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NO. 625195

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

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TERRY DEFOOR AND G.W.C. INC.,

Appellants/Cross-Respondents,

v.

STACEY DEFOOR,

Respondent/Cross-Appellant.

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**ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF  
OF STACEY DEFOOR**

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## I. INTRODUCTION

When Stacey and Terry Defoor’s nineteen-year relationship ended in September 2006, Terry<sup>1</sup> removed Stacey’s name from their bank accounts and jointly-owned corporation, and took sole control over millions of dollars in cash and other valuable assets. Stacey was suddenly left with no income, no liquid assets, and crippling debt. She petitioned for a distribution of the couple’s property; Terry fought her at every step and on every issue. After a nineteen-day bench trial, the court found that Terry’s version of events simply was not credible – that Terry had lied about the nature of the parties’ relationship, fabricated documents to hide Stacey’s ownership of their corporation, and engineered a “sham” transaction for the purpose of removing assets from Stacey.

*Terry and GWC’s appeal.* This case involves two important equitable principles: the committed intimate relationship doctrine<sup>2</sup> and the alter ego doctrine. The trial court found that Stacey and Terry were in an committed intimate relationship. The trial court also found that the couple’s corporation, Appellant GWC, Inc. (“GWC”), was jointly owned by Stacey

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<sup>1</sup> Because the parties use the same last name, this brief refers to them by their first names. No disrespect is intended.

<sup>2</sup> Washington courts now use the term “committed intimate relationship” because it accurately describes the status of the parties, and is less derogatory than “meretricious” relationship. *Olver v. Fowler*, 161 Wn.2d 655, 657 n.1, 168 P.3d 348 (2007).

and Terry, is Terry's alter ego, and that the parties routinely used GWC for their personal expenses. Terry and GWC do not appeal from these rulings.

Instead, Terry and GWC appeal from the trial court's division of only a handful of specific property items. But the court's division of property flows directly from its findings regarding the relationships among the parties. Contrary to Terry's suggestion, the disputed items were not his separate property. Judge Inveen's property valuations, her tracing of community-like assets, and her treatment of GWC's corporate assets are supported by substantial evidence. The trial court properly exercised its discretion in disposing of the assets and liabilities held by the parties, taking into account the economic circumstances of both parties. Indeed, under the judgment Terry retains the great majority of the couple's income and assets. This Court should affirm the trial court's allocation of each of the assets disputed by Terry.

*Stacey's cross-appeal.* Stacey cross appealed from the trial court's failure to consider the role of attorneys' fees in dividing the assets held by the couple and their corporation. Terry financed his scorched-earth litigation strategy – including GWC's and Terry's patently unfounded counterclaims against Stacey – with the couple's quasi-community funds. Not only was Stacey denied access to virtually all of the couple's joint funds that might have paid for her defense, but the trial court also failed to

adequately consider Terry's litigation expenditures in its final property division. The lower court subsequently declined to award any statutory attorneys' fees to Stacey under RCW 23B.08.520, which requires the mandatory indemnification of corporate directors who successfully defend against a lawsuit, or under RCW 23B.16.020, which provides shareholders a right to access certain corporate documents and reimbursement of their attorneys' fees if they have to resort to the courts to obtain them.

Stacey respectfully requests that this Court affirm the trial court's division of the parties' individual and corporate property disputed by Terry, but that the Court remand the case to the trial court to determine the amount of an appropriate award of attorneys' fees to Stacey.

## **II. ISSUES RELATED TO TERRY'S APPEAL OF PROPERTY DIVISION**

1. Did the trial court have the authority to distribute property acquired by Stacey's and Terry's company GWC Inc.?
2. To the extent that any of the disputed property items are held by Terry rather than GWC, did the trial court correctly determine that each item is quasi-community property?
3. Are the trial court's valuations of the two disputed property items supported by substantial evidence?

4. Did the trial court properly exercise its discretion in distributing the disputed items of quasi-community and GWC property?

### **III. ASSIGNMENTS OF ERROR ON CROSS APPEAL**

1. The trial court erred by entering its November 20, 2008 judgment to the extent that the Judgment divides the quasi-community assets of Terry and Stacey and the assets of GWC Inc. without taking into account the parties' respective litigation expenses.

2. The trial court erred in its Finding of Fact No. 65 to the extent that it found that the interim payments Stacey received prior to trial constituted a substantially equal off-set to Terry's unilateral post-separation expenditure of the parties' assets on his litigation expenses.

3. The trial court erred in its March 20, 2009 Order denying any award of attorneys' fees to Stacey under RCW 23B.08.520 or RCW 23B.16.020 & .040.

### **IV. ISSUES RELATED TO ASSIGNMENTS OF ERROR ON STACEY'S CROSS APPEAL**

1. Did the trial court abuse its discretion by dividing the quasi-community assets of Terry and Stacey and the assets of GWC Inc. without taking into account the parties' respective litigation expenses?

(Assignments of Error 1 and 2)

2. Did the trial court abuse its discretion by failing to award any

attorneys' fees to Stacey under RCW 23B.08.520, which requires the mandatory indemnification of corporate directors who successfully defend against a lawsuit? (Assignment of Error 3)

3. Did the trial court abuse its discretion by failing to award any attorneys' fees to Stacey under RCW 23B.16.020 & .040, which provides shareholders a right to access certain corporate documents and reimbursement of their attorneys' fees if they have to resort to the courts to obtain the documents? (Assignment of Error 3)

## V. STATEMENT OF THE CASE

### A. **Prior to September 2006, Stacey and Terry Defoor Had a Long-Term Committed Intimate Relationship.**

Stacey and Terry had a continuous intimate committed relationship that lasted for over 19 years until their separation in September 2006. Finding of Fact<sup>3</sup> ("FF") 3. They were married from 1987, divorced in 1992, but reunited in 1992 after a short separation. FF 4. From 1992-2006, both Stacey and Terry held themselves out as a happy, committed, married couple. FF 11. Everyone who was close to the couple thought they were married, and saw no evidence otherwise. *Id.* Terry identified Stacey as his wife to friends, neighbors, business colleagues, lawyers, and courts. *Id.* The committed intimate nature of the relationship was corroborated by

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<sup>3</sup> Unless specifically noted, all citations to the trial court's Findings of Fact are to findings that Terry and GWC do not challenge, which thus are considered verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

extensive evidence at trial, including witness testimony, financial documents, and anniversary cards. *See, e.g.*, RP 3/4 41-42; FF 28(c); Ex. 346.

Nevertheless, after their separation in September 2006, Terry denied that he had been in a committed intimate relationship with Stacey. For example, Terry opposed any interim financial relief to Stacey, denying the existence of their relationship in sworn testimony. Ex. 595 at ¶ 6 (“I do not recall ever introducing Stacey as my wife”); Ex. 596. He had his accountant file amended tax returns removing references to Stacey as the co-owner of their business. RP 3/13 120. Terry insisted that Stacey submit the nature of their relationship to a full-blown trial, and represented that he would present witnesses and other evidence establishing that he and Stacey were never together.

In the end, however, Terry produced no witnesses to support his characterization of the relationship, and he does not appeal from the trial court’s determination that the couple had an intimate committed relationship. Open. Br. 5. As Judge Inveen concluded, and appellants do not dispute, Terry’s “assertions of a lack of intimacy and lack of committed relationship are not credible.” FF 17.

**B. GWC Served as Stacey and Terry's Alter Ego and Joint Personal Bank Account.**

GWC was initially incorporated in 1997. FF 25. Stacey and Terry were joint and equal owners of GWC. FF 28. Stacey was a director, FF 29, and routinely listed on corporate documents as a high-ranking officer, including president and chairman of the board. FF 28(b).

The Defoors used GWC as their conduit for land acquisition deals. FF 26. Stacey's and Terry's business was to acquire interests in land for the purposes of subdividing the land for residential development. FF 26. Stacey's excellent credit was essential to GWC's success: due to Terry's poor credit and tax liens through 2005, the parties would have been unable to make many of their deals without Stacey solely obligating herself to provide for financing. FF 26.

