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No. 71391-4-I

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

In re Marriage of:
AMANDA J. HALLIGAN,

Respondent,

and

JOHN KEVIN HALLIGAN,

Appellant.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. INTRODUCTION

In this appeal from a Final Decree of Dissolution, the husband raises six issues, all pertaining to pretrial evidentiary rulings or financial issues. The wife's overriding argument is that the trial court committed no manifest abuse of discretion in any of the challenged rulings:

- With respect to valuation of the Raytheon pension, the trial court based its finding on the only qualified expert opinion of record, which was admitted without objection by either party; and the information that the expert supposedly overlooked was not proven to be material by any cross-examination of the expert, and was not timely disclosed by the husband.
- With respect to striking the late-disclosed vocational expert, there is no question he was disclosed way too late under both the Case Schedule Order and even under the more generous standard of counting backwards from the new trial date; the trial court found that the manner of producing his report was intentionally calculated to mislead because it was given during the wife's lawyer's noticed European vacation and not served on her associated co-counsel; and the trial court made the appropriate findings to satisfy the *Blair/Burnet* factors.

- With respect to characterization of John's post-separation "contributions" to the Fidelity 401K, these were actually loan payments that the husband agreed to make in the Agreed Temporary Order, and the trial court acted within its discretion not to readjust that agreement; what's more, all property, both community and separate, is before the trial court for equitable distribution, and regardless of characterization of these payments (the disputed portion of which amounts to only 0.75% of the marital property), the overall distribution made here is fair and equitable.
- With respect to allocation of the Federal income tax child exemption to the wife, this was not a "scrivener's error," but the product of an agreement between the parties given in exchange for a lower monthly child support contribution from the husband.
- With respect to the husband's request to clarify the language of the Agreed Temporary Order and Final Child Support Order to require verification directly from the nanny of the work-related charges, there is no law cited in support of this argument and therefore it is not properly raised; but even if properly raised, in light of the need to disentangle these parties' lives and finances, it was well within the trial court's discretion to refuse to interject the husband back into the business relationship between the wife and her child care provider.

- With respect to the very moderate award to the wife of less than one-third of her trial-level attorneys fees based on need and ability to pay, the unchallenged finding showing that the husband earns roughly ten thousand dollars per month more than the wife, coupled with the sworn financial disclosures in evidence showing that the husband has a monthly surplus of income over expenses while the wife lives on a tighter budget and has a monthly deficit, amply supports the trial court's discretionary award of fees.
- The wife also requests an award of fees on appeal based on need and ability to pay, and that request is briefed in §III(G)(2), *infra*.

II. STATEMENT OF THE CASE

A. Overview

Before the Court is the husband's appeal from the Final Decree in a dissolution of marriage matter. The parties to this matter are Amanda J. Halligan ("Amanda"), and John Kevin Halligan ("John"). Amanda filed the Petition for Dissolution and it was duly served on John in June, 2012. CP 163-64 (FF##2.1-2.3).

The parties were married on September 23, 1995, but lived together in a committed intimate relationship for approximately one year prior to that time. CP 164 (FF#2.4). They separated on May 28, 2012.

CP 164 (FF#2.5). This was a marriage / committed relationship of eighteen years duration. CP 164 (FF#2.4).

There was one child of the Halligan marriage, born on October 28, 2011, who was nearly two at the time of the Findings and Final Decree. CP 171 (FF#2.17). The parties entered an agreed Parenting Plan, which was approved by the trial court. CP 172 (FF#2.19). Parenting is not at issue here. The only issues are financial and evidentiary.

B. Facts Pertaining to the Issues Raised by Appellant

1. Valuation of the Raytheon Pension

In response to Amanda's Interrogatory 15, asking (inter alia) for the date on which John would be eligible for early retirement under the Raytheon pension, John responded "Unknown." Ex. 58. With trial set to commence August 19, 2013, CP 163, Amanda's attorney, Ms. LeMoine, followed up in writing twice (letters dated July 24 and August 5, 2013), seeking specific information about early retirement benefits under this pension. Exs. 59 & 60. As John admits in his brief, the expert certified public accountant, Steven Kessler, who had been jointly hired by the parties to value their retirement plans, also requested this information. *Brief of Appellant* at 6 (*quoting*, Ex. 60). It was John's duty to produce this information, since Amanda's Request for Production #14 asked for "any correspondence, memos, notes, or other information received or

available from the military and other employer regarding calculation of your pension benefit.” Ex. 60.

Steven Kessler is a CPA with almost thirty years of experience in performing present value analysis of pensions. 8-20 RP 76/13-21. Due to John’s failure to timely disclose all the requested pension benefit information in discovery, and (in John’s own words) “under pressure of the upcoming trial date,” *Brief of Appellant* at 6, Mr. Kessler performed his analysis nine days before trial as best he could with the available information.¹ His report, dated August 10, 2013, states his “opinion of the fair market value” of the Ratheon pension “using discounted present value analysis.” Ex. 20. After listing the factual assumptions, including the retirement benefit at age 65, the 6.00% discount rate, and the mortality table of the Society of Actuaries, Mr. Kessler states in his report:

In my opinion, the total present value of Mr. Halligan’s pension benefit with retirement at age 65 is \$16,044 as of June 13, 2012.

In my opinion, the total present value of Mr. Halligan’s pension benefit with retirement at age 55 and assuming no reduction in benefits is \$34,052 as of June 13, 2012.

¹ The Brief of Appellant asserts without any citation to the record that the information on the early retirement benefit was obtained by Ms. LeMoine on 8/7/13 and by John on 8/8/13, and that they unsuccessfully attempted to give this information to Mr. Kessler, but he did not receive or use it. *Brief of Appellant* at 7. This statement violates RAP 10.3(a)(5) (“Reference to the record must be included for each factual statement”), and should not be considered by this Court.

Ex. 20.

At trial, Mr. Kessler identified his report (Exhibit 20), noted that John was eligible to take early retirement at age 55, and confirmed on the record his opinion that the value of the Raytheon pension at age 55 is \$34,052. 8-20 RP 79/2-14. Significantly, Exhibit 20 was offered and admitted **without any objection.** 8-20 RP 79/22-25. Furthermore, John's attorney, Mr. Finesilver, cross-examined Mr. Kessler at some length, but never examined his conclusion as to the value of the Raytheon pension at age 55. 8-20 RP 82-100. Mr. Finesilver did not inquire into the meaning of the phrase "assuming no reduction in benefits" as used by Mr. Kessler in his opinion on value, Exhibit 20. Nor did he inquire as to whether Mr. Kessler had updated information about the benefit at age 55, or whether his "discounted present value analysis" would or would not be affected by the lack of such information. Nor did Mr. Finesilver inquire whether Mr. Kessler had "actuarially reduced" the benefit from age 65 to age 55, as suggested by Exhibit 19, as part of his present value analysis. Instead, by the time Mr. Kessler's testimony was completed, the record contained a completely valid and unchallenged opinion as to the value of the Raytheon pension at age 55, stated by the jointly-hired and well-qualified expert CPA.

