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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS NO. 33355-8-III

Spokane County Superior Court Case No. 13-3-02021-0  
The Honorable Linda Tompkins  
Spokane County Superior Court Trial Judge

DAVID ALLEN CUMMINGS,	)	
	)	
Appellant,	)	
	)	Court of Appeals No.33355-8III
vs.	)	Sup. Ct. No. 13-3-02021-0
	)	
MICHELLE L. CUMMINGS,	)	
	)	
Respondent.	)	
	)	
	)	
	)	
_____	)	

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**RESPONSIVE BRIEF OF THE RESPONDENT**

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## I. INTRODUCTION AND RELIEF REQUESTED

This is divorce action for a 34-year marriage. At issue on appeal is the award of two of the parties' five real properties. Appellant's theory of the case is that, in distributing two of the parties real properties, (the family home on Montague Drive and a commercial rental property on Dean) the superior court failed to apply RCW 26.09.080 properly. Appellant tells this Court that the only reason the trial Court awarded the family home to Mrs. Cummings was because, "...the wife had a better relationship with the grandchildren." Opening Brief, pg. 6. Respondent strongly disagrees. In the statement of the case, Respondent makes a thorough recitation of facts and evidence the trial Court considered, and the trial court's rulings, including that the trial Court found the Appellant's testimony "less than credible," RP 364, lns. 25; 365, lns. 1-5, all of which shows that the issues raised on appeal are so far from reasonable that fees should be awarded to Respondent for having to defend against this appeal.

## II. RESPONDENT'S COUNTER STATEMENT OF THE CASE

The parties were married on April 15, 1979 in Cheney, WA. CP 4. Two children were born of this marriage, but they were adults by the time of trial. RP 362, lns. 2-3. The parties separated on May 13, 2013. CP 361, ln. 25. This was a 34-year marriage. RP 368, ln. 8. Mrs. Cummings testified that she left the marital home on May 13, 2013. Mr. Cummings

testified that he offered to let Mrs. Cummings stay in the marital home, but that she refused. RP 173, Ins. 6-23. At the time of separation, the parties had acquired significant community property assets. CP 44-47, Asset Liability Spreadsheet. At the time of trial, Mr. Cummings had acquired four retirement accounts and 15 ounces of gold through and Inheritance from his mother. CP 44-47. The parties' real properties were located at 712 N. Montague Drive, Cheney, WA; a duplex located at 712/714 E. North, Spokane, WA; a duplex located at 403/405 W. Wabash, Spokane, WA; a duplex located at 811/815 E. Garland, Spokane, WA, and a commercial property located at 1618 W. Dean, Spokane, WA. CP 44. The real property located at 712 N. Montague was the family home. CP 44. See also, RP 368, ln. 18. The remaining properties were rental or income properties. Id. Mrs. Cummings had no retirement benefits as of separation, but the evidence at trial showed that Mr. Cummings had three community property retirement benefits. RP 44, Ins. 5-8, CP 46. Mr. Cummings' community property retirement benefits included a Charles Schwab IRA, an Oak Mark Money Market Investment Account, and a Wang Laboratories/Prudential retirement plan. Id. Other community assets included 5 vehicles and 5 bank accounts. CP 45-46. Mr. Cummings also inherited separate property assets from his mother; which included a Sun America retirement account, Hartford Annuity, D. A. Davidson

retirement account, an AIG variable annuity and 15 ounces of gold. CP 47. At trial, Mr. Cummings' separate property assets were valued at \$75,847. RP 375, Ins. 4-13. Mrs. Cummings did not have any separate property assets. CP 44-49, RP 374, In. 4.

At the time of separation, the parties also had community liabilities in the forms of mortgages on four of the properties and a HELOC secured by the marital home. CP 47-48. See also, CP 4-6. At the time of trial neither party had any separate debts. CP 47-48. On November 15, 2013, the parties entered into an agreed order whereby Mr. Cummings would pay \$500 to Mrs. Cummings each month from rental income. CP 89-90. Mr. Cummings continued to pay \$500 per month to Mrs. Cummings through March of 2015. RP 37, Ins. 5-14, RP 44, Ins. 9- 16.

### **1. Preparation for Trial**

In preparation for this dissolution of marriage trial, counsel for the parties prepared a joint trial management report which listed all of the parties' disputed issues, exhibits, and witnesses. CP 37-43. The issues in dispute for this trial were spousal maintenance for the wife, distribution of the community and separate property assets, distribution of community liabilities, and attorney fees and costs. CP 38. Attached to the joint trial management report was an asset-liability spread sheet; wherein each party set forth their lists of community assets and liabilities, values for those

assets and liabilities, and their proposed distributions of the assets and liability obligations. CP 44-50. Also included in the asset liability spread sheet were the values for each of Mr. Cummings' separate property assets and the parties' proposed distributions of those assets. CP 46-47.

**2. Trial Exhibits and Stipulations at Trial**

Trial of this dissolution action commenced on March 23, 2015, continued on March 24, 2015, and was completed on March 30, 2015. The Court's oral ruling was issued on April 2, 2015. RP 2.

**3. Exhibits submitted for trial:**

Because spousal maintenance, distribution of assets, and attorney fees were at issue, the parties both submitted exhibits to support their claimed incomes and financial circumstances at the time of trial. Mrs. Cummings provided copies of her pay statements, 2013 tax return and W-2, 2014 W-2, and a financial declaration prepared for trial. Ex, P-1, P-2, P-3. Mr. Cummings also provided copies of documents to support his claimed income and financial circumstances as of the time of trial. Ex, R 109-R 118.

Prior to trial the parties, per agreement, secured appraisals of all five of their real properties, and copies of those appraisals were submitted as exhibits for trial. Ex, P-4 – P-8, See also, RP 45, lns. 23-25, pg. 46, lns. 1-4. Mortgage statements and a statement showing the balance of the

HELOC loan were submitted at trial as well. Ex, R-119. Mrs. Cummings also submitted exhibits to show the values of amounts in the parties' two Joint Banner Bank accounts, their rental property account, Mr. Cummings account for his business, Professional Appraisals, and a Wheatland Bank account. Ex, P-15-P-20. Those exhibits were admitted at trial as set forth below. Mrs. Cummings also submitted exhibits at trial to show the values of Mr. Cummings' community retirement benefits with Charles Schwab, Oak Mark, and Wang Laboratories. Ex, P-20-P-22. Those exhibits were also admitted at trial; as set forth below. Mrs. Cummings submitted documentation to verify the value of Mr. Cummings Sun America and D. A. Davidson retirement benefits and the Hartford and American General annuities he inherited from his mother. Ex, P-23-P-26. Those exhibits were admitted at trial as well. Lastly, Mrs. Cummings submitted copies of Mr. Cummings 2011-2013 Professional Appraisal tax returns, and his Professional Appraisal bank statements for 5/30/14 through 12/31/14. Ex, P-29-31, and P-42. All of those exhibits were admitted at trial for the purposes of showing assets available to Mr. Cummings, (community and separate retirement accounts), community bank accounts, and Mr. Cummings incomes for 2013 and 2014.

Mr. Cummings also filed exhibits to support his claimed amounts for his income, from his business and the rentals, and values for the

community retirement benefits. Ex, R 111-R 118. Specifically, Mr. Cummings submitted copies of checks from his business account, checks from the parties joint Banner Bank account, statements for his Charles Schwab and Oakmark retirement accounts, his 2014 business tax return, and rental ledger. Ex, R 111 –R 116, and R 118. Those exhibits were admitted at trial.

**4. Stipulations at trial:**

The parties stipulated to the values for the five real properties set forth in the asset liability spreadsheet; which were based upon the appraised values set forth in Mrs. Cummings' trial exhibits P-4 through P-8. Ex, P-4 - P-8, see also, RP 7, lns. 4-8. These values were later adopted by the trial judge. RP 369, lns. 14-18.