By 2006, GWC's primary business model was to enter into option contracts with little or no money down, then partner with a residential developer. FF 26. GWC sales agents would contact individual parcel owners for the purpose of acquiring options for the purchase of properties that were suitable for aggregation and subdivision. *Id.* GWC would usually assign its interest in the properties to Camwest, *id.*, which is a large construction and development company. RP 3/10 43. GWC itself did not participate in the marketing or construction process. Rather, GWC would

receive 50% of the value of the property (less land and engineering costs) upon GWC's choice of either preliminary plat or engineering approval. FF 28. The GWC model proved to be very lucrative. For example, GWC received a \$2.3 million assignment fee in 2006 on the West Coast project after investing *zero* cash. RP 3/13 48, RP 3/27 34.

GWC's business model required little overhead. *Id.*; RP 4/10 43. As the trial court found, there was little or no need to retain earnings in the corporation for it to undertake most of its activities, and assets held in GWC's name could be reallocated to Terry or Stacy without being detrimental to GWC's continued operation. FF 30 (challenged by Terry). The court's finding is supported by extensive evidence. For example, prior to their separation, the Defoors regularly removed millions of dollars in GWC funds to make purely personal purchases. *See, e.g.*, RP 3/5 108 (\$1 million in cash for pleasure boat); RP 3/10 12-13 (Terry purchased million-dollar Costa Rica condo). GWC's actual business operations required minimal funds. RP 3/11 78.

Since 1999, GWC has served as Terry's and Stacey's personal bank account, and they used it to pay all of their personal bills and obligations. FF 30. The corporate entity was regularly disregarded, and Terry and Stacey were given free access to all assets. *Id.* For all intents and purposes,

the income of GWC was the income of the parties, and was treated as such.

*Id.*

**C. Since Their Separation in September 2006, Terry Has Exercised Sole Control Over the Couple's Funds And Business Business.**

Stacey and Terry separated in September 2006. FF 7. In July 2006, in anticipation of an impending separation, Terry unilaterally removed Stacey as an officer and director of GWC. FF 28(b), 29; Ex. 288, 289. Terry also secretly removed Stacey's access to GWC's investment account – which had a balance of **\$3,206,284** on September 20, 2009. Ex. 657. When the couple separated, Stacey was able to access only **\$21,000** of the parties' joint funds. FF 34. Terry had taken her name off of all other accounts without warning. *Id.*

Terry's actions left Stacey as the sole obligor on the mortgage on their house in Duvall, Washington (\$6079/month); the mortgage on a vacation home in Marco Island, Florida (\$6079/month); and the mortgage on a Florida condo where Stacey's parents had moved after selling their Branson home to GWC (\$1285/month). FF 34. Even though he knew Stacey had serious pre-existing medical needs, Ex. 39, Terry cancelled Stacey's health insurance without notice. FF 35. Terry also left Stacey with thousands of dollars of credit card debt – including a charge of \$10,000 from Terry's attorneys for litigating against Stacey. FF 34. Although

Stacey was the sole obligator on most of the couple's personal debt, Terry left her with no income and no ability to pay for any these obligations. FF 34. Stacey's debt totaled \$3,487,000. RP 4/1 96.

In contrast, Terry walked away with *no* personal debt. FF 34. With his unrestricted access to the couple's joint funds, Terry used substantial amounts of GWC income and assets to acquire personal assets. FF 31. For example, Terry used GWC funds to purchase a \$2.45 million home in Kirkland and a \$261,185 motor home. *Id.* Terry also charged approximately \$60,000 per month on credit cards, largely for personal items, which GWC paid in full each month. FF 34.

Since 2006, Terry has also exercised sole control over GWC's operations and its business assets. FF 29. Terry was able to move funds freely among numerous GWC accounts, and to negotiate new deals with Camwest and other business partners. For example, Camwest was due to pay GWC its full assignment fee for the Federal Way project in December 2006. RP 4/1 99, Ex. 478. Nevertheless, without Stacey's consent Terry agreed to indefinitely postpone Camwest's obligation to make further payments. Ex. 201. Although Terry has refused to provide a full accounting of GWC's financial activities since the couple's separation, he argues that "at best, the evidence was that entire estate" was "worth no more than \$7 million." Open. Br. 21. But substantial evidence – including

Terry's own repeated statements to third parties – demonstrates that the actual value of the estate is many times greater than Terry's low-ball figure. *See, e.g.*, Ex. 225 (Terry represented to UBS in 2007 that his net worth was \$25m); Ex. 72, 137 (GWC's pre-separation balance sheet showed over \$16 million in assets, including Federal Way property awarded to Terry).

**D. In October 2006, Stacey Filed a Petition Seeking Equitable Relief.**

On October 6, 2006, Stacey filed a petition seeking a division of the parties' assets under the committed intimate relationship doctrine. CP 5. Stacey also sought to establish her half ownership in GWC and a distribution of its assets. CP 4. The case was assigned to Judge Nicole McInnes. On January 22, 2007, Judge McInnes allowed limited interim relief to Stacey, ordering an equal division of a \$775,000 distribution of GWC funds that Terry had recently made to himself. Supp. CP \_\_ (Doc. Sub. 49). The court rejected Terry's assertions that "there is no meretricious relationship and that petitioner has no interest in GWC," and observed that "Of most significance, however, is the fact that GWC essentially funded the personal living expenses of the parties." *Id.* On February 14, 2007, Judge McInnes denied Terry's motion for reconsideration. Supp. CP \_\_ (Doc. Sub. 67).

**E. Terry and GWC Filed a Separate Suit Asserting Various Counterclaims Against Stacey, and Aggressively Opposed Stacey's Efforts to Obtain Interim Relief.**

On October 20, 2006, Terry and GWC filed a separate lawsuit against Stacey. CP 558. Their claims were predicated on the same two central propositions – now abandoned – that Stacey did not have an interest in GWC, and that she and Terry were not in a committed intimate relationship. CP 894-99.

The same lawyers who represented Terry in Stacey's original action also represented GWC and Terry in their suit. CP 563. Shortly after Judge McInnes ordered interim relief to Stacey, Terry moved to consolidate the two actions. CP 888. As soon as the cases were consolidated, GWC's corporate lawyer Terry Thomson appeared for the purpose of filing an affidavit of prejudice against Judge McInnes. Supp. CP \_\_ (Doc. Sub. 78, 79, 90). The case was assigned to a new judge. CP 6.

As the voluminous docket demonstrates, Terry aggressively opposed Stacey's committed intimate relationship and corporate alter ego claims. Terry also successfully resisted any further distributions to Stacey, based on his misrepresentations about their company and relationship. Supp. CP \_\_ (Doc. Sub. 233). Terry's false statements to the court and other litigation tactics are particularly troubling when juxtaposed with his earlier repeated admissions that Stacey owned half of GWC, FF 28(c), and with his sworn

testimony submitted to Judge Mattson in an unrelated case in June 2005 that “Stacey has been my domestic partner since 1987,” and “We have shared our lives together since that time, in sickness and in health.” Ex. 39 at ¶ 3.

**F. After a 19-Day Bench Trial, the Court Entered Judgment in Favor of Stacey on Her Equitable Claims, and Dismissed Terry’s and GWC’s Counterclaims.**

In March and April 2008, Judge Inveen heard evidence regarding the couple’s relationship, the status of GWC, the valuation of the parties’ properties, their proposed property division, and the counterclaims against Stacey. The trial court summarily rejected Terry’s and GWC’s counterclaims against Stacey. FF 67, 68. Appellants do not appeal from their dismissal. The court also rejected Terry’s implausible denial of his relationship with Stacey as “not credible,” FF 17, and his contention that he was the sole owner of GWC. FF 28. Terry and GWC do not appeal from the court’s finding that “The only stock certificate presented showing Respondent as 100% owner was created in April, 2006 by Respondent,” and that its creation “was consistent with Respondent’s consistent pattern of creating false documentation to support his financial affairs.” FF 27.

