1). The creditor also may have a cause of action against a person accepting a fraudulent transfer. RCW 19.40.081(b)(1); *see generally Thompson v. Hanson*, 168 Wn.2d 738, 744-45, 239 P.3d 537 (2009). The UFTA provides that certain types of property transfers are deemed fraudulent. RCW 19.40.041(a)(1); RCW 19.40.041(a)(2)(ii); RCW 19.40.051(a).

However, Shantel did not assert a claim under the UFTA to avoid the transfer or to recover from Chopra; she moved to vacate a judgment under CR 60(b). Shantel does not present any authority that supports the application of the UFTA standards in the context of a CR 60(b)(4) motion to vacate for fraud. In the absence of such authority, we decline to apply UFTA standards and presumptions in addressing the trial court's CR 60(b)(4) ruling.

Properly applying the clear, cogent, and convincing standard, the trial court concluded that Shantel did not establish that Steven fraudulently concealed $300,000 of AJP income. Accordingly, we hold that the trial court did not abuse its discretion in denying Shantel's CR 60(b) motion to vacate the AJP valuation and distribution.

b. Sham Debts

Shantel characterizes four of the community debts allocated to Steven in the dissolution decree as sham debts: (1) a $25,000 loan from AJP that Steven did not repay, (2) the balances on three credit cards that AJP must have paid, (3) a loan on a boat that either did not exist or Steven was not making payments on, and (4) a car loan that AJP must have paid.[5]

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[5] Shantel also places in this category the second mortgage/equity line of credit allocated to Steven in the CR 2A worksheet that he later claimed was Shantel's debt. But she does not argue on appeal that the second mortgage allocation entitles her to relief under CR 60(b)(4). Instead, she argues (as discussed below) that she should not be responsible for the second mortgage.

The trial court noted that the only evidence Shantel presented to show that Steven was not liable for the debts was her inability to find payments on the debts in Steven's bank statements. In addition, the court found that Shantel had not presented evidence that someone other than Steven was responsible for payment of the debts. The court also relied on *In re Marriage of Maddix*, 41 Wn. App. 248, 703 P.2d 1062 (1985), to conclude that Shantel had an obligation to resolve her disagreement about the amount of the debts before entering into the CR 2A agreement.[6] Therefore, the court concluded that Shantel had not shown by clear, cogent, and convincing evidence that Steven committed fraud or misrepresentation regarding the community debts allocated to him. Substantial evidence supports that finding.

Shantel also argues that Steven had the burden of proving good faith regarding the community debt allocate to him. She points out that he failed to produce proof of the credit card payments, the boat loan, or the car loan. But in a CR 60(b) motion, the moving party has the burden of proof. *Dalton*, 130 Wn. App. at 665. The trial court found that Shantel did not meet her burden.

Accordingly, we hold that the trial court did not abuse its discretion in denying Shantel's CR 60(b) motion to vacate the distribution of community debt.

B. MOTION ON UNDISCLOSED PROPERTY

As noted above, the CR 2A agreement provided that each party would own 50 percent of "[a]ny undisclosed property." CP at 3. Shantel identifies certain property as "undisclosed": (1)

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[6] In *Maddix*, the court stated that when a party has sufficient notice to protect his or her interests, it is incumbent upon a party to examine the value of a business before proceeding with the dissolution. 41 Wn. App. at 253. The court stated that a party "should not be allowed to return to court to do what should have been done prior to entry of the final decree." *Id.*

the $300,000 in allegedly concealed profits from AJP, (2) a $31,733.33 distribution from NHG that Steven received shortly after the dissolution, and (3) the value of Steven's interest in NHG. She argues that the trial court improperly applied a clear, cogent, and convincing evidence standard rather than a preponderance of the evidence standard for the undisclosed property motion.

We agree that the trial court erred in applying a clear, cogent, and convincing evidence standard when addressing Shantel's undisclosed property claims. However, we reverse only the denial of Shantel's motion regarding the $300,000 in allegedly concealed AJP profits. The other two claims have no merit regardless of the evidence standard applied.

1. Alleged $300,000 in AJP Profits

Shantel argues that the trial court erred by applying the CR 60(b)(4) clear, cogent, and convincing burden of proof to the claims brought in her undisclosed property motion. She asserts that her burden should have been to show undisclosed property by a preponderance of the evidence. We review the applicable burden of proof de novo. *In re Marriage of Wehr*, 165 Wn. App. 610, 613, 267 P.3d 1045 (2011).

