

No. 41040-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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In re the Marriage of:

KRISTINE L. BOWMAN,

Respondent,

and

JAMES W. BOWMAN JR,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE FRANK CUTHBERTSON

AMENDED BRIEF OF RESPONDENT
(WITH CITATIONS TO SUPPLEMENTAL CLERK'S PAPERS)

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I. INTRODUCTION

After a 20-year marriage, the husband financially abandoned the wife and their dependent children, defying orders to provide temporary support for the family. While the wife and children were left to deal with utility disconnection notices and a pending foreclosure on the family home, the husband had unilateral control over nearly \$200,000 of community funds. After a 1-day trial, the trial court awarded the wife the “underwater” residence and ordered the husband to pay child support. The trial court also awarded the wife a judgment for half the community funds the husband had squandered during the marriage and dissolution proceeding and a second, discounted judgment for the back temporary support and attorney fees that the husband had refused to pay under the court’s temporary order.

The husband appeals *pro se*, with barely a citation to the record or legal authority, challenging nearly every decision by the trial court, but especially the court’s temporary order. “Pro se litigants are bound by the same rules of procedure and substantive law as attorneys.” ***Holder v. City of Vancouver***, 136 Wn. App. 104, 106, ¶ 2, 147 P.3d 641 (2006), *rev. denied*, 162 Wn.2d 1011

(2008). The husband's failure to provide adequate legal authority alone should cause this court to affirm the trial court's decision. See *Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to comb the record and construct arguments for appellant); RAP 10.3(a)(5) ("reference to the record must be included for each factual statement"); RAP 10.3(a)(6) (argument must include citations to legal authority and relevant parts of the record). Nevertheless, there is substantial evidence to support the trial court's orders, which were well within its broad discretion. This court should affirm and award attorney fees to the wife.

II. RESTATEMENT OF FACTS

A. The Parties Were Married For Over Twenty Years, And Had Three Children.

Respondent Kristine Bowman, age 44, and appellant James Bowman, Jr., age 47, were married on December 18, 1987, and separated on October 12, 2008. (3/12/2010 RP 30; CP 531-32) The parties met while students at the University of Washington; Kristine dropped out of school to marry James and within a year gave birth to their oldest son James III ("J.T."). (3/12/2010 RP 44)

The parties have three children: J.T., age 22, Katarina, age 20, and Austin, age 18. (3/12/2010 RP 30) When the Petition for

Dissolution was filed, the two younger children were both attending Bellarmine, a private high school, and living at home with Kristine. (CP 531-32, 536) By the time of trial, Austin was a junior in high school; Katarina was attending the University of San Diego; and J.T. was attending the University of Southern California. (3/12/2010 RP 31-32, 33, 36) The older two children had scholarships that covered the cost of tuition but no additional expenses, which Kristine estimated were between approximately \$2,250 (for Katarina)¹ and \$4,000 (for J.T.) annually, not including their transportation expenses. (3/12/2010 RP 33-35)

B. During Most Of The Marriage The Husband Was The Majority Owner Of A Successful Management Company And The Wife Was A Stay-At-Home Mother, With Little Knowledge Of Their Finances.

Throughout most of the marriage, Kristine was a stay-at-home mother and homemaker. (3/12/2010 RP 44-45) Kristine eventually returned to school, and after earning her culinary degree from the Seattle Culinary Academy in 2003, she started her own business, "Last Bite," baking and selling pastries and wedding cakes from the family home. (3/12/2010 RP 46-47) Initially, "Last

¹ Kristine testified that she provided \$250 per month to Katarina while at school to cover her personal expenses. (3/12/2010 RP 34)

"Bite" did not generate significant income, so in 2007 Kristine started working at the children's private high school as a "lunch lady" to supplement the household income, earning \$15 per hour. (3/12/2010 RP 48-49) The parties used Kristine's income to pay the children's tuition at the high school. (3/12/2010 RP 50)

Kristine was initially hired at Bellarmine to only serve lunch, but after she expressed an interest in overhauling the school's lunch program to offer "home-cooked" food to the students, the school allowed Kristine to pursue this change, which generated positive publicity for the school. (3/12/2010 RP 48-49) As a result, and at Kristine's request, the school made her a full-time employee and raised her salary. (3/12/2010 RP 49) In 2009, Kristine earned \$31,512 at Bellarmine. (3/12/2010 RP 50) Meanwhile, "Last Bite" was increasing its sales, and Kristine grossed \$32,626 in income in 2009. (3/12/2010 RP 86)

Early in the marriage, James was a loan officer for AVCO. (3/12/2010 RP 45) James eventually started Pacific Real Estate Management Company (PREMCO) in 1999, a successful company that managed branches for mortgage companies. (3/12/2010 RP 45, 60; CP 40) At one point, PREMCO had three offices.