After examining the voluminous record, the trial court found that the two properties currently disputed by Terry – Sea-Tac and Boren – were

quasi-community and/or GWC asset.<sup>4</sup> CP 309-10. At the conclusion of trial the court also assigned values for the parties' various property interests, including the two valuations now disputed by Terry. CP 320, 323. Most of the court's findings are undisputed.

**G. Summary of Judgment Dividing GWC and Quasi-Community Property.**

Terry presents a skewed version of the court's property division, based on his selective challenge to the trial court's factual findings. *See* Open. Br. 23. The court's actual property distribution is as follows:

**1. Distribution of Enumerated Non-Cash Assets.**

<u>Description</u>	<u>Stacey</u>	<u>Terry</u>
<i>Branson/Boren</i>	29,230	2,630,770 <sup>5</sup>
<i>Sea-Tac</i>	1,625,000	
Kirkland home (net)		699,732
Duvall home (net)	759,000	
Marco Island home (net)	420,000	
Naples condo (net)	105,000	
Letourneux	35,000	
Tobin		550,000
Redmond		50,000
<i>Balance due from Costa Rica condo</i>		725,000
Vehicles/boats/machines	240,000	353,780
Jewelry	46,400	9,000
Country club membership		65,000
<b>Total of "valued" assets:</b>	<b>\$3,259,630</b>	<b>\$5,083,282</b>

<sup>4</sup> The factual record regarding each of these items is discussed in connection with Stacey's argument below. *See, infra*, pp. 21-23, 27-29 (Sea-Tac), 23-24, 29-31 (Branson/Boren).

<sup>5</sup> The valuations and distributions that have been appealed by Terry appear in italics, and are discussed below in Stacey's argument.

## **2. Distribution to Terry of GWC and its Ongoing Business.**

Rather than dissolve GWC, the Judgment instead extinguishes Stacey's interest in GWC, and awards the parties' entire interest in the business to Terry. CP 556. Terry thus receives not only the assets that GWC held when the couple separated in 2006, but also GWC's ongoing business, including millions of dollars in funds received prior to trial. *See, e.g.*, Ex. 656 (\$2.4 million proceeds from selling parcel to State of Washington in January 2007); Ex. 918 (\$1,050,000 interim payment from Camwest on Federal Way project in October 2007); FF 21 (\$400,000 initial proceeds of Costa Rica condo sale in January 2007). Terry is also responsible for any liabilities incurred by GWC, which are under his control and in many cases denied by Terry. CP 317.

The judgment extinguishes Stacey's claim as a creditor of the corporation for the income she would have received from GWC after September 2006 had the couple not separated. FF 31 (after the separation, Terry continued to receive substantial income from GWC); *id.* ("If the parties had not separated, funds would have gone to her as officer compensation or a draw to support the wealthy lifestyle she and Respondent had come to expect").

The only limitation on Terry's sole ownership of GWC going forward is that Stacey was awarded a share in any additional proceeds from pending projects between GWC and Camwest. CP 553. These include the pending Federal Way project involving property that Terry's own expert valued at over \$11 million. RP 4/1 26. Terry appeals from the award to Stacey of *any* interest in the proceeds from pre-existing GWC projects. Open. Br. 34-38.

### **3. Money Judgment in Favor of Stacey.**

The Judgment awards Stacey \$2,233,368.60 in cash. CP 550 This amount was calculated based on the value of the Tobin property, CP 553, on a snapshot of the balance in one of Terry's many bank accounts opened with community funds, CP 313, and on the court's exercise of discretion in equalizing the parties' allocations, CP 320. The amount of the money judgment to Stacey may be increased (but not decreased) depending on the balance in a GWC investment account at UBS. CP 550-51. The money judgment is not limited to any particular funding source, and is entered against both Terry and GWC. CP 550. Terry is awarded the remainder of the funds held in GWC's and the parties' accounts. CP 556.

Terry appeals from the amount of the money judgment to the extent that – according to Terry – the trial court failed to consider (1) GWCA's purported obligations on a line of credit obtained by Terry in 2007; (2) two

sales commissions allegedly owed by GWC. Open. Br. 41-43. Each of these items is discussed in the argument below. *See, infra*, p. 34 (GWCA line of credit); p. 36 (sales commissions).

**H. The Court Denied Stacey's Requests for Attorneys' Fees.**

After they separated, Terry used GWC funds to pay his attorneys' fees. Supp. CP \_\_ (Doc. Sub. 221, at 2). Because the trial court later divided the remaining GWC funds between the couple, Stacey, in effect, paid for half of Terry's attorneys' fees, while she was left to pay all of her fees with post-separation funds. Stacey argued that the court should equalize the division of the parties' assets to reflect the substantial amount of GWC funds Terry used to pay his attorneys. Supp. CP \_\_ (Doc. Sub. 488, at 2-3); RP 9/18 42-43.

In its findings and conclusions, the trial court characterized Terry's post-separation expenditures of joint GWC funds as substantially equivalent to the very limited interim relief obtained by Stacey early in the litigation. FF 65. Stacey then filed a separate motion seeking statutory fees under RCW 23B.08.520 and RCW 23B.16.020 & .040. Supp. CP \_\_ (Doc. Sub. 529). The trial court denied her motion. Supp. CP \_\_ (Doc. Sub. 559). Stacey has cross-appealed from the court's failure to award attorneys' fees. Supp. CP \_\_ (Doc. Sub. 561).

## VI. ARGUMENT FOR ANSWERING BRIEF

### A. Terry Unilaterally Appropriated Community Assets for His Personal Use After the Couple Separated.

Terry argues that he has been “financially crippled” by the trial court’s rulings. Open. Br. 2. But Terry is no pauper. To the contrary, in the over three years since he unilaterally removed Stacey from their joint bank accounts and their joint corporate assets, Terry has enjoyed sole control not only of GWC’s various real estate interests, but also *at least \$8 million in additional community cash:*

Balance in US Bank account 9/06	\$3,206,284	(Ex. 657)
Proceeds of High Hook boat 12/06	\$157,257	(F F 20)
Sale of GWC real estate to State 1/07	\$2,403,939	(Ex. 656)
Proceeds from Costa Rica condo 1/07	\$400,000	(F F 21)
Fairwood assignment fee 3/07	\$225,000	(Ex. 227)
Camwest payment for Fed Way 10/07	\$1,050,000	(Ex. 918)
Costa Rica condo balance 2008	\$725,000	(FF 21)

**Terry cash total: \$8,167,480**

Since the couple’s separation, Terry has been free to spend these community funds both on GWC’s ongoing business as well as his own lavish lifestyle. For example, with their funds, Terry bought a \$2.45 million home, \$225,000 in furnishings, and a motor home. FF 31. He has also used the couple’s funds to spend over \$60,000 per month on other personal expenses, *id.*, and to pay for his attorneys’ fees in this litigation, FF 34. Terry spent only \$1.6 million of joint funds on purchasing an asset that the trial court awarded to Stacey – the Sea-Tac property. FF 49.

In contrast with Terry's post-separation appropriation of the couple's **\$3.2 million bank balance**, Ex. 657, Terry left only **\$21,000** in an account to which Stacey had access. FF 34. And in contrast with Terry's post-separation income of at least **\$5,300,000** in cash derived from GWC assets, Stacey received only a one-time payment in March 2007: before GWC affidavited Judge McInnes, Terry was ordered to split with Stacey \$775,000 of GWC funds he had distributed to himself, i.e., \$387,500 each. Supp. CP \_\_\_ (Doc. Sub. 49). Thus, out of the **\$8,576,480** in joint cash received and documented through trial, Terry has enjoyed **95.2%** of it. Even after the conclusion of this appeal, Terry will still control the majority of what had been the couple's joint funds. Terry's representation to this Court that the trial court left him "entirely responsible for the quasi-community debt, with no way of paying it," Open. Br. 3, is galling and untrue. It is Stacey who has been "financially crippled" in the three years since the couple separated – bereft of funds, solely responsible for the mortgages on the parties' residences in her name, and without the regular income previously provided to *both* parties by GWC.