Shantel does not dispute that the trial court properly applied the clear, cogent, and convincing standard of proof to her CR 60(b) motion. But her undisclosed property claims were not based on CR 60(b)(4); they were based on the "undisclosed property" provision in the CR 2A agreement. Shantel's claims presented a factual issue based on the contract language – whether certain property was undisclosed and therefore subject to the CR 2A provision requiring joint ownership of that property.

"[T]he preponderance of the evidence standard generally applies in civil cases." *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 208, 378 P.3d 139 (2016); *see also Nguyen v. Dept. of Health*, 144 Wn.2d 516, 524, 29 P.3d 689 (2001) (stating that the preponderance standard generally applies in civil cases involving monetary disputes between private parties). Steven does not cite any authority supporting the application of a clear, cogent, and convincing evidence standard to these contract-based claims, and in fact he does not even address this issue.

In its April 22, 2016 oral ruling on all of Shantel's postjudgment motions, the trial court focused primarily on the CR 60(b)(4) motion. The court engaged in a lengthy analysis of Shantel's argument that the $300,000 in purported loans were concealed profits, and concluded that the evidence did not support a finding that Steven was hiding community profits or committed fraud or misrepresentation. The court expressly applied the clear, cogent, and convincing evidence standard in making these conclusions. The trial court addressed Shantel's undisclosed property claim in one sentence and did not expressly state whether it was applying the clear, cogent, and convincing standard or the preponderance standard in making this ruling.

On reconsideration, Shantel argued that the trial court's application of the clear, cogent, and convincing standard applied only to the motion to vacate and not to her motion on undisclosed property under the CR 2A agreement, for which a preponderance of the evidence standard applied.

In response, the trial court made it very clear that it was applying a clear, cogent, and convincing standard to all of Shantel's motions. The trial court stated,

> I'm going to deny your motion for reconsideration. I don't think I need to clarify my ruling, I think it was unambiguous. I ruled that the standard was clear, cogent, and convincing evidence. I didn't find there was that standard. I also did not have to find that there was a standard by the preponderance of the evidence because that

> is not the appropriate standard I had to abide. I found Ms. Wazny's evidence to be insufficient in every respect, and I found that the standard was appropriate of clear, cogent, and convincing evidence.

CP at 1067.

The trial court should have applied a preponderance of the evidence standard to Shantel's claim that the $300,000 Steven received was undisclosed property under the CR 2A agreement. But the trial court made it clear that it applied the clear, cogent, and convincing evidence standard to that claim. Therefore, we hold that the trial court erred in applying the wrong burden of proof. And because we cannot determine if the trial court would have made the same ruling if it had applied the proper standard, we must remand for the trial court to consider this claim based on a preponderance of the evidence standard.

2. NHG Distribution

Steven apparently received his 2013 profit distribution from NHG in the amount of $31,733.33 in December 2013, shortly after the dissolution was finalized. Shantel argues that she is entitled to half of the NHG distribution because it was undisclosed

Steven does not directly address this argument, but apparently does not dispute that this distribution was undisclosed at the time of the settlement. However, the CR 2A agreement expressly provides that each party "will keep his/her post separation acquisitions." CP at 2. The parties separated on October 23, 2011. There is no question that Steven's entitlement to profits from NHG earned in 2013 constituted a post-separation acquisition of property. Accordingly, we hold that the trial court did not err in denying Shantel's motion to divide Steven's $31,733.33 profit distribution from NHG for 2013.

3. Value of Steven's Interest in NHG

Shantel argues that she is entitled to 50 percent of Steven's interest in NHG under the CR 2A agreement. However, the trial court made a specific finding of fact that NHG was fully disclosed before the parties signed the CR 2A agreement and the dissolution decree. Shantel does not appear to dispute this fact, and she cannot deny that the parties jointly retained an expert to value NHG long before the settlement.

Instead, Shantel focuses on the fact that NHG was *undivided* in the CR 2A agreement. She claims that "[t]he parties contracted in their CR2A [sic] agreement to split undivided property 50-50." Br. of Appellant at 24-25. But Shantel's claim is incorrect. The CR 2A agreement clearly states that the parties will jointly own undisclosed property, not undivided property. Any claim to undivided property must be addressed under the common law (discussed below), not under terms of the CR 2A agreement.