(3/12/2010 RP 45) James is a 92.5% owner of PREMCO. (3/12/2010 RP 93-94) By the time of trial, James had shut down PREMCO and filed for bankruptcy on its behalf. (3/12/2010 RP 72, 157; See Ex. 32, 33, 34) Thereafter, James became a sales manager for Prospect Mortgage. (3/12/2010 RP 144)

James controlled the family finances. (3/12/2010 RP 50-53; CP 536-37, 539-40) Throughout the marriage, James was secretive about the finances of PREMCO and the family finances, having all financial statements mailed directly to the PREMCO offices. (3/12/2010 RP 51-52; CP 536-37, 539-40) James also filed all of the parties' tax returns electronically, so that Kristine could not review them. (3/12/2010 RP 52) This left Kristine without any real knowledge of the parties' finances. (3/12/2010 RP 60; CP 536-37, 539-40, 571, 596-97) Based on the parties' lifestyle and historical expenses, Kristine determined that James earned at least \$10,000 net per month. (3/12/2010 RP 115; CP 539-40) This was confirmed when Kristine discovered James' Social Security Statement and found that in the last few years, he had regularly earned well over \$100,000 annually. (See 3/12/2010 RP 60)

In addition to his take home income, Kristine learned that James also had controlled other cash assets – assets that he had never shared with Kristine. In 2007, James cashed out a \$123,000 401(k) account without Kristine's knowledge. (3/12/2010 RP 94) Around the time the parties separated in late 2008, James received at least \$60,000 from a lawsuit settlement related to PREMCO. (3/12/2010 RP 95-96) James also received the parties' 2007 tax refund of nearly \$15,000. (3/12/2010 RP 53, 90)

Kristine had no knowledge of what James did with these funds. (3/12/2010 RP 53, 94-96) James simply told Kristine that he spent the funds on different obligations. (3/12/2010 RP 94-96, 97)

C. The Husband Abandoned The Family And Refused To Provide Any Financial Support. The Wife Filed To Dissolve The Marriage And Obtained Temporary Orders Of Support That The Husband Ignored.

James left the family home in October 2008, financially abandoning the family. (3/12/2010 RP 53-55; CP 542-43) After James left, Kristine discovered that James had not paid the monthly mortgage payment of \$2,700 since August 2008. (3/12/2010 RP 54; CP 542) Kristine was only able to make one payment towards the mortgage on her own, and by December 2008, the house was

at risk of foreclosure. (3/12/2010 RP 54; CP 542) Meanwhile, James moved into his father's home, where he lived rent-free. (CP 538, 599)

Kristine filed a Petition for Dissolution on December 1, 2008. (CP 531) Kristine also filed a motion for temporary orders seeking spousal maintenance and child support. (CP 556-59) Kristine asserted that the family's household expenses were \$9,455 per month, which she could not meet on her income alone. (See CP 550-55) Kristine asked the court to impute income to James at \$10,000 net per month. (CP 539-40) Kristine also asked the court to restrain James from spending or disbursing the proceeds from the approximately \$60,000 settlement that he had received on behalf of PREMCO. (CP 538, 557)

Hearing on Kristine's motion for temporary orders was set for December 18, 2008 at 9:30 a.m. (CP 530) James was provided with notice of the hearing on December 2, 2008, but failed to appear. (CP 560-61, 562; 12/18/08 RP 2) On December 18, 2008, Superior Court Commissioner James H. Marshall ordered James to pay \$1,395 for the monthly support of the parties' two minor children, plus his proportionate share of their educational expenses,

based on the court's finding that James' monthly net income was \$10,000 and Kristine's monthly net income was \$3,608. (CP 666-68, 673) The commissioner ordered James to pay temporary monthly spousal maintenance of \$4,500 to Kristine. (CP 98) The commissioner ordered James to bring the mortgage on the family residence current. (CP 99) The commissioner restrained James from disbursing the proceeds from the PREMCO settlement proceeds. (CP 100) Finally, Kristine was awarded attorney fees of \$10,000. (CP 100)