The parties also stipulated to the values for the four outstanding mortgages and the HELOC set forth in the parties' asset-liability spreadsheet, and Mr. Cummings' exhibit R 119, and those values were adopted by the Court at trial. RP 7, lns. 5-8; RP 18, lns. 1-3; RP 376, lns. 10-24.

The parties stipulated to the admissibility of Mrs. Cummings' exhibits, P-1 through 31, and P 37-P-40. RP 7, lns. 11-16, also lns. 17-21.

Significant for this appeal are Mrs. Cummings Exhibits P-1 through P-3; as those exhibits were provided to show Mrs. Cummings'

economic circumstances as of the time of trial, and included copies of Mrs. Cummings most recent pay statements, Mrs. Cummings 2013 tax return and W-2, 2014 W-2, and her financial declaration prepared for trial. Ex. P-1, P-2, P-3.

Additionally, the parties stipulated to the admissibility of Mr. Cummings' exhibits, R-101, R 103-106, R 109, R 111-R 116, R 118-R 119. RP 7, ln. 23-25, pg. 8, lns. 1-9. Significant for this appeal were Mr. Cummings' exhibits R-111, R 112, R-113, R-116, and R-118; as those exhibits were submitted to show Mr. Cummings' economic circumstances at the time of trial and verify most recent incomes to Mr. Cummings from his business, Professional Appraisals, and the parties' rental properties. Ex R-111, 112, 113, 118. R-116 was a copy of Mr. Cummings' 2014 business tax return and W-2. Ex. R 116.

## **5. Testimony And Evidence Presented On Spousal Maintenance**

### **A. Length of Marriage:**

Mrs. Cummings testified that the parties were married on April 15, 1979 and that the parties separated on May 13, 2013. RP 22, lns. 15-17, 25, pg. 3, lns. 1-2. Mrs. Cummings testified that she was seeking a spousal maintenance award in the amount of \$500 per month until she reached the age of 65. RP 23, lns. 21-25, pg. 24, lns. 1-3. She testified that the parties had been married for 34 years. RP 24, lns. 15-19.

**B. Parties' Education and Work Experiences:**

Ms. Cummings testified that she had a Master's degree, an MBA in health care management, that she was an R.N, was a certified gerontology nurse, and a licensed nursing home administrator. RP 24, Ins. 22-25, pg. 25, Ins. 1-3. Mrs. Cummings testified that Mr. Cummings had a Bachelor's of Arts in Business Administration, that he was a licensed real estate broker, and a licensed real estate appraiser. RP 25, Ins. 9-16. Mr. Cummings provided testimony regarding Mr. Cummings' work history from the time of their marriage to the time of trial. RP 29, Ins. 1-12.

Mr. Cummings testified that he had a real estate broker's license, but that he had not used that license to earn any commission since 1987. RP 173, Ins. 24-25; RP 174, Ins. 4-6.

**C. Parties' Health Issues That May Affect Future Employment:**

Both parties testified about their health issues. RP 27, Ins. 23-25, pg. 28, ln. 1. RP 27, Ins. 19-20. RP 28, Ins. 9-11, RP 177, Ins. 1-19. RP 177, Ins. 20-23.

**6. Incomes and Financial Obligations of Parties At Time of Trial:**

Mr. Cummings' attorney stated in her opening statement that,

We also expect the evidence to show that both parties are educated, sophisticated professionals; that both parties are financially independent. And we will expect the evidence to show that Mrs.

Cummings makes significantly more money than Mr. Cummings and that, therefore, spousal maintenance will not be necessary in this case. RP 21, Ins. 7-13.

**MRS. CUMMINGS:**

Mrs. Cummings identified Exhibit P-1; which were copies of her pays statements for October 6, 2014 through March 6, 2016. RP 32, Ins. 2-16, Ex, P-1. She testified that she currently earned \$34 per hour and that she was paid bi-monthly. RP 32, Ins. 17-20. Mrs. Cummings also identified Exhibit P-2 as her 2013 tax return, and that she reported a gross taxable income for the 2013 tax year of \$62, 387. RP 33, Ins. 10-22, Ex, P-2. Mrs. Cummings also reported that \$6,617 was withheld for federal income taxes and that she owed \$2,418 in additional taxes for the 2013 tax year. RP 34, Ins. 8-11. Mrs. Cummings identified her 2013 W-2, incorporated into Exhibit P-2; which reflected “wages, tips, and other compensation” for 2013 in the amount of \$62, 387. RP 34, Ins. 14-23. Mrs. Cummings also identified her 2014 W-2, incorporated into Exhibit P-2, and testified that her gross earnings for the 2014 tax year amounted to \$63, 357.24. RP 35, Ins. 1-14. Lastly, Mrs. Cummings identified her financial declaration; which was prepared for trial, as Exhibit P-3. RP 35 Ins. 15-20, Ex. P-3.

In reviewing the disclosures in her financial declaration, Mrs. Cummings testified that her gross monthly income was \$5,279.77, and

that amount was calculated by dividing her gross annual 2014 earnings by 12 months. RP 36, lns. 9-18. Mrs. Cummings incorporated \$500 per month as “spousal maintenance” into her financial declaration, because she hoped that payment would continue. RP 37, lns. 5-15, and Ex. P-3. Ms. Cummings went on to explain how her net monthly income was calculated. RP 37, lns. 21-25, pg. 38, lns. 1-19. Mrs. Cummings testified that she had twenty dollars in cash and \$4,000 in the bank at that time. RP, pg. 37, lns. 22-25, pg. 38, lns. 1-3. Mrs. Cummings testified to the amounts of each of her monthly expenses as set forth in her financial declaration. RP 39, lns. 6-25 through pg. 44, ln. 4. She concluded that her monthly expenses, excluding the amounts owed for her attorney fees, amounted to \$4,132.42. RP 43, lns. 18-20. Mrs. Cummings’ monthly expenses set forth in her financial declaration included, but were not limited to, rent, food, utilities, supplies, vehicle and vehicle insurance payments, gasoline, health insurance and uninsured medical, support for her son, tithing, and gifts for the parties’ grandchildren. RP 39, lns. 6-25 through pg. 44, ln. 4.

**MR. CUMMINGS:**

Mr. Cummings testified about his income at trial. RP 174, ln.14. Mr. Cummings testified that that he has never earned income in the amount of \$15,000 per month. RP 175, lns. 3-18. Mr. Cummings

identified Exhibit R-116 as his 2014 business tax return, and testified that his gross income for 2014; as depicted on line 10 of that return amounted to \$57,913. RP 176, lns. 3-11. Mr. Cummings also identified Exhibit R-120, (not admitted), as his 2013 personal income tax return, and that his income from all sources for 2013 amounted to \$55,963. RP 176, lns. 12-24. Unlike Mrs. Cummings, Mr. Cummings did not produce a current declaration of his financial circumstances at trial. RP 203, lns. 24-25, pg. 203, lns. 1-11. Instead, Mr. Cummings' attorney asked him to orally testify as to his monthly expenses as of the time of trial. RP 204, lns. 13-14. "Let's talk about your costs of daily living. Did you submit a financial declaration?" RP 203, lns. 24-25. He testified that he paid \$500 per month for medical insurance, \$75-\$100 per month for medication costs, \$100 per month for gas, \$175 for electric, water, garbage, and sewer, (later stated \$170), \$80 per month for telephone, \$69 for cable, \$50 for internet, \$400 for mortgage, taxes, and insurance, less than \$400 per month for food, \$67 (\$800 per year), for vehicle insurances, \$400 per month for gifts, \$400 per month for gas, \$50 per year for vehicle license and tabs, and \$200 per month for credit card payments, \$40 per month for haircuts, for a total of \$3,026 in monthly expenses. RP 204, lns. 20-25 through RP, pg. 209, ln. 12. Mr. Cummings also testified that he had two credit card debts at the time of trial, one was an Alaska Airlines card with

approximately \$4,000 owed and the other had a balance of \$600 or \$700.