There is no dispute that Steven's interest in NHG was disclosed at the time of the parties' settlement. Accordingly, we hold that the trial court did not err in denying Shantel's motion to divide that interest under the undisclosed property provision of the CR 2A agreement.

C. ENTITLEMENT TO INTEREST IN NHG AS UNDIVIDED PROPERTY

As discussed above, Shantel appears to argue on appeal that she is entitled to divide Steven's interest in NHG under the common law because it was community property and was not divided in the CR 2A agreement or the dissolution decree.[7] We disagree that Shantel has shown that Steven's interest in NHG was community property.

[7] Shantel did not rely on the common law in her original motion, referencing only her entitlement to divide NHG under the CR 2A agreement. But she did briefly make this argument before the commissioner, and on reconsideration.

Shantel is correct that community property not disposed of in a dissolution is owned thereafter by the former spouses as tenants in common. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 203, 580 P.2d 617 (1978). And property acquired during a marriage is presumed to be community property. *In re Marriage of Schwarz*, 192 Wn. App. 180, 189, 368 P.3d 173 (2016). However, property acquired after spouses separate is the separate property of each, not community property. RCW 26.16.140; *Schwarz*, 192 Wn. App. at 188-89. This rule is reflected in the CR 2A agreement, which provides that each party "will keep his/her post separation acquisitions." CP at 2. The issue here is whether Steven acquired his interest in NHG before or after the parties separated.

Shantel states without citation to the record that NHG was formed during the *marriage*. But she does not state whether or not NHG was formed *before the separation*. Steven relies on the clause in the CR 2A agreement stating that each party would keep property acquired after separation, and implies that his interest in NHG was acquired after the separation. But he does not cite to the record to show when he acquired his interest in NHG. The trial court did not address or make any finding of fact on this issue, probably because Shantel did not make this argument in her original motion.

The record shows that NHG opened an operating account on October 1, 2012, almost a year after the date of the separation. The CPA's report on NHG states that NHG's first restaurant opened on December 17, 2012. And the financial records indicate that the restaurant was likely purchased in November 2012 because there was a large initial deposit of $275,540 that month from an account owned by Chopra followed three days later by a withdrawal for $197,545, which is consistent with purchasing a restaurant. The December statement shows 18

deposits over the course of the month totaling $185,714, which is consistent with opening the restaurant.

This evidence is consistent with NHG being formed around October 2012 for the purpose of purchasing a fast food restaurant. This timing of NHG's formation also is consistent with the CR 2A agreement and the dissolution findings of fact, neither of which list NHG as community property. Shantel identifies no evidence or even a reasonable inference showing that NHG was formed before the parties separated in October 2011.

Shantel seems to argue that the fact that Deaton made a valuation of NHG indicates that it was community property. But the fact that Deaton prepared a valuation calculation for NHG does not establish that NHG was formed before the separation.

The only reasonable inference from the evidence presented is that NHG was formed around October 2012, a year after the parties separated. As a result, we cannot apply the presumption that Steven's interest in NHG was community property that the parties jointly owned. Accordingly, we hold that the trial court did not err in denying Shantel's motion to divide Steven's interest in NHG.

D. RESPONSIBILITY FOR SECOND MORTGAGE

Shantel argues that the trial court commissioner erred in finding that she agreed to pay the second mortgage because she did not initial the handwritten interlineation on the CR 2A agreement. We disagree.

Shantel argues that the division sheet included with the CR 2A agreement is not enforceable with respect to the handwritten interlineation indicating that she takes the second mortgage. She argues that the CR 2A agreement and division sheets do not clearly show that she

in fact agreed to take responsibility for paying the second mortgage because (1) she did not initial the handwritten interlineation, (2) the numbers on the division sheet showing the home value less the first mortgage were not corrected to reflect her assumption of the second mortgage, and (3) the debt division sheet still listed the equity line of credit as Steven's responsibility.