Around the time the temporary orders were entered, James surreptitiously removed the family car – a Suburban – from the family residence. (3/12/2010 RP 62-63) Kristine used the Suburban to transport the children to school and their activities, as well to deliver desserts for her business. (3/12/2010 RP 64-66; CP 565-66) Despite her many pleas, James refused to return the Suburban to Kristine. (3/12/2010 RP 64) This left Kristine with only their daughter's 27-year old pickup truck to drive. (3/12/2010 RP 64) Kristine had to borrow friends' vehicles because she could not transport desserts in the back of the pickup truck in the middle of winter. (3/12/2010 RP 66)

James' actions placed Kristine's livelihood at risk, and robbed the family of any safe transportation for months. (CP 566) James only returned the Suburban after Kristine filed a motion for contempt. (3/12/2010 RP 65)

James refused to voluntarily comply with the terms of the temporary orders. (3/12/2010 RP 57-58, 70; *See also* CP 566-70, 583-84, 591-92) Kristine's income from Bellarmine was largely consumed by the children's tuition, which the school automatically deducted from her paychecks. (3/12/2010 RP 85; CP 567, 573) This left Kristine with what little income she received from her pastry business to meet the family's other obligations, including expenses for the children. (CP 567-69) Kristine had to undertake substantial credit card debt to meet the family's expenses, including utilities for which she began to receive disconnection notices. (CP 567-69) Meanwhile, because James had failed to bring the mortgage current, as he had been ordered, the Bank continued to threaten to foreclose on the family home, and posted a default notice on the front door. (3/12/2010 RP 67-68; CP 569)

The Bank notified Kristine that they would proceed with the foreclosure unless she brought the mortgage current or obtained a

loan modification. (3/12/2010 RP 67-69; CP 569) Losing the family home would not only be devastating to the family, but would destroy Kristine's business, since the commercial kitchen in their home was where she baked her desserts. (3/12/2010 RP 47; CP 536, 569, 580-81) James refused to bring the mortgage current. (3/12/2010 RP 68, 70) By May 2009, Kristine received a notice that the house would be sold at public auction unless the mortgage was brought current. (3/12/2010 RP 68-69) Kristine started working extra jobs, while also working at Bellarmine, to pay off the arrearage of approximately \$20,000. (3/12/2010 RP 69) Kristine also accepted loans from her mother and stepfather to assist with her obligations and attorney fees. (3/12/2010 RP 74-75, 125)

While all of this was happening, James, without any notice to Kristine, filed for personal bankruptcy and bankruptcy on behalf of PREMCO. (3/12/2010 RP 70-71) The bankruptcy trustee for PREMCO contacted Kristine to obtain the Suburban, because it was purportedly an asset of the company. (3/12/2010 RP 72) Kristine was forced to retain a bankruptcy attorney. (3/12/2010 RP 72) Kristine ended up having to buy back the Suburban from the bankruptcy trustee for \$6,000. (3/12/2010 RP 72-73) Also as a

result of James' bankruptcy, Kristine's wages were garnished for bills that he had incurred after he moved out of the family residence, but before Kristine filed for dissolution. (3/12/2010 RP 76-79) This caused Kristine to have to file her own bankruptcy petition. (3/12/2010 RP 79) Both personal bankruptcy petitions were discharged by the time of trial, and the majority of the parties' community debts were discharged. (See Finding of Fact (FF) 2.10, CP 629; CP 143-44)

On July 17, 2009, the parties appeared before Pierce County Judge Frank E. Cuthbertson to address James' refusal to comply with the temporary orders, including his failure to retain the PREMCO settlement proceeds, and disclose how (or if) the proceeds were disbursed. (See CP 591-94) In response to James' assertion that he used the proceeds to pay PREMCO's lawyers and his father for an alleged (and unsecured loan), the trial court expressed concern that James was dissipating or hiding assets while Kristine was left alone to try to preserve assets, including the family home:

Dad got paid, you know. The lawyer in San Francisco got paid. Everybody who Mr. Bowman decided he wants to get paid, get paid you know? And what makes this difficult is that while all this is going on,

Kristine Bowman is trying to cover the two mortgages on the house, to preserve the assets, right? I have real questions about his financial declaration...

