Supreme Court No. 98263-5

COA No. 36040-7-III

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

EDWARD A. MILLER,

Respondent,

and

RITA L. YTURRI-SMITH,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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Petitioner seeks review of Division III's ruling on *In the Matter of the Marriage of Miller*, COA No. 36040-7-III, entered on February 6, 2020, hereafter referred to as "Opinion," and attached at Appendix A. [1]

III. ISSUES PRESENTED FOR RAP 13.4 (b)(1) REVIEW.

1. Is a spouse's sale of their marital earning capacity by entering into a non-compete agreement during marriage the sale of community property?

2. Does a spouse's recapitalization of corporate stock during marriage using community wages create community property stock?

3. Are fire insurance proceeds that flow from a term policy paid for by a spouse with her post-separation income that spouse's separate property?

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[1] *In the Matter of the Marriage of EDWARD A. MILLER, Respondent, & RITA L. YTURRI-SMITH, Appellant.*, 36040-7-III, 2020 WL 589544 (Wash. Ct. App. Feb. 6, 2020)

4. Should the wife receive fee assistance under RAP 18.1 and RCW 26.09.140?

IV. STATEMENT OF THE CASE.

Husband Ed Miller (Miller) and wife Rita Yturri-Smith (Smith) began accruing community property within a committed intimate relationship (CIR) commencing in 2003. *Opinion* at page. 3. By 2005, Miller, now a sole owner of a small advertising company, had accrued customer accounts across the country, including accounts in San Francisco, Chicago, and Los Angeles. *RP 844-845*. Miller had "opened up an Atlanta office." *RP 846-847.* In December 2007, Miller sold his business under a contract to a buyer called Ascentium. *Ex. 361, with certain relevant pages only attached at App. B.* Miller committed to a nationwide three year non-compete and non-solicitation agreement as a material term of the sale. *Id. at section 5.5(b) and (c)*. Section 5.5 is the only section in the contract deemed "material and of essence to [the] agreement." *Id., section 5.5(f)*. The buyer "would not have entered into this Agreement but for the covenants and agreements contained in this Section 5.5." *Id., section 5.5(a)(iv)*. The non-compete provision "induce[d] Buyer to enter into this Agreement." *Id.* The consideration given by the buyer explicitly "reflects and assumes Shareholder's strict compliance with, and the enforceability by

the Company and Buyer of these restrictions." *Id. at 5.5(e)*. Section 5.5's restrictions were "necessary" to the transaction. *Id.* Miller's counsel confirmed that the sale price being negotiated was intended to permanently remove Miller from the advertising market (i.e., "Taking you out of the market.") *Ex. 359(a) at 935, 936*. The obligation not to compete would be an obligation upon Miller during marital earning years. Miller also agreed to work with the buyer to transition all of his client base to the company during the course of his non-compete. *Ex. 361, App. B, at 996.* The sale contract was entitled "Stock Purchase Agreement," and liberally referenced Miller as the shareholder. *See, e.g. section 5.4*. But there were no stock certificates to transfer. Part of the sale required that Miller certify that there were no stock certificates. *Id. at section 6.7*. Miller never fulfilled that requirement. *RP 1527-1528*. The buyer paid him anyway. *CP 623, FOF (D)(11)*. The buyer made the payments over the duration of the non-compete from 2007 through 2010. *Opinion* at 7*; CP 625, FOF (D)(11)*.

Division III upheld the trial court's ruling that this contract effected only a stock sale, not a sale of marital earnings. *Opinion,* Issue 1, pages 19-24. It agreed that the language of the contract "bolsters Smith's argument" regarding the non-compete and non-solicitation clauses being a material term of the agreement, but it concluded that the contract language "did not

read that Miller's promise was the only material or essential term." *Opinion* at 23.

As to the issue of what stock may have sold in this sale, the parties' 2007 joint tax return shows that Miller sold the buyer stock he acquired in 2007 during the marriage. Specifically, the original stock Miller acquired in 1993 had a $0 cost basis—Miller received it for nothing. *RP 99.* According to his 2007 joint tax return, the stock that Miller sold in 2007 had a cost basis of $359,850. *Opinion* at 6*; and see App. C, Ex. 323, extracted page 533 only (installment sale schedule).* Miller's accountant testified inconsistently as to how this new cost basis arose. *Opinion at 12-13, and 26.* She testified that Miller loaned his earnings of $375,000 [2] to his corporation on November 30, 2005 for its operating expenses, and in 2007, instead of repaying him those wages, his corporation applied $359,850 of his wage loan to the "acquisition" of 458 shares. *RP 130: 14-24*. *Opinion pp. 4-5; and Issue 2, pp. 24-26.* At Miller's lawyer's behest, she altered this--the 2005 wage loan went *both* "toward the acquisition of the stock or … towards creating additional stockholder's equity…Correct." *Foltz at RP 130: 25 – RP 131:8*. Miller's counsel offered: "Let's start over:"

> Q: Did this $359,850 get applied towards the acquisition of any shares?

[2] *RP 110-111*.

A: No.

RP 131: 11-12. The accountant then stated that the shareholder loan was "converted" to "paid-in capital." *RP 133-134*. The wage loan was repaid to Miller ("reduced by") his paid in capital "dollar for dollar*." RP 134: 12-14.* The funds "add(ed) to the stockholder equity by that amount." *135*:5-8. That $359, 850 of earnings recapitalization gave Miller his new cost $359,850 cost basis in his stock, which he then sold, taking that tax benefit from the stepped up basis.[3]

What is not in dispute, then, is that $359,850 of Miller's earnings during the marriage were kept by his corporation, and the corporation repaid those wages either by issuing Miller new shares with a stepped-up cost basis, or by entirely recapitalizing his old stock to gain a new cost basis, which would then reduce his (the parties') capital gains tax on the

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[3] (Schultz) "Q: What sold in 2007 between Ed and Ascentium, Ms. Foltz, was not Ed's 5 percent with a cost basis of 0; it was stock that had a cost basis of $359,850, correct? (CPA Foltz) A: Correct.
Q: Whatever happened to this $0 cost basis stopped, it kind of went away, because in 2007 the stock that was sold to Ascentium had a cost basis of what? Was it 359-something?
A: Yes…..it's on the installment schedule.
Q: P-4 at 43. That's his tax return. $359,850. Is that right?
A: Yes.
Q: And that $359,850 cost basis was for a hundred percent of the stock, wasn't it?
A: Yes.
Q: Where did that $359,850 come from?
A: Shareholder loan."

RP 100-101.

2007 sale of that stock. *App. C, Ex. 323: 8, 10 and 14*. Division III held that "On November 30, 2007, the corporation converted the shareholder loan to $359,850 in additional paid-in capital." *Opinion* at 25. Without cite to tax law authority, it then held that "[T]he loan increased Miller's tax basis for the stock, *but the change in basis does not equate to a change in the value of the stock, a sale of the stock, or a transfer of the stock*." *Opinion* at 26, Issue 2 (emphasis added). Smith asserts that this ruling is in direct conflict with the federal tax law, and that by failing to apply the latter, the ruling conflicts with Supreme Court precedent holding that property acquired during the marriage and sourced by community earnings is community property. She asserts that whether this stepped-up cost basis used in the parties' 2007 joint tax return arose from newly acquired stock via earnings or from newly recapitalized stock via those earnings, either use rendered that stock community property.

The third marital property characterization issue presented is that of post-separation term fire insurance proceeds. Following the parties' separation, the home owned by Miller and Smith sustained fire damage. *Opinion* at 8. Smith had been paying the term fire insurance policy premiums post-separation with her maintenance income, and she asserted that those policy proceeds were her separate proceeds. This gave her a

discernible value of her separate contribution to that home, even if her labor in managing the reconstruction was not so valued. *Opinion* at 28-20*, Issue 4.* Division III disagreed, and held that term fire insurance proceeds take on the underlying character of the property insured, not the source of the premium payments made. Division III 's ruling conflicts with *Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d 652, 689, P.2d 46 (1984). *Opinion* at 28-29.

V. ARGUMENT AS TO WHY REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4 (b)(1).

Three marital property characterization rulings made by Division III are in direct conflict with Supreme Court precedent, and Petitioner requests review under RAP 13.4(b)(1). Division III fails to apply the presumption established by this Supreme Court—that property "acquired" during marriage is presumptively community property, regardless of how title is held. *Dean v. Lehman*, 143 Wn.2d 12, 21, 18 P.3d 523, 529 (2001), at 19, *referencing* RCW 26.16.030.

A. A spouse's sale of their marital earning capacity by entering into a non-compete agreement during marriage is the sale of community property.

Division III holds that a spouse's entry into a non-compete agreement during marital years does not render the funds received for that

non-compete agreement community property. While Washington does not have precedent directly on point in the marital dissolution law, the ruling conflicts with well-established Supreme Court precedent holding that a party's labor is community property, as are that party's earnings from labor. *In re Marriage of Landry*, 103 Wn.2d 807, 810, 699 P.2d 214 (1985). A salary is unquestionably community property. *Hamlin v. Merlino,* 44 Wn.2d 851, 858, 272 P.2d 125 (1954). Moreover, a marital community is entitled to the fruits of each party's labor. *Lindemann v. Lindemann,* 92 Wn. App. 64, 68 (1998). A spouse's contractual agreement to *cease* their marital earning and labor during the marital years in exchange for money must then necessarily render that money community property. The "sale" of a spouse's wage earning capacity is the sale of community property. Moreover, Supreme Court precedent holds that property is deemed "acquired" when the obligation is undertaken. *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932 (2009). In 2007, Miller took on an obligation to cease work for three years during the marriage in exchange for money. He thereby committed himself to a three year obligation, and "acquired" those funds in exchange for that obligation, which he then performed over the ensuing marital years. Division III's ruling is in conflict *with In re Estate of Borghi* as well, because it ignores

the obligation taken on over the marital years.

Supreme Court precedent readily characterizes lost wages under its tort law. Recovery for lost wages and diminished earning capacity is community property. *Brown v. Brown,* 100 Wn.2d 729, 739, 675 P.2d 1207, 1213 (1984). Tort damages which compensate for services or earnings lost by the community are community property. *Brewer v. Brewer,* 137 Wn.2d 756, 767–68, 976 P.2d 102 (1999). Moreover, other states' appellate courts have specifically addressed the issue of non-compete clauses in marital property law in the manner urged by Smith. In *Cirrito v. Cirrito*, 44 Va. App. 287, 292 (2004), a Virginia court analogized funds paid in exchange for a non-compete agreement to a severance package, and held that money acquired "for not competing (with a prior employer)" is "within the definition of marital property since the right to receive the money was acquired during the marriage and is not separate property." In *Grigsby v. Grigsby,* 648 N.W.2d 716, 723 (Minn. Ct. App. 2002), a Minnesota appellate court held that a spouse's forbearance of earnings under a non-compete agreement takes on the character of the labor being relinquished, and where payments made for such forbearance stem from the husband's marital employment, the payments thereby take the purpose of marital earnings. In *Demont v. Demont*, 67 So. 3d 1096, 1105-

1106 (Fla. Dist. Ct. App. 2011), a Florida court held that payments made in exchange for a non-compete or forbearance of earnings during a marriage are marital property. Division III's ruling conflicts with all of the foregoing in its failure to recognize the community obligation undertaken and performed in exchange for the funds received.

Moreover, Division III held that evidence existed to support the premise that the husband had planned to retire on the sale, and that the payments therefore did not replace work earnings. *Opinion* at 22. But *Demont* finds this sort of reasoning flawed. *Demont* holds that "in no reasonable way can the non-compete/non-solicit payments be described as 'like retirement.'" *Id.* at 1106. This is because "payment to an employee to honor a covenant not to compete is not a retirement fund based on past labor and services." *Id.* Such agreements obligate a spouse for the duration of the agreement—such an agreement will "require that the spouse not engage in post-agreement competitive practices against the employer." *Id.* A non-compete is therefore expressly not a retirement—it is an obligation to which a spouse becomes bound over the course of the contractual term. *Demont* is in accord with this Supreme Court's ruling in *Borghi,* 167 Wn. 2d. at 484. Division III's holding that a spouse's sale of their marital earning ability does not create community property conflicts with this

Supreme Court's precedent and should be reviewed per RAP 13.4(b)(1).