However, Shantel ignores the fact that the CR 2A agreement was incorporated into the dissolution decree. Generally, when the dissolution decree incorporates by reference a separation agreement, the agreement merges into the decree. *In re Marriage of Yearout*, 41 Wn. App. 897, 900, 707 P.2d 1367 (1985). In addition, "[w]here a property settlement agreement is approved by a divorce decree, the rights of the parties rest upon the decree rather than the property settlement." *Mickens v. Mickens*, 62 Wn.2d 876, 881, 385 P.2d 14 (1963).

Here, the dissolution decree expressly addressed the second mortgage. Regarding Shantel's liabilities, the decree referred to the CR 2A agreement, but then further stated, "Wife shall be responsible for payment of . . . 1st and 2nd mortgages on the family home awarded to her." CP at 707. This provision clarified any ambiguity in the CR 2A agreement and unequivocally allocated the second mortgage to Shantel.

Accordingly, we hold that the commissioner did not err in ruling that Shantel was responsible for the second mortgage.

E. SHANTEL'S REQUEST FOR ATTORNEY FEES

Shantel argues that the trial court commissioner erred in denying her request for attorney fees under RCW 26.09.140. We disagree.

Under RCW 26.09.140, a trial court in a dissolution action "after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to

the other party of maintaining or defending any proceeding under this chapter." A trial court has discretion whether to award attorney fees to a party under RCW 26.09.140. *In re Marriage of Kim*, 179 Wn. App. 232, 256, 317 P.3d 555 (2014).

We have reviewed the record, and we hold that the commissioner did not abuse its discretion in declining to award Shantel attorney fees under RCW 26.09.140.

F. TRIAL COURT'S AWARD OF ATTORNEY FEES TO STEVEN

The CR 2A agreement's "undisclosed property" provision stated: "Any undisclosed property shall remain 50% each to the parties as tenants in common and may be brought back to Court. Prevailing party entitled to attorney fees and costs on court ruling." CP at 3. The trial court awarded attorney fees to Steven based on the CR 2A agreement provision. And the court awarded Steven the full amount of the attorney fees he incurred, less certain deductions, without segregating the fees among Shantel's various claims.

Shantel challenges the amount of attorney fees the trial court awarded to Steven on various grounds. But we need not address these claims because we are reversing on Shantel's primary claim under the CR 2A agreement. Therefore, at this point Steven no longer is the prevailing party. Accordingly, we vacate the award of attorney fees to Steven, subject to further consideration on remand.

G. ATTORNEY FEES ON APPEAL

Shantel argues that we should award her attorney fees either under the CR 2A agreement or under RCW 26.09.140. Although we are remanding the primary undisclosed property issue that would be subject to the CR 2A agreement's attorney fee clause, the prevailing party on that issue is not yet known. And Shantel is not the prevailing party on any of the other issues on

appeal. Therefore, she is not entitled to recover attorney fees on appeal under the CR 2A agreement. And we decline to award Shantel attorney fees under RCW 26.09.140.

Steven argues that we should award him attorney fees under the CR 2A agreement or under RAP 18.9(a) for defending against frivolous arguments. Because we are remanding Shantel's primary undisclosed property claim, the prevailing party on that issue is not yet known: Steven is the prevailing party on all other issues, but most of them do not involve the CR 2A agreement and we decline to award attorney fees on those issues. And we decline to award attorney fees under RAP 18.9(a) because Shantel's arguments were not frivolous.

CONCLUSION

We affirm the trial court and the court commissioner in all respects except that (1) we reverse the trial court's denial of Shantel's undisclosed property motion regarding her allegation that Steven concealed $300,000 of AJP profits and that those profits constituted undisclosed property under the CR 2A agreement, and (2) we vacate the trial court's award of reasonable attorney fees to Steven as the prevailing party under the CR 2A agreement. We remand for the trial court to consider, using the preponderance of the evidence burden of proof, Shantel's claim that Steven concealed $300,000 of AJP profits and that the $300,000 was undisclosed property under the CR 2A agreement.

No. 49393-4-II

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.

MAXA, A.C.J.

We concur:

JOHANSON, J.

LEE, J.

Filed
Washington State
Court of Appeals
Division Two

October 19, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of: STEVEN D. WAZNY, Respondent, and SHANTEL P. WAZNY, Appellant.	No. 49393-4-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the court's September 19, 2017 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Maxa, Lee

FOR THE COURT:

Maxa, A.C.J.
ACTING CHIEF JUDGE

LAW OFFICES OF JEAN SCHIEDLER-BROWN, P.S.

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