I am concerned about what has been disclosed and what has been brought forth....

[I]t would be helpful if there was some record in front of the Court and in front of the commissioner below to suggest that folks aren't dissipating or hiding assets or at least making a good faith effort to disclose what's really there.

(7/17/09 RP 21, 22-23) The trial court rejected James' request to "vacate" the December 18, 2008 temporary orders, but left it open for James to separately move to modify the temporary order if he could show there was a change in circumstances to warrant modification. (7/17/2009 RP 30)

D. The Husband Continued To Withhold Financial Information, Making It Difficult To Determine The Family's Income And Assets, And Filed Several Meritless Motions That Increased The Wife's Attorney Fees.

In addition to failing to comply with the financial terms of the temporary order, James, who was intermittently represented by counsel but acted largely *pro se*, resisted Kristine's discovery

requests. (See 9/18/2009 RP 3)² This made it difficult for Kristine to determine among other things, whether James still retained the proceeds from the PREMCO settlement that he had previously been restrained from disbursing. (See 9/18/2009 RP 3-4; CP 101)

On September 18, 2009, the trial court granted Kristine's motion to compel discovery, and awarded her attorney fees of \$1,500 as sanctions. (9/18/2009 RP 14-15) The trial court questioned the credibility of a "report" offered by James purporting to detail the disbursement of the PREMCO settlement proceeds. (9/18/2009 RP 11) The trial court noted that the person who prepared the report on behalf of James did not appear to be a Certified Public Accountant, and instead was a "registered agent for [what] appears to be a sham." (9/18/2009 RP 5) The trial court also expressed concern that the purported "20,000 pages" of discovery that James had provided was in fact an attempt to "sandbag" Kristine. (9/18/09 RP 10, 11) The trial court ordered James to complete his response to discovery and to pay sanctions

² The cover page for this VRP says the hearing was on "August 18, 2009," but in fact the hearing was on September 18, 2009. (Compare 9/18/2009 RP 1 with 9/18/2009 RP 2)

to Kristine: "I don't want to reinforce his dilatory behavior, so he needs to cough it up in two weeks." (9/18/2009 RP 15)

The parties were originally scheduled to appear for trial on December 1, 2009. Before trial, James filed several motions, including a motion for contempt related to the parenting plan for the parties' son, then age 17, a motion to compel discovery, a motion for a "walkthrough" of the family residence, and a motion to continue the trial date. (CP 151, 161, 175; 12/1/2009 RP 2) The trial court expressed concern over the "rash of motions that have been filed at the 11th hour." (12/1/2009 RP 11) The trial court granted the continuance, but expressed concern that James continued to refuse to comply with earlier orders, and in particular had failed to pay attorney fees to Kristine for his earlier refusal to completely answer discovery: "I ordered you to provide documentation that wasn't provided, that was dilatory, meaning delayed improperly. I imposed a sanction. That sanction hasn't been paid. That sanction needs to be paid. I'm not spitting here in the wind, Mr. Bowman, okay?" (12/1/2009 RP 17)

One month before the parties' continued trial date, James filed his fourth unsuccessful motion to vacate the December 18,

2008 temporary order.³ (CP 238) The trial court found there was “no basis” for James’ motion. (2/19/2010 RP 11) The trial court expressed concerned with James’ “vexatious litigation,” which is “just racking up attorney’s fees [and] makes no sense to me at all.” (2/19/2010 RP 12-13) In response to James’ assertion that “finances are tight,” the trial court asserted that the court would consider the credibility of that statement at trial, and “we’ll find out in trial whether people are hiding money or whether there is money; but at this point everything is going upside down.” (2/19/2010 RP 12)

E. After A One-Day Trial, The Trial Court Equitably Divided The Parties’ Remaining Assets And Compensated The Wife For Funds That The Husband Unilaterally Controlled.