John was permitted to provide some testimony on this issue. He was allowed to read from the Raytheon non-bargaining retirement plan handbook, 8-22 RP 37/17-20, which says with respect to early retirement:

[Y]our pension may be reduced actuarially from [your] Social Security date or reduced by one-half of one percent for each month your annuity start date precedes your Social Security retirement date if that provides a larger pension.

However, your pension is the same as the amount payable at your Social Security retirement date, if your Raytheon employment ends, or if you are laid off from Raytheon within three years before that date and you have completed 10 years of continuous service at that time.

8-22 RP 40-41/25-9 (emphasis added). There is no dispute that John's employment with Raytheon ended with his termination in January 2008, and Mr. Kessler was aware of that fact. 8-22 RP 41/11-12; Ex. 20; 8-20 RP 78-79/23-1. Nobody asked Mr. Kessler about the impact of this language on his analysis.

John testified that he applied the one-half of one percent per month reduction formula to conclude that his retirement benefit at age 55 would have been \$180.35. 8-22 RP 41/17-23, 44-45/21-9. However, when he attempted to testify as to the present value of his Raytheon pension at age 55, the trial court sustained objections to his qualifications to perform such a pension present value actuarial analysis. 8-22 RP 45/10-16; 8-22 RP 46/1-14. The Appellant has not assigned error to

these evidentiary rulings, *Brief of Appellant* at 1-2, and has provided no argument on this issue. Not only are these evidentiary rulings proper and well within the trial court's discretion, but any possible challenge is now waived. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

The net result is that **Mr. Kessler's opinion on present valuation of the Raytheon pension at age 55 is the only opinion of record.** John, who was not qualified to do so, never stated any contrary opinion. What's more, as argued in the argument portion below, even if he had stated a contrary opinion, the trial court would have been well within its discretion and authority as finder of fact to prefer the unchallenged opinion of the expert CPA over the lay opinion of an interested party.

2. Striking Late-Disclosed Expert Witness Neil Bennett and His Report

The Case Schedule Order in this matter contained the following two key deadlines for witness disclosure: (1) DEADLINE for Disclosure of Possible Primary Witnesses: Tue 02/19/2013; and (2) DEADLINE for Disclosure of Possible Additional Witnesses: Mon 03/18/2013. CP 227. In compliance with this Order, and as admitted by John, both sides disclosed their possible primary witnesses on time, by February 19, 2013. CP 39-41 (Amanda's disclosures); CP 42-44 (John's

disclosures); *Brief of Appellant* at 15. The proposed vocational expert at issue here, Neil Bennett, was *not disclosed* at this time. CP 81-83.

On March 4, 2013, the parties stipulated to an Order for Continuance “of the trial date to August 19, 2013, to allow the parties to participate in mediation.” CP 241. The stipulated Order for Continuance does not provide for any extension of the deadlines in the Case Schedule Order. According to Ms. LeMoine, “the reason trial was continued was simply to allow the parties to participate in a settlement conference, nothing more, so no new case schedule was issued.” 8-19 RP 5/12-15. The statements in the Brief of Appellant to the effect that “all case schedule deadlines were delayed three months,” *Brief of Appellant* at 15, *see also, id.* at 14, are without citation to the record, unsupported by the language of the Stipulated Order of Continuance, and must therefore be disregarded. RAP 10.3(a)(5).²

As John admits, the March 18, 2013, deadline for disclosure of possible additional witnesses came and went without either side adding any additional witnesses. *Brief of Appellant* at 15; CP 227, 250, 257, 259-270. The discovery cut-off under the Case Schedule Order, April 15,

² It is not within the power of the parties to alter or rescind a valid, subsisting order of the court such as the Case Schedule Order, and if they consensually engaged in some supplemental discovery after the discovery cut-off date, that certainly does not constitute a waiver of witness discovery deadlines in the Case Schedule Order.

2013, also came and went prior to any disclosure of additional witnesses. CP 227.

On May 20, 2013, Ms. LeMoine filed and served a Notice of Absence, notifying Mr. Finesilver that she would be out of the country *from June 3 to July 10*, returning to her office July 11, 2013. CP 85-87, 245-46. At the same time, Ms. LeMoine filed and served a Notice of Association of Counsel, by which Attorney Katrina Zafiro associated on behalf of Amanda for the purpose of handling emergency matters during Ms. LeMoine's absence. CP 247-48; 8-19 VRP 5-6/23-5, 26/3-15.

As John admits, it was not until on or about June 25, 2013 – during Ms. LeMoine's vacation absence – that Mr. Finesilver served a Disclosure of Possible Primary Witnesses that identified proposed vocational expert Neil Bennett for the first time. CP 73-75, 276-78; *Brief of Appellant* at 15. No disclosure of Mr. Bennett's opinions was made at this time. Mr. Bennett's report was emailed to Ms. LeMoine on July 3, 2013, while she was still out of the country. CP 46.

Ms. LeMoine did not access Mr. Bennett's report while she was in Europe. She was unable to open the attachment to this email with the limited equipment available to her on vacation, and therefore she did not see the report until July 25, when a hard copy was presented with John's settlement conference materials. CP 80. Significantly, the late disclosure

and report of proposed expert witness Mr. Bennett *was not served on associated counsel for Amanda, Katrina Zafiro*. CP 78; 80; 8-19 RP 5-6/23-5.

With trial set for August 19, Ms. LeMoine did not have time to depose Mr. Bennett and locate, prepare and disclose a rebuttal vocational expert, so to avoid severe prejudice she moved to strike Mr. Bennett and several of the other late-disclosed witnesses. CP 249-53; 8-19 RP 7-8/22-6, 8/21-25.