Moreover, Division III's construction of the sale contract conflicts with Supreme Court precedent in *Hearst Commc'ns, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 503–04, 115 P.3d 262, 267 (2005). Division III ignores the sales contract's "materiality" terms. But the parties' intent in contracting is to be determined by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. *Id.* The court is not to interpret what was intended to be written, but what was written. *Id.* Here, the contract before Division III objectively and repeatedly declares that the material and necessary term of the sale agreement was the husband's commitment to the nationwide three year non-compete and non-solicitation agreement. *App. A, Ex. 361 at Section 5.5(b) and (c)*. [4] Division III's ruling that this determinative contractual non-compete obligation may be disregarded in a dissolution proceeding conflicts with *Hearst Commc'ns, Inc.* and should be reviewed under RAP 13.4(b)(1).

[4] As noted above, Section 5.5 is the only section specifically deemed "material and of essence to [the] agreement." *Id., Section 5.5(f)*. The contract makes objectively clear that the buyer "would not have entered into this Agreement but for the covenants and agreements contained in this Section 5.5." *Id., Section 5.5(a)(iv)*. The non-compete provision "induce[d] Buyer to enter into this Agreement." *Id.* The consideration given by the buyer explicitly "reflects and assumes Shareholder's strict compliance with, and the enforceability by the Company and Buyer of these restrictions." *Id. at 5.5(e)*. Section 5.5's restrictions were "necessary" to the transaction. *Id., Section 5.5(e)*.

B. A spouse's recapitalization of corporate stock during marriage using community wages creates community property stock.

Division III's decision also conflicts with this Supreme Court precedent in *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498, 503 (1999), and *In re Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995), which hold that property acquired during a marriage is presumed to be community in character. Division III's holding that stock acquired during a marriage with community wages, or, alternatively, that stock recapitalized during a marriage with community wages, can remain a party's preexisting separate stock under the facts here is in conflict with these rulings.

Specifically, Miller was deemed to have sold stock in the 2007 Ascentium transaction. But the parties' 2007 joint tax return is determinative evidence of community property characterization of that stock as a matter of law, because that tax return confirmed a stepped up cost basis from a funding transaction in 2007. *Exhibit 323, with the determinative installment sale schedule at App. C*.

A stock's "cost basis" as represented on a federal tax return is controlling as to the identity of the *specific* stock that sold. *Davidson v. Comm'r of Internal Revenue*, 305 U.S. 44, 45, 59 S. Ct. 43, 83 L. Ed. 31 (1938). A cost basis identifies the acquisition date by identifying the cost

of the specific stock sold- the cost basis. Individuals may buy the same company's stock at different times, and then later sell specific units of that stock. The cost basis will thus denote *which* of that company's specific stock was sold in that transaction, and the seller is taxed on that specific gain. While the parties' tax schedule for the sale represented at line 2a that the stock being sold was acquired on "1/01/93," the representations that delivered the tax benefit are the ensuing "cost basis" lines 8 and 10. These lines report the cost basis identifying what stock sold, and it is that stepped-up cost basis that lowered the community's taxable gain on the sale of that stock. Thus, even if the 2007 sales contact was in part a stock sale, the stock that sold was community property stock, because the stock sold had a stepped up cost basis, signifying a new acquisition of stock in 2007. Division III's ruling that "the change in basis does not equate to a change in the value of the stock, a sale of the stock, or a transfer of the stock," *Opinion* at 26, conflicts with the foregoing federal tax law, and thereby conflicts with Supreme Court precedent as to the acquisition date of, and characterization of, marital property from the acquisition date, per *Zahm* and *Short*, supra. It should be reviewed under RAP 13.4(b)(1).

Cost basis manipulation to lessen tax on stock sales is well known, as is simple error as to which stock is being sold. An individual may

identify stock he or she believes they are selling, but "it does not follow that they were the shares sold." *Davidson*, 305 U.S. at 46. "The commissioner rightly computed gain on the basis of what was done rather than on what petitioner intended to do." *Id*., *and see Turan v. Comm'r of Internal Revenue*, 114 T.C.M. (CCH) 65 (T.C. 2017), citing *Davidson,* 305 U.S. at 46 (holding that as a general rule, when taxpayers hold multiple lots or shares of identical stock, they must compute their gains or losses against the basis of those shares actually sold, not the shares the taxpayer intended to sell.)

Parties often attempt to gain a stepped-up cost basis in corporate stock in corporate acquisitions and mergers. *See, e.g., PIA-Asheville, Inc. v. Bowen,* 850 F.2d 739 (D.C. Cir. 1988) (disallowing the use of a stepped-up cost basis in a "two-step acquisition" where the acquirer purchased stock of a corporation and followed the purchase with liquidation and distribution of the acquired company's assets to the acquirer himself); *Supreme Inv. Corp. v. United States,* 468 F.2d 370, 377 (5th Cir. 1972) (holding that a purchase of a corporation's stock is to be treated as a direct purchase of the assets, with the consequence that the cost of the stock should serve as the basis for the assets); *Richey Manor, Inc. v. Schweiker*, 684 F.2d 130, 132–33 (D.C. Cir. 1982) (noting that "the price paid by the purchaser shall be

the cost basis in a bona fide sale for fair market value). Intentionally inflating the basis of stock to eliminate capital gains and thereby avoid taxes can be penalized. *Stobie Creek Investments LLC v. United States*, 608 F.3d 1366, 1369 (Fed. Cir. 2010).

Here, Miller sold stock using a stepped-up cost basis for tax benefit, and in doing so, he confirmed that this stock was acquired in 2007. Division III's holding fails to apply this acquisition date.

Similarly, "recapitalization" of stock signifies the equivalent of new stock being exchanged for old stock. *Heady v. C.I.R.,* 162 F.2d 699, 700–01 (7th Cir. 1947)(where recapitalization "consisted of the issuance of 1000 shares of new capital stock having a par value of one dollar a share ….to be exchanged for the 1000 shares of the old no-par value stock.") Recapitalization can also denote a statutory reorganization. *Id* at 701. In fact, the general definition of a recapitalization is a "reshuffling of a capital structure within the framework of an existing corporation." *Berner v. United States*, 282 F.2d 720, 725 (Ct. Cl. 1960), citing to *Helvering v. Southwest Consolidated Corp*., 315 U.S. 194, 202, 62 S.Ct. 546, 86 L.Ed. 789. Recapitalization "may generally be taken as signifying," e.g., "an agreement of all stockholders and creditors to change and increase or decrease the capitalization or debts of the corporation or both." *United Gas*

Improvement Co. v. Comm'r of Internal Revenue, 142 F.2d 216, 218 (3d Cir. 1944). The recapitalization thus argued by Miller and accepted by Division III changed the capital structure of that corporate stock in accord with its recapitalization by community wages. Division III's holding ignores this fundamental change in the stock character by recapitalization.

In either event, whether by acquisition of new stock outright by wages or by using wages to wholly recapitalize older stock, that stock was "acquired" or transformed in 2007 by the use of community wages and is community property. Community property stock, acquired by wages, is what sold in that 2007 sale, and the proceeds from that sale were community property. Division III's holding that a stepped up cost basis or recapitalization in 2007 had no effect on the character of the 1993 separate stock conflicts with the foregoing federal tax law, and thereby conflicts with Supreme Court precedent as to the acquisition date and characterization of marital property from the acquisition date, per *Zahm* and *Short*, supra, and should be reviewed.

Moreover, Miller is estopped by this same federal tax law from later denying his earlier tax characterizations after accepting the tax benefits of his characterization. *In re Cunningham,* 141 B.R. 671, 674–75 (Bankr. W.D. Mo. 1992). Where a party identified payments as alimony to deduct

those payments, and took the tax advantages flowing from that characterization, he could not later disavow that alimony characterization because it no longer benefitted him. *In re Robb,* 23 F.3d 895, 898 (4th Cir. 1994). In similar circumstances, "several courts have held that the doctrine of quasi-estoppel precludes debtors from subsequently claiming in bankruptcy proceedings that these payments were something other than alimony." *Id.,* citing *Matter of Davidson,* 947 F.2d 1294, 1297 (5th Cir.1991); *In re Cunningham*, 141 B.R. at 674; and *In re Robinson,* 122 B.R. 502, 506 (Bankr.W.D.Tx.1990). A party may not accept the benefits of a transaction or statute and then subsequently take an inconsistent position to avoid the corresponding obligations or effects. *Id.,* citing *Matter of Davidson*, 947 F.2d at 1297. The same must apply to this marital property characterization. Division III's allowing the husband to take this tax benefit in 2007, and to then hold that what the husband sold was his 1993 zero basis stock, conflicts with the federal tax law and thereby with this Court's characterization law. Petitioner requests review under RAP 13.4(b)(1).

C. <u>Fire insurance proceeds that flow from a term policy paid for by a spouse with her post-separation income are that spouse's separate property.</u>

Division III's ruling characterizing term policy fire insurance

proceeds conflicts with *Aetna Life Insurance Co. v. Wadsworth,* 102 Wn.2d 652, 689 P.2d 46 (1984), and should be reviewed under RAP 13.4(b)(1). *Aetna* holds that the community or separate character of a term life insurance policy aligns with the character of the source of the premium payments made on the policy for the relevant term. This "premium payment" characterization of term policy proceeds was extended to mortgage life insurance in *In re Estate of Bellingham*, 85 Wn. App. 450, 454, 933 P.2d 425 (1997). Division III's ruling conflicts with *Aetna* by applying an earlier older and implicitly overruled decision in *In re Estate of Hickman,* 41 Wn.2d 519, 250 P.2d 524 (1952). *Hickman* specifically addressed fire insurance proceeds, but its reasoning conflicts with the later ruling in *Aetna*, because fire insurance is also term insurance. *Hickman* adopted a "freehold" reasoning from the 1917 Texas civil law in *Rolater v. Rolater,* Tex.Civ.App., 198 S.W. 391 (1917), which held that "a policy on appellee's home attached to and formed a part of the realty" because of the concern that to hold otherwise would allow a party to buy insurance in their own name and convert the community home to separate property. *Id.* 198 S.W. at 393. But applying *Hickman's* "freehold" reasoning here works the very substantial injustice *Rolater* sought to avoid. Here, Smith kept the term policy in force post-separation for her own living situation, and Smith

rebuilt the damaged home from the term policy proceeds with her own work and management. Division III's failure to apply *Aetna* allows Smith's funds and her work to be usurped as "the husband's 77.15% separate property." Applying *Hickman's* reasoning here effects the unjust result it intended to avoid. *Aetna* should control.

Moreover, in no respect did *Hickman* address "contents coverage." *Opinion* at 31-32. While it may be true that term fire insurance proceeds were in fact intended to replace a piece of Miller's clothing, Miller made the decision to leave everything behind when he left the home. He left Smith to use her own money to keep her fire insurance in effect, if she chose to do so. He failed to insure any of those pieces of his own accord. Without Smith's premiums and her work at inventorying, none of the $355,132 of contents coverage would have been received. Again, Division III's ruling conflicts with *Aetna,* and results in Miller unjustly receiving a windfall as to this contents coverage as well. Smith seeks review under RAP 13.4 (b)(1).