The parties once again appeared before Pierce County Frank E. Cuthbertson for trial on March 12, 2010. James represented himself pro se. Kristine was represented by Gig Harbor attorney Jeffrey Robinson. (3/12/2010 RP 4)

The trial court awarded Kristine the family residence, which it acknowledged had an “upside down” value of negative \$53,000

³ James had previously filed motions to vacate the temporary order on March 6, 2009 (CP 49), April 30, 2009 (CP 94), and December 18, 2009. (CP 200)

because more was owed on it than it was worth. (6/11/2010 RP 3; CP 622) The trial court awarded Kristine the household furnishings, valued at \$10,000. (6/11/2010 RP 3; CP 622) The trial court awarded "Last Bite" to Kristine, along with the equipment owned by the company, which it valued at \$6,000. (6/11/2010 RP 4; CP 622) The trial court also awarded Kristine her 401(k) with Bellarmine, which held \$511. (6/11/2010 RP 4; CP 622)

The trial court ordered that Kristine should be compensated for one-half of the 401(k) of \$123,000 that James unilaterally liquidated, the nearly \$15,000 IRS refund that James controlled, and the \$60,000 PREMCO settlement that James received around the time the parties separated. (6/11/2010 RP 4-5; CP 622) The court found that PREMCO was a closely held S-Corp, and the parties held an over 90% interest in the company. (6/11/2010 RP 5) The trial court found that PREMCO was an alter ego of James, which it concluded allowed it to direct the settlement proceeds in the parties' dissolution action. (6/11/2010 RP 5)

For purposes of child support, the trial court found that James had monthly net income of \$4,053; and Kristine had monthly net income of \$3,956. (CP 637) The trial court ordered James to

pay monthly child support of \$738.76 for Austin. (CP 638) The trial court declined to order post-secondary support for the parties' older son, but noted that it "believes that it is appropriate that the parents share the expenses that are not covered by ROTC equally." (CP 640) Regarding Katarina, the trial found that she "warrants and deserves support for college." (CP 640) The trial court ordered that the parents and Katarina each be responsible for one-third of any expenses that exceed scholarships and grants awarded to Katarina. (CP 640)

Finally, at James' request, the trial court reconsidered James' motion to vacate the December 18, 2008 temporary order. The trial court "categorically" rejected James' allegation that Kristine "committed fraud or misrepresented Mr. Bowman's income to the court." (6/11/2010 RP 13; FF 2.12, CP 631) The trial court found that Kristine reasonably estimated James' income in light of the fact that he was secretive regarding his income and PREMCO finances. (6/11/2010 RP 13) The trial court determined that at the time the temporary order was entered, James' income was less than \$10,000 a month. (6/11/2010 RP 13) On "equitable grounds,"

the trial court found that the temporary order should be retroactively modified. (6/11/2010 RP 14-15; FF 2.12, CP 631)

The trial court found that James should have paid undifferentiated support of \$4,500 per month (instead of approximately \$5,900 as previously ordered) from January to August 2009. (6/11/2010 RP 14; FF 2.12, CP 630) Thereafter, the trial court found that James should have paid \$4,000 undifferentiated support until the time of trial. (6/11/2010 RP 14; FF 2.12, CP 630) The trial court entered a judgment for \$79,500 against James for past-due support that he had failed to pay under the December 18, 2008 order as modified by the trial court. (CP 621, 623-24)

Finally, the trial court awarded attorney fees to the wife of \$11,500. (CP 625) The trial court found the husband intransigent, that his "actions have exacerbated the cost of attorney's fees in this case," and those actions have been "willful, intentional and malicious." (FF 2.15, CP 631)

James appeals. (CP 618)

III. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion In Refusing To Vacate A Validly Entered Temporary Order.** (Response to Assignments of Error (AE) 1, 4, 5)

On appeal, the husband challenges the December 18, 2008 temporary orders awarding child support and spousal maintenance to the wife. Whether a trial court vacates a validly entered order is a matter of discretion. *Morgan v. Burks*, 17 Wn. App. 193, 197, 563 P.2d 1260 (1977). The trial court's decision will not be reversed "absent a showing of a clear or manifest abuse of that discretion." *Morgan*, 17 Wn. App. at 197. In this case, the trial court did not abuse its discretion in declining to vacate the December 18, 2008 temporary order, which required the husband to provide temporary child support for the parties' two children who resided primarily with the wife, and to provide temporary spousal maintenance.