During the hearing on this motion, the trial court asked Ms. LeMoine to address the *Blair/Burnet* factors regarding lesser sanctions. 8-19 RP 7/19-23. Ms. LeMoine pointed out that she didn't receive the Bennett report until July 25 – only about three weeks before trial and after the discovery cutoff – so “what could have happened . . . would be to delay the trial so that I could hire a vocational expert to meet with Amanda, to change the discovery cutoff date so . . . that vocational expert could meet with Amanda and we could present a counter report and do more work in that area.” 8-19 RP 7-8/23-5. Ms. LeMoine pointed out that Mr. Finesilver could have proactively provided Mr. Bennett's file and offered him up for deposition, but he didn't do that. 8-19 RP 8/7-9, 8-9/23-1. Ms. LeMoine argued that “Counsel knows I don't have enough time to schedule a deposition of his witness. He knows my discovery

cutoff problem.” 8-19 RP 8/21-23. Then the trial court asked Mr. Finesilver to address the issue of why the court should not simply enforce the dates of the Case Schedule Order. 8-19 RP 12/2-12. Near the end of the hearing, the trial court questioned Ms. LeMoine on the issue of notice of association of counsel with Ms. Zafiro prior to leaving the country. 8-19 RP 26/3-15. The record is clear that the trial court actively engaged in a colloquy with counsel on the key issues during the hearing.

After hearing argument from both sides on this motion (as well as on John’s own Motion in Limine³), the trial court ruled that the existing Case Schedule Order governs:

[T]he operative deadlines are those in the order . . . of the initial case scheduling. That’s a court order. That’s not just a guideline.

And it is extremely routine to ask when there’s a continuance that the Court issue another case scheduling order.
...

And in this case, it was an agreed stipulation and order for a continuance with no reference whatsoever to the case scheduling dates. I decline to read into that a request to have the Court reissue the case scheduling deadlines, dates, and I decline to ignore the existing ones.

8-19 RP 31/2-17. Then the trial court specifically found that the late disclosure was willful:

³ By way of contrast, Mr. Finesilver sought to exclude testimony of two witnesses who were properly disclosed by Amanda’s counsel on February 7 and February 19, 2013,

And so I do find that, with respect to the three witnesses that are the subject of Ms. Halligan's motion, there was a failure to disclose timely those witnesses. Applying the Brunette [*sic. - phonetic*] and Blair factors, the Court finds that it was an intentional late disclosure, timed at a time where Ms. Halligan's counsel, Ms. LeMoine, would not have any opportunity to respond, timed, and not including the associated counsel, notwithstanding the fact that she'd been identified as associated counsel, and notwithstanding the fact that Ms. LeMoine had given her absent dates and vacation dates.

8-19 RP 32/6-16. The trial court also found prejudice, and that no lesser sanction would suffice under the circumstances:

So I find, given the timing of this and the fact that it wasn't accompanied by any kind of proposal, or stipulation, or offer to provide notes and help with a deposition or anything like that, that there . . . were no and are no less restrictive alternatives. It's clearly prejudicial, the late disclosure. And so the vocational counselor, Mr. Bennett, will not be permitted to testify based on the Court's findings.

8-19 RP 32-33/23-5. The trial court supplemented this finding in the written Order Striking Certain Witnesses & Exhibits (August 19, 2013):

The Court finds that the Petitioner [Amanda] would be prejudiced by allowing witnesses Neil Bennett, a vocational consultant, and [others] . . . to testify, and that she would be prejudiced by admission of their reports and opinions because:

1. The names of these witnesses were disclosed several months after the deadline for witness disclosures . . . ;
2. The reports of these witnesses were produced after the discovery cutoff, just a few weeks before trial. The reports are ones which the Petitioner would rebut with other testimony and experts, had she the time to do so. The vocational report

both timely under the initial Case Schedule Order. CP 34-40, 227. The trial court found the disclosures to be timely and sufficient, and denied that motion. 8-19 RP 33/18-23.

implies that Petitioner is capable of earning a large salary immediately. This is an issue critical to the Petitioner's request for maintenance, and presenting an expert witness' report after the discovery cutoff is prejudicial to the Petitioner. . . .

The court has considered whether lesser sanctions would rectify the problems presented by the respondent's late disclosure and does not find any lesser sanctions would suffice.

CP 200-01. Based on these findings, the trial court exercised its informed discretion to exclude Mr. Bennett's proposed testimony and report. CP 201.

3. Post-Separation Payments on the Community Loan from Fidelity 401K

John calls this issue "post-separation contributions" to the Fidelity 401K, but in fact these are *loan payments* to service a loan taken to help with the purchase of the Ronald real estate. CP 168 (FF 2.8(11)). John accurately quotes FF 2.8(11), CP 168, concerning the Fidelity 401K. *Brief of Appellant* at 20-21. There, the trial court found:

1. This 401K is in John's name. However, "[t]he entire 401K account was accumulated during the marriage and is community property." CP 168.

2. The 401K was worth \$175,159 as of August, 2013, but the parties took a loan against it to buy property in Ronald, WA, and the amount of \$25,626 is owed. CP 168.

3. John has been making loan payments post-separation. CP 168.

4. The value for purposes of distribution was net of the outstanding loan balance. CP 168; *see also*, CP 113 line 33 (matrix only distributes net value).

The total amount of post-separation payments to the Fidelity 401K according to John's own Exhibit 102, line 25, is only \$7,039. *Accord, Brief of Appellant* at 21. The parties agree that the trial court's property division was based on the asset matrix at CP 112-13, which shows a total net value of community plus separate assets of \$564,265. *Brief of Appellant* at 11; CP 112-13. This means that the post-separation payments to the Fidelity 401K that John is challenging equal about 1.2% of the net value of the property of the parties.⁴ Because John has already been awarded 40% of this asset, the total amount in controversy on this issue is only about 0.75% of the net total assets of the parties.

In point (d) at page 22 of his Brief, John selectively quotes from the record to suggest that Ms. LeMoine conceded this issue. Ms. LeMoine conceded the characterization, but not the conclusion that this

⁴ $7039 \div 564,265 = 1.247\%$.

warrants a credit. 8-29 RP 34/6-16 (“But I do not believe, nor do we agree, that he should be credited almost \$5,000 for paying himself back.”). Ms. LeMoine argued on this issue that, in the Agreed Temporary Order, John agreed to be responsible for the mortgage and “all related costs” for the community real estate, including the Ronald property, and that agreement did not provide for any credit back, and therefore no additional credit should be given. CP 109, 116.