D. <u>Petitioner should receive fee assistance under RAP 18.1.</u>

Smith received little to no fee assistance during the trial court proceeding, which culminated in a trial involving 2,000 pages of trial testimony, 221 marked exhibits, and Miller's presenting multiple witnesses

and experts. *Opinion* at 40. Miller had unfettered and exclusive access to some $3,000,000 of liquid assets during the course of the action, while Smith had none, and Smith predictably incurred substantial debt to sustain and present her case. *CP 640* (Decree of Dissolution totaling $237,695.56 of separate debt to wife, including $197,000 of loans from her family); *CP 590* (Smith's fees in the case were $255,530, of which $120,756.29 remained outstanding). Miller did not that after offsets were applied for Miller's separate property interests, Smith's transfer payment from the parties' accrued funds was only $91,196, from which Smith applied $13, 342.48 towards her trial fees in partial payment only. *Smith financial declaration filed October 10, 2019 at para. 4; Response Affidavit of Miller filed October 16, 2019.* Smith requests that this Supreme Court review Division III's decision declining to provide her fee assistance for her appeal and for trial. *Opinion* at pages 39, 42, Issues 10 and 13.

VI. CONCLUSION.

Petitioner respectfully asks this Court for review.

RESPECTFULLY SUBMITTED this 7th day of March, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers, and that on 7th day of March, 2020, she electronically filed the foregoing document with the Court of Appeals, Division III, and thereby served a copy to the following individuals:

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Dated this 7th day of March, 2020.

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Appendix A

FILED
FEBRUARY 6, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Marriage of EDWARD A. MILLER, Respondent, and RITA L. YTURRI-SMITH, Appellant.	)))))))))))	No. 36040-7-III UNPUBLISHED OPINION

FEARING, J. — In this appeal, Rita Smith appeals numerous rulings of the dissolution court surrounding distribution of the parties' assets and the award of maintenance. We affirm all but one of the trial court's rulings.

FACTS

This appeal concerns the dissolution of the marriage between Edward (Ed) Miller and Rita Yturri-Smith (Smith). At the time of their dissolution trial, husband Ed Miller was 63 years old. Miller graduated from Spokane Falls Community College with an associate of arts degree. In 1985, Miller began a successful career in advertising with the Spokane firm of Clark White, Inc. Clark White later became WhiteRunkle Associates,

Inc. (WhiteRunkle). In 1993, WhiteRunkle founders awarded Miller 458 shares, or five percent, of the company's corporate stock.

Ed Miller gained his 458 shares of WhiteRunkle by a November 1, 1993, share transfer agreement executed by Miller, WhiteRunkle, and the other company shareholders, Jack White and Robert Runkle. The agreement restricted the shareholders' right to dispose of their shares in order to assure the continuation of the sound and harmonious management of the advertising company and to protect against the disruptive result of outsiders acquiring stock.

Wife Rita Yturri-Smith was 53 years old at the time of the marital dissolution trial. Smith graduated from Eastern Washington University with a bachelor of arts degree. Smith engaged in marketing and earned an approximate annual salary of $80,000. During the pendency of this dissolution, Smith left employment and enrolled in science and nursing courses at a local community college.

Ed Miller and Rita Smith were previously married to others before the two began dating in 2002. Smith has two adult children from her first marriage. Miller and Smith bore no children from their relationship.

In December 2003, Ed Miller moved into Rita Smith's home (the "Glennaire" home). This date is important because the trial court found that is when the parties entered a committed intimate relationship equivalent to a marriage.

In December 2003, Rita Smith and her former husband were in the midst of divorcing and jointly owned the Glennaire abode. Ed Miller and Smith agreed that Miller should buy an interest in the Glennaire residence. Smith's former husband conveniently wished to purchase Miller's home located on North Vista Court, in Spokane. The parties entered a sales agreement. Under the agreement, (1) Miller acquired a 77.15 percent interest in the Glennaire residence, (2) Miller's payment for his interest retired the Smiths' mortgage on Glennaire, (3) Rita Smith retained a 22.85 percent interest in the Glennaire residence, and (4) Smith's former husband ratified his promise to satisfy both community debts assigned to him in the Smith dissolution decree.

Before cohabitating with Ed Miller, Rita Smith owned, with her mother, a home on Lake Coeur d'Alene. Throughout the relationship, Miller and Smith utilized the lake home and made mortgage payments on the residence.

We return to the advertising business of Ed Miller. WhiteRunkle paid its three shareholders, Jack White, Robert Runkle, and Ed Miller bonuses each quarter. If the corporation lacked funds to pay the bonuses, the corporation posted an accounting entry,

under which the corporation owed the shareholder for the amount of the bonus. WhiteRunkle carried significant accounts receivable. When collected, the accounts receivable paid the loans to the shareholders. For example, at the close of the 2004 corporate tax year, WhiteRunkle owed $1,500,505 in loans to the shareholders as a result of unpaid bonuses. The corporation paid those loans to the shareholders during the 2005 corporate tax year.

In 2005, Jack White and Robert Runkle wished to retire from WhiteRunkle and be paid for their respective ownership interests in the corporation. The two held a 95 percent interest in WhiteRunkle. On October 1, 2005, WhiteRunkle redeemed the stock of White and Runkle for $1,000,000. The corporation paid the 2004 loans owed to its three shareholders before paying White and Runkle the $1,000,000 for the stock redemption. To fund the redemption of stock, WhiteRunkle used retained earnings held in a separate account. Ed Miller did not pay from his personal funds for the redemption of White's and Runkle's corporate shares. After White's and Runkle's departure, Ed Miller renamed the company Miller.WhiteRunkle, Inc. (Miller.WhiteRunkle). Miller became the sole owner of the advertising firm, although his share amount remained at 458 shares.

On November 30, 2005, Ed Miller loaned Miller.WhiteRunkle $375,000 for unpaid compensation owed to him. Rita Smith and Ed Miller married on July 25, 2007.

On November 30, 2007, Miller.WhiteRunkle converted Ed Miller's 2005 $375,000 loan to the corporation into additional paid-in capital in the amount of $359,850. According to corporate CPA (certified public accountant) Zoe Foltz, converting the loan to paid-in capital gave Miller a basis in his stock for tax returns and increased stockholder's equity, although the conversion did not increase Miller's shares of stock.

On December 29, 2007, Ed Miller sold all of his shares in Miller.WhiteRunkle, Inc. to Ascentium Corporation for $2,225,000. Miller represented in the stock purchase agreement that he was the sole shareholder in Miller.WhiteRunkle. As part of the sale agreement, Miller presented to Ascentium a list of clients and all contracts to which the corporation was a party. Section 5.5 of the stock purchase agreement prohibited Miller from competing with Ascentium or soliciting clients and employees of Miller.WhiteRunkle for three years. Ed Miller agreed that the noncompete promises were necessary to protect the goodwill of the business. The first sentence of section 5.5(f) declared:

> Shareholder acknowledges and agrees that the provisions of this Section 5.5 are material and of the essence to this Agreement.

Ex. 361 at 972.

Ed Miller testified at trial to the setting of a purchase price for the Miller.WhiteRunkle stock to provide him a particular cash flow thereafter.

> A Well, immediately after pulling off the floor that somebody wanted to buy this thing [Miller.WhiteRunkle], I contacted Jerry Karstetter because he was my financial advisor, and I contacted him because I needed to know if I did sell this thing, what would I have to sell it for in order to have a certain kind of income without touching the principal.
>
> Q Okay.
>
> A And what would that figure be in order to get there.
>
> Q All right. And so in order to generate a certain level of cash flow—
>
> A Yes.
>
> Q —for personal consumption, you needed to know how much money you had generating cash flow, I guess?
>
> A What I needed to generate the cash flow.
>
> . . . .
>
> Q And was some number proffered in terms of what you needed from this sale net of tax?
>
> A Yes.
>
> Q And what was that number?
>
> A The number was, we calculated if a number was paid, and I took the capital gains over a year, that I would need to net 1.9 million to add to what I already had in the account.
>
> Q All right. And based upon some projected rate of return that would generate some acceptable cash flow to you?
>
> A Three percent return is based on.
>
> Q Which would get you to some acceptable level of cash flow?
>
> A Yes.

5 Report of Proceedings (RP) (July 27, 2017) at 868-69.

Ed Miller's 2007 tax return reported the sale of Miller.WhiteRunkle to Ascentium for $2,225,000, with a tax basis of $359,850. The 2007 tax return declared that Miller acquired, on January 1, 1993, the Miller.WhiteRunkle stock sold to Ascentium. Ed Miller and Rita Smith's 2008, 2009, and 2010 joint tax returns also listed Miller's acquisition

date, for the stock sold to Ascentium, as 1993. Miller and Smith paid taxes on the income from the stock sale on a capital gains basis rather than as ordinary income.

Ascentium paid the purchase price for Miller.WhiteRunkle in installments of $725,000 in 2008, $375,000 in 2009, and $1,125,000 in 2010. With interest on the installments, Miller received a total of $2,607,661 for his stock in Miller.WhiteRunkle. Miller deposited the funds into an investment fund, the Centaurus fund.

In 2008, during the parties' marriage, Ed Miller purchased a 2008 Cobalt boat. The certificate of title for the boat listed Rita Smith's name as one of the owners. When asked during trial why he believed the boat was his separate property, Miller replied: "[o]h, boy, because I bought it with my funds." 5 RP (July 31, 2017) at 897.

According to Ed Miller, Rita Smith exorbitantly spent money and incurred substantial credit card debt throughout the marriage. Miller and Smith separated on November 7, 2013. Miller moved from the Glennaire residence that month.

At the time of separation, neither spouse worked. The couple paid their expenses from the Centaurus fund, in which Miller deposited Ascentium purchase payments. The Centaurus fund, in addition to some pension assets in Miller's name, then totaled $3,100,000.

PROCEDURE

Ed Miller filed for divorce on March 10, 2014. On August 19, 2014, the dissolution court entered temporary orders directing Ed Miller to pay Rita Smith $3,400 per month in maintenance. The court also required, as additional maintenance payments, that Miller pay utilities, real estate taxes, and homeowners' insurance on the Glennaire residence. The court also ordered Miller to pay for jewelry insurance and health and auto insurance for Smith. The court granted control of the Centaurus fund and other pension funds to Miller, but demanded that Miller preserve the funds.

On June 2, 2015, Rita Smith's Glennaire home sustained fire damage. The damage from the fire was limited to the garage, laundry room, a minor part of the kitchen, and a portion of the family room. Smith used homeowners' insurance proceeds to restore the home. The policy named Ed Miller and Rita Smith as the insureds. Smith hired and managed contractors who performed the repairs.

The fire destroyed contents inside the Glennaire residence. Thereafter, Rita Smith performed an extensive eighty-five page inventory of the nonsalvageable personal property. Much of the property consisted of tools from the garage and adult clothing. Ed Miller lost one hundred collectibles left in the garage. He also suffered damage to painting accessories. Smith did not separate community property from separate property

in her inventory. Safeco paid $355,131 for the loss of the personal property under the homeowners' policy's contents coverage.

After the August 2014 temporary orders, Ed Miller transferred $1.5 million from the Centaurus fund and pension funds into a new Centaurus account. He employed $640,000 of the transferred funds to purchase a Spokane home on Radio Lane with cash. As a result, on May 18, 2017, the dissolution court found Ed Miller in contempt of the temporary order requiring him to preserve funds. The court sought to correct the inequity caused by Ed Miller's profligate spending compared to Rita Smith's monthly maintenance. The dissolution court ordered Miller to pay Rita Smith sanctions of $10,000.00 and an additional $29,383.50 for attorney fees and costs incurred by Smith.

The dissolution court conducted a nine-day trial in July and August 2017. Seven witnesses testified. The witnesses included CPA Zoe Ann Foltz, former accountant for Miller.WhiteRunkle and its predecessor WhiteRunkle; Todd Carlson, a CPA and accounting expert hired by Ed Miller; attorney Stanley Purdue; Thomas Bro, Rita Smith's former boyfriend; Randy Berg, a residential real estate appraiser; Ed Miller; and Rita Smith.

As part of the marital dissolution, the dissolution court needed to engage in a complex tracing of the parties' assets and spending. To that end, the court admitted as exhibits, during trial, 150 financial records.