RP 208, Ins. 17-23.

On cross examination, Ms. Cummings' attorney challenged Mr. Cummings as to why he only provided copies of checks from his Professional Appraisals business account for January 11, 2013 through December 28, 2013, when Mrs. Cummings' discovery requests, Production of Documents # 20, specifically asked for, among other things, canceled checks for the last three years. Ex, P-41, R 111, and RP 247, Ins. 13-25, RP 248, Ins. 1-25, RP 249, Ins. 1-25, RP 250, Ins. 1-25. Ms. Cummings' attorney also challenged the 2014 business tax return and W-2 Mr. Cummings filed in support of his claimed income. Ex, R 116. RP 251, Ins. 12-25, RP 251, Ins.1-3. It is important to note that Mr. Cummings did not provide a copy of his 2014 personal tax return for trial. Ex R 101-R 119; RP 262, Ins. 4-13. Though Mr. Cummings earlier testified that he had no business employees, he indicated on line 18 of his 2014 tax return that he had paid \$17,050 in employee benefits. Ex, R 116. RP, 254, Ins. 1-25, RP 255, Ins. 1-11. It was clear on cross-examination of Mr. Cummings that the only evidence he provided to show what his 2014 income was were a self-created W-2, and a 2014 tax return that was signed on November 14, 2014, and apparently submitted to the IRS prior to the end of the 2014 tax year. RP 245, Ins. 16-25, RP 246, Ins. 1-25, RP 251,

Ins. 12-25, RP 252, Ins. 1-3, RP 255, Ins. 5-20, RP 256, Ins. 1-25, RP 257, Ins. 1-8.

On direct Mr. Cummings testified his clients were business entities, but he did not produce a single 1099 or W-2 to show the amounts he was paid in the 2014 tax year for appraisals he completed for those clients. Ex, R 101-R 119, See also, RP 280, Ins. 7-9. When asked how he arrived at the number he claimed on line 6 of his 2014 tax return for his taxable income, he testified that 70% of his business came from Washington State Employees Credit Union; to which Mr. Cummings responded,

I, um—my income is—when I get paid for an appraisal, I take a copy of the check and put it in a folder, and I do that with every appraisal. And I provided—you know, you’ve been provided with that for three years. And if, um—and then I add up on the folder—I’ve got a whole bunch of them there to show you if you need to look at them—I add up on the folder for that month all the check’s I’ve received. RP 279, Ins 5-15.

On re-direct examination, Mr. Cummings’ attorney asked him if he gets 1099s; to which Mr. Cummings responded, “From 30, 40 percent of the clients-people that I work with.” There were no follow up questions. RP 313, Ins. 21-22.

When challenged on cross examination with, “Sir, isn’t it true that with regards to these numbers on page 8 of Exhibit 116 that you have not provided this Court with verification of any of these numbers,” Mr.

Cummings responded, "Um, No." RP 282, lns. 14-25, through RP 284, ln. 23. When asked to tell the Court why we did not have his 2014 personal tax return for trial, Mr. Cummings responded, "I don't have them done." RP 285, lns. 13-15.

On direct examination, Mr. Cummings testified that he lost a client that he did a lot of work for over 10 to 15 years. RP 189, lns. 5-9. Mr. Cummings provided no evidence at trial to verify this claim. Ex R 101-R 119, RP 170-332. On cross-examination, Mr. Cummings testified that he did seventy percent of his appraisals for Washington State Employees Credit Union. RP 279, lns. 16-19. He also testified that, "...probably 15% were for Wells Fargo." RP 280, lns. 3-4. When questioned about the expenses claimed on his 2014 Schedule C for mileage, Mr. Cummings testified that he no longer had the account with Washington State Employees Credit Union. RP 282, lns. 21-25, RP 283, lns. 1-4. Mr. Cummings went on to testify that because he lost Washington State Employees Credit Union as a client he no longer did appraisals in Pullman, WA and that, "I've kind of had to re-create my whole process because I'm not approved with them anymore." RP 283, lns. 3-8. When trial resumed on March 30, 2015, on cross-examination Mr. Cummings was again asked to disclose who his clients were in 2014. Mr. Cummings testified that he wasn't doing it for Washington State Employees Credit

Union any more, was doing it for Wells Fargo, did one for Alaska Federal Credit Union, “possibly,” RP 296, lns. 10-20. Mr. Cummings was asked to state whether or not he had been paid by clients for appraisals done in 2014, whose names were incorporated into a summary list, but his response was not helpful. RP 297, lns. 3-25. RP 298, lns. 1-10. On re-direct, Mr. Cummings testified that Washington State Employees Credit Union ceased being his client “four or five” months ago and that 60 to 65% of his work came from that client. RP 326, lns. 9-21.

**7. Standard of living during the parties’ marriage:**

Mrs. Cummings did testify to the standard of living during their marriage. RP 30, lns. 16-25; RP 311-13. Mr. Cummings did not provide any testimony specific to the standard of living the parties had during the marriage. RP 170-332. However, given the narrow scope of the issues for this appeal, that testimony will not be addressed in detail in this brief.

**8. Testimony regarding the nature of Mr. Cummings’ business, “Professional Appraisals:”**

Mrs. Cummings testified that Mr. Cummings started his own business, Professional Appraisals, “about eight years ago...” RP 29, ln. 11. She also testified that he had no employees, that he had an office for himself at the house, and that his office supplies or equipment consisted of a “computer and cell phone.” She also testified that, “I think we

purchased a fax machine for his office, but he was able to receive faxes on his computer.” RP 29, lns. 15-25. She testified that he also had a desk and a file cabinet, but no other office furnishings. RP 30, lns. 1-6.

Mr. Cummings did not refute any of Mrs. Cummings’ testimony about his business at trial. RP 170-332. On direct examination, Mr. Cummings confirmed that he had no current employees, and that his son and son-in-law worked for him, “six-seven years ago.” RP 187, lns. 16-19. When asked if he could run his business out of the Dean property today, Mr. Cummings responded, “No. I only need one office.” RP 325, lns. 13-17.

#### **9. Testimony and Evidence Re Distribution of Real Properties**

##### **MRS. CUMMINGS:**

Mrs. Cummings testified that she believed her request for the real property distribution was “fair.” RP 61, lns. 9-13. She testified that she wanted the Court to award her the family home because, “...the home is what meant so much to me and being part of the home. ... I wanted to feel secure and safe in my home and never wanted to leave it.” RP 61, lns. 13-17.

Mrs. Cummings also testified that the rental properties should be awarded to Mr. Cummings because,

“I don’t know anything about them. I don’t know how to run them. I don’t know how to repair them. I would have to obtain a property manager to run them, and even then, I wouldn’t know what to look at when they were showing me. I wouldn’t know what to compare them to. I wouldn’t know if they were cheating me out of profits. It’s not my business. It would be as if—if we were to own nursing homes together, and during this process he wanted to divest some of—I wanted to give him some of those and expect him to run them, he wouldn’t know what to do. He wouldn’t know all the rules and regulations. Well the same thing goes with the real estate. He knows real estate inside and outside. I know nothing about it. And he knows how to make them profitable. I don’t. If I were to have these rentals, I would probably have to—I would have to sell them. And it appears that, as we went over the appraisals, that they are not in very good condition. So in order to sell them, I’d have to prepare them to be sold and have to fix them up, and I don’t know the resources to call for that type of thing. I don’t even have the money to put into them to fix them up to sell. I just felt that it would be easier on him to do what he wanted to do, and that’s why I asked for it this way.” RP 62, lns. 4-25, pg. 63, lns. 1-7.