The trial court agreed. CP 168; *see also*, CP 165 (FF 2.8(2)). The key finding by the trial court pertaining to debts against the Ronald property is FF #2.8(2), as follows:

During the separation, the husband paid the Ronald mortgage, taxes and homeowners’ dues for the property, and the husband has asked the court to credit him with all the Ronald payments. The property debts were community obligations, assigned to the husband during the separation by the parties’ agreed temporary order. The order does not provide for reallocation of the debt payments. The Court finds no reason to credit the husband for payments made on the Ronald property, pursuant to the agreed temporary order, which is Ex. 54.

CP 165.

4. Award of Federal Dependent Child Tax Exemption to Amanda

John omits the key fact in his discussion: *the parties agreed* that Amanda would be allocated the dependent child tax exemption in every year.

In her Trial Brief, Amanda requested \$814 per month in child support. CP 4. The trial court, however, ultimately ordered that John pay \$729 per month. CP 189 (Order of Child Support ¶3.6). An agreement to allocate the exemption to Amanda in exchange for the lower monthly payment is demonstrated in an exchange between counsel just prior to entry of the final written orders. Mr. Finesilver's Memorandum of September 20, 2013, in which he objects to Ms. LeMoine's draft proposed final order, states:

The court [orally] ordered Mr. Halligan to pay child support in the amount of \$729.00 a month. *That assumes LeMoine's client is awarded the exemption for their child. . . .* Ms. LeMoine's order has him paying \$755 per month with him having the exemptions this year, but losing it to her next year without a provision of support at \$729 per month when he does not have the exemption and Ms. Halligan does.

CP 93-94 (emphasis added). John's attorney attached a proposed child support worksheet to support the \$729 monthly payment. CP 102-06.

Ms. LeMoine filed a response on September 23, 2013, which states, in relevant part:

Child Support: We have accepted the husband's proposed child support worksheet, and attach that to the revised child support order, which sets child support at \$729 per month. . . .
Child exemption: My client accepts the exemption each year.
The child support worksheets, as revised, are accepted.

CP 110 (emphasis added). Thus, Ms. LeMoine accepted this compromise on behalf of Amanda.

5. Proof of Work-Related Daycare Expenses

In the Agreed Temporary Order (“ATO”) entered July 6, 2012, the parties agreed to strike the Domestic Violence Protective Order set for hearing on that date, to put the divorce “on hold” for four months, to permit John supervised visitation, and to work towards couples counseling. CP 119-20. During that time when the emotional trauma of separation was fresh, Amanda was not feeling secure, and therefore she was permitted by the ATO to keep her residence address secret. CP 120. The ATO provided that, “[f]or the next 4 months: . . . *Dad pays 75% of work related day care . . .*” CP 121 (emphasis added). Under the circumstances, no provisions for verification were agreed to by the parties, CP 121, and no agreement on verification would have been possible.

The evidence shows that Amanda took the “work related” limitation seriously. Amanda testified that she went through her calendar and compared the bills she received from the nanny with the time that she had spent working, and “reduced every debt.” 8-20 RP 64/3-19. She discounted the nanny bills “[b]ecause the temporary order said work-related expenses and I was attempting to follow the order.” 8-20 RP 69-70/23-1.

During the pendency of the dissolution, John failed to pay anything towards the work related childcare expenses that he had agreed to pay under the ATO. 8-20 RP 29/6-18. Prior to entry of the final orders, John asked that the ATO be beefed up with verification requirements, under which Amanda would be required to give him “the nanny’s invoices and proof of payment for both work-related and personal babysitting” each month. CP 95. Amanda objected that providing John with such minute detail on her personal life “would be an unwarranted invasion of her privacy . . .” CP 111. The trial court apparently agreed with Amanda. In the Final Child Support Order, it ordered that “[t]he father shall pay daycare . . . for the period up and until September 1, 2013 [the effective date of the final orders], paying 75% of work related daycare costs the mother incurs . . . [per] the agreed temporary order.” CP 190 (¶3.9).

By Motion for Reconsideration, John requested clarification of the Child Support Order, requiring an invoice directly from the nanny to John in which the nanny confirmed that the dates and times of services listed were work-related only. CP 153. The trial court, in the exercise of its discretion on reconsideration, declined to place such a burden on the nanny or to interject John directly into the relationship between Amanda and her nanny. According to the order entered in the trial court’s

handwriting: “The child support order related to daycare expenses . . . does not require clarification.” CP 204.

It is this order denying reconsideration to which John assigns error. *Brief of Appellant* at 2 (assignment #6).

6. Attorneys Fees based on Need and Ability to Pay

The trial court found that Amanda’s total attorney’s fees were \$60,621, and that these fees were “reasonable, given the amount of work involved in presenting the case at trial, the length of trial, and the complexity of some of the trial issues.” CP 171 (FF #2.15). This finding is supported by credible evidence in the record, and does not appear to be the part of the finding that is challenged. Ex. 10, p.5; 8-19 RP 143-44/14-11; CP 111. At trial, Amanda testified that she still owed \$34,000 in attorney’s fees. 8-19 RP 144/9-11.

The trial court took a moderate approach to the attorney’s fee issue, awarding Amanda only \$18,000, or slightly more than one-half of what she still owed and less than one-third of her total fees. 9-23 RP 11/9-17. In connection with this award, the trial court found that “[t]he wife has the need for the payment of fees and costs and the husband has the ability to pay these fees and costs.” CP 171 (FF #2.15). This finding is challenged on appeal.

The trial court found that “[t]he husband earns significantly more than the wife”: \$13,049 per month for John, versus \$3,231 per month for Amanda. CP 170 (FF #2.12). Based on this, the trial court ordered reasonable maintenance of \$3,500 per month for five years. CP 171 (FF #2.12). These findings are not challenged on appeal. Even accounting for the effects of the maintenance award, John’s income far exceeds Amanda’s, \$9,549 versus \$6,731 per month. John’s briefing on the attorney’s fee issue completely ignores this income disparity.

John states that “Amanda’s and John’s financial declarations show their routine living expenses to be about the same (Ex 10, Ex 101).” *Brief of Appellant* at 11. This is not accurate. Amanda’s total expenses on Exhibit 10 are \$6,953, Ex. 10 ¶5.12, whereas John’s on Exhibit 101 are \$8,653, Ex. 101 ¶5.21. This bears directly on the “need” side of the “need and ability to pay” equation. Even though Amanda is living on roughly \$1,600 a month less than John, with John’s higher income (pre-maintenance) this leaves him a \$4,396 *surplus* per month, whereas with Amanda’s income (without maintenance) this leaves her a \$3,722 *deficit* per month. Even adjusted for maintenance, John still has a surplus, whereas Amanda is still running a small deficit.