Ed Miller testified regarding his sale of Miller.WhiteRunkle to Ascentium in 2007 for $2,225,000. Miller attempted, but failed, to find a signed copy of the stock sale agreement. He testified that he did not know whether a signed stock sale agreement between Ascentium and him existed. Miller did not recall signing an agreement. Nonetheless, he and Ascentium reached a stock purchase agreement.

The trial court admitted, as exhibit 361, a December 29, 2007, unsigned copy of a stock purchase agreement between Ascentium Corporation, Miller.WhiteRunkle, and Ed Miller. The exhibit was a draft exchanged during the negotiation of the stock sale. During trial, Miller recalled that the parties exchanged draft contracts similar in language to exhibit 361.

According to Ed Miller, the only asset of value to Ascentium was Miller's client portfolio. Miller planned to retire on the sale of his interest in Miller.WhiteRunkle.

During trial, CPA Zoe Foltz testified that the founders of WhiteRunkle first retained her services in 1988. Foltz testified to the character of Ed Miller's ownership of

WhiteRunkle, the conversion of the debt owed him by the corporation to paid-in capital, and the character of the proceeds from the sale of Miller.WhiteRunkle to Ascentium.

In this appeal, Rita Smith emphasizes a portion of Zoe Foltz's testimony concerning Ed Miller's use of a wage bonus accrued during the committed intimate relationship:

> [SALINA:] Additional contribution to equity. Did Mr. Miller pay an additional contribution of equity known as paid in capital?
> [FOLTZ:] Yes.
> [SALINA:] How much was that?
> [FOLTZ:] $359,850.
> [SALINA:] Was any of that $359,850 applied towards the acquisition of stock?
> [FOLTZ:] Yes.
> [SALINA:] The acquisition of what stock?
> [FOLTZ:] Ed's 458 shares.

RP (July 24, 2017) at 130. Rita Smith ignores Foltz's testimony, which immediately followed:

> [SALINA:] The 359,850 was—I thought he already owned that stock?
> MS. SCHULTZ: Objection. Leading. Witness has answered the question.
> THE COURT: Sustained.
> [SALINA:] (By Mr. Salina) The 359,850, did that go toward the acquisition of the stock or did it go towards creating additional stockholder's equity?
> [FOLTZ:] I understand now. Correct.
> [SALINA:] Let's start over and you can answer that.
> [FOLTZ:] All right.

> [SALINA:] Did the 359,850 apply towards the acquisition of the stock?
> [FOLTZ:] No.
> [SALINA:] Say that again. Did 359,850—
> MS. SCHULTZ: Objection as to vague, unless counsel identifies the stock. Are you talking about the 458 shares?
> MR. SALINA: There's only 458 shares. Only been 458 shares.
> MS. SCHULTZ: That's your theory.
> THE COURT: Sustained. He can rephrase his question.
> [SALINA:] (By Mr. Salina) Has Mr. Miller ever owned anything other than 458 shares of Miller.WhiteRunkle?
> [FOLTZ:] No.
> [SALINA:] Did his share ownership at all increase, the number of shares increase as a consequence of the redemption?
> [FOLTZ:] No.
> [SALINA:] Did this $359,850 get applied towards the acquisition of any shares?
> [FOLTZ:] No.
> [SALINA:] Did it get applied against the redemption of any shares?
> [FOLTZ:] No.

1 RP (July 24, 2017) at 130-32.

CPA Todd Carlson testified to a tracing analysis performed by him of Ed Miller's financial investment accounts. The analysis isolated funds deemed community property from funds considered separate property. Carlson reviewed voluminous financial records, bank statements, investment records, and tax returns to formulate his testimony. The dissolution court admitted his tracing report, exhibit 109, into evidence.

Todd Carlson began his tracing analysis with the assumption that Ed Miller's and Rita Smith's relationship began in December 2003. Under the analysis, Carlson treated deposits into accounts, after the beginning of the relationship, as a community contribution unless records showed the deposit originated from a separate property source. Carlson allocated payments from Ascentium as Miller's separate property. Carlson also traced account withdrawals to either community purposes or separate purposes, and allocated the withdrawals accordingly.

The following colloquy occurred at trial between Todd Carlson and Ed Miller's counsel:

> [SALINA:] Pretty simple up until this point. And then we get to 2008. Mr. Miller has sold his Ascentium stock and he starts receiving these massive transfers of wealth into this account?
>
> [CARLSON:] Correct.
>
> [SALINA:] And that first deposit that is made is January 2 of '08 and there's $625,000 you talked about earlier?
>
> [CARLSON:] Correct.
>
> [SALINA:] Let's go to Note 3. And there is your note where you said you had in your tracing evidence of the proof of that. So what was the proof that that came from Ascentium?
>
> [CARLSON:] Note 3 says that the RBC Wealth Management account, the account statement received wired funds from Evergreen Seattle, 3294. Evergreen is the escrow note servicing company collecting payments from Ascentium on behalf of Mr. Miller from the sale of Miller.WhiteRunkle.
>
> [SALINA:] Is there any doubt in your mind that this 625 came from the sale of stock?
>
> [CARLSON:] No.

> [SALINA:] And you applied the entirety of that to Mr. Miller's separate property column; is that correct?
>
> [CARLSON:] Correct.
>
> [SALINA:] Now for the first time we have some withdrawals from this account.
>
> [CARLSON:] Yes.
>
> [SALINA:] And that's $99,000. And let's go to Note 4, and tell us what Note 4 summarizes.
>
> [CARLSON:] There were two checks or withdrawals that were deposited in the Horizon account, one on April 14, 2008 and other September 15 of 2008, and they totaled $99,000.
>
> [SALINA:] All right. Now if you look at page 5483, you reduced Mr. Miller's separate property column by that $99,000?
>
> [CARLSON:] Correct.
>
> [SALINA:] So you've apparently assumed that that's a separate liability. What consideration did you take there?
>
> [CARLSON:] The tax returns and information I had was [sic] pretty clear that these were due to tax liabilities associated with the sale. And so because it was, because it was such, I felt that proper to categorize it as separate property rather than community property withdrawals.
>
> [SALINA:] So the 625 you treated as a separate income and the $99,000 was an encumbrance of tax on that income, so you reduced it from his separate property?
>
> [CARLSON:] That's what I determined, yes.

1 RP (July 24, 2017) at 191-93.

Todd Carlson traced all but $91,126 of the $2,607,661 paid by Ascentium to each account listed in his schedules. Rita Smith did not proffer a tracing expert to rebut any of Carlson's testimony.

Ed Miller's real estate appraiser, Randy Berg, testified at trial. He acknowledged that when a fire destroys a home, the property's value may be appraised solely on the

value of the land on which the home sits. According to Berg, the land value of the Glennaire home in 2015 was $85,000. He never testified, however, that the fire to the Glennaire residence completely destroyed the home or that the property's value should be based solely on the value of the land immediately after the fire in 2015.

According to the Glennaire property tax information, the Glennaire home's total value in 2014 equaled $348,800. In 2015, it equaled $361,900. In 2016, it equaled $203,300, and in 2017 the home's total value was $206,300. Randy Berg did not appraise the home during those years. Berg valued the residence, as of July 5, 2017, at $472,200. By that time, the home no longer suffered any fire damage. Rita Smith presented no testimony contesting Berg's appraisal.

After trial, the trial court entered a memorandum decision. The memorandum introduced the primary disputes at trial:

> [T]he duration of the CIR [committed intimate relationship], the character of and tracing of proceeds from the sale of Miller.WhiteRunkle to Ascentium in 2007, the character of funds in certain accounts, the character of and percentage of ownership of the Glennaire residence, the character of and distribution of insurance proceeds from a June 2, 2015 fire that damaged the Glennaire residence and personal property, the character of ownership of a home on Radio Lane, an equitable lien in favor of the community on a home on Lake Coeur d'Alene, Idaho, certain recreational equipment, certain vehicles, and four tickets for Gonzaga University Basketball games.

Clerk's Papers (CP) at 507.

The trial court found that Ed Miller acquired all of his stock in WhiteRunkle in 1993. Miller's and Rita Smith's committed intimate relationship begin in December 2003. In 2005, WhiteRunkle, Inc. paid for the redemption of Jack White's and Randy Runkle's corporate stock from retained earnings and, thus, Miller paid no money from community property funds for the redemption that rendered him the sole stockholder in the company. Miller's corporate shares remained his separate property despite the intervening commencement of the relationship with Smith.

The trial court found that when Ed Miller sold his stock in Miller.WhiteRunkle in 2007, to Ascentium, the stock retained its separate property status. The dissolution court also characterized the payments by Ascentium as payments for corporate stock rather than for future wages or for Miller's promise not to compete.

The trial court adopted Todd Carlson's tracing analysis when entering findings about the nature of the Centaurus fund. As of January 31, 2017, the Centaurus account consisted of $760,818.00 in separate property funds of Ed Miller and $693,989 in community funds of the parties, for a total of $1,454,807.00. The respective percentages of the total were 52.3 percent and 47.7 percent. Nevertheless, the court found that the total in this account was actually $1,387,441.12 on July 13, 2017, not $1,454,807.00. Therefore, the trial court found 52.3 percent of $1,387,441.12 resulted in $725,631.69 of

separate property funds for Ed Miller. The trial court awarded each spouse $330,904.70 as one-half of each party's community property. It also awarded the $725,631.69 in separate funds to Miller.

The dissolution court ruled that the insurance proceeds from the fire at the Glennaire residence retained the same community or separate property character as the home. The couple received $275,131.04 in insurance proceeds for contents destroyed in the fire. The court deemed the proceeds to be community property and awarded each party $137,565.52.

Ed Miller sought an equitable lien on behalf of the community estate for improvements paid by the couple for Rita Smith's Coeur d'Alene lakefront property. He waived a right to any community property interest in the home resulting from the couple's payment of the mortgage on the home during the committed intimate relationship. The trial court denied an equitable lien for the improvements because of Ed Miller's inability to produce receipts or other records substantiating the expenses paid.

The dissolution court ruled that Ed Miller's residence on Radio Lane constituted separate property. The court found that Miller convincingly traced the payment for the purchase of and improvements to the home to his separate property. Miller purchased the abode after the couple's separation.

Finally, the trial court entered findings concerning the characterization and allocation of personal property, such as household goods, jewelry, vehicles, and insurance proceeds. The dissolution court characterized the Cobalt boat as Ed Miller's separate property because he purchased the boat before the committed intimate relationship. The court also found two 2002 Sea-Doo jet skis to be separate property of Miller.

The trial court found that Ed Miller satisfied the contempt award of $40,000 with separate property funds. Therefore, the court did not deduct the payment from Miller's distribution of community property.

The trial court, while relying on its findings and conclusions, awarded Rita Smith community assets valued at $718,761.49. Additionally, the trial court awarded Smith her separate property assets valued at $787,284.45. Smith's total award was $1,506,045.94. The dissolution court awarded Ed Miller community property valued at $630,992.49 and separate property valued at $1,992,875.70. Miller's total award was $2,623,868.19. The trial court ordered that Miller pay Smith some of his separate funds to satisfy some of Smith's community interest in the couple's assets.

Ed Miller proposed to fund part of Rita Smith's community property allocation with parts of his separate property. The trial court accepted Miller's proposal, in part.

The trial court ordered each party to pay their own attorney fees and costs. In support of the ruling, the dissolution court found that Rita Smith is ten years younger than Ed Miller and she has an education that enables her to work. Despite her education and work experience, Smith chose not to work. In addition, Smith received more than $1,500,000 in the dissolution decree.

LAW AND ANALYSIS

Issue 1: Whether the trial court erred when characterizing the proceeds from the sale of stock in Miller.WhiteRunkle sold to Ascentium by Ed Miller in 2007 as separate property?

Answer 1: No.

On appeal, Rita Smith assigns numerous errors to the trial court findings. The assignment implicating the greatest sum of money concerns the trial court's characterization, as Ed Miller's separate property, of the proceeds of the sale of Miller.WhiteRunkle stock to Ascentium. Smith contends the proceeds constituted community property.