Mrs. Cummings also testified that she would reap a financial benefit in being awarded the family home. For the nearly two years between the parties date of separation, May 13, 2013 and the date of trial, Mrs. Cummings had to pay monthly rent in the amount of \$875 and renter’s insurance in the monthly amount of \$10.42, for a total amount of \$885.42. RP 39, lns. 6-14. Mrs. Cummings stated that awarding her the family home would be the fair thing to do because Mr. Cummings did not have to pay comparable amounts per month to live in the family home over the past two years. RP 99, 4-14.

Also, he's had—he's lived at the home for the last two years basically rent free. He paid for utilities. I've paid almost \$20,000 just in rent alone in the last two years. With him being awarded the four properties, I feel that he would have monies for retirement, and further down the road as he took good care of them, he would have—he'd be better off than I would, let's just say. And I want him to have his rentals. That's what he wanted, and that's what I want him to have. And I don't feel like I'm asking for much. I'm trying to be fair. RP 99, lns. 4-14.

Under cross examination, Mrs. Cummings testified, "I don't have the time or the ability to try to learn how to make them [the rental properties] profitable." RP 125, lns. 1-2.

On re-direct examination Mrs. Cummings testified that it would be fairer for Mr. Cummings to give her the Dean property than the other rentals he proposed she take because that commercial property did not have any damage to the building like the other non-commercial rentals had. RP 155, lns. 19-21. Though she did not blame Mr. Cumming for deliberately causing the damage to the non-commercial rental properties, she did assign responsibility to him for their current deteriorated conditions because, "he was the one running everything and taking care of everything, so this happened apparently under his management of the buildings." RP 155, lns. 9-12. Mrs. Cummings testified that the appraisals for the duplexes on North and Garland, Ex P-5 and P-7, stated that those buildings had a lot of damage and had a lot of repair work that needed to be done. RP 156, lns. 4-10. Mrs. Cummings also testified that

in looking at the asset/liability spreadsheet sections for Mr. Cummings' proposals for the real property distributions that he would be getting the better properties if his proposal was granted. RP 156, lns. 11-15.

She also testified that she wanted a home of her own because it was difficult to have her grandchildren and "everyone around" in a small apartment and that the noise level for her neighbors when they are all there "is not very nice." RP 163, lns. 21-24. Lastly, another reason that Mrs. Cummings rejected Mr. Cummings' proposal for her to take the North and Garland properties while he take the family home, Wabash and Dean properties was that the North and Garland properties were the two properties appraised with the lowest values of all. RP 167, lns. 19-24, Ex P-5 and P-7.

Though it is true that one of the reasons Mrs. Cummings wanted the Court to award the family home to her was because it is close to her grandchildren, it is clear from her testimony that was one of many reasons she asked for the family home to be awarded to her.

**MR. CUMMINGS:**

Mr. Cummings testified that he wanted to remain in the family home because his clients assigned appraisals to him based upon the location of his business. RP 189, lns. 4-25, pg. 190, lns.1-13. Mr. Cummings provided no documentary evidence at trial to support his claim

that clients assigned appraisals to him based upon the physical location of his business. Ex, R 101-R 119. Mr. Cummings produced no witnesses, real estate appraisers, or clients to testify at trial to corroborate his claim that clients were assigned to him on the basis of the business location. RP 1-360. However, Mr. Cummings later testified that he wanted to keep the commercial property located on Dean because, "I originally bought that to try to do a business in it." He went on to state that, "And even though at my age, it's getting where I might take a last shot for five years of going in and then trying to get a business going again." RP 195, lns. 6-12.

Under cross-examination, Mr. Cummings changed his testimony when asked what his plans are for the Dean property.

I initially thought I'd move into it myself, but it's not—there was a company there that continued to rent it. I—I would never—the only way I'd move into it is if they vacated it, and I would do it temporarily until I could get it back rented. I—I had thought of — there's no way I could move in there and survive with the rent stuff or the payment and stuff. RP 311, lns. 9-18.

Mr. Cummings also testified that because the family home was located near his son's residence that it would be convenient for his son to work with him as an appraiser apprentice in the future, if he chose to do so. RP 190, lns., 14-25, pg. 191, lns. 1-2.

Mr. Cummings testified that another reason why he would like the family home was because it was located in close proximity to where his

grandchildren reside and he can be available if his son or daughter needed him to care for the grandchildren. RP 191, Ins. 3-19. Proximity to the grandchildren was one of the reasons why Mr. Cummings requested that the family home be awarded to him.

### **III. Oral Findings of Fact and Conclusions of Law**

In making her oral findings of fact and reaching her conclusions of law the trial judge considered, “the testimony of the witnesses, the exhibits that have been admitted into evidence, the argument of counsel, and the legal authorities applicable to the issues.” RP 361, Ins. 20-23.

#### **1. Nature and Extent of Community Property:**

The trial judge considered the nature and extent of the real and personal property and it found that the majority of the property before it was community property. RP 367, Ins.24-25, RP 368, In. 1. The Court characterized all five of the parties’ real properties as community properties.

#### **2. Nature and Extent of Separate Property:**

The trial court found that the husband had, “...received significant separate property from inheritance from his mother.” RP 368, Ins. 1-3.

The court valued the separate property inherited by Mr. Cummings as follows: Sun America account, \$24,075; the Hartford annuity, \$14,404; the D.A. Davidson account, \$11,707, and the AIG American General

account, \$25,661. RP 375, Ins. 4-9. The court assigned a total value for those four, separate property accounts of \$75,847. RP 375, In. 9. The Court found that there was a \$19,000 amount that was from an insurance claim for a remodel of Mr. Cummings' mother's home; which Mr. Cummings later used to purchase 15 ounces of gold valued at \$20,025 for trial. RP 375, Ins. 14-23. The Court found that this too was Mr. Cummings' separate property from the inheritance, but because the parties agreed to split the gold as part of an intra-trial agreement, the Court assigned to each party \$10,012.50 for their half of the total value of the gold at that time; which was \$20, 025. RP 375, Ins. 20-25, RP 376, Ins. 1-3.

The trial court found that there were some, "items of separate personal property that the wife claimed from her family," but, "the matter was able to be analyzed without invading separate property of either party." RP 368, Ins. 4-7. The trial court awarded the separate property, designated in Exhibit B submitted with Mr. Cummings' Exhibit R 101, to Mrs. Cummings, and valued that property at \$500. Ex 101, Exhibit B, RP 371, Ins. 2-5.

### **3. Duration of the Marriage:**

The trial judge found that the parties were married in 1979 in Cheney, that they separated on May 13, 2014, and that the marriage is a 34-year marriage. RP 361, Ins. 24-25; RP 368, ln. 8.

**4. Economic Circumstances of Each Spouse at time of Division of Property:**

The court considered the economic circumstances of the parties at the time of trial.

The economic circumstances of each of the spouses at the time of trial indicated they were both fully employable. Again, at age 58, they were in great careers that had economic potential with lots of great experience with just the minor diminishing, as the Court has indicated before. RP 368, Ins. 12-17.

The trial court considered the parties' respective advanced degrees and current financial circumstances as follows:

**A. For Mrs. Cummings the Court made the following findings:**

The Court found that Mrs. Cummings had an undergraduate degree, was a,

“registered nurse, certified in gerontological nursing, that she operated as a licensed administrator of nursing homes and director of assisted living, and that at trial she was a director of nursing in a major assisted living graduated care facility”. RP 362, Ins. 3-10.