The trial court was justified in using values in John’s accounts as of the date of separation. The filings submitted by *both parties* just

before entry of the final orders contained the values of John's accounts as of the date of separation, totaling \$104,452 in liquid assets in the husband's accounts. *Compare*, CP 112, lines 20-26 (Amanda's filing), *with* CP 93 (John's filing, made September 20, 2013). This is the value that comports with Table 2, not Table 3, in John's brief, leaving him \$38,462 in liquidity after the asset transfer to satisfy the property distribution. *Compare*, *Brief of Appellant* at 29-30, *with*, *id.* at 31. John attempted to update these amounts to current balances with an erratum filed on September 23, 2013, CP 128-30, but then submitted a matrix with his Motion for Reconsideration on October 8 that returned to the date of separation values that both parties had submitted before entry of the final orders in their original filings, which were the values adopted by the trial court. *Compare*, CP 112, lines 20-26 (Amanda's filing), *with* CP 159, lines 10-12, and CP 160, line 26. It appears that the current value erratum was submitted too late in the process to influence the trial court, either in entry of the final orders, or in connection with the reconsideration.

John's briefing on need and ability to pay not only fails to account for income disparity, but it also fails to account for the full spectrum of assets awarded to him. These include the Ronald, WA property with an equity of \$34,300, to be sold and the proceeds equally divided; and the

parties' single-family home in Ballard, with an assessed value of \$475,000 and equity (at that time) of \$41,471, that was awarded entirely to John. CP 112, 159, 165.

III. ARGUMENT

A. Standard of Review – In General

The trial court has broad discretion when distributing property in a dissolution proceeding, and the disposition will not be disturbed on appeal absent a showing of manifest abuse of discretion. *Brewer v. Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999); *In re Marriage of Kaseburg*, 126 Wn. App. 546, 556, 108 P.3d 1278 (Div. 2 2005); *In re Marriage of Glorfield*, 27 Wn. App. 358, 360, 617 P.2d 1051 (Div. 3), *rev. den.*, 94 Wn.2d 1025 (1980). The trial court is in the best position to determine what is just, fair and equitable in dissolution matters. *Brewer v. Brewer*, *supra*, 137 Wn.2d at 769; *In re Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (Div. 2 2002), *rev. den.*, 148 1011 (2003).

“[I]n the area of domestic relations, the appellate courts have granted deference to the trial courts because ‘ “[t]he emotional and financial interests affected by such decisions are best served by finality” ’ and de novo review may encourage appeals.” *In re Parentage of Jannot*, 149 Wn.2d 123, 127, 65 P.3d 664 (2003) (*quoting, In re Parentage of Jannot*, 110 Wn. App. 16, 21, 37 P.3d 1265 (Div. 3 2002) (*quoting, In re*

Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985))). “[A] trial judge generally evaluates fact based domestic relations issues more frequently than an appellate judge and a trial judge's day-to-day experience warrants deference upon review.” *Parentage of Jannot, supra*, 149 Wn.2d at 127.

B. Valuation of the Raytheon Pension Was Properly Based on the Only Admissible Expert Opinion

John allowed Mr. Kessler’s opinion as to the “discounted present value” of the Raytheon pension based on age 55 early retirement to be admitted without any objection or cross-examination. This is not surprising, because Mr. Kessler was a jointly-hired expert CPA, with nearly thirty years of experience in valuation of pensions. There is no qualified expert evidence (as opposed to lay argument and speculation) that the benefit payment amount at age 55 was essential to an accurate discounted present valuation, or that Mr. Kessler’s stated valuation is not accurate under the terms of the pension. Mr. Kessler knew the age 65 benefit amount, and was fully competent to perform the “actuarial reduction” to age 55 called for by Exhibit 19 (quoted at page 5 of the Brief of Appellant) – *if* he even believed that was necessary and appropriate, a point on which nobody examined him.

Mr. Finesilver did not cross-examine as to the meaning of the phrase “assuming no reduction in benefits” as used by Mr. Kessler in his opinion on value (Ex. 20) at age 55. This might refer to what John says it refers to – an assumption by the expert that the benefit payment is the same at age 55 as it is at age 65. Alternatively, it might simply mean that the expert is assuming there will be no change to the overall benefits allowed under the Raytheon pension plan. Or it might even have been Mr. Kessler’s way of applying the language in the summary plan booklet (which he may have obtained) stating that the pension is the same as on “your Social Security retirement date” if your Raytheon employment ends. 8-22 RP 40-41/25-9. On this record, there is no way to know, and by allowing this evidence in without cross-examination and without objection, John has waived the issue. *State v. Fredrick*, 45 Wn. App. 916, 922, 729 P.2d 56 (Div. 1 1986) (“attorney did not object to the admission of this evidence at trial, precluding review on appeal.”).

It bears emphasizing that Mr. Finesilver did not even ask whether the benefit amount at early retirement was essential information to perform the present value analysis. This would not have been an area in which the trial court was free to speculate.

With respect to John’s military pension, Mr. Kessler had this to say:

Ms. LeMoine: Mr. Kessler, you are only valuing the current military benefit that Mr. Halligan enjoys. Is that correct?

Mr. Kessler: Yes.

Q: You are not projecting ahead to what his benefit will be when he retires?

A: No. *I believe that would be inappropriate.*

8-20 RP 78/11-16 (emphasis added). Therefore, the relationship between present value analysis and the actual benefit payment at age 55 is murky, at best. On this record, it cannot be said that the expert found it to be necessary to his calculations. Certainly, he did not state that he was unable to form an opinion, and the opinion he did form was provided in clear and unchallenged testimony and exhibit form.

The record before the trial court contains Mr. Kessler's opinion as to present value of the Raytheon pension at age 55. *There is no other opinion of record.* John wanted to state an opinion, but the objection that he lacked the qualifications to do so was properly sustained twice, ER 701, 702, and he has not assigned error or made any argument about those rulings, and therefore this issue is waived. *State v. Olson, supra*, 126 Wn.2d at 321.

The trial court stated in its oral opinion that it was basing its finding of the value of the Raytheon pension on Mr. Kessler's testimony and his report, Exhibit 20. 9-3 RP 7/8-12. This constitutes substantial evidence in the record to support the finding, and therefore it must be

sustained. *In re Marriage of Stern*, 57 Wn. App. 707, 717, 789 P.2d 807 (Div. 1 1990) (quoting, *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

C. The Trial Court Did Not Commit a Manifest Abuse of Discretion by Disallowing the Late-Disclosed Vocational Expert

1. Standard of Review

In reviewing the trial court's decision on imposition of sanctions for late disclosure of witnesses, the following standard applies:

We review a trial court's decision to exclude a witness for an abuse of discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). This “ ‘determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’ ” *Burnet*, 131 Wn.2d at 494, 933 P.2d 1036 (quoting *Associated Mortgage Investors v. G.P. Kent Const. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)).