As part of a marriage dissolution, all of the spouses' property, both separate and community, comes before the court for distribution. *In re Marriage of Schwarz*, 192 Wn. App. 180, 188, 368 P.3d 173 (2016). The court establishes the character of property as

separate or community based on its character at the time of acquisition. *Marriage of Schwarz*, 192 Wn. App. at 189. Property acquired before marriage is separate property. RCW 26.16.010. Separate property will retain its separate character through all of its changes and transitions so long as it can be traced and identified. *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). Property acquired during marriage is presumptively community property. *Marriage of Skarbek*, 100 Wn. App. at 449. Property acquired during the marriage takes on the character of the property used to acquire it. *In re Marriage of Zahm*, 138 Wn.2d 213, 223, 978 P.2d 498 (1999); *In re Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995). The court may distribute the separate property of one spouse to the other spouse as part of the dissolution, but the court must consider the nature of the property, as separate property or community property, when issuing its award. RCW 26.09.080. The trial court's characterization of property as community or separate is a question of law reviewed de novo. *Marriage of Schwarz*, 192 Wn. App. at 192; *Marriage of Skarbek*, 100 Wn. App. at 447.

Rita Smith astutely argues that the material asset sold in the 2007 sale to Ascentium was not Ed Miller's stock in Miller.WhiteRunkle, but a noncompete agreement whereby Miller sold his marital earning power between 2008 and 2011. Smith emphasizes section 5.5 of the stock purchase agreement that prohibits Miller from

competing with Ascentium or soliciting clients and employees for three years. While relying on *Cirrito v. Cirrito*, 44 Va. App. 287, 605 S.E.2d 268 (2004), a Virginia Court of Appeals decision, Smith contends that proceeds of a spouse's sale of his or her marital earning ability through a noncompete agreement is community property.

In *Cirrito v. Cirrito*, the husband executed an agreement to sell his interest in a telephone service company. In exchange for his shares in the company, the husband received shares of the acquiring company, appointment as president of its consumer division, and an annual salary of $375,000. Part of the sales agreement included a noncompete provision providing the husband with $1 million within one year after his termination with the acquiring company "provided he would not engage in any competing business." *Cirrito v. Cirrito*, 44 Va. App. at 290-91. The parties married twelve days after the husband executed the agreement. The husband complied with his obligation to not compete and, one year after the marriage, received the $1 million. Virginia law recognizes marital property, rather than community property. The trial court characterized the payment as the husband's separate property rather than marital property.

On appeal, in *Cirrito v. Cirrito*, the wife argued that the $1 million payment constituted marital property because the husband forewent competing with his employer for one year after his employment ceased and this one-year window of time spanned the

marriage. The *Cirrito* court analogized the noncompete agreement to a severance package. The $1 million replaced lost earnings during the period of time the husband declined competition with the acquiring company. Although the agreement was negotiated prior to the marriage, the right to receive payment was contingent on the husband not engaging in a particular business in the future. Accordingly, the *Cirrito* court concluded that the payment for not competing constituted marital property because the right to receive the money accrued during the marriage.

Cirrito v. Cirrito holds distinguishing factors from the sale of Miller.WhiteRunkle to Ascentium by Ed Miller. Unlike the husband in *Cirrito*, Ed Miller did not go to work for the acquiring company, Ascentium. Miller did not take a salary from Ascentium. Miller planned to retire on the sale of Miller.WhiteRunkle to Ascentium. Thus, Ascentium payments did not replace Miller's work earnings. The tax returns of Miller and Rita Smith for the years 2007, 2008, 2009, and 2010 characterize the sale as one of corporate shares. Rita Smith garnered tax benefits by this characterization. Ed Miller testified that the one thing of value purchased by Ascentium by reason of receiving the corporate stock of Miller.WhiteRunkle was the company's client portfolio. This testimony confirms that Ascentium principally desired an asset of the corporation not

work from Ed Miller. Miller's agreement not to compete protected Ascentium's purchase of this important asset.

Rita Smith highlights language in the stock purchase agreement that Ed Miller's promise not to compete or to solicit clients was an essential and material term of the purchase. We agree that this strong language bolsters Smith's argument, but the language did not read that Miller's promise was the only material or essential term. Other evidence supports a finding that Ascentium purchased a going concern with valuable clients.

In her appeal brief, Rita Smith misstates testimony and findings of fact in order to support her argument that Ed Miller sold to Ascentium Miller's right to future wages, not shares of stock. For example, Smith writes that Ed Miller conceded at trial that the price paid by Ascentium for the purchase of the stock reflected earnings replacement. Smith cites page 869 of the report of proceedings for this purported concession. Ed Miller made no such concession. Miller testified that his financial analyst projected a sales price that would generate an acceptable cash flow. An acceptable cash flow can come from an investment as well as from working wages. Smith also contends that her former husband confirmed, on the same page of the report of proceedings, he knew he was selling his forbearance from earning income. Miller did not so testify.

Rita Smith writes, in her appeal brief, that the trial court found that Ascentium and Ed Miller structured the sale of Miller.WhiteRunkle as a stock sale in order to avoid taxation on sums paid as ordinary income to lower taxes owed. The dissolution court found that, based on trial testimony, Ed Miller sold shares of stock to Ascentium. The trial court further found that a stock sale reduced taxes because Miller needed to only pay capital gains taxes. The court never found, however, that the parties structured the sale as one of corporate shares of stock in order to reduce taxes.

We agree with Rita Smith that earnings arising from a spouse's services performed during the marriage constitute community property. Nevertheless, the dissolution court concluded, based on clear and convincing evidence, "that the sale was a stock sale and not a payment for future wages or some other characterization." CP at 624-25. Substantial evidence supports the trial court's findings.

Issue 2: Whether the trial court erred when characterizing the stock in Miller.WhiteRunkle sold to Ascentium by Ed Miller in 2007 as separate property?

Answer 2: No.

In the alternative, Rita Smith contends that, even if the 2007 Ascentium purchase is properly characterized as a sale of stock, the trial court erred in awarding its proceeds to Ed Miller as his separate property because the stock sold was a community asset

acquired in 2005 with one of Miller's wage bonuses. The wage bonus would be community property since earned during the committed intimate relationship with Smith.

As explained before, property acquired during the marriage takes on the same character as the funds used to purchase it. *In re Marriage of Chumbley*, 150 Wn.2d 1, 6, 74 P.3d 129 (2003). Years before Ed Miller and Rita Smith had a committed intimate relationship, Miller acquired 458 shares in WhiteRunkle, which constituted 5 percent of the corporation's total shares. The stock was then his separate property at least as to Rita Smith. *In re Marriage of Schwarz*, 192 Wn. App. 180, 189, 368 P.3d 173 (2016).

On October 1, 2005, WhiteRunkle redeemed the total shares of Jack White and Robert Runkle for $1 million. The total number of shares owned by Miller did not increase or decrease as a consequence of the redemption. Nevertheless, he became the sole shareholder.

Following the October 2005 redemption, Ed Miller loaned Miller.WhiteRunkle $375,000. The loan represented unpaid compensation, in the form of a shareholder loan, owed to Miller. The Miller.WhiteRunkle tax return for fiscal year December 1, 2005 to November 30, 2006, recorded the shareholder loan of $375,000. On November 30, 2007, the corporation converted the shareholder loan to $359,850 in additional paid-in capital.

As CPA Zoe Foltz noted, this recharacterization of the loan as paid-in capital did not increase or decrease Miller's stock.

Rita Smith highlights the portion of Zoe Foltz's testimony that the new corporation, Miller.WhiteRunkle, repaid Ed Miller a $375,000 wage bonus by issuing him 458 shares of stock. In turn, Smith contends this testimony establishes that the 458 shares of stock in the corporation must be community property since Miller earned the wage bonus during the committed intimate relationship. Whereas, Foltz provided this testimony, the testimony conflicted with the facts shown in financial records. The records did not support Miller acquiring any stock in 2005. He acquired the shares in 1993. His amount of shares never increased. Miller's loan to the corporation in 2005 had no relationship to WhiteRunkle's redemption of White's and Runkle's stock. Miller loaned the money two months after completion of the redemption. The loan increased Miller's tax basis for the stock, but the change in basis does not equate to a change in the value of the stock, a sale of the stock, or a transfer of the stock. Also, Foltz later corrected her testimony. The dissolution court, based on the evidence as a whole, could reasonably conclude that the wage bonus did not purchase any of the corporate stock.

Issue 3: Whether the trial court erred when characterizing Ed Miller's ownership in the Radio Lane home as his separate property?

Answer 3: No.

Rita Smith contends that the trial court committed reversible error when it characterized Ed Miller's Radio Lane residence as separate property because Miller purchased the home with the 2007 Ascentium sale proceeds. This argument, of course, assumes that the proceeds from the stock sale were separate property. We have already affirmed the trial court's ruling to the contrary.

Ed Miller purchased the Radio Lane home in April 2015 after the couple's separation. Miller's tracing expert, CPA Todd Carlson, determined that Miller employed proceeds from the sale of stock to Ascentium to purchase the home.

Issue 4: Whether the trial court erred when refusing to characterize the value Rita Smith created in the Glennaire home as her separate property when she increased its value with post-separation labor and insurance proceeds?

Answer 4: No.

Before the parties' relationship, Rita Smith and her former husband owned the Glennaire home. Ed Miller moved into the residence in December 2003. When Miller switched domiciles, the parties engaged in a transaction by which Miller gained a 77.15 percent separate property interest in the Glennaire residence and Rita Smith retained a 22.85 percent separate property interest. In 2015, post-separation, the Glennaire home

sustained fire damage. The dissolution court ruled that the fire insurance proceeds assumed the character of the home, and, thus, the court distributed the insurance proceeds in accordance with the parties' relative ownership interests in the Glennaire home. In so ruling, the trial court relied on *In re Estate of Hickman*, 41 Wn.2d 519, 250 P.2d 524 (1952).

Rita Smith contends that the trial court should have characterized the fire insurance proceeds used to restore the Glennaire residence as Smith's separate property. She bases this argument on the fact that she indirectly paid the insurance policy premium with her separate funds after the parties' separation through the dissolution court's order to Ed Miller to pay the premium as part of his spousal maintenance obligation.

Rita Smith relies on *Aetna Life Insurance Co. v. Wadsworth*, 102 Wn.2d 652, 689 P.2d 46 (1984) to support her argument. The *Aetna* court held that the community or separate character of a term *life insurance* policy depends on the character of the funds used to pay the most recent premium. The court in *In re Estate of Bellingham*, 85 Wn. App. 450, 454, 933 P.2d 425 (1997), extended this concept to mortgage life insurance policies. Applying the rule in *Aetna*, the *Bellingham* court held that "paying insurance premiums with community funds renders the policy community property." *Estate of Bellingham*, 85 Wn. App. at 454.

Rita Smith asks this court to extend the *Aetna* rule to fire insurance policies. Smith contends that the Supreme Court implicitly overruled *Estate of Hickman*, 41 Wn.2d 519 (1952) in *Aetna Life Insurance Co. v. Wadsworth*. We disagree. In *Bellingham*, the trial court relied on *Hickman* when it characterized the mortgage insurance proceeds as the estate's separate property. In holding that *Aetna* applied, the court found that the trial court's reliance on *Hickman* was misplaced. "Those cases concern fire insurance proceeds, which the court held assumed the character of the *property* insured." *Estate of Bellingham*, 85 Wn. App. at 455. Because *Bellingham* concerned life insurance rather than fire insurance, the court held that the *Hickman* line of cases does not apply.

We apply *Bellingham*'s logic inversely. Because this appeal concerns fire insurance rather than life insurance, the *Aetna* line of cases do not apply. Overruling *Hickman* should come expressly from the Supreme Court.

Rita Smith also contends that her percentage of separate property ownership interest in the Glennaire residence should increase because of the labor she performed in restoring the abode after the fire. Smith contends that she should be credited with the difference between the land value of the Glennaire home, $85,000, and the appraised value of the home, which is $480,000. We disagree.