It is undisputed that the husband was the primary wage earner during the marriage, and that the wife's income alone could not meet the household expenses with which the husband left her when he left the family residence. (See 3/12/2010 RP 60; CP 536, 539-40, 550) The trial court rejected the husband's claims, which he repeats in this appeal, that the wife falsely claimed that he

earned \$10,000 net per month in support of her motion for a temporary order. (FF 2.12, CP 631) The trial court found that the “allegations by the husband that the wife committed fraud or misstated income at the time of the December 2008 hearing, is categorically rejected by the trial court.” (FF 2.12, CP 631) The trial court recognized that the wife’s claims were reasonable in light of the fact that the husband had historically, and also during this proceeding, refused to disclose the most basic financial information to the wife. (6/11/2010 RP 13)

While the trial court recognized that it appeared the husband was earning less than \$10,000 per month at the time the temporary order was entered, it concluded that the husband could pay monthly family support of at least \$4,500, which it retrospectively ordered. (6/11/2010 RP 13-14; FF 2.12, CP 630) Although the husband essentially claims he did not have sufficient income to pay *any* temporary support, the trial court simply did not believe him. The trial court’s credibility determinations should not be disturbed on appeal. ***Marriage of Rich***, 80 Wn. App. 252, 259, 907 P.2d 1234, *rev. denied*, 129 Wn.2d 1030 (1996) (the role of the appellate

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court is not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses).

In light of the fact that the trial court found that the husband had some ability to provide support, and the wife had an unquestionable need for support, the trial court did not abuse its discretion in declining to vacate the temporary order. However, whether the trial court had authority to retroactively reduce the temporary support order is questionable. Any “decree respecting maintenance or support may be modified only as to installments *accruing subsequent*” to the motion. RCW 26.09.170(1) (emphasis added); ***Lindsey v. Lindsey***, 54 Wn. App. 834, 835, 776 P.2d 172 (1989) (“Temporary support installments become judgments as they fall due”). While the husband did file a motion to modify the temporary support order, it was not until February 18, 2010 (CP 349), and the trial could not modify support before that date. RCW 26.19.070(1). Although the wife does not challenge the trial court’s decision on appeal, if there was any error, it was in the trial court’s retrospective modification of the temporary order – not in denying the husband’s repeated motions to vacate it.

The fact that the husband might have, to his detriment, relied on a court clerk's assertion that he did not need to appear for the December 18, 2008 hearing (App. Br. 27) does not compel vacation of the temporary order. First, there is substantial evidence that the husband was properly served with a notice of hearing that directed him to appear at the Pierce County Superior Court on December 18, 2008 at 9:30 a.m. (CP 530, 560-61) Second, court clerks are not authorized to provide legal advice. See RCW 2.32.090. Third, there was evidence that the husband was aware that the hearing was set for December 18, 2008 based on a telephone call between the parties prior to the hearing. (See 3/12/2010 RP 57) Under these circumstances, where there is evidence that the husband should have known to appear at the hearing regardless of any flawed advice from the clerk, the trial court did not abuse its discretion in denying the father's motion to vacate the temporary support order.

In light of the trial court's retroactive modification of the temporary support order, and the evidence presented, the trial court did not abuse its discretion in denying the husband's motion to vacate the temporary support order.

B. The Trial Court Did Not Abuse Its Discretion In Compensating The Wife For The Equivalent Of One-Half The 401(k), The Community Tax Refund, And Settlement Proceeds, All Of Which The Husband Controlled. (Response to AE 2)

The trial court did not abuse its discretion in compensating the wife for the funds available to the husband from his liquidated 401(k), the community tax refund, and the PREMCO settlement, all of which he controlled during the separation. To the extent that these funds no longer existed at trial, as the husband claims, the trial court did not err in considering his waste and dissipation of these assets in its property distribution.

Trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. **Marriage of Brewer**, 137 Wn.2d 756, 769, 976 P.2d 102 (1999); RCW 26.09.080. "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**, 137 Wn.2d at 769. In light of the trial court's broad discretion, a trial court's property distribution will not be reversed on appeal absent a showing of a manifest abuse of discretion. **Brewer**, 137 Wn.2d at 769.

In addition to the factors of RCW 26.09.080, the trial court may also consider a spouse's waste or concealment of assets in distributing the parties' assets. **Marriage of Wallace**, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003). RCW 26.09.080 does not limit the court's ability to consider one spouse's breach of fiduciary duty to the community in its determination of an appropriate distribution of assets. The "marital misconduct" that a court may not consider is limited to "immoral or physically abusive conduct within the marital relationship." **Marriage of Steadman**, 63 Wn. App. 523, 528, 821 P.2d 59 (1991); *see also Wallace*, 111 Wn. App. at 708-09. But the court may consider one spouse's "gross fiscal improvidence" or "squandering of marital assets" in making a fair and equitable distribution of the parties' assets and liabilities. **Steadman**, 63 Wn. App. at 528. That is precisely what the trial court did in this case.