**B. The Trial Court had Jurisdiction Over and the Authority to Distribute the Disputed Property Items.**

Terry and GWC do not dispute the trial court's two key rulings: that Stacey and Terry had a committed intimate relationship, and that GWC was

their jointly-owned alter ego. Instead, Terry's primary argument on appeal is that the trial court had no authority to award Stacey various enumerated items that Terry characterizes as his "separate property." Open. Br. 1.

Terry's argument fails for two separate reasons. *First*, the disputed items were acquired *by GWC* – and it is undisputed that Stacey continued to have a 50% interest in the corporation even after the couple separated. In making an equitable distribution of corporate assets, the trial court had authority to consider all property held by GWC, including property GWC acquired with their joint assets after the couple separated. *Second*, irrespective of the role of GWC, the trial court correctly determined that each disputed property item should be considered quasi-community property under the committed intimate relationship doctrine because each was acquired with the couple's joint funds.

**1. The Trial Court had Equitable Authority to Resolve the Parties' Claims to Property Held by Their Alter Ego GWC.**

This court may affirm a lower court's judgment on any basis supported by the record. *Clype v. State*, 61 Wn. App. 94, 97, 808 P.2d 777 (1991). As Terry's counsel acknowledged at closing argument, Stacey asserted "two different legal theories. One is that the parties had an intimate and committed relationship and other is that she is actually an owner of GWC." RP 4/4 64. Terry does not dispute that Stacey owns half of GWC,

and that the equitable doctrine of alter ego applies to the corporate relationship. Open. Br. 10. The trial court thus was authorized to distribute *all* of the assets held by GWC itself – regardless of the date the asset was acquired by GWC, and regardless of its characterization as separate or quasi-community property. *See, e.g., Soltero v. Wimer*, 159 Wn.2d 428, 435 n.5, 150 P.3d 552 (2007) (intimate committed relationship doctrine does not “foreclose the possibility of different theories of recovery”).

A trial court’s equitable distribution of corporate assets is reviewed for abuse of discretion. *See Henry George & Sons, Inc. v. Cooper-Grange, Inc.*, 95 Wn.2d 944, 953, 632 P.2d 512 (1981) (abuse of discretion applies to corporate dissolution); *Rabey v. Dep’t of Labor & Industries*, 101 Wn. App. 390, 396-97, 3 P.3d 217 (2000) (standard of review for exercise of equitable authority). The trial court properly exercised its discretion in its division of the disputed GWC assets.

**a. Sea-Tac is a GWC asset.**

In February 2007, Terry formed a new corporation, GWC & Associates, Inc. (“GWCA”). GWC provided the entirety of the operating capital for GWCA. *Id.* It is undisputed that Terry formed GWCA in order to “separate assets and deals from GWC in an attempt to *keep them from [Stacey].*” FF 33 (emphasis supplied).

Sea-Tac is a single two-acre parcel located on International Boulevard near the Seattle-Tacoma International Airport. FF 49. Unlike GWC's typical project, Sea-Tac did *not* involve the aggregation of numerous individual parcels, plat approval for multi-single home residential development, or the participation of Camwest. Terry signed an agreement in July 2007 to purchase Sea-Tac for \$1.6 million. FF 49. Terry purchased Sea-Tac in the name of his new company GWCA, rather than GWC, and created a written joint venture agreement between GWC that purports to govern the property. FF 49. Under the purported agreement, GWCA received title to the property, and 75% of any proceeds from the project. Ex. 951.

The trial court found that the agreement giving GWCA title to the Sea-Tac property was a "sham" and "designed simply to remove the assets of GWC from Stacey Defoor." FF 49 (challenged by Terry). The trial court's factual and credibility findings are supported by substantial evidence. GWC provided *all* of the funds for the purchase. RP 3/31 8. Although Terry originally testified that the joint venture agreement protected GWC by giving it a security interest in the Sea-Tac property, RP 3/31 32, Terry conceded on cross examination that was untrue. RP 3/31 84-85. Terry's assertion that GWC was receiving interest on its \$1.6 million contribution likewise turned out to be untrue. RP 3/31 86.

Terry also challenges the court’s finding that the purported GWCA/GWC agreement was a sham on the ground that the arrangement “was similar to earlier GWC/Camwest agreements.” Open. Br. 27. To the contrary, the prior 50/50 Camwest agreements involved the assignments of GWC’s interest in multiple parcels that would then be aggregated so Camwest could build dozens or hundreds of single-family homes. In contrast, Sea-Tac is a single two-acre urban parcel. FF 49. Camwest itself is an experienced and well-capitalized residential builder and developer. RP 3/10 43. Unlike Camwest, GWCA was a brand-new company with no assets and no similar development experience. This Court should affirm the trial court’s factual findings that the purported deal was a “sham,” and that Sea-Tac is a “GWC Inc. asset.” FF 49.

**b. The Branson Property, Including the Boren Parcel, is a GWC Asset.**

Branson, Missouri is a well-known recreation and vacation destination. FF 48. Stacey’s family, the Leas, owned approximately 100 lots in the area. Prior to their separation, Terry and Stacey, with the assistance of Stacey’s parents, assembled many additional lots. *Id.* The value of these properties was as an assemblage, rather than as individual lots. *Id.* GWC paid Stacey’s elderly parents only \$40,000 for their

substantial interest based on Terry's representations that they would reap a part of the ultimate benefit of the development. *Id.*

The Leas left their home and moved to a condo in Naples Florida, relying on Terry's representation that he would be financially responsible for the condo. RP 3/18 8, 10. Terry abandoned the Leas along with their daughter. RP 3/18 41 (Terry sued Leas for a \$1 million); RP 3/18 33 (Terry threatened to leave Stacey broke). Terry's self-serving version of the Branson transactions, Open. Br. 10-13, is simply untrue. As the trial court found, "Respondent's own actions or those of the title company were the cause of any failed transaction with the Leas concerning their property in Missouri." FF 68.

After the couple separated, GWC purchased the Boren property in Branson. RP 3/24 126. While Boren is geographically separate from the other Branson properties, it is still part of the Branson development, and was purchased by GWC. Open. Br. 17. Terry used community funds to purchase the Boren property, RP 3/24 33, and the Boren parcel was among the assets owned by GWC at trial. The trial court correctly concluded that the entire Branson property, including Boren, was a GWC asset. CP 309. This Court should affirm the trial court's property distribution on the ground

that the only two properties that appellants contend were not before the court – Sea-Tac and Boren – were GWC assets.<sup>6</sup>

**2. This Court May Affirm the Judgment on the Separate Ground that Sea-Tac and Boren were Quasi-Community Property for Purposes of the Committed Intimate Partner Doctrine.**

The trial court had the authority to award each of the disputed items to Stacey as quasi-community property under the committed intimate partner doctrine because *each was acquired with community funds*. The division of property between parties in a committed intimate relationship is reviewed for an abuse of discretion. *Soltero*, 159 Wn.2d at 433.

The character of property as separate or community is established at the point of acquisition. *Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). In the dissolution of a committed intimate relationship, quasi-community property is that “that would have been characterized as community property had the parties been married.” *Connell v. Francisco*, 127 Wn.2d 339, 349, 898 P.2d 831 (1995). Classification of property as

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<sup>6</sup> The factual background section of Terry’s appeal brief includes a discussion of the Fairwood project, but Terry does not actually ask this Court for any relief from the trial court’s treatment on that project. Open Br. 17-18. Fairwood involved an assignment agreement between Camwest and Terry’s new company GWCA. The trial court determined that an initial assignment fee of \$225,000 received by GWCA in March 2007, Ex. 227, “shall be reallocated to GWC, Inc,” because the “the primary labor and efforts expended by Respondent culminating in the assignment to Camwest should be considered to have occurred pre-separation.” *Id.* Terry does not assign error to this finding. *See also* RP 3/31 10-13 (Terry provided false testimony regarding the timing of Fairwood project based on nonexistent “notes”). In any event, the trial court did not list the Fairwood fee among the assets awarded to either party or used in its valuation.

separate or community presents mixed question of law and fact. The time of acquisition, method of acquisition and intent of donor, for example, are questions for trier of fact, but whether the facts, as found, support classification of property as separate or community is for the court to determine as a matter of law. *Marriage of Martin*, 32 Wn. App. 92, 94, 645 P.2d 1148 (1982). “However, factual findings upon which the court’s characterization is based may be reversed only if they are not supported by substantial evidence.” *Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002).