We fault Rita Smith's analysis for many reasons. First, Smith emphasizes the real estate appraiser's testimony that, when a fire destroys a home, the property's value may be based solely on the value of the land. This observation has no relevance to the Glennaire residence. Smith provided no testimony that the fire completely demolished the home and that the property's value, after the fire, was only $85,000. Second, Smith's contention assumes that her labor alone restored the home and created the $480,000 value. But insurance proceeds paid construction contractors to restore the home. Third, Smith provided no testimony as to the value of her services that restored the Glennaire home after the fire.

Smith correctly cites *In re Marriage of DeHollander*, 53 Wn. App. 695, 699-700, 770 P.2d 638 (1989) for the assertion that, when one party contributes her separate property to the marital community's property, the contributor may have a right of reimbursement. As already stated, however, Smith supplied no evidence of the value of her labor or any evidence of the extent to which her labor increased the value of the Glennaire property.

Issue 5: Whether the dissolution court erred when characterizing Rita Smith's right to $355,131 of Safeco "contents" proceeds as community property when she paid the latest premium on the insurance policy and the fund was acquired by Smith with post-separation labor and maintenance income?

Answer 5: No.

Rita Smith contends that the trial court mischaracterized the $355,131 of Safeco fire insurance "contents coverage" as community property. Smith argues that she paid the latest premium payment on the homeowners' insurance policy. She further contends that her inventorying, cleaning, and storage of the damaged personal property inside the Glennaire residence entitles her to the insurance payment as her separate property.

We already affirmed the trial court's ruling that the character of the insurance proceeds, regardless of who paid the premium, follows the character of the ownership of the property destroyed. We assume, without contrary evidence, that the parties accumulated the contents inside the home during the marriage. We further must presume that property acquired during the marriage and not traced to a separate property origin is community property. *In re Marriage of Skarbek*, 100 Wn. App. 444, 449, 997 P.2d 447 (2000).

Rita Smith asserts that contents inside the home are not realty and, therefore, the rule equating insurance proceeds to restore the residence to the same as the character of the home should not apply. Nevertheless, Smith cites no authority for this contention. We do not consider conclusory arguments that do not cite authority. RAP 10.3(a)(6). Smith also cites no authority for the proposition that one's creation of the inventory for damaged or destroyed personal property entitles that person to sole ownership of the insurance proceeds attributed to the property.

Issue 6: Whether the dissolution court erred when characterizing the 2008 Cobalt boat as Ed Miller's separate property?

Answer 6: Yes.

In 2008, Ed Miller purchased a 2008 Cobalt boat. The certificate of title, issued on September 29, 2008, included Rita Smith's name as owner. The dissolution court found the 2008 vessel to be Miller's separate property because Miller acquired the boat before the parties' 2003 committed intimate relationship. We agree with Rita Smith that the trial court erred.

We take judicial notice that a 2008 model boat cannot be purchased during or before 2003. Thus, we apply the presumption that an asset acquired during the marriage is community property.

Ed Miller testified that he believed the boat was his separate property because he bought it with his separate funds. Nevertheless, he provided no other testimony to support a conclusion that he purchased the boat with separate funds. A party may rebut a presumption of community property by offering clear and convincing evidence that the property was acquired with separate funds. *In re Marriage of Schwarz*, 192 Wn. App. 180, 189, 368 P.3d 173 (2016). Miller's averment of his belief does not supply clear and convincing evidence.

Issue 7: Whether the trial court abused its discretion in failing to assess against Ed Miller's distribution of property $802,840 of funds he dissipated from the Centaurus fund and D.A. Davidson accounts while the dissolution action was pending?

Answer 7: No.

Rita Smith next contends that the trial court abused its discretion when refusing to assess against Ed Miller's share of the property $802,840 in assets he dissipated. Citing trial exhibit 109, Smith alleges Miller depleted $1,556,036 from the community investment accounts in the Centaurus fund and D.A. Davidson accounts. Washington courts recognize a party's dissipation of marital assets as relevant to the just and equitable distribution of property. *In re Marriage of Williams*, 84 Wn. App. 263, 270, 927 P.2d 679 (1996).

During the pendency of the marital dissolution proceeding, the trial court held Ed Miller in contempt because of his unauthorized withdrawal of funds. The trial court ordered Miller to pay Rita Smith $29,383.50 in attorney fees and costs and $10,000.00 in sanctions. The dissolution court reserved for later a ruling on the nature of the funds unlawfully withdrawn, as either separate property or community property.

The trial court ultimately recognized that Ed Miller took $766,196 from the Centaurus fund to purchase the Radio Lane home, and Miller deposited $57,297 of the amount into a D.A. Davidson account. The trial court then accounted for the depleted D.A. Davidson account in its unchallenged findings and compensated Rita Smith her one-half interest in the $114,595 community account as set forth in section G of the decree. The trial court also acknowledged Miller's contempt payment of $40,000.

We cannot conclude, as alleged by Rita Smith, that Ed Miller depleted the Centaurus account by another $802,840. The trial court entered no such finding. Instead, the court relied on CPA Todd Carlson's tracing and found that, after analyzing the origin and source of deposits in the Centaurus fund, the account consisted of $760,818 separate property of Miller and $693,989 in community funds. In her opening brief, Smith cites numerous withdrawals from 2014 to 2017 totaling $1,297,196. Nevertheless, Carlson

testified regarding these withdrawals, and he characterized the funds withdrawn. The trial court accepted Carlson's characterization of the funds.

This court reviews a trial court's property division made during a marriage dissolution for manifest abuse of discretion. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Marriage of Muhammad*, 153 Wn.2d at 803. We conclude that the trial court did not abuse its discretion regarding any alleged dissipation of the Centaurus fund by Ed Miller.

Issue 8: Whether the trial court abused its discretion when it forced Rita Smith to buy Ed Miller's 14-year-old separate property Sea-Doos as part of its property distribution?

Answer 8: No.

At trial, Rita Smith claimed the two 2002 Sea-Doo jet skis were community property because the couple purchased the skis during the committed intimate relationship. The trial court characterized the Sea-Doos as Ed Miller's separate property because Miller acquired them prior to the relationship as confirmed by their being mentioned in his divorce decree from his previous wife.

On appeal, Rita Smith may concede that the Sea-Doos constitute Ed Miller's separate property and are correctly valued at $3,415. Smith now asserts, however, that the trial court abused its discretion because the court forced her to buy Miller's Sea-Doos from him by awarding them to Smith and then granting an offset for what it deemed the value of these items against the community funds Miller owed Smith. With no citation to authority, Smith asserts a forced sale on an unwilling party is abuse of discretion under RCW 26.09.080's disposition authority. We do not consider conclusory arguments that do not cite authority. RAP 10.3(a)(6).

Rita Smith also cites *In re Marriage of Bobbitt*, 135 Wn. App. 8, 15, 144 P.3d 306 (2006) for the proposition that the trial court has no jurisdiction to order the sale of the parties' assets without their consent because the law does not grant the trial court such authority. In *Bobbitt*, the trial court ordered the wife to sell a piece of property awarded to the husband as his separate property in the dissolution decree. We do not know why Smith cites this specific rule as *Bobbitt* does not readily apply to the facts of this case. Rita Smith's trial court did not force either party to sell the two Sea-Doos. Smith had in her possession and retained possession of the Sea-Doos.

Issue 9: Whether the dissolution court failed to properly consider the RCW 26.09.080 factors when it distributed the property?

Answer 9: No.

In a dissolution action, the property of the spouses, whether community or separate, comes before the court for distribution. *Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972). RCW 26.09.080 guides the dissolution court to make such disposition of the property and liabilities "as shall appear just and equitable," based on consideration of the following factors:

> (1) The nature and extent of the community property;
> (2) The nature and extent of the separate property;
> (3) The duration of the marriage or domestic partnership; and
> (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

The Washington Supreme Court reads RCW 26.09.080 to require trial courts to weigh all of the factors to come to a fair, just, and equitable division of property. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985). Character of the property is a relevant factor, but it is not controlling. *Marriage of Konzen*, 103 Wn.2d at 478. Under RCW 26.09.080, trial courts have broad discretion in the distribution of property in marriage dissolution cases. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). Trial courts are in the best position to assess the assets and liabilities of the parties and determine what is fair, just, and equitable under all the circumstances.

Marriage of Brewer, 137 Wn.2d at 769. Thus, trial court distributions of property will seldom be changed on appeal. *In re Marriage of Stenshoel*, 72 Wn. App. 800, 803, 866 P.2d 635 (1993).

Rita Smith argues that the trial court abused its discretion in its consideration of the statutory factors because the trial court failed to consider the lack of liquidity of its award to Smith when compared with the need for her to pay a personal debt of $360,000. Nevertheless, Smith does not cite the record for her assertion that she bears $360,000 in outstanding debt.

The dissolution court wrote in its memorandum decision:

> [T]his was a long and difficult case to reconcile competing positons and testimony. Ultimately, the Court relied on RCW 26.09.080 to reach a just and equitable decision.

CP at 508. A trial court's memorandum decision may supplement findings of fact and conclusions of law. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 523 n.3, 22 P.3d 795 (2001).

The trial court's statement in its memorandum decision coincides with its findings of fact and conclusions of law. Over the course of a nine-day trial, the court heard testimony from seven witnesses, including both parties and an expert who opined as to the origins of the various assets. The court reviewed 150 exhibits. In its sixteen-page

findings of fact and conclusions of law, the court carefully considered and resolved the evidence and arguments before the court, including those bearing on the statutory factors. The dissolution court heard evidence and made findings regarding the parties' ages, health, education, and future earning potential. The court also made extensive findings regarding the nature and extent of community and separate property, including a finding that each party had significant assets. We conclude that the trial court relied on RCW 26.09.080 to reach a just and equitable division of property.

Issue 10: Whether the *trial court abused its discretion in denying Rita Smith attorney fee assistance in the trial court?*

Answer 10: No.

Rita Smith maintains that the trial court abused its discretion in declining to award her attorney fees under RCW 26.09.140. This court reviews a trial court ruling regarding fees under RCW 26.09.140 for an abuse of discretion. *In re Marriage of Kile & Kendall*, 186 Wn. App. 864, 888, 347 P.3d 894 (2015). Smith bears the burden of showing the trial court exercised its discretion in a clearly untenable or manifestly unreasonable way. *In re Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996).

RCW 26.09.140 states in pertinent part:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

In general, when determining an award of fees, the trial court balances the needs of the requesting spouse against the ability of the other spouse to pay. *Marriage of Crosetto*, 82 Wn. App. at 563.

In *Marriage of Kile & Kendall*, 186 Wn. App. 864 (2015), the husband failed to show an abuse of discretion when the court did not award him attorney fees because the husband was awarded nearly $650,000 in assets.

Rita Smith asks for fees because this trial took nine days, had 2,000 pages of trial testimony, and 221 exhibits, 150 of which were admitted. The trial court refused to award attorney fees based on its finding that neither party demonstrated need. Each spouse received an estate in excess of $1 million. The court noted that Smith is 54 years of age and more than ten years younger than Ed Miller. The trial court also found that Smith had education and training that enabled her to work, but she chose to pursue a new career path through education. Finally, the trial court noted that Smith's decision not to

work contributed to her debts. Because of the substantial sum awarded Rita Smith, we conclude the trial court did not abuse its discretion.

Issue 11: Whether the trial court erred in failing to award Rita Smith separate liens against the community property or against Ed Miller's separate property when Smith contributed cash to the community from a separate tort claim and because of the rental and use value she gave to the community of the Lake Coeur d'Alene home?

Answer 11: We decline to address this issue because Rita Smith presents no argument in her brief to support this assignment of error.

Rita Smith assigns error to the trial court's failure to award her an equitable lien for tort settlement proceeds of over $300,000 and the rental and use value of the lake home of $750,000. Smith only referenced this argument in her assignments of error section of her opening brief and extended no argument or analysis to this issue in her brief.