The Court found that at trial, Mrs. Cummings was, “full-time employed, currently able to work, but facing some emerging health issues.” RP 362, Ins. 16-17. The Court considered Mrs. Cummings past years' incomes; as

verified by exhibit P-2, Mrs. Cummings 2013 tax returns, and her 2014 W-2; which showed that her adjusted gross income for 2013 was \$62,409, and for 2014 was \$63,357. RP 362, Ins. 18-21. The Court also considered Mrs. Cummings' financial declaration, submitted for trial as Exhibit P-3, and that she had been receiving an additional \$500 per month from Mr. Cummings from rental incomes. RP 362, Ins. 22-25, RP 363, Ins. 1-4. The Court recognized that if the \$500 payment to Mrs. Cummings ceased, that, "her net income and expenses come very close to matching. The expenses higher than the income, but the Court realizes these are fluid numbers and are approximations as much as possible." RP 363, Ins. 8-15.

The Court found that the parties were both fully employable, and, "at age 58, they were in great careers that had economic potential with lots of great experience..." RP 368, Ins. 14-16.

**B. For Mr. Cummings the Court made the following findings:**

Mr. Cummings' education included receiving a Bachelor of Arts in Business Administration, a real estate broker's license, and a real estate appraiser certificate. RP 364, Ins. 4-8. The Court found that at the time of trial, Mr. Cummings "was actively engaged in the profession of real estate appraising." RP 364, Ins. 13-15. The Court discussed Mr. Cummings' work history up to the time of trial when she found that he was, "president of the business known as Professional Appraisals." RP 364, Ins 22-24.

With regards to Mr. Cummings' income at the time of trial, it is significant for this Court to note that during the trial the trial judge stated the following: "Certainly, the Court is going to take notice that there's no back up for the income evidence that the witness is providing except for his signatures on his tax returns." RP 257, lns. 5-8.

In making her oral findings the trial judge found that,

"The evidence of the husband's income was very difficult to deduce. Counsel in this matter did a fine and professional job of trying to distill it. Mr. Cummings' own testimony, however, made that very, very challenging. And I must advise that his testimony was, in large part, less than credible." RP 364, ln. 25; 365, lns. 1-5.

The Court did consider the fact that Mr. Cummings no longer had some of his prior "larger entities" clients and that had "impacted his earnings." RP 365, lns. 15-17.

In determining Mr. Cummings' income, the Court relied in part upon a summary of 2014 income from appraisals; which Mr. Cummings' corroborated through testimony at trial, and indicated that he received \$55,780 for appraisals for the 2014 year. RP 365, lns. 6-9. The Court also considered R-120, (never admitted); which was Mr. Cummings' 2013 tax return that showed he assigned himself a salary of \$30,500 and had other income in the amount of \$29,051 for a total adjusted gross income for of \$55,963 for 2013 tax year. RP 364, lns. 18-25; RP 366, ln. 1. The Court

went on to discuss the difficulty for counsel and the Court created by Mr. Cummings lack of disclosure,

“So very, very difficult, challenging for all counsel, and I commend you, each of you. But despite that good work on each side, the picture still remained murky, at best for the Court. It’s a shame, because the reluctance in being forthcoming does nothing but penalize the reluctant party. However, in this case I’m satisfied there was enough relevant and reliable evidence for the Court to make necessary determinations.” RP 367, lns. 1-8.

Because of Mr. Cummings’ lack of accounting and failure to disclose, the Court was unable to determine the income from the parties’ rental properties with any certainty.

“In the course of the husband’s work as an appraiser, he also was managing the acquisition and operations of several rental properties, hiring a contractor for repairs and maintenance and utilizing the assistance of the wife with financial documentation and bill paying. But the management of these properties were under his general financial direction. The lack of accounting and professional documentation of income, expenses, tax management, again, was a hindrance in ascertaining the working income, if you will, or cash flow or lack thereof from these operations. The Court commends the parties for the agreements that they did enter with regards to values, but, again, a true value for income generating capacity was very difficult.” RP 367, lns 9-23.

**5. Other factors the Court considered in distributing the parties’ community real properties:**

**Family Home:** With regards to the family home, located on Montague drive, the Court found that, despite Mr. Cummings’ testimony that clients were assigned based upon the location of his business, that, “the geographic market,” [related to his appraisal business], “generally centered in the west plains and the Palouse, was also changing.” RP 369,

Ins. 1-3. The Court found that he had lost a major account, and “it was clear he was going to have to branch out geographically.” RP 369, Ins. 3-4. The Court found that Mr. Cummings, “does have the potential for work from the Dean property.” RP 369, Ins. 5-7. The Court did not ultimately award the Dean property to Mr. Cummings, but explained the reasons for awarding the Dean property to the wife later in the Court’s oral ruling. RP 371, Ins. 19-25, RP 371, Ins. 1-15.

The Court did also consider the parties’ testimonies regarding their relationships to and involvement with their grandchildren and the proximity of the Montague, family home to where their grandchildren lived.

At trial, pursuant to direct examination, Mrs. Cummings testified that they had six living grandchildren. and that they all resided in Cheney, WA. RP 31, Ins. 14-18. Mrs. Cummings testified that she spends time with her grandchildren, “All the time.” RP 31, Ins. 17-19. She testified that she babysat for the grandchildren for “two or three years full time.” RP 31, Ins. 21-22. She testified that since separating from Mr. Cummings she spends “as much [time] as I can,” and that “They are at my house every weekend.” RR 31, Ins. 23-25, RP 32, ln. 1. On cross examination, Mrs. Cummings testified that one of the reasons that she wanted to live in the Montague home was to be closer to her grandchildren. RP 169, Ins.7-

10. She explained that she rented an apartment in Liberty Lake because “It was the only place I felt safe. I needed to get away.” RP 169, Ins. 11-17.

Mr. Cummings testified that the location of the family home helped him care for his grandchildren. RP 191, Ins. 13-25, RP 192, Ins. 1-2. He testified that he watches the grandchildren if, “there’s an emergency to pick them up at school.” RP 191, Ins. 17-18. He testified that his children call him to pick the grandchildren up from school, “once every two weeks, probably.” RP 192, Ins. 4-6. He went on to say that, “Lately, it’s been less.” RP 192, In. 10.

Though the Court did consider the parties’ relationships with their grandchildren and the proximity of the Montague home to where the grandchildren lived, that consideration was just one of the many factors that the Court considered in awarding the Montague home to Mrs. Cummings.

“The family home at 712 North Montague Drive is in close proximity to the grandchildren, and both claimed to want to live in the home in order to be closer to the children and grandchildren. Husband’s caring for grandchildren was a very recent vintage based on his work flexibility. However, I didn’t see an overall history of profound and consistent involvement as in the case of the wife.” RP 368, lines 18-25.

The Court went on to say,

**“In the balance,** it was more beneficial to award the family home to the wife as it related to the children’s and grandchildren’s

involvement. **The factors, then, as the Court has analyzed them above** result in the following distribution, as reflected on the asset and liability documentation.” RP 369, Ins. 8-13. [Emphasis added].

The Court then awarded the Montague home to Mr. Cummings and the E. North/Wabash/and Garland duplexes to Mr. Cummings. RP 369, Ins. 14-18.

With regards to the Dean property, the Court explained why it found that it was, “...more equitably awarded to the wife.” RP 369, Ins. 19-21. The Court determined that because the Dean property tenant was stable, and Mrs. Cummings had at least a limited involvement in managing the parties’ other rental properties over the years that Mrs. Cummings would be able to manage the Dean property. RP 369, Ins. 21-25. The Court went on to talk about the disparity of the parties, “in the area of retirements.” RP 370, Ins. 6-8. The Court found that the Dean property, “did appear to be income generating.” RP 370, Ins. 4-5. The Court determined that the “disparity in the area of retirements,” where Mrs. Cummings had no retirement benefits, and Mr. Cummings had multiple separate and two community retirement benefits, may be overcome to the benefit of Mrs. Cummings through income from the Dean property. RP 370, Ins. 8-11.