Terry does not dispute that he purchased Sea-Tac and Boren with GWC funds. FF 48, 49, Open. Br. 17. Property has the “same character as the funds used to buy it.” *Skarbek*, 100 Wn. App. at 449. Property purchased with community funds is community property. *Marriage of Marzetta*, 129 Wn.2d 607, 619, 120 P.3d 75 (2005), *rev’d on other grounds*, *McCausland v. McCausland*, 159 Wn.2d 607, 152 P.3d 1013 (2007). Community property can be changed to separate property only by the agreement of both parties. *Marriage of Mueller*, 140 Wn. App. 498, 504, 167 P.3d 568 (2007). This Court should affirm the court’s conclusion that Sea-Tac and Branson/Boren are quasi-community property for purposes of the committed intimate relationship doctrine.

**C. The Trial Court's Valuations of Sea-Tac and Boren are Supported by Substantial Evidence.**

The parties devoted days of trial testimony and voluminous exhibits to the valuation of numerous real property interests. Terry challenges the trial court's valuation of just two items: Sea-Tac and Branson. Open. Br. 45-49.

Property valuation is a question of fact that is reviewed for substantial evidence. *Marriage of Hall*, 103 Wn.2d 236, 246, 692 P.2d 175 (1984). The trial court has broad discretion in setting a date on which to value property. *Koher v. Morgan*, 93 Wn. App. 398, 404, 968 P.2d 920 (1998); 20 Kenneth W. Weber, WASH. PRACTICE: FAMILY AND COMMUNITY PROP. LAW § 32.7, at 167 (1997) (“The court not only may select a valuation date that is fair to both parties, but ... is free to select a different valuation date for different assets if to do so would bring about a fair distribution of the assets.”). The court may rely on a wide variety of evidence regarding value, including values provided by the owners. *State v. Larson*, 54 Wn.2d 86, 88, 338 P.2d 135 (1959). A valuation within the scope of evidence presented at trial will not be overturned. *Marriage of Matthews*, 70 Wn. App. 116, 122, 853 P.2d 462 (1993).

**1. This Court Should Affirm the Trial Court's  
Valuation of Sea-Tac.**

The trial court valued the Sea-Tac property at \$1,625,000, CP 320, reflecting the amount of its purchase price just six months before trial. Substantial evidence supports the court's valuation of this single two-acre parcel. Ex. 554 (\$1.62m purchase price); *see also State v. Reano*, 67 Wn.2d 768, 772, 409 P.2d 853 (1966) (recent transaction is evidence of value).

Terry argues that the value should instead be \$2.65 million, based on the valuation he used in the sham GWC/GWCA joint venture agreement for GWCA's "contract rights to the Sea-Tac property." Open. Br. 14; *see also* Ex. 951, at 14. However, substantial evidence supports the court's finding that the purported joint venture arrangement was a "sham." *See, supra*, pp. 22-23. Terry continues his pattern of false financial statements by making further misrepresentations to this Court. According to Terry, in the purported GWCA/GWC joint venture agreement "signed **July 1, 2007**, GWC contributed \$1.65 million cash and GWCA contributed the contract rights to the Sea-Tac property, which U.S. Bank **had appraised** at \$2.65 million." Open. Br. 14 (emphasis supplied). In fact, Terry testified that he came up with the valuation of the purported GWCA contract rights in Exhibit A to the joint venture agreement based on his own opinion, not an appraisal. RP 3/31 15-16. And Terry did not submit at trial the purportedly

“undisputed” U.S. Bank appraisal, Open. Br. 14, which is dated actually *September 7, 2007* – two months after the purported agreement. CP 508.

Terry also disputes the trial court’s valuation on the ground that during closing arguments, Stacey’s attorney noted that Terry – not Stacey – had valued Sea-Tac at \$2.65 million, and argued that if Terry retained Sea-Tac, Stacey should be awarded the corresponding amount of additional cash. Open. Br. 45-46 (citing RP 4/4 107-08). But the court did not award Sea-Tac to Terry, and counsel’s unsuccessful argument is not a binding admission of value. Rather, the trier of fact determines property value. Because the trial court’s valuation of Sea-Tac is supported by substantial evidence, this Court should affirm.

**2. This Court Should Affirm the Trial Court’s Valuation of Branson.**

The trial court determined that the total value of the Branson properties, including Boren, is \$2,660,000. CP 323. The trial court found that the parties’ interest in the Branson project “has a substantially higher value than as individual properties,” and can be developed into “182 lots and the Boren parcel into townhomes.” FF 48 (challenged by Terry). The trial court’s findings are supported by substantial evidence. In particular, substantial evidence supports the \$2,660,000 valuation. *See, e.g.*, RP 3/11 91 (co-owner Stacey testified that she would have accepted an award of

Branson valued at \$2.6 million value); RP 3/6 54 (expert valued specific property interest at \$2,660,000).

Terry disputes the testimony of Stacey's expert Mr. Kilpatrick. Open. Br. 47-48. But "credibility determinations are solely for the trier of fact" and "cannot be reviewed on appeal." *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). And Terry's own experts declined to offer any value for GWC's aggregated interests in the Branson parcels, limiting their analysis instead to the cost basis of individual parcels. RP 3/31 102,145 (expert Duffy did not value property, only GWC books, and gave past performance no weight).

Terry also argues that the trial court should have valued Branson based on its original acquisition costs, comparing it to Sea-Tac. Open. Br. 49. Unlike the single-parcel Sea-Tac property, however, Branson is an aggregation of multiple parcels intended for multi-home residential development. FF 48. The trial court did not abuse its discretion valuing the two properties differently.

Finally, Terry disputes the trial court's valuation because he claims that the Branson project "came to a halt" at the end of 2006. Open. Br. 13. However, Terry testified that he was not "abandoning any of the GWC projects." RP 4/25 27. And in their counterclaim alleging that Stacey's conduct had lowered the value of Branson, Terry and GWC contended that

the *reduced* revenue that will be generated to GWC from the Branson development will still be over \$15 million. RP 3/26 28. The court's valuation of Branson is within the range of values presented at trial, and is supported by substantial evidence.

**D. The Trial Court Properly Exercised its Discretion in Distributing the Parties' Assets and Liabilities.**

A trial court "sitting in equity exercise[s] broad discretion"  
*Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 (2006).

Terry has failed to establish the lower court abused its discretion.

**1. Terry's Award of GWC is Properly Subject to Stacey's Interest in Part of the Proceeds from Pending Projects.**

The trial court awarded one of the couple's key joint assets – GWC itself – to Terry. CP 323. Because of the difficulty in determining the current value of GWC's contract arrangements with Camwest, and rather than merely liquidate the company, the award to Terry is subject to Stacey's right to share in the proceeds of the GWC's existing contracts with Camwest. CP 319. Contrary to Terry's suggestion, the court did not order him to pay "maintenance." Open. Br. 37.

Terry challenges the court's decision on the ground that it makes the parties "co-owners of the Camwest contract rights." Open. Br. 37 (citing *Shaffer v. Shaffer*, 43 Wn.2d 629, 630, 262 P.2d 763 (1953)). To the contrary, Terry will be the sole owner of GWC going forward. Terry also

contends that the judgment fails to leave the couple's "respective interests in their property ... definitely and finally determined." Open. Br. 37 .