In **Steadman**, the husband managed the parties' community business and made decisions regarding the payment of bills, including its tax obligations. 63 Wn. App. at 526. The trial court ordered the husband to pay the business tax liabilities – over three times the liabilities it charged to the wife. **Steadman**, 63 Wn. App.

at 525. Acknowledging that the trial court may consider this type of financial misconduct in dividing property and debts, this court upheld the allocation of debts because it was the husband's "negatively productive conduct, [which] resulted in the tax liabilities at issue." **Steadman**, 63 Wn. App. at 528.

The trial court in this case considered this same type of "negatively productive conduct." The trial court was rightfully concerned that after the parties separated, the husband did absolutely nothing to preserve the parties' remaining assets, and did absolutely nothing to support the family, even though he had available nearly \$200,000 of community funds under his unilateral control. (See e.g. 7/17/2009 RP 22-23; 2/19/2010 RP 12; 6/11/2010 RP 13) Because those assets were "squandered" by the husband, the trial court properly placed the value of those assets, had they been properly preserved, on the husband's side of the ledger, and awarded the wife an equal offset. See **Steadman**, 63 Wn. App. at 528.

This case is different from **Marriage of White**, 105 Wn. App. 545, 20 P.3d 481 (2001), which held that the trial court erred in awarding the wife \$30,511 that had been her separate property but

was used to pay off the mortgage on the family residence four years before the parties' separation. The **White** court held that these funds, which no longer existed at the time of trial because they had been spent on the family residence four years earlier, could not be distributed to the wife. 105 Wn. App. at 551. However, the **White** court did not hold that the funds could not be *considered* in fashioning an equitable division of property. Rather, the court emphasized that the trial court had discretion to divide the property in an equitable manner that takes into consideration "a spouse's unusually significant contributions to (or wasting of) the assets on hand at trial." **White**, 105 Wn. App. at 551. Thus the trial court has discretion, as it did here, to consider one parties' dissipation of assets as relevant to the just and equitable distribution of property. **Steadman**, 63 Wn. App. at 528.

Finally, the trial court did not err in finding that the PREMCO settlement proceeds were community property that could be considered in its equitable division. The trial court found that the husband regularly infused community property into the corporation, and that the community had an over-90% ownership interest in the corporation. (6/10/2010 RP 5) Accordingly, the trial court properly

found that it could consider the corporate assets in distributing the community estate. See **Standard Fire Ins. Co. v. Blakeslee**, 54 Wn. App. 1, 5-6, 771 P.2d 1172, *rev. denied*, 113 Wn.2d 1017 (1989) (when a corporate actor controls a corporation so closely, the corporation acts on behalf of the individual, and the corporate assets may be used to satisfy personal debts); **W. G. Platts, Inc. v. Platts**, 49 Wn.2d 203, 207-08, 298 P.2d 1107 (1956) (when the interests of justice require, the court may disregard the corporate entity in a divorce action); **Morgan v. Burks**, 93 Wn.2d 580, 585, 611 P.2d 751 (1980) (the corporate entity may be disregarded when the corporation has been intentionally used to violate or evade a duty owed to another).

The trial court's property distribution was well within its discretion, and based on a reasoned consideration of the factors in RCW 26.09.080, and one spouse's waste or dissipation of community assets.

C. The Trial Court Did Not Abuse Its Discretion In Making A Limited Award Of Post-Secondary Support For The Parties' Daughter. (Response to AE 6)

RCW 26.19.090(2) provides that when considering whether to order support for post-secondary educational support, the "court

shall determine whether the child is in fact dependent and is relying upon the parties for the reasonable necessities for life.” The standard of review for a trial court’s award of post-secondary support is abuse of discretion. “Discretion is abused where it is exercised on untenable grounds or for untenable reasons.” *In re Goude*, 152 Wn. App. 784, 790, ¶11 219 P.3d 717 (2009), *rev. denied*, 168 Wn.2d 1024 (2010).