Lancaster v. Perry, 127 Wn. App. 826, 830, 113 P.3d 1 (Div. 1 2005).

2. The Trial Court Properly Considered the *Blair/Burnet* Factors in Excluding a Vocational Expert Disclosed So Late it Would Necessarily Require Trial Continuance

According to the Washington Supreme Court:

In punishing a discovery violation, “the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery.” *Burnet*, 131 Wn.2d at 495-96, 933 P.2d 1036. Although a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion,

“the record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it.” *Mayer*, 156 Wn.2d at 688, 132 P.3d 115 (relying on *Buret*, 131 Wn.2d at 494, 933 P.2d 1036).

Blair v. TA-Seattle East No. 176, 171 Wn.2d 342, 348, 254 P.3d 797 (2011). The record here satisfies these three required elements, and therefore the trial court's exercise of its broad discretion to sanction the discovery violation here should not be disturbed.

a. Consideration of a Lesser Sanction

The record clearly shows that the trial court considered whether a lesser sanction should be applied here. During the arguments on the motion, the trial court expressly asked counsel for Amanda to address the issue of lesser sanctions. 8-19 RP 7/19-23. Counsel for John argued this point without any prompting from the court. 8-19 RP 10-11/5-12. In the exercise of its discretion, the trial court thought that Amanda's counsel had the better argument. As detailed in the Statement of the Case §II(B)(2), *supra*, Ms. LeMoine argued that the only realistic remedy was amending the Case Schedule Order to extend the discovery schedule and continuing the trial to enable her to depose Mr. Bennett and locate and prepare a rebuttal vocational expert. This was because of the importance of the vocational testimony to the issue of permanent maintenance, and the fact that this disclosure was sneaked past Ms. LeMoine and her

associated counsel so it was not effectively made until July 25, with trial set for August 19 and the discovery deadline long passed.

One key factor in determining whether the trial court properly exercises its discretion in imposing sanctions is whether a colloquy between the court and counsel demonstrates that the factors were considered. *Blair v. TA-Seattle East, supra*, 171 Wn.2d at 348. Here, the record is clear that such a colloquy took place. *See*, Statement of the Case §II(B)(2), *supra*, pp.11-12. Based on this record, the trial court specifically found that the Bennett report is one “which the Petitioner would rebut with other testimony and experts, had she the time to do so,” CP 200, that “given the timing of this and the fact that it wasn’t accompanied by any kind of proposal, or stipulation, or offer to provide notes and help with a deposition or anything like that, that there . . . were no and are no less restrictive alternatives,” 8-19 RP 32-33/23-2, and it stated in its written order that “[t]he court has considered whether lesser sanctions would rectify the problems presented by the respondent’s late disclosure and does not find any lesser sanctions would suffice.” CP 201.

Because the record clearly reflects that the trial court considered and rejected the possible lesser sanction of continuance of the trial and amending the Case Schedule Order’s discovery cut-off, the first of the *Blair/Burnet* factors is satisfied.

b. Willfulness of the Violation

The test of willfulness is an objective one:

In the context of CR 37 sanctions, the trial court does not abuse its discretion by excluding testimony as a sanction when there is a showing of intentional or tactical nondisclosure, willful violation of a court order, or other unconscionable conduct. *Fred Hutchinson Cancer Research Cntr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987); *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 760, 637 P.2d 998, 645 P.2d 737 (1981). A violation of a court order without reasonable excuse will be deemed willful. *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984); *Anderson v. Mohundro*, 24 Wn. App. 569, 574, 604 P.2d 181 (1979), *review denied*, 93 Wn.2d 1013 (1980).

Allied Financial Services, Inc. v. Mangum, 72 Wn. App. 164, 168, 864 P.2d 1 (Div. 1 1994); *accord, e.g., Dempere v. Nelson*, 76 Wn. App. 403, 405, 886 P.2d 219 (Div. 1 1994), *rev. den.*, 126 Wn.2d 1015, 894 P.2d 565 (1995). In this case, the trial court found both “intentional or tactical nondisclosure” in the timing of the disclosure to coincide with Ms. LeMoine’s vacation absence, and the failure to send Bennett’s report to Ms. LeMoine’s associated counsel, Ms. Zafiro, 8-19 RP 32/6-16, as well as violation of the Case Schedule Order without reasonable excuse, which is deemed willful as a matter of law under *Allied Financial* and *Dempere, supra*. 8-19 RP 31/2-17. Based on all this, the trial court “finds that it was an intentional late disclosure . . .” 8-19 RP 32/9-10. This discretionary ruling was neither manifestly unreasonable, nor

exercised on untenable grounds, nor for untenable reasons, and therefore it should be upheld.

c. Substantial Prejudice

The final *Blair/Burnet* factor is that the record must show “substantial prejudice” arising out of the violation. *Blair v. TA-Seattle East, supra*, 171 Wn.2d at 348. In the trial court’s written order, it specifically found that this eleventh-hour disclosure of an expert witness whose testimony bears on a crucially important issue was prejudicial:

The reports of these witnesses were produced *after the discovery cutoff, just a few weeks before trial*. The reports are ones which the Petitioner would rebut with other testimony and experts, had she the time to do so. The vocational report implies that Petitioner is capable of earning a large salary immediately. This is an *issue critical to the Petitioner’s request for maintenance*, and presenting an expert witness’ report after the discovery cutoff is *prejudicial to the Petitioner*.

...

CP 200 (emphasis added).