However, courts in dissolutions routinely award major assets (such as the family home) to one partner, subject to an obligation to subsequently compensate the other partner. *See, e.g., Hartley v. Liberty Park Assoc.*, 54 Wn. App. 434, 438, 774 P.2d 40 (1989); *von Herberg v. von Herberg*, 6 Wn.2d 100, 121, 106 P.2d 737 (1940). Indeed, in the case cited by Terry, the court recognized that imposing a lien in favor of one spouse on property awarded to the other is *less* likely to lead to subsequent disputes than merely leaving the parties co-owners of the asset. *Byrne v. Ackerlund*, 108 Wn.2d 445, 449-50, 739 P.2d 1138 (1987). In this case, the court provided Stacey and Terry with a definite and final determination of their rights by setting forth the "specific disposition of each asset which informs the parties of what is going to happen to the asset and upon what operative events." *Id.*

As the trial court found, and Terry does not dispute, the "appropriate method of dividing any future income from the current agreements is to increase the allocation to Respondent over the course of time." FF 44. The court's exercise of discretion is particularly appropriate given that Terry has had sole control since 2006 over the parties' joint assets. Indeed, the only reason that any "[e]xtensions will be necessary" for the Federal Way projects, Open. Br. 35, is that Terry unilaterally agreed to release Camwest

from paying assignment fees that came due while this case was pending, Ex. 201 – even though Terry’s own real estate expert valued the Federal Way properties at over \$11 million. RP 4/1 26. The trial court properly exercised its discretion in awarding GWC to Terry, while compensating Stacey with a portion of proceeds received during a reasonable period after the entry of judgment.

**2. The Trial Court Properly Considered Terry’s Receipt of the Proceeds of the Costa Rica Condo Sale.**

In determining the amount of the money judgment in favor of Stacey, the court considered various quasi-community assets to which it assigned values, including a \$725,000 note representing the balance of the \$1.1 million Terry received from selling the couple’s condo in Costa Rica. CP 323. Terry contends that the valuation is improper because he chose to accept a discounted payment in 2007. Open. Br. 40. Terry cites *Marriage of White*, 105 Wn. App. 545, 20 P.3d 481 (2001), in support of the proposition that if a party “disposed of an asset before trial, the court simply has no ability to distribute that asset at trial.” *White*, 105 Wn. App. at 549. But *White* is distinguishable because the Costa Rica asset existed at the time of the parties’ separation. It was within the court’s discretion to value these assets at the time of separation as opposed to the date of trial for purposes of calculating the final distribution. *Marriage of Griswold*, 112 Wn. App. at

351 (affirming trial court's decision to value family home at the time of separation). The trial court, using its equitable powers, may also enter judgment against one party that accounts for wrongful transfers. *Angelo v. Angelo*, 142 Wn. App. 622, 646, 175 P.3d 1096 (2008). The court did not abuse its discretion in its treatment of the Costa Rico condo proceeds.

**3. The Trial Court Correctly Rejected Terry's Argument that Sea-Tac is Encumbered by Debt.**

Terry argues that trial court abused its discretion by awarding Sea-Tac to Stacey "free and clear" of the "debt associated with its acquisition." Open. Br. 29. Yet it is undisputed that the Sea-Tac property itself is unencumbered by any debt. RP 3/31 83. The trial court properly awarded Sea-Tac to Stacey as-is.

Nevertheless, Terry argues that that this Court should make Stacey responsible for the balance on a \$1.5 million line of credit that Terry obtained for GWCA. Open. Br. 30-31. According to Terry, he used this credit line as the mechanism to purchase Sea-Tac for \$1.62 million. But the trial court did not credit Terry's assertion that GWC's \$1.62 million was merely contributed "as collateral for the line of credit that GWCA used to acquire Sea-Tac." Open. Br. 16. As the court concluded, the GWC/GWCA transaction was a "sham." FF 49 (challenged by Terry). As discussed above at pp. 22-23, substantial evidence supports the court's

characterization of the transaction, including this purported financing arrangement. As the trial court found, Terry engaged in a “consistent practice of creating false documentation to support his financial affairs.” FF 27. The court’s characterization of the GWCA/GWC arrangement as a sham is further corroborated by Terry’s practice of moving large sums between accounts and assets. *See, e.g.*, Ex. 54 (Terry moved over \$6 million in and out of a single account in October 2006); RP 3/18 77 (Terry purchased a Kirkland home in January 2007 with \$2.45 of GWC funds, then immediately refinanced and removed \$1.8 million in cash); RP 3/31 70 (Terry converted \$2.9 million in GWC account to cashiers checks).

Terry also argues that the court must “take into consideration the line of credit” by “deducting the amount of the outstanding obligation on the line of credit.” Open. Br. 32. But a court’s allocation of a couple’s assets and liabilities for purposes of distribution between the parties is separate from determining the rights of third parties. *Marriage of Wallace*, 111 Wn. App. 697, 709, 45 P.3d 1131 (2002). The trial court did not abuse its discretion in calculating the amount of the money judgment to Stacey based in part on the balance in the UBS investment account, regardless of Terry’s potential obligations to parties other than Stacey.

Terry’s reliance on *Dizard v. Getty & Damson*, 63 Wn.2d 526, 387 P.2d 964 (1964), is misplaced because *Dizard* involved third-party claims.

Moreover, unlike the separated husband in *Dizard*, Terry improperly seized the couple's joint corporation and other assets. As the trial court concluded, "It is just and equitable to award to the Respondent all putative and real debts of GWC, due to the fact that these debts are denied by, or largely controlled by Respondent. Furthermore, Respondent is being awarded the corporation and its goodwill." Conclusion of Law ("CL") 6. The trial court did not abuse its discretion in allocating to Terry the debt he chose to incur after the couple's separation.

**4. The Trial Court Correctly Found that Two Other Alleged Potential GWC Liabilities Were Insufficiently Substantiated for Purposes of its Calculation.**

As the court found, Terry had a practice of carrying unsubstantiated debts or liabilities on the GWC books to avoid unfavorable tax implications. FF 66 (challenged by Terry). For example, for several years GWC carried on its books a phantom \$800,000 debt to Olympic Properties in violation of accepted accounting principles. RP 3/11 5, 20.

Terry appeals from the trial court's failure to include in its calculation two sales commissions allegedly owed by GWC. Open. Br. 42-43. The trial court determined that the items listed on GWC's books and appealed by Terry – \$100,000 and \$325,000 commissions claimed by Ed Flannigan and Shelly Hyatt – should not be counted as actual GWC liabilities when calculating the value of assets and liabilities to be divided

between the parties. FF 66. This finding is supported by substantial evidence. *See, e.g.*, RP 3/11 5, 20 (Terry's practice of carrying phantom debt); Ex. 1002 (Terry himself vigorously disputes the Hyatt claims); RP 3/11 116 (Flannigan has taken no action to pursue claim).

**5. The Trial Court's Final Division Properly Considered the Circumstances of the Parties.**

Judge Inveen reached her findings and conclusions after considering nineteen days of testimony and hundreds of exhibits. She was in the best position to determine the credibility of witnesses, and to weigh the parties respective claims. Terry has failed to sustain his heavy burden of demonstrating that the trial court abused its discretion.

Terry's brief conspicuously neglects any discussion of *Stacey's* circumstances. Yet in distributing the parties' assets and liabilities, the trial court properly considered Stacey's obligations, health problems, now-devasated credit, and general financial situation – including the substantial debts that Terry left Stacey after cutting off her income from GWC.

Terry's accusation that "trial court deliberately left Terry with no cash with which to run his businesses," Open. Br. 43, is improper and incorrect. In addition to the specific assets enumerated in the judgment, Terry continues to benefit from his misappropriation of millions of dollars in joint funds. *See, supra*, pp. 18-19. Moreover, substantial evidence supports

the court's findings that "There was little or no need to retain earnings in the corporation for it to operate for most of its activities," and that "Although many assets and financial accounts are currently in the name of GWC, they may be reallocated to the parties as their separate assets without being detrimental to the continued operation of GWC." FF 30 (challenged by Terry). *See, supra*, p. 8.