Lastly, another factor the trial Court considered in awarding real properties was that Mr. Cummings did have joint ownership in an

additional duplex property with the parties' son. During trial, it was discovered that Mr. Cummings had a 50% ownership interest with the parties' son in another income-producing real property. RP 370, Ins. 16-22. He was awarded half interest in that property as his separate ownership interest. RP 370, Ins. 19-20.

Because Mr. Cummings only appeals distribution of two of the parties' five real properties, Mrs. Cummings does not invest additional time to providing a detailed recitation of testimony and findings related to the other community property items set forth in the parties' asset-liability spreadsheet. The trial court did distribute all of the parties' community and separate properties and community liabilities as set forth in the verbatim report of proceedings. RP 370, ln. 23-25 through RP 377, ln. 1. The Court valued the entire estate at \$875,997. RP 377, Ins. 3-4. The Court's value of the assets to Mrs. Cummings was \$451,950 and to Mr. Cummings, \$424,047. RP 377, Ins. 5-6. The Court valued the community liabilities at \$217,818, and allocated to Mrs. Cummings liabilities amounting to \$73,819 and to Mr. Cummings liabilities amounting to \$143,999. RP 377, Ins. 7-9. The Court then determined that the net value of the community was \$658,179, the net worth to Mrs. Cummings was \$378,131 and the net worth to Mr. Cummings was \$280,048. RP 377, Ins. 10-12. The Court determined that the disparity between the community property

net worth allocated to the parties was in the favor of the wife in the amount of \$98,083, and determined that the equalization amount was \$49,041.50. RP 377, Ins. 13-17. The Court declined to require Mrs. Cummings to make an equalization payment to Mr. Cummings because Mr. Cummings was awarded \$75,000 in separate property assets. RP 377, Ins. 18-21. The Court concluded that, “...this is an equitable distribution without any transfer payment.” RP 377, In. 25, RP 378, Ins. 1-2. The Court again expressed concern about Mr. Cummings’ lack of disclosure.

“Again, the difficulty and the continued reluctance to be forthcoming in identifying assets and liabilities, even at trial, renders it difficult to be more precise, but that is what is the cost of not being forthcoming, and the Court expects and the law expects the parties to disclose clearly and fairly what the extent of the assets and liabilities are.” RP 378, lines 3-9.

Despite Mr. Cummings’ failure to fully disclose prior to and during trial, the Court found that, “I am satisfied that although this is not an equal distribution, it is an equitable distribution...” RP 378, Ins. 10-11.

#### **6. Written Findings and Conclusions and Decree**

Written findings of fact and conclusions of law and a decree of dissolution were entered on April 23, 2015. CP 54-60 and 61-69. Mr. Cummings makes no claim to this Court that the findings of fact and conclusions of law and the decree of dissolution were not in conformity or consistent with the trial Court’s oral rulings. Opening Brief, pgs. 1-14.

Section 2.21 of the findings of fact stated as follows:

**The court finds that the distribution of the parties' community property and liabilities; as set forth in paragraphs 3.2-3.5 of the decree of dissolution (filed herewith and fully incorporated herein by this reference), is a just and equitable distribution based upon the circumstances of the parties as determined by the evidence produced a trial. The net distribution to the Wife is greater than the net distribution to the Husband. However, because of the substantial separate property awarded to the Husband; which he inherited from his mother, the Court finds than an equalization payment from the Wife to the Husband is not warranted. CP, pg. 58, Sec. 2.21. [Emphasis added].**

Mr. Cummings did not assign error to this finding in his Opening Brief.

Opening Brief, pgs. 1-14. Mr. Cummings does not ask this Court to find that the trial Court's distribution of all of the parties' assets and liabilities was not a "just and equitable" distribution. Opening Brief, pgs. 1-14.

Instead, Mr. Cummings asks this Court to focus its attention on only two of the many property items before the trial court and redistribute those property items in isolation. Id. The Court denied Mrs. Cummings' request for spousal maintenance.

"No maintenance. Each of these folks are capable of maintaining their income; their needs are covered. Mrs. Cummings' financial declaration was fully evaluated and allowed the Court to conclude that it's not going to be easy. It never is easy." RP 379, ln. 25, 380, lns.1-4.

#### IV. LEGAL ARGUMENT

Appellant attempts to frame this case as being solely about the marital home (which also operated as his home office at the time of trial) and the business property on Dean Avenue in Spokane, Washington. He claims that the residential rental property – 3 duplexes – were not the

properties of value, see Opening Brief at 12, and asserts that the trial court failed to apply RCW 26.09.080 factors when determining that the Respondent, Mrs. Cummings, should receive the marital home and the Dean property. He makes this claim despite the fact that the parties stipulated to values of the five properties, making the marital home and Dean property valued at a total of \$355,000 and the three duplexes valued at a total of \$336,000 (though the duplexes had more liens associated with them – a difference that the court determined did not need to be equalized due, *inter alia*, to the husband’s significant separate property). RP 376-377.

Mr. Cummings also makes the assertion that he had to work out of the marital home (thus making the division of property an abuse of discretion, according to him), and states that this was “undisputed” despite the fact that his own testimony showed that (a) he had lost the bulk of his business that was near the marital home, and (b) he himself testified that he could run his business elsewhere (i.e., he could run his business from the Dean property, RP 195, lns. 6-12, bringing into question his entire trial position that only the marital home would suffice.

Mr. Cummings bases this argument on two grounds.

*First*, he alleges that the trial court did not actually apply the RCW 26.09.080 factors in reaching her ruling. *Second*, he alleges that the trial

court's application of the factors was an abuse of discretion because the court did not weigh factors appropriately. Both claims are meritless.

The transcript shows that the distribution was fair and equitable, and that Mr. Cummings' own behavior played a role in it. Prior to trial, he was found intransigent for failing to provide discovery, creating a history of a failure to cooperate which the judge considered in her ruling. See RP 374, Ins. 4-17 (court awarded retirement accounts to one party or the other to avoid interaction between the parties). Then during trial, the court, Mrs. Cummings, and *both* attorneys learned that Mr. Cummings had failed to reveal not only three or four other bank accounts but also *another rental property* that he owned with the parties' son and which were granted to Mr. Cummings in the divorce without a specific value. See RP 370, Ins. 16-17; 372, Ins. 4-10. The trial court found Mr. Cummings not to be credible, which is not reviewable on appeal. See Burrill v. Burrill, 113 Wash. App. 863, 868, 56 P.3d 993 (2002). It was pursuant to *these facts* that the court ruled what was fair and equitable. Mr. Cummings' own arguments undercut him. At trial, he wanted Mrs. Cummings to receive two duplexes, while he took the third as well as the Dean business property and the marital home. CP 46-47. Now that he was awarded all 3 duplexes, he claims they have little value.

At no time has Mr. Cummings challenged the division of property in terms of disparate distribution, making the equity of that distribution a verity on appeal. In re Marriage of Brewer, 137 Wn. 2d 756, 766, 976 P.2d 102 (1999). His challenge is to which piece of property he received, not how it is valued. He cites to no case law to justify this kind of objection, nor can he adequately explain how the property division was unfair either by law or under the facts of the case. His failure to cite relevant case law, along with his previous intransigence below, should result in a ruling that he pay Mrs. Cummings' attorney fees to defend this appeal.

**1. The standard of review in a property distribution pursuant to a dissolution of marriage action is abuse of discretion.**

Because the trial court is in the best position to decide issues of fairness, the appellate court reviews a trial court's property division only for manifest abuse of discretion. In re Marriage of Muhammad, 153 Wn.2d 795, 803, 108 P.3d 779 (2005); In re Marriage of Larson and Calhoun, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." Muhammad, 153 Wn.2d at 803 (quotation omitted). "Trial court decisions in dissolution proceedings will seldom be changed on appeal." In re Marriage of Stenshoel, 72 Wn. App. 800, 803, 86, P.2d 635 (1993).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)

In re Marriage of Littlefield, 133 Wn. 2d 39, 46-47, 940 P.2d 1362 (1997).