The Supreme Court in *Burnet* recognized that there is significantly more prejudice to the non-wrongdoing parties in cases in which “the sanctionable conduct [occurred] on the eve of trial.” *Burnet v. Spokane Ambulance, supra*, 131 Wn.2d at 496. The discovery deadline had closed and counsel for Amanda should have been able to concentrate of the many tasks of preparing her witnesses and exhibits, reviewing existing witnesses, discovery and exhibits received from her opponent,

and providing the trial court with a good trial memorandum covering issues that were already fully scoped and explored from a factual perspective. Instead, she was placed in a position in which she entered trial without knowing the full extent of the issues and evidence on a crucial issue, and without a realistic time frame in which to locate and prepare a rebuttal expert on this issue. Good experts are busy professionals who need time to digest the underlying information, and to gather the facts necessary for formulating their opinions. A vocational evaluation of Amanda could not happen overnight. On this record, the trial court's finding that the eleventh-hour and rather sneaky disclosure of a crucial vocational expert would cause Amanda substantial prejudice was not manifestly unreasonable – indeed, it was manifestly very reasonable – and therefore it was not an abuse of discretion to exclude the proposed expert witness and his report.

d. Conclusion on Exclusion of Neil Bennett

The record demonstrates that the disclosure of Neil Bennett was substantially late, carried out in a manner calculated to “slip by” Amanda's attorneys, done after the discovery cut-off, and that it was done too close to trial to permit adequate response without a trial continuance. The record further demonstrates that the trial court carefully applied the *Blair/Burnet* factors to its discretionary decision to

sanction this violation by exclusion of the witness and his report. “[T]he court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, *but not be so minimal that it undermines the purpose of discovery.*” *Blair v. TA-Seattle East, supra*, 171 Wn.2d at 348 (*quoting, Burnet*, 131 Wn.2d at 495-96) (emphasis added). One of the key purposes of discovery is “to promote efficient and early resolution of claims.” *Cedell v. Farmers Ins. Co.*, 176 Wn.2d 686, 698, 295 P.3d 239 (2013). The *Blair/Burnet* formula is drawn from *Washington State Physicians Ins. Exchange & Assoc. v. Fisons*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993). The very next sentence of that case governs here: “*The sanction should insure that the wrongdoer does not profit from the wrong.*” *Fisons, supra*, 122 Wn.2d at 356 (emphasis added). Under the circumstances of this case, allowing a second trial continuance and amendment of the Case Schedule Order to accommodate the eleventh-hour disclosure of this expert witness would have cast additional expense and delay on Amanda in a process that was already fraught with expense and emotional turmoil, and would have permitted John and his recalcitrant attorney to profit from their wrong. It would also have thrown wide open a whole new area of inquiry on the eve of trial, thus frustrating the key discovery goal of promoting early and efficient resolution of claims. Therefore, the trial court acted well

within its broad discretion to exclude the late-disclosed expert witness and report.

D. Post-Separation Loan Payments into John's Fidelity 401K

1. The Trial Court Did Not Abuse its Discretion by Refusing to Reallocate Payments Specified Under the Agreed Temporary Order

John is in effect asking this Court to order the reimbursement from amounts Amanda was awarded in the Final Decree, amounts that John was required to pay to service community debt on real estate under the terms of the Agreed Temporary Order. Nothing in the ATO suggests that, although the husband shall be required to service the debt on the real estate during the pendency of the proceedings, the wife shall later be required to pay him back. The trial court acted well within its discretion to deny this request. *Brewer v. Brewer, supra*, 137 Wn.2d at 769.

2. Failure to Characterize Post-Separation Loan Payments as Separate Property had no Significant Effect on the Overall Fairness of the Property Distribution, and is Not Grounds for Reversal

The trial court declined to characterize \$7,039 in post-separation loan payments to John's Fidelity 401K as separate property. Ex. 102; CP 168 (FF 2.8(11)). Based on this, John is asking this Court to set aside the property distribution in order to award him this amount. Because he has already received 40% of this amount, in practical effect that would mean

shifting \$4,223 (60% of \$7,039) to John. *Brief of Appellant* at 45. However, John's argument fails for two reasons: (1) all property, both community and separate, is before the court for equitable distribution; and (2) notwithstanding any alleged mischaracterization, the distribution is fair and equitable as it stands.

RCW 26.09.080 requires a just and equitable distribution of *all the parties' property*, not merely of community property. RCW 26.09.080 (court shall make equitable distribution of "the property and the liabilities of the parties, *either community or separate*,") (emphasis added); *accord, e.g., Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972) ("In an action for divorce *all* property, both community and separate, is before the court for distribution" (emphasis in original)); *In re Marriage of Pilant*, 42 Wn. App. 173, 176-77, 709 P.2d 1241 (1985).

Under RCW 26.09.080 trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. . . . Distribution of property by the trial court should be disturbed only if there has been a manifest abuse of discretion. The trial court is 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."

Brewer v. Brewer, supra, 137 Wn.2d at 769 (quoting, *In re Marriage of Konzen*, 103 Wn.2d 470, 477-78, 693 P.2d 97 (1985)).

“The trial court's paramount concern when distributing property in a dissolution action is the economic condition in which the decree leaves the parties.” *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (Div. 2 1997); *accord, e.g., In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (Div. 1), *rev. den.*, 114 Wn.2d 1002 (1989). The duration of the relationship – in this case a relatively long marriage of eighteen years – is another factor for the trial court to weigh in its discretionary decision on property distribution. RCW 26.09.080(3).

Contrary to John’s argument, “[t]he characterization of property does not control the division of it upon dissolution.” *In re Marriage of Pilant, supra*, 42 Wn. App. at 177. Instead, the determining factor is whether the distribution achieves “[t]he statutory goal [of] a fair and equitable distribution.” *Id.*

Although failure to properly characterize property may be reversible error, mischaracterization of property is not grounds for setting aside a trial court's property distribution if it is fair and equitable.

In re Marriage of Gillespie, supra, 89 Wn. App. at 399.

Under these legal standards, the label attached to any particular item of property is not fatal to the property distribution, so long as the overall distribution is fair and equitable. Furthermore, the trial court’s distribution is entitled to great deference because the trial court was in the

best position to assess the many circumstances affecting the parties to this eighteen-year marriage. Therefore, its property distribution should not be set aside absent a manifest abuse of discretion apparent on the record.

The unchallenged finding of the trial court is that John's earnings are \$13,049 per month, compared with Amanda's earnings of \$3,231 per month, CP 170 (FF #2.12). In its oral decision, the trial court found that this earning disparity was tied to mutual decisions made by the parties over the course of the marriage, in the interest of the community. 9-3 RP 10/9-12. To help Amanda cope with her diminished earning capacity and to attempt to equalize the "economic condition in which the decree leaves the parties," the trial court made the 60-40 distribution in this matter. Although John challenges a few particulars, he does not challenge the equity of this 60-40 distribution itself. *Brief of Appellant* at 1-4. It cannot be said that, had the trial court characterized the small amount of post-separation loan payments to the Fidelity 401K as separate property, that it would have chosen to change the overall property distribution in the way that John requests. To the contrary, it appears that the trial court was more concerned with the fact that John agreed to make all payments on the Ronald property debt service in the ATO, and that it did not feel it was appropriate to revise this agreed order by shifting these costs to Amanda at the last minute.