Finally, in making a property distribution, a court may consider one party's "waste or concealment of assets." *Marriage of Wallace*, 111 Wn. App. at 708. Substantial evidence supports the trial court's finding that Terry "has shown a continued practice of deception for purposes of strengthening his financial situation." FF 37 (challenged by Terry). Each of the court's illustrative examples identified in Finding 37 is well documented. *See, e.g.*, Ex. 11, 596 (false court declaration re marital status and stock certificates); RP 3/11 5, 20 (misleading company books). The trial court fully considered the parties' circumstances, and this Court should affirm the trial court's distribution of the parties' assets and liabilities.

## **VII. ARGUMENT FOR STACEY'S CROSS-APPEAL**

The trial court should have awarded Stacey at least some portion of her attorneys' fees for three reasons – one of which is equitable, and two of

which are mandated by statute. The trial court abused its discretion,<sup>7</sup> however, and denied her requests for fees.

*First*, Terry cut off Stacey's access to their joint funds and paid his attorneys' fees with those funds *before* the court divided them between the couple, thus leaving Stacey to pay her attorneys' fees with her post-division share of assets and, in effect, paying half of Terry's fees. The trial court should have ordered Terry to pay at least half of Stacey's attorneys' fees to put the parties on an equal footing.

*Second*, Washington law requires a corporation to indemnify its directors for costs incurred in successfully defending against a lawsuit. Here, Stacey was a director of GWC and successfully defended herself against a lawsuit by Terry and GWC; the trial court should have awarded her attorneys' fees for the cost of doing so.

*Third*, when a corporation denies a shareholder the right to inspect certain corporate documents and the shareholder resorts to the courts to gain access, Washington law requires the company to pay the shareholder's attorneys' fees. Terry refused Stacey access to GWC documents by vigorously denying her status as a shareholder. Because Stacey proved her

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<sup>7</sup> This Court "review[s] a trial court's denial of attorney fees for an abuse of discretion." *Emmerson v. Weilep*, 126 Wn. App. 930, 940, 110 P.3d 214 (2005).

shareholder status at trial, Terry must pay her fees for establishing a fact about which he was well aware.

**A. Because Terry Used the Couple's GWC Funds to Pay His Attorneys' Fees, Stacey Was Entitled to be Reimbursed for Half of Her Attorneys' Fees, As Well.**

For many years, both Terry and Stacey used GWC as their "personal bank account" "to pay all of their personal bills and obligations." FF 30.

After the couple's separation, however, Terry "seized control of GWC and all of its accounts and assets," FF 29, thus leaving Stacey with no access to her funds and documents. FF 34. Terry then "used substantial amounts of GWC income and assets to acquire personal assets" and to pay his attorneys' fees. FF 31, 34; Ex. 219, at 2; Supp. CP \_\_ (Doc. Sub. 221).

His attorneys' fees were undoubtedly a substantial sum: this litigation has been pending since October 2006; Terry has vehemently litigated every aspect of this case, even filing his own lawsuit against Stacey; and the parties spent 19 days in trial. Indeed, from January to May 2007 alone, Terry spent at least \$163,500 on his attorneys, Supp. CP \_\_ (Doc. Sub. 217, Ex. E), and, if Stacey's legal bills in the trial court, which already top \$1.39 million, are any indication, Terry's fees must be in the same ballpark. In short, Terry's spending on *his* legal fees significantly impacted the *couple's* assets before they were divided between them.

Having been cut off from GWC funds by Terry's unauthorized action, Stacey did not fare as well as Terry after their separation. Stacey had no money to pay her own attorneys – she even proceeded pro se for a brief time – and her counsel have filed an attorney's lien on her judgment. Doc. Sub. 557. Accordingly, Stacey will pay for her attorneys' fees using funds she will receive after the division of the couple's assets. Terry also stuck Stacey with a \$25,000 credit card bill that included a \$10,000 charge for *his* attorneys. FF 34.

While the superior court accounted for some of Terry's post-separation personal spending spree when dividing the couple's assets, it did not account for Terry paying his attorneys' fees using pre-division GWC funds. Rather, the court simply found that Stacey's half of the *equal* division of community funds that Stacey received to cover her living expenses was "a substantially equal off-set to [Terry's] unilateral post-separation expenditure of the parties' assets." FF 65 (challenged by Terry). But that finding, as explained above, at pp. 18-19, is demonstrably false – Terry's post-separation spending far out-paced any funds that Stacey received. Thus, at the time of the court's division, Terry's spending on *his* legal fees had reduced the *couple's* funds, which, in turn, reduced Stacey's eventual share of those funds, from which she then has to pay her own legal bills. By dividing GWC's assets *after* Terry had used community assets to

pay his own attorneys' fees, Terry in effect paid only half of his attorneys' fees – and Stacey paid the other half. Because GWC's funds belonged equally to both parties, the trial should have awarded Stacey at least half of her attorneys' fees.

**B. Stacey is Entitled to Indemnification for Attorneys' Fees She Incurred in Successfully Defending Against GWC's Lawsuit.**

After Stacey filed her Petition for Distribution of Property, Terry filed his own lawsuit against Stacey on behalf of himself and GWC. Terry alleged that Stacey trespassed on GWC premises, converted GWC property (i.e., documents), and tortiously interfered with GWC's contract to purchase property in Branson. The trial court made short work of these claims, finding them without merit and dismissing them with prejudice. FF 67-68, CL 7. Terry does not assign error to those findings on appeal.

Under Washington law, “[u]less limited by its articles of incorporation, a corporation *shall* indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the corporation against reasonable expenses incurred . . . in connection with the proceeding.”<sup>8</sup> RCW 23B.08.520 (emphasis supplied). Stacey meets these criteria and is entitled to indemnification for her attorneys' fees.

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<sup>8</sup> The Articles of Incorporation for GWC are silent on the issue of indemnification, Ex. 908, and therefore do not change the statute's default rule of indemnification.

Stacey was a director of GWC. She “was routinely listed on corporate documents as a high ranking officer, including president, and chairman of the board.” FF 28(b). And she held those positions until Terry attempted unilaterally to seize control of GWC and remove her as a director and officer without her knowledge or consent in anticipation of their impending separation. FF 28(b), 29.

Stacey was “wholly successful” in defeating Terry and GWC’s claims – the trial court dismissed them with prejudice. CL 7. Nevertheless, the trial court found that the mandatory indemnification statute did not apply because Stacey was not “a party because of being a director of GWC.” Supp. CP \_\_\_\_ (Doc. 559).

No Washington case law interprets the “because of” language of RCW 23B.08.520. Other state courts interpreting similar indemnification statutes have given such statutes a “broad[] interpret[ion],” *Rudebeck v. Paulson*, 612 N.W.2d 450, 455 (Minn. Ct. App. 2000), in particular “constru[ing] the term[] ‘because’ ... in an expansive, rather than restrictive fashion.” *Weisbart v. Agri Tech, Inc.*, 22 P.3d 954, 957 (Colo. Ct. App. 2001). Accordingly, a director is entitled to indemnification if she “successfully defends against claims of personal liability that arise from or have a nexus to [her] corporate position.” *Witco Corp. v. Beekhuis*, 38 F.3d 682, 692 (3d Cir. 1994); accord *Emprise Bank v. Rumisek*, 215 P.3d 621,

633 (Kan. Ct. App. 2009). To trigger mandatory indemnification, a director need not be sued solely because she was a director, but rather “sued, *at least in part*, because [s]he was a director.” *Heffernan v. Pacific Dunlop GNB Corp.*, 965 F.2d 369, 372 (7th Cir. 1992) (emphasis supplied); *accord Weisbart*, 22 P.3d at 958.