**2. Because the Appellant failed to assign error to the finding of fact, set forth in Section 2.1 of the Final Findings of Fact and Conclusions of Law, that finding becomes a verity for the purpose of this appeal.**

The Findings of Fact and Conclusions of Law entered on April 23, 2015

set forth the following in section 2.21.

The court finds that the distribution of the parties' community property and liabilities; as set forth in paragraphs 3.2-3.5 of the decree of dissolution (filed herewith and fully incorporated herein by this reference), is a just and equitable distribution based upon the circumstances of the parties as determined by the evidence produced a trial. The net distribution to the Wife is greater than the net distribution to the Husband. However, because of the substantial separate property awarded to the Husband; which he inherited from his mother, the Court finds than an equalization payment from the Wife to the Husband is not warranted. CP, pg. 58, Sec. 2.21.

Unchallenged findings are verities on appeal. In re Marriage of Brewer, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Mr. Cummings did not challenge this finding; which stated that the trial Court's entire property and liability distribution, including the parties' community properties and liabilities and Mr. Cummings' separate property, this finding should be upheld on appeal.

**3. It is improper for the Appellant to ask this Court to re-distribute in isolation only two properties of the total number of the parties' community property previously distributed at trial.**

All property is before the court for distribution. In re Marriage of Farmer, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). The Appellant asks this Court to completely disregard the entire property and liability distribution and focus solely on two real properties in isolation. That is contrary to the statutory requirements and applicable case law. Consequently the trial court's distribution of all of the parties' properties, separate and community, and community liabilities, should be affirmed.

**4. The trial court carefully considered all the evidence and applied all of the factors set forth in RCW 26.09.080 in making its findings of fact and conclusions of law and final distribution of the parties' properties and liabilities.**

“In a marriage dissolution proceeding, the trial court must ‘dispose of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors.’” In re Marriage of Muhammad, 135 Wn. 2d 795, 803, 108 P.3d 779 (2005) (quotation omitted). In distributing parties' property and liabilities the Court must consider the following statutory factors: (1) the nature and extent of the community property, (2) the nature and extent of the separate property, (3) the duration of the marriage, and (4) the economic circumstances of each spouse when the property distribution is

to become effective. RCW 26.09.080. The pre-ceding list of factors is a non-exclusive list, and the Court may consider other factors relevant to a particular case. In re Marriage of Larson and Calhoun, 178 Wn. App. 133, 138, 313 P.3d 1228 (2013).

The court has broad discretion to decide what is just and equitable based on the circumstances of each case. In re Marriage of Rockwell, 141 Wn. App. 235, 242, 170 P.3d 572 (2007). All property is before the court for distribution. In re Marriage of Farmer, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). Distribution “does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties.” In re Marriage of Crosetto, 82 Wn. App. 545, 556, 918 P.2d 954 (1996). “Fairness is attained by considering all circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules.” In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). “Just and equitable distribution does not mean that the court must make an equal distribution.” In re Marriage of Dewberry, 115 Wn. App. 351, 366, 62 P.3d 525 (2003). “Under appropriate circumstances ... [the trial court] need not award separate property to its owner.” In re Marriage of White, 105 Wn. App. 545, 549, 20 P.3d 481 (2001). The trial court is in the best position to assess the assets and liabilities of the parties and to determine what

constitutes an equitable outcome. In re Marriage of Brewer, 137 Wn. 2d 756, 769, 976 P.2d 102 (1999). Because of the emotional and financial interests affected by appeals of a marriage dissolution decree are best served by finality, trial court decisions in such proceedings are rarely changed on appeal. In re Marriage of Landry, 103 Wn.2d 807, 809. Thus affirmation of the trial court's decisions is warranted unless no reasonable judge would have reached the same conclusions. Id., 809-810; Kim, 179 Wn. App. at 240.

While Mr. Cummings attempts to claim that the trial court did not consider the statutory factors, a review of the oral ruling shows that it did. It certainly considered the length of the marriage and the nature of the parties' economic circumstances, as well as the nature and extent of the property, both community and separate. The ruling is extensive. The appropriate factors were considered, without question. Mr. Cummings' claim that the trial Court did not consider the economic circumstances of the parties at trial is completely without merit. The trial Court refuted that claim when in issuing her oral ruling the Court stated that she considered the following:

“The economic circumstances of each of the spouses at the time of trial indicated they were both fully employable. Again, at age 58, they were in great careers that had economic potential with lots of great experience with just the minor diminishing, as the Court has indicated before.” RP 368, lns. 12-17.

Mr. Cummings' claim that the Court's award of the marital home to the wife was solely determined by the Court's consideration of the parties' relationships with their grandchildren is without merit. Mr. Cummings' claim that the trial Court's sole basis for awarding the marital home to Mrs. Cummings her stronger relationship with the parties' grandchildren is completely refuted by the extensive testimony of the parties, admitted trial exhibits, the trial Court's oral findings of fact and conclusion, and the final orders. The trial Court considered all of the parties' separate property, RP 368-375, EX 101, CP 46-47, all of the parties community property, RP 61-62, RP 99, RP125, RP 155-156, CP 44-51, the length of the parties marriage, RP 22, lns. 15-17, 25, pg. 3, lns 1-2, RP 24, lns. 15-19, RP 361, Lns 24-25, RP 368, Ln. 8. and the parties' economic circumstances at the time of the distribution of their properties, Ex P1-P-3, Ex R110-R 118, RP 32-39, RP 174-176, RP 203-208, RP 247-256, RP 280-285, RP 296-297, RP 362-365, RP 368, lns. 12-25, RP 369-371.

The Court also considered the following additional factors in making the property and liability distribution:

1. Mrs. Cummings had only minimal involvement in the management of the rental properties.
2. Mr. Cummings was solely responsible for the accounting, repairs, upkeep, managing of the rental properties.

3. Mr. Cummings failed to properly manage and upkeep the duplex rentals.

4. Mr. Cummings reaped a financial benefit by being able to remain in the family home for 2 years and only paying less than \$100 per month for a HELOC payment while Mrs. Cummings paid rent and renters insurance in the amount of \$885 per month.

5. Mr. Cummings' refusal to fully disclose documents or provide testimony regarding his income, or rental incomes, prevented the Court from making an accurate determination of what those rental income amounts were.

6. Mrs. Cummings, though she had limited experience in managing the rental properties, could handle managing the Dean property because the tenant was stable and long-term, and the property was in good condition.

7. Mr. Cummings lost clients and needed to expand geographically anyway, so he did not require the marital home to continue his business. He provided contradictory testimony in saying that he needed the family home because that was the location of his business, and his clients' assigned appraisals based upon his business location, because he went on to testify he wanted the Dean property to give one last shot to rebuilding his business. Finally, there was no evidence that he was prohibited from getting another business location in Cheney (the marital home location).

As the above recitation of evidence and findings demonstrate, the relationship each had with the grandchildren, and the marital home's proximity to the grandchildren was only one factor out of many that the Court considered.

**5. Even if this Court determines that the trial Court did not consider all of the factors set forth in RCW 26.09.080, substantial evidence was before the trial Court to support the Court's findings of fact and conclusions of law and its ultimate distribution of the parties' property and liabilities in its entirety.**

Substantial evidence exists if the record contains evidence of a sufficient extent to persuade a fair-minded rational person of the truth of the declared premise. The appellate court does not reweigh the evidence. In re Marriage of Kim, 179 Wn. App. 232, 244, 317 P.3d 555 (2014). It defers to the trial court's weighing of the evidence. In re Marriage of Rostrom, 184 Wn. App. 744, 750, 339 P.3d 185 (2014). The court of appeals does not weigh conflicting evidence or substitute its judgment for that of the trial court. In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). Findings of fact supported by substantial evidence will not be disturbed on appeal. Thorndike v Hesperian Orchards, Inc., 54 Wn. 2<sup>nd</sup> 570, 575, 343 P.2d 183 (1959).