Without argument or authority to support it, an appellant waives an assignment of error. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004). This court need not consider arguments that are not developed in the briefs and for which a party has not cited authority. *Bercier v. Kiga*, 127 Wn. App. at 824. Because Rita Smith failed to develop or

support her argument regarding her request for separate liens, we decline to address this assignment of error.

Issue 12: Whether this reviewing court should direct the dissolution court to order additional maintenance payments in favor of Rita Smith?

Answer 12: No.

Rita Smith asks that maintenance be assessed on remand because Ed Miller continues to dissipate and transfer funds during the pendency of this appeal. Smith cites *Marriage of Kile & Kendall*, 186 Wn. App. 864, 887 (2015) for this assertion. *Marriage of Kile & Kendall*, however, did not involve a situation when one party dissipated funds during the appellate process. Smith presents no evidence on appeal that Miller continues to squander any funds.

Issue 13: Whether this court should award Rita Smith reasonable attorney fees and costs incurred on appeal?

Answer: No.

Rita Smith also asks this court to order Ed Miller to pay her attorney fees on appeal, while claiming she has need and Miller the ability to pay under RCW 26.09.140. Under RCW 26.09.140, this court may award attorney fees on appeal after considering the financial resources of the parties. This court also has discretion to award fees and costs

on appeal based on a showing of intransigence or need. *In re Marriage of Buchanan*, 150 Wn. App. 730, 740, 207 P.3d 478 (2009).

RAP 18.1(c) requires a party, in a dissolution action, to file an affidavit of financial need if seeking an award of reasonable attorney fees and costs on appeal. In her affidavit, Rita Smith testifies that she currently receives no monthly income and incurs monthly expenses of $4,839.62. Smith also avers that she received a total net distribution at the conclusion of the marital dissolution of $77,854.

We do not deem Rita Smith's financial affidavit believable, when the dissolution court awarded her more than $1.5 million in assets. We also follow the trial court's finding that Rita Smith voluntarily chose unemployment despite having a good education and previously accruing $80,000 per year in marketing. Thus, we deny Rita Smith reasonable attorney fees and costs on appeal.

CONCLUSION

We remand to the trial court for a recharacterization and redistribution of the Cobalt boat as a marital community asset. We otherwise affirm the trial court's property distribution and other rulings. We deny Rita Smith an award of reasonable attorney fees and costs on appeal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Korsmo, J.

APPENDIX B

EXECUTION COPY

STOCK PURCHASE AGREEMENT

BY AND AMONG

ASCENTIUM CORPORATION,

MILLER.WHITERUNKLE INC.

AND

MR. EDWARD A. MILLER

DATED AS OF DECEMBER 29, 2007

RYS

MILLER v. YTURRI-SMITH
Case No. 14-3-00584-7
Exhibit No. R-361
Disposition: ADMITTED

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subject to the shareholder vote (the "***280G Shareholder Approval***"), or (ii) that the 280G Shareholder Approval was not obtained and as a consequence, that such payments and/or benefits shall not be made or provided to the extent they would cause any amounts to constitute a parachute payment under Section 280G(b)(1), pursuant to the waivers of those payments and/or benefits, which were executed by the affected individuals prior to the shareholder vote.

Section 5.3. Termination of Plans. Effective as of no later than the day immediately preceding the Closing Date, the Company and its subsidiaries and any ERISA Affiliate (as such term is defined in ***Exhibit A***, as applicable, shall each terminate (in a manner satisfactory to Buyer) any and all group severance, separation or salary continuation plans, programs or arrangements and any and all plans intended to include a Code Section 401(k) arrangement (unless Buyer provides written notice to the Company that such 401(k) plans shall not be terminated) (collectively, "***Terminating Company Plans***"). Unless Buyer provides such notice to the Company, no later than five business days prior to the Closing Date, the Company shall provide Buyer with evidence that such Company Employee Plan(s) have been terminated (effective as of the day immediately preceding the Closing Date) pursuant to resolutions of the Board of Directors of the Company, Subsidiary or ERISA Affiliate. The form and substance of such resolutions shall be subject to review and approval of Buyer. The Company also shall take such other actions in furtherance of terminating such Company Employee Plan(s) as Buyer may reasonably require. In the event that termination of a Company Employee Plan or other arrangement under this Section 5.3 would reasonably be anticipated to trigger liquidation charges, surrender charges or other termination fees then such charges and/or fees shall be the responsibility of the Company and the Company shall take such actions as are necessary to reasonably estimate the amount of such charges and/or fees and provide such estimate in writing to Buyer no later than fifteen (15) calendar days prior to the Closing Date.

Section 5.4. Shareholder Release. Effective as of the Closing, the Shareholder does for itself and its respective affiliates, partners, heirs, beneficiaries, successors and assigns, if any, release and absolutely forever discharge the Company and each of its officers, directors, Shareholder, affiliates, employees and agents (each, a "***Released Party***") from and against all Released Matters. It is the intention of the Shareholder in executing the release contained in this Section 5.4, and in giving and receiving the consideration called for in this Agreement, that this release shall be effective as a full and final accord and satisfaction and general release of and from all Released Matters. Notwithstanding anything herein or otherwise to the contrary, the release contained in this Section 5.4 will not be effective so as to benefit a particular Released Party in connection with any matter or event that would otherwise constitute a Released Matter but involved fraud, willful misconduct or willful concealment, or the breach of any applicable law on the part of such Released Party. The Shareholder hereby represents to the Buyer that the Shareholder has not voluntarily or involuntarily assigned or transferred or purported to assign or transfer to any Person any Released Matters and that no Person other than the Shareholder has any interest in any released matter by law or contract by virtue of any action or inaction by the Shareholder. The invalidity or unenforceability of any part of this Section 5.4 shall not affect the validity or enforceability of the remainder of this Section 5.4, which shall remain in full force and effect.

Section 5.5. Non-Competition and Non-Solicitation.

(a) Covenants. Shareholder recognizes the highly competitive nature of the industry in which the Company's business is involved, and acknowledges: (i) Shareholder's services to the Company are special and unique; (ii) Shareholder's work for the Company allows Shareholder access to the Company's highly confidential and proprietary information and trade secrets; (iii) the Company's business is conducted throughout the United States of America; (iv) Buyer would not have entered into this Agreement but for the

covenants and agreements contained in this Section 5.5; and (v) the agreements and covenants contained in this Section 5.5 are essential to protect the business and goodwill of the Company. In order to induce Buyer to enter into this Agreement, Shareholder covenants and agrees to the restrictions set forth in this Section 5.5.

(b) Non-Solicitation of Employees. For a period of three (3) years following the Closing Date, Shareholder will not directly or indirectly, on behalf of Shareholder or any third party that offers, sells, or markets products or services that are directly competitive with those of the Company and Buyer, or the same or similar products or services that are directly competitive with those of the Company or Buyer: (i) directly or indirectly induce any employee of the Company or Buyer to terminate his or her employment with the Company or Buyer; or (ii) directly or indirectly employ or offer employment to any person who is currently employed by the Company or Buyer, where such person will work in a capacity or position similar to his or her capacity or position with the Company or Buyer or in any capacity or position in which he or she will directly compete with the Company or Buyer.

(c) Non-Competition. Ancillary to this otherwise enforceable Agreement, Shareholder agrees that for a period of three (3) years following the Closing Date, Shareholder will not, directly or indirectly, own or participate in the ownership of, manage, control, participate in, consult with, render services for, or operate any entity or provide any service as an employee, director, consultant or otherwise, which is, or is preparing to be, in the business of marketing, developing, or selling products or services that are directly competitive with those of the Company or Buyer, or the same or similar products or services that are directly competitive with those of the Company or Buyer (the "***Restricted Business***") in the United States of America. Notwithstanding the foregoing, Shareholder may own, as a passive investment, up to 1% of a publicly traded company that engages in the Restricted Business. The parties acknowledge and agree that this non-competition covenant does not preclude Seller from working in the aforementioned business sector in some role which would not compete with the business of the Company or Buyer. This non-competition agreement shall be considered a series of separate covenants for each month of the agreement and a series of separate covenants for each state within the United States; in the event that a court or arbitrator should determine that the agreement is not enforceable to the extent agreed by the parties, the court or arbitrator shall limit the scope of the non-competition agreement to the maximum number of months and broadest geography that shall be enforceable. Shareholder acknowledges that the geographical and time restrictions contained in this Section 5.5(c) are reasonable in nature and no broader than necessary to protect the legitimate business interests of the Company and Buyer because the nature of the Company's and Buyer's businesses is national in scope and the Company's and Buyer's customers are located throughout the United States.

(d) Non-Solicitation of Clients and Prospective Clients. For a period of three (3) years following the Closing Date, Shareholder agrees to abide by the following restrictions: (i) Shareholder shall not interfere with existing client relationships of the Company and Buyer and shall not solicit or attempt to take away any business of the Company or Buyer that was either under way or was about to begin as of the Closing Date; (ii) Shareholder shall not interfere or compete in any way with any proposal efforts of the Company or Buyer already in progress (that is, a proposal sent to or being then currently developed for a specific client or clients, or contemplated to be submitted to a specific client or clients by the Company or Buyer within two (2) years) as of the Closing Date; and (iii) Shareholder shall not make use of any of Shareholder's personal or business relationships or business contacts developed during the course of employment with the Company and utilized for business purposes within the two (2) years of the Closing Date, for the benefit of Shareholder or any third party, in a competitive manner with respect to the business of the Company or Buyer.

(e) Acknowledgements and Reasonableness. Shareholder acknowledges and agrees that the restrictions set forth in this Section 5.5 are fair, reasonable and necessary to protect the goodwill, trade secrets, confidential or proprietary information, and other legitimate interests of the Company and Buyer, such restrictions were negotiated and bargained for and the consideration delivered in connection with this Agreement reflects and assumes Shareholder's strict compliance with, and the enforceability by the Company and Buyer of these restrictions.

(f) Materiality. Shareholder acknowledges and agrees that the provisions of this Section 5.5 are material and of the essence to this Agreement. In addition, if any restriction or covenant contained in this Section 5.5 should be or become too broad or extensive to permit enforcement thereof to their fullest extent, then such restriction or covenant shall be enforced to the maximum extent permitted by law, and Shareholder hereby consents and agrees that: (i) it is the parties' intention and agreement that the covenants and restrictions contained herein be enforced as written, and (ii) in the event a court of competent jurisdiction or arbitrator should determine that any restriction or covenant contained herein is too broad or extensive to permit enforcement thereof to its fullest extent, or, for whatever reason, is against public policy, the scope of any such restriction or covenant may be modified accordingly in any judicial or arbitration proceeding brought to enforce such restriction or covenant, but should be modified to permit enforcement of the restrictions to the maximum extent the court or arbitrator, in its judgment, will permit.

Section 5.6. Conduct of Business. From the date hereof to the Closing, the Shareholder shall cause the business of the Company to be conducted in the ordinary course consistent with past practice and use its reasonable best efforts to (i) preserve intact its present business organization, (ii) maintain in effect all foreign, federal, state and local licenses, permits, consents, franchises, approvals and authorizations, (iii) not enter into any Contracts; (iv) pay any registration, maintenance or renewal fees, and file any documents, applications or certificates for the purposes of obtaining, maintaining, perfecting or preserving or renewing any Company Registered Intellectual Property Rights; (v) keep available the services of its officers and key employees, (vi) maintain satisfactory relationships with its customers, lenders, suppliers, and others having material business relationships with it and shall (x) manage its working capital (including the timing of collection of accounts receivable , the payment of accounts payable and the management of inventory) in the Ordinary Course of Business consistent with past practice and (y) pay all debts and Taxes of the Company when due.

Section 5.7. Consents. Prior to the Closing, the Shareholder shall use, and shall cause the Company to, use its reasonable best efforts to obtain any consents and waivers under any contracts to which the Company is a party or approvals, consents, permits, authorizations and other confirmations required to be obtained from any third party or Governmental Entity with respect to the transactions contemplated hereby, and shall, and cause the Company to, cooperate with Buyer, upon the request of Buyer, in any reasonable manner in connection with Buyer obtaining any, such consents and waivers; provided, however, that such efforts and cooperation shall not include any requirement of Shareholder or the Company to expend money, commence or participate in any litigation or offer or grant any accommodation (financial or otherwise) to any third party.