Here, the daughter was still a minor when the dissolution action was commenced. (CP 531) The mother testified that the daughter was still dependent on her parents to assist her with expenses beyond tuition; the mother contributed \$250 per month to the daughter’s expenses while the dissolution action was pending. (3/12/2010 RP 34) The trial court found that the daughter “warrants and deserves support for college.” (CP 640) The trial court noted that the daughter is a “very good student,” and “both parents have encouraged her to go to college.” (6/11/2010 RP 10) Accordingly, the trial court properly ordered the parties and the daughter, who is an honor student, to each pay one-third of any expenses that exceed the daughter’s scholarship, which at the time of trial covered her entire tuition. (CP 640) The trial court’s post-

secondary support order was well within its discretion and should be affirmed.

D. The Husband Was Granted A “Fair Trial” In Which To Put On His Case. (Response to AE 3)

As a basis for his claim that his due process rights were violated, the husband complains that the wife did not provide him with a “Domestic Relations Information Form” two days before trial, as required by Pierce County Local Rule 94.04(b). He fails to state how he was prejudiced by this minor lapse. After the husband raised his objection, the trial court inquired whether the late disclosure impeded his ability to proceed with the trial, and the husband did not object to the trial proceeding. (See 3/12/2010 RP 10-13)

The husband also complains that he was deprived of discovery from the wife, which he alleges impeded his ability to have a “fair trial.” Again, he fails to cite what information he lacked. The only allegation the husband made regarding the alleged lack of disclosure was his claim that he could not discern the wife’s income. (3/12/2010 RP 13) But, notably, among the many, many challenges to the trial court’s orders on appeal, he does not challenge the trial court’s determination of the wife’s income.

Finally, the husband claims that he was entitled to a 2-3 day trial, but the trial court would only allow one day. The husband's only support for his claim was an aside made by the trial court three months before trial that it did not believe that a 2-3 day trial was necessary, as only the parties were testifying. (2/18/2009 RP 12-13) There is no evidence that on the day of trial the husband was prevented from fully litigating his case – he could have sought additional time to finish his case if he believed it was necessary, but did not. In fact, the husband was able to cross-examine the wife, and present a direct examination of himself. The husband cites no legal or factual authority to support his claim that this violated his due process rights to a fair trial, and there is none.

E. This Court Should Award Attorney Fees To The Wife.

This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). This court should award attorney fees to the wife because she has the need for her fees to be paid and the husband has the ability to pay.

RAP 18.1; RCW 26.09.140 (court may award fees considering the financial resources of the parties on any appeal).

This court should also award attorney fees to the wife based on the husband's intransigence. The trial court found the husband intransigent, that his "actions have exacerbated the cost of attorney's fees in this case," and those actions have been "willful, intentional and malicious." (FF 2.15, CP 631) The husband does not challenge these findings of fact, and they are verities on appeal. ***Marriage of Brewer***, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). This appeal is simply an extension of the intransigent conduct found by the trial court, which warrants an award of attorney fees in this court. See ***Chapman v. Perera***, 41 Wn. App. 444, 456, 704 P.2d 1224, *rev. denied*, 104 Wn.2d 1020 (1985) (awarding attorney fees to the respondents based on appellants' excessive filing of various motions in the trial court and appellate court while the appeal was pending and because the appeal lacked little merit).

The husband should be ordered to pay attorney fees to the wife under RCW 26.09.140 and based on his refusal to comply with the decree, which he has never sought to stay but, as with the temporary orders, simply ignored.

IV. CONCLUSION

The trial court's orders were well within its discretion, and this court should affirm. This court should also award attorney fees to the wife for having to respond to this appeal.

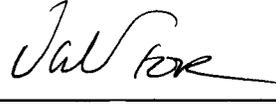
Originally submitted: 25th day of August, 2011.

Submitted with omitted citations: August 30, 2011.

SMITH GOODFRIEND, P.S.

JEFFREY A. ROBINSON, P.S.

By: 

By: 

Catherine W. Smith
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Date: 8/30/11
BY: [Signature]

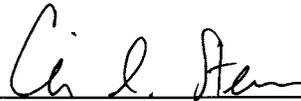
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 30, 2011, I arranged for service of the foregoing Amended Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
James W. Bowman 1315 SW 310th St. Federal Way, WA 98023	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Jeffrey A. Robinson Attorney at Law 4700 Point Fosdick Dr. NW, Ste. 301 Gig Harbor, WA 98335-1706	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 30th day of August, 2011.



Carrie L. Steen

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 30, 2011, I arranged for service of the foregoing letter, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 30th day of August, 2011.



Carrie L. Steen