To determine if a person was sued in part because she was a director, courts “look[] at the substance of the allegations and the nature and context of the transaction giving rise to the complaint in the underlying action.” *Weisbart*, 22 P.3d at 958. Here, Terry and GWC sued Stacey because in early October 2006 she purportedly “entered the business premises of GWC,” “demanded access to corporate records,” and “took business records of the company . . . without any right, title or interest therein.” CP 896-97 ¶¶ 15-18, 21. However, as a director of GWC, Stacey *did* have an interest in accessing its business premises and corporate documents. Terry and GWC’s lawsuit directly challenges Stacey’s authority as a director and, therefore, “ha[d] a nexus to [her] corporate position.” *Witco Corp.*, 38 F.3d at 692. Under Washington’s mandatory indemnification statute, the trial court should have ordered GWC to reimburse Stacey for the fees she incurred in successfully defending against Terry and GWC’s lawsuit.

**C. Stacey is Entitled to Attorneys' Fees for GWC's Failure to Provide Her Corporate Records Because She Purportedly Lacked Shareholder Status.**

As a shareholder of GWC, Stacey was entitled to copies of certain corporate documents and to attorneys' fees if GWC refused her access. Specifically, under Washington law, any "shareholder of a corporation is entitled to inspect and copy . . . any of the records of the corporation described in RCW 23B.16.010(5) if the shareholder gives the corporation notice of the shareholder's demand at least five business days before [she] wishes to inspect and copy." RCW 23B.16.020(1). The records described in RCW 23B.16.010(5), include the following: bylaws or restated bylaws and all amendments; minutes of shareholders' meetings, and records of corporate actions approved by shareholders without a meeting; and initial report or most recent annual report delivered to the secretary of state.

Similarly, upon five days notice, a shareholder may also "inspect and copy ... [e]xcerpts from minutes of any meeting of the board of directors, ... records of corporate actions approved by the shareholders or board of directors," and "[a]ccounting records of the corporation" if the "shareholder's demand is made in good faith and for a proper purpose," "describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect," and the "records are directly connected with the shareholder's purpose." RCW 23B.16.020(2) & (3).

If a shareholder makes such a request and requires a court's order before the corporation will comply, the court "*shall* also order the corporation to pay the shareholder's costs, *including reasonable counsel fees*, incurred to obtain the order *unless* the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded." RCW 23B.16.040(3) (emphasis supplied).

Stacey requested the following documents from GWC: minutes of meetings of the board of directors, minutes of meeting of shareholders, consents in lieu of meetings, financial statements, initial and annual reports submitted to the State. Ex. 234, at 4. Under RCW 23B.16.020, these are all documents to which a shareholder is entitled. Even after Stacey was forced to file suit to enforce her shareholder rights, Terry's and GWC's document production was incomplete, missing meeting minutes, bylaw revisions, and annual reports. Supp. CP \_\_ (Doc. Sub. 184 ¶ 4); Supp. CP \_\_ (Doc. Sub. 178, at 11). The incomplete production forced Stacey to subpoena GWC's counsel, Terry Thomson, for these records. Supp. CP \_\_ (Doc. Sub. 230, Ex. A).

GWC fought Stacey's request for the documents, arguing, *inter alia*, that "it had a reasonable basis for doubt about the right of [Stacey] to inspect the records demanded" because it "had a reasonable basis to doubt

[Stacey's] shareholder status." Supp. CP \_\_ (Doc. Sub. 539, at 3-4). Terry's purported basis for denying Stacey access to GWC document is consistent with his disingenuous litigation strategy of denying Stacey's ownership in GWC. In the middle of the parties' dispute over Stacey's request for GWC documents, when Stacey sought an additional distribution of the couple's funds to cover her living expenses, Terry swore that "Stacey does not have an ownership interest in GWC. She has never had an ownership interest in GWC. . . . No GWC stock has ever been issued to Stacey." Supp. CP \_\_ (Doc. Sub. 221, at 2); *see also* CP 894 ¶ 2. Based on Terry's representations, the court reserved for trial the threshold question of whether Stacey was a shareholder. Supp. CP \_\_ (Doc Sub. 233, at 2).

At trial, Stacey proved that she was an equal shareholder of GWC, FF 28, and Terry does not appeal that finding. Terry had no good faith basis for doubting Stacey's shareholder status and right to inspect GWC records. He knew that she was a shareholder of GWC; indeed, he fabricated the document purporting to exclude her as one. FF 27.

Stacey requested the GWC documents for a legitimate purpose – to establish the value of the parties' interests in GWC and its assets for the purpose of dividing them between her and Terry. Proving her shareholder status and gaining access to GWC corporate documents caused Stacey to incur needless attorneys' fees. This Court should reverse the superior

court's order denying her attorneys' fees incurred in establishing her shareholder status and in litigating GWC's refusal to allow her access to the corporate records covered by RCW 23B.16.020.

### VIII. ATTORNEYS' FEES ON APPEAL

Pursuant to RAP 18.1, Stacey requests that this Court award her attorneys' fees on appeal on two grounds. **First**, if Stacey prevails on her cross-appeal, this Court should also grant her attorneys' fees for her cross-appeal. "In general, a prevailing party who is entitled to attorney fees below is entitled to attorney fees if [she] prevails on appeal." *Martin v. Johnson*, 141 Wn. App. 611, 623, 170 P.3d 1198 (2007). Because Stacey was entitled to attorneys' fees in the trial court for the reasons given above, she should also receive fees for her cross-appeal.

**Second**, regardless of its resolution of the cross appeal, this Court should award Stacey her attorneys' fees for defending against Terry's appeal. The committed intimate relationship doctrine is an equitable doctrine established by courts and analogized to marriage when appropriate to ensure "a just and equitable disposition of the property." *Marriage of Lindsey*, 101 Wn.2d 299, 304, 678 P.2d 328 (1984). While this Court has held that the **statute** providing for attorneys' fees upon the dissolution of a marriage, RCW 26.09.140, does not extend to committed intimate relationship relationships, *Foster v. Thilges*, 61 Wn. App. 880, 887-88, 812

P.2d 523 (1991), as a matter of *equity*, the Court should make fees available for the division of assets at the end of such relationships.

This approach is particularly appropriate given the domestic partnership legislation that went into effect in December 2009. Senate Bill 5688 (2009-10). Now both married couples and registered domestic partners in the process of dissolving their relationships have the benefit of attorneys' fees when appropriate – but similarly-situated couples in committed intimate relationships going through the same process are left without that basic protection. As this case demonstrates, the consequences of this disparate treatment can greatly disadvantage one partner. This Court should remedy that disparity and hold that, as an equitable matter, attorneys' fees are available for committed intimate relationships under similar circumstances as married couples and registered domestic partners.

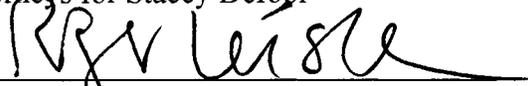
## **IX. CONCLUSION**

Stacey respectfully requests that this Court affirm the trial court's property division, and that it remand the case to the trial court to determine the amount of an appropriate award of attorneys' fees to Stacey.

SUBMITTED this 16th day of December, 2009.

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**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington that true and correct copies of the **ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF STACEY DEFOOR** attached to this **CERTIFICATE OF SERVICE** were filed with the Clerk of Court and served on counsel of record as noted below:

<p><b><u>Original + 1 copy to:</u></b></p> <p>Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101</p>	<p><input checked="" type="checkbox"/> <i>By hand-delivery via legal messenger</i></p>
<p><b><u>Copy to:</u></b></p> <p>Gail N. Wahrenberger STOKES LAWRENCE, P.S. 800 Fifth Avenue, Suite 4000 Seattle, WA 98104-3179</p>	<p><input checked="" type="checkbox"/> <i>By hand-delivery via legal messenger</i></p>
<p><b><u>Copy to:</u></b></p> <p>Howard M. Goodfriend EDWARDS SIEH SMITH &amp; GOODFRIEND P.S. Watermark Tower, Suite 500 1109 First Avenue Seattle, WA 98101</p>	<p><input checked="" type="checkbox"/> <i>By hand-delivery via legal messenger</i></p>

DATED at Seattle, Washington this 16<sup>th</sup> day of December, 2009.

  
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Belen Johnson