Section 5.8. Financial Statements. The Shareholder shall (i) deliver an unaudited balance sheet and statements of operations, stockholder's equity and cash flows of the Company at and for the fiscal year ended November 30, 2007, and accompanying notes, which financial statements shall have been reviewed by Fruci and Associates, P.S. and (ii) use his best efforts to assist Buyer and the Company to prepare an unaudited balance sheet and statement of operations at and for the month ended December 31, 2007, in each

case, which financial statements shall be delivered or prepared, as the case may be, as soon as practicable after the Closing Date and in any event not later than January 25, 2008.

Section 5.9. Tax Matters. Buyer shall prepare or cause to be prepared and file or cause to be filed all Returns for the Company that are due after the Closing Date. For the avoidance of doubt, Buyer shall bear the cost of preparing such Returns. Without limiting Section 5.1 hereof, Shareholder shall cooperate fully, as and to the extent requested by Buyer and the Company, in connection with the filing of any Returns pursuant to this Section 5.9, and any audit, litigation or other proceeding with respect to Taxes.

ARTICLE VI. - CONDITIONS PRECEDENT TO OBLIGATIONS OF BUYER

The obligations of Buyer to perform and observe the covenants, agreements and conditions to be performed and observed by it at or before the Closing shall be subject to the satisfaction of the following conditions, which may be expressly waived only in writing signed by Buyer.

Section 6.1. Accuracy of Representations and Warranties. Each of the representations and warranties of the Company and the Shareholder contained in this Agreement and the other Transaction Documents (including the Disclosure Schedule and Exhibits thereto) shall be true and correct as of the Closing Date as though made on that date (except to the extent such representations and warranties relate to an earlier date, in which case such representations and warranties shall be true and correct as of such date).

Section 6.2. Performance of Agreements. Each of the Company and the Shareholder shall have performed all obligations and agreements and complied with all covenants and conditions contained in this Agreement or each other Transaction Document to be performed by, or complied with, each of them at or prior to the Closing.

Section 6.3. Closing Certificate. Buyer shall have received a certificate of an officer of the Company and Shareholder, dated the Closing Date, substantially in the form attached as ***Exhibit B***, certifying that the conditions set forth in Sections 6.1 and 6.2 have been fulfilled.

Section 6.4. Consulting Agreement. The Company and the Shareholder shall have executed and delivered the consulting agreement in the form attached hereto as ***Exhibit C*** (the "***Consulting Agreement***") and such consulting agreement is in full force and effect and has not been repudiated by the Shareholder.

Section 6.6. Proceedings and Documents; Certificate. All corporate and other proceedings in connection with the transactions contemplated hereby and all documents and instruments incident to such transactions shall have been taken including all measures necessary for Buyer to hold shareholders' meetings and meetings of the Board of Directors of the Company that shall allow buyer to appoint new directors to the Board of Directors of the Company, appoint new Company signatories, change the financial year and rename the Company. All such corporate and other proceedings in connection with the transactions contemplated hereby and all documents, if any, and instruments, if any, incident to such transactions shall have been approved by counsel to Buyer. If requested by Buyer, the Company shall issue a power of attorney to the person or persons designated by Buyer to enable such person or persons to sign for and on behalf of the Company until new signatories have been duly registered.

Section 6.7. ~~Delivery~~Secretary's of ~~Certificates~~Certificate. ~~The Shareholder shall deliver to Buyer at Closing all share certificates representing the Shares and accompanied by a stock power duly endorsed in blank in proper form for transfer.~~ The Company shall deliver to Buyer at Closing a certificate of

the Secretary of the Company certifying (i) that the Company has never adopted any Bylaws; (ii) that the Company has never issued any certificates representing shares of its capital stock and that the Shares are uncertificated; (iii) the members of the Board of Directors of the Company and the valid appointment of such directors; (iv) the due authorization of the Executive Committee of the Board of Directors of the Company, the members of such committee and the valid appointment of such members; (v) the current officers of the Company and the valid appointment of such officers; (vi) a true and complete copy of the Articles of Incorporation of the Company; (vii) the resolutions duly adopted by the Board of Directors of the Company; (viii) the resolutions duly adopted by the shareholders of the Company.

Section 6.8. Resignations; Appointments. Buyer shall have received copies of (a) resignations effective as of the Closing Date of all the officers and directors of the Company, with each such directors acknowledging that he or she has no claims against Buyer of the Company for compensation or otherwise, and (b) the appointment, effective immediately prior to Closing, of the directors and officers of the Company to be designated by the Buyer prior to the Closing.

Section 6.9. Legal Opinion. The Buyer shall have received a legal opinion from Company Counsel, legal counsel to the Company, substantially in the form attached hereto as ***Exhibit D***.

Section 6.10. Section 280G Payments. With respect to any payments or benefits that Buyer determines may constitute a "parachute payment" under Section 280G(b)(1), the shareholders of the Company shall have approved, pursuant to the method provided for in the regulations promulgated under Section 280G of the Code, any such payments or benefits or shall have disapproved such payments and/or benefits, and, as a consequence, no such payments or benefits shall be paid or provided for in any manner and Buyer and its subsidiaries shall not have any liabilities under Section 280G of the Code of Section 4999 of the Code.

Section 6.11. Termination of Terminating Company Plans. The Company shall have provided Buyer with evidence, reasonably satisfactory to Buyer, as to the termination of the Terminating Company Plans referred to in Section 5.3.

Section 6.12. Post-Closing Employee Matters. Following the Closing Date, Buyer shall arrange for each Employee of the Company who becomes an employee of Buyer or any of its subsidiaries (the "***Company Participants***"), or an eligible dependent of any such employee, as the case may be, to be eligible for the same employee benefits as those received by Buyer employees with similar positions and responsibilities. Each Company Participant shall be given service credit for all purposes, including for eligibility to participate (provided that no retroactive contributions will be required) and eligibility for vesting under Buyer employee benefit plans and arrangements (other than with respect to employee benefit plans and arrangements adopted on or after the Closing Date) with respect to his or her length of service with the Company (and its subsidiaries and predecessors) prior to the Closing Date. Buyer shall cause any and all pre-existing condition (or actively at work or similar) limitations, eligibility waiting periods and evidence of insurability requirements under any Buyer employee benefit plans and arrangements to be waived, to the extent permitted under law and under existing Buyer contracts, with respect to such Company Participants and shall provide them with credit for any co-payments, deductibles, and offsets (or similar payments) made during the plan year which includes the Closing Date for the purposes of satisfying any applicable deductible, out-of-pocket, or similar requirements under any Buyer employee benefit plans or arrangements in which they are eligible to participate after the Closing Date.

APPENDIX C

R & H FINANCIAL SERVICES, INC.
PO BOX 633
LIBERTY LAKE, WA 99019-0633

2007 Individual Return
prepared for:

COPY
FOR YOUR FILE
R & H FINANCIAL SERVICES, INC
(509) 892-5114

Edward A Miller and Rita L Yturri-Smith
5026 East Glennaire Drive
Spokane, WA 99223

RYS

MILLER v. YTURRI-SMITH
Case No. 14-3-00584-7
Exhibit No. R-323
Disposition: ADMITTED

Form **6252**

Department of the Treasury
Internal Revenue Service

Installment Sale Income

► Attach to your tax return.
► Use a separate form for each sale or other disposition of property on the installment method.

OMB No. 1545-0228

2007

Attachment Sequence No. 79

Name(s) shown on return

Edward A Miller and Rita L Yturri-Smith

Identifying number

532-60-8851

1 Description of property ► MillerWhiterunkle Stock

2a Date acquired (month, day, year) ► 1/01/93 b Date sold (month, day, year) ► 12/14/07

3 Was the property sold to a related party (see instructions) after May 14, 1980? If 'No,' skip line 4 ☐ Yes ☒ No

4 Was the property you sold to a related party a marketable security? If 'Yes,' complete Part III. If 'No,' complete Part III for the year of sale and the 2 years after the year of sale ☐ Yes ☐ No

Part I Gross Profit and Contract Price. Complete this part for the year of sale only.

5	Selling price including mortgages and other debts. **Do not** include interest whether stated or unstated		5	2,225,000.
6	Mortgages, debts, and other liabilities the buyer assumed or took the property subject to (see instructions)	6		
7	Subtract line 6 from line 5	7	2,225,000.	
8	Cost or other basis of property sold	8	359,850.	
9	Depreciation allowed or allowable	9		
10	Adjusted basis. Subtract line 9 from line 8	10	359,850.	
11	Commissions and other expenses of sale	11		
12	Income recapture from Form 4797, Part III (see instructions)	12		
13	Add lines 10, 11, and 12		13	359,850.
14	Subtract line 13 from line 5. If zero or less, **do not** complete the rest of this form (see instructions)		14	1,865,150.
15	If the property described on line 1 above was your main home, enter the amount of your excluded gain (see instructions). Otherwise, enter -0-		15	0.
16	**Gross profit.** Subtract line 15 from line 14		16	1,865,150.
17	Subtract line 13 from line 6. If zero or less, enter -0-		17	0.
18	**Contract price.** Add line 7 and line 17		18	2,225,000.

Part II Installment Sale Income. Complete this part for the year of sale **and** any year you receive a payment or have certain debts you must treat as a payment on installment obligations.

19	Gross profit percentage. Divide line 16 by line 18. For years after the year of sale, see instructions		19	0.8383
20	If this is the year of sale, enter the amount from line 17. Otherwise, enter -0-		20	0.
21	Payments received during year (see instructions). **Do not** include interest, whether stated or unstated		21	0.
22	Add lines 20 and 21		22	0.
23	Payments received in prior years (see instructions). **Do not** include interest, whether stated or unstated	23		
24	**Installment sale income.** Multiply line 22 by line 19		24	0.
25	Enter the part of line 24 that is ordinary income under the recapture rules (see instructions)		25	
26	Subtract line 25 from line 24. Enter here and on Schedule D or Form 4797 (see instructions)		26	0.

Part III Related Party Installment Sale Income. **Do not** complete if you received the final payment this tax year.

27 Name, address, and taxpayer identifying number of related party

28 Did the related party resell or dispose of the property ('second disposition') during this tax year? ☐ Yes ☐ No

29 **If the answer to question 28 is 'Yes,' complete lines 30 through 37 below unless one of the following conditions is met. Check the box that applies.**

a ☐ The second disposition was more than 2 years after the first disposition (other than dispositions of marketable securities). If this box is checked, enter the date of disposition (month, day, year) ►

b ☐ The first disposition was a sale or exchange of stock to the issuing corporation.

c ☐ The second disposition was an involuntary conversion and the threat of conversion occurred after the first disposition.

d ☐ The second disposition occurred after the death of the original seller or buyer.

e ☐ It can be established to the satisfaction of the Internal Revenue Service that tax avoidance was not a principal purpose for either of the dispositions. If this box is checked, attach an explanation (see instructions).

30	Selling price of property sold by related party (see instructions)	30	
31	Enter contract price from line 18 for year of first sale	31	
32	Enter the **smaller** of line 30 or line 31	32	
33	Total payments received by the end of your 2007 tax year (see instructions)	33	
34	Subtract line 33 from line 32. If zero or less, enter -0-	34	
35	Multiply line 34 by the gross profit percentage on line 19 for year of first sale	35	
36	Enter the part of line 35 that is ordinary income under the recapture rules (see instructions)	36	
37	Subtract line 36 from line 35. Enter here and on Schedule D or Form 4797 (see instructions)	37	

MARY SCHULTZ LAW PS

March 07, 2020 - 7:56 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36040-7
Appellate Court Case Title:	In re Marriage of Edward A. Miller and Rita L. Yturri-Smith
Superior Court Case Number:	14-3-00584-7

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