On this record, it must be held that the overall property distribution was fair and equitable, and that John's argument that he should have received 0.75% more property falls far short of demonstrating a manifest abuse of discretion.

E. Allocation of the Federal Income Tax Child Exemption

John's entire argument is based on the false premise that it "may have been a scrivener's error" to allocate the tax exemption to Amanda in every year. *Brief of Appellant* at 46. In fact, John's attorney offered the exemption to Amanda in exchange for a lower monthly child support payment, and Amanda's attorney accepted. CP 93-94, 110. There is no evidence in the record to suggest that counsel did not have authority to bind their clients on this point.

This Court will "review a trial court's order of child support for abuse of discretion." *In re Marriage of Schnurman*, 178 Wn. App. 634, 638, 316 P.3d 514 (Div. 1 2013). In light of the agreement between the parties, which included an agreed child support worksheet, the trial court did not abuse its discretion by awarding \$729 per month child support coupled with giving the tax exemption to Amanda in every year. There is no basis to set aside this ruling.

F. Requiring Special Verification by the Nanny of Work-Related Child Care Expenses Under the Agreed Temporary Order

1. This Issue is Not Sufficiently Briefed and Should Not be Considered

John cites absolutely no legal authorities in connection with his argument that further verification of the “work related” nature of the childcare expenses are necessary before he should pay them. *Brief of Appellant* at 46-49. This violates RAP 10.3(a)(6) (“The argument in support of the issues presented for review, together with citations to legal authority . . .”). Washington appellate courts generally “do not consider conclusory arguments that are unsupported by citation to authority.” *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (Div. 3 2014) (and cases cited therein); *accord, e.g., Joy v. Dept. of Labor and Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (Div. 2 2012) (and cases cited therein).

2. The Trial Court Did Not Abuse its Discretion by Refusing to Clarify the Language of the ATO and Final Child Support Order

John challenges the denial of his motion for reconsideration, by which he asked the trial court to clarify its order requiring him to pay 75% of work related childcare expenses per the Agreed Temporary Order, by ordering the nanny to bill John directly, with a certification that all dates and services were work related. As demonstrated by our

Statement of the Case, §II(B)(5), *supra*, the “work related” language John claims needs clarification was first put into an *agreed order* that both parties signed on to. John flagrantly disobeyed this order by failing to make the required payments, and, as noted above, he has demonstrated no legal basis to be relieved from the order to which he has already agreed through his counsel.

Denial of a motion for reconsideration is reviewed for abuse of discretion. *Alpacas of America, LLC v. Groome*, 179 Wn. App. 391, 396, 317 P.3d 1103 (Div. 2 2014). The trial court was well within its discretion to deny further clarification of the ATO’s and Final Child Support Order’s language based on the evidence that Amanda understood and had carefully attempted to comply with the work-related limitation by comparing the bills with her work schedule and cutting them back accordingly. In addition, the trial court found “that the parties need to disentangle this relationship and their financial affairs.” 9-3 RP 8/16-17. Thus, the trial court acted within its discretion to give credence to Amanda’s concern that her personal privacy would be unduly invaded by John’s distrustful attempt to obtain information about her personal life and/or to interject himself into her relationship with her nanny. There is no showing of abuse of discretion, and this ruling should be affirmed.

G. Attorney's Fees

1. Award of Attorney's Fees by the Trial Court

The trial court's award of attorney's fees in dissolution proceedings under RCW 26.09.140 based on need and ability to pay is reviewed for abuse of discretion, which means it is only set aside only "if the decision is untenable or manifestly unreasonable." *In re Marriage of Spreen*, 107 Wn. App. 341, 351, 28 P.3d 769 (Div. 2 2001); *accord, e.g., In re Marriage of MacDonald*, 104 Wn.2d 745, 751, 709 P.2d 1196 (1985). In *Spreen*, the Court of Appeals affirmed an award of fees in favor of the wife based on the "wide disparity" in incomes, favoring the husband. *Marriage of Spreen, supra*. Similarly, in this case, unchallenged Finding #2.12 – which is a verity on appeal, *In re Marriage of Rideout*, 150 Wn.2d 337, 353, 77 P.3d 1174 (2003) – demonstrates a nearly *ten thousand dollar per month* income advantage in favor of John. On the need side of the equation, the record before the trial court showed that, even though Amanda was living on about \$1,600 per month less than John, she was running a \$3,722 per month deficit, compared to his \$4,396 per month surplus (pre-maintenance). This, combined with the totality of the property division – not merely the division of liquid assets, which is all John points to in his briefing – amply supports the trial court's finding of Amanda's need and John's ability to pay.

The trial court's very moderate award of less than one-third of Amanda's total attorneys' fees was not untenable or manifestly unreasonable, and therefore there was no abuse of discretion.

2. Request for Attorney's Fees on Appeal based on Need and Ability to Pay

Under RCW 26.09.140 the Court has discretion to award one party to a dissolution action their reasonable costs and attorney's fees after considering the relative financial resources of the parties. *In re Marriage of Casey*, 88 Wn. App. 662, 668, 967 P.2d 982 (Div. 2 1997). The statute provides that, "[t]he 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 attorney's fees or other professional fees in connection therewith . . .," and that, "[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." RCW 26.09.140.

Based on the record as stated in §II(B)(6), *supra*, and the fee declarations to be submitted pursuant to RAP 18.1(c), Amanda respectfully requests an award of her attorney's fees and costs on appeal.

IV. CONCLUSION

John is attempting to retry his case in the appellate court. That is not the proper role of this Court. *Parentage of Jannot, supra*, 149 Wn.2d at 127. The trial court in this case was in the best position to weigh all the facts and the various factors applicable to the sensitive decisions made in this emotionally-charged dissolution, and because its orders were not untenable or manifestly unreasonable, there was no abuse of discretion.

For all the foregoing reasons, Amanda respectfully requests that the challenged final orders in her dissolution be AFFIRMED, and that she be awarded her reasonable attorney's fees and costs on appeal.

Respectfully submitted this 29th day of August, 2014.

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CERTIFICATE OF SERVICE

I, Michael T. Schein, hereby certify that on the date set forth below I caused a copy of the within BRIEF OF RESPONDENT to be served by email (per prior agreement) to the pro se Appellant and to co-counsel, at the following addresses:

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DATED this 29th day of August, 2014.



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