The trial court is the judge of credibility and the court of appeals reviews challenged findings of fact only for substantial evidence in the record before the trial court. Dodd v Polack, 63 Wn.2d 828, 829, 389 P.2d 289 (1964). It is the court's prerogative to disregard witness testimony that is not credible. Id. at 829; Keene Valley Ventures, Inc. v. City of Richland, 174 Wn. App. 219, 224, 298 P.3d 121 (2013).

In this case, the trial court had full evidence before it, as is detailed in the factual statement set forth above. The trial court specifically stated at the outset of its oral ruling that it had "considered the testimony of the witnesses, the exhibits that have been admitted into evidence, the argument of counsel, and the legal authorities applicable to the issues"

when reaching a final judgment. RP 361, lns. 20-23. It specifically ruled that, even though it could reach conclusions based on the evidence before it at trial, it was troubled by Mr. Cummings' lack of credibility, and that that lack of credibility was unfortunate for the party withholding information (in this case, Mr. Cummings). RP 366, ln 5; 373 ln. 23. The trial court was aware that Mr. Cummings had been sanctioned prior to trial for discovery violations, and noted late revelations of at least one bank accounts during trial, as well as real property held jointly with the parties' son, none of which had been disclosed during discovery, causing ongoing intransigence. RP 366, lns. 10-13. These hindrances for determining value and distribution of assets were all of Mr. Cummings' making, not Mrs. Cummings.

Knowing the specific facts and circumstances in the case, and being charged with determining, *inter alia*, the credibility of the parties (in which Mr. Cummings was found lacking), the trial court ruled that it was fair and equitable to divide the property so that Mr. Cummings received the residential rental properties (i.e., the 3 duplexes); which he had managed during the marriage, all four of his separate property retirement benefits, one community property retirement benefit and 50% of another community property retirement benefit, 7.5 gold bars and half of the monies in all of the bank accounts. Mrs. Cummings was awarded the

marital home, the Dean rental property, one of the parties community retirement benefits and 50% of another, half of the monies in the parties community bank accounts, and 7.5 bars of gold. Mrs. Cummings request for spousal maintenance was denied.

The Court carefully considered the distribution of the parties' community real properties. It awarded her the marital home and the Dean commercial real property. The Court found that because the Dean property had a long-term, stable tenant, that managing that property would be less challenging than Mrs. Cummings, a non-realtor/non-property manager, attempting to manage the three residential real properties.

Each of these rulings shows that the trial court considered property distribution and all relevant factors before issuing a ruling. Not only was the court's conclusions reasonable, but they were proper under the facts.

The court did not find Mr. Cummings credible. The Court did not find credible Mr. Cummings testimony the survival of his appraisal business was contingent upon him being awarded the family home; as Mr. Cummings testified at trial that he thought about trying to re-start his business from the Dean property. Mr. Cummings testified that he had lost a major client that provided him with 60-65% of his business months before trial; which supported the trial Court's finding that he would need to expand geographically in order to continue his business. RP 311, lns. 9-

18, 326, Ins. 9-21. Moreover, Mr. Cummings testified that he offered to have Mrs. Cummings live in the home at the time of the separation, RP 173, Ins. 6-23, thus indicating his willingness and ability to run his business elsewhere. Mr. Cummings' appraisal business consisted of had nothing more than a desk, computer, file cabinet, fax machine, and cell phone. RP 29, Ins. 15-25. His appraisal business does not require him to reside at any specific location for the business to survive; as he travels to complete his cite checks and then completes his appraisals on his computer. Mr. Cummings' business is not like a mechanic whose shop is located at the same place as the family home. He can be extremely mobile and succeed. He does not cite, nor can the undersigned find, a case that restricts a court from granting the marital home to a party under the circumstances and facts of this case.

Moreover, the court expressed a reasonable concern about the disparity between Mr. Cummings numerous retirement benefits and Mrs. Cummings' having none. It awarded the Dean property to her because it has a long-term stable renter and it is income generating; thus giving her a supplemental, (though minimum), income stream between trial and retirement. RP 369-370. This was not only a reasonable choice, it was an equitable choice. Given the fact that Mr. Cummings alone had the experience of managing the three residential rental properties, it was just

and equitable to award those properties to him. The evidence showed Mr. Cummings had been responsible for the duplexes' upkeep, and he was the party with the real estate background to manage these properties. In re Marriage of Williams, 84 Wn. Ap. 263, 270, 927 P.2d 679 (1996) (noting that each party's responsibility for dissipating marital assets is a relevant consideration to the just and equitable distribution of property).

Even if the trial court had failed to make specific findings as he now claims, such failure is without consequence; as substantial evidence in the record supports the trial Court's findings and distribution. Cf. In re Marriage of Steadman, 63 Wn. App. 523, 526, 821 P.2d 59 (1991) ("Winston's contention that the court failed to make a formal finding as to economic circumstances is without merit. There is no such obligation. The obligation is to consider the respective circumstances of the parties. The findings and the oral opinion of the court demonstrate that this was done."); see also In re Marriage of Larson, 178 Wn.App. 133, 144, 313 P.3d 1228 (2013) (trial court properly exercised its discretion when it determined fair and equitable property because the court listened closely to the testimony of the parties and additional witnesses, reviewed the exhibits admitted into evidence as well as extensive legal briefing, heard closing arguments of counsel, and provided ample, tenable justifications for its decision).

Here the court not only made specific findings, but also stated that it considered the entire record, the argument of counsel, and the testimony and exhibits of the parties. To require some other process is not the law.

As noted in Konzen v. Konzen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985):

This court will not single out a particular factor, such as the character of the property, and require as a matter of law that it be given greater weight than other relevant factors. The statute directs the trial court to weigh all of the factors, within the context of the particular circumstances of the parties, to come to a fair, just and equitable division of property. The character of the property is a relevant factor which must be considered, but is not controlling.

Mr. Cummings' only citation to a case regarding what a trial court must consider during a property distribution is with regard to where the statute specifically states what *not* to consider. See In re Marriage of Mohammad, supra, and at Opening Brief at 10. In that case, the court reversed and remanded out of a concern that the trial court had considered the husband's abusive behavior in and of itself in dividing property (and not tied to a outcome for the wife such as poor health). This is not an analogous case to the facts here, and should be disregarded.

In sum, there is no basis in law or fact to justify this appeal.

6. **This Court should award attorney fees to Mrs. Cummings.**

Mrs. Cummings seeks an order from this Court requiring Mr. Cummings to pay reasonable attorney fees for having to defend this appeal. She makes this request on three grounds:

**A. Intransigence**

A court may order legal fees paid if caused by another party's intransigence. In Re Marriage of Bobbitt, 135 Wn. App. 8, 30, 144 P.3d 306 (2006). Intransigence includes obstruction and foot-dragging, filing repeated unnecessary motions, or making a proceeding unduly difficult and costly. Id. "A party's intransigence in the trial court can also support an award of attorney fees on appeal." In re Marriage of Mattson, 95 Wn. App. 592, 606, 976 P.2d 157 (1999).

Here, Mr. Cummings was found to be intransigent below, before trial. He then showed himself during trial to have failed to provide information on bank accounts and other real property, compounding his original intransigence. He now comes before this Court with a legal theory for which he has no citation, which violates this Court's rules. See RAP 10.3(a)(6) (party required to provide citations to legal authority). All instances of intransigence has had direct impact on Mrs. Cummings, as she has been required to expend extra funds to force Mr. Cummings to comply with discovery, and – as with this appeal – to refute his unjustified legal arguments. This relief can be granted under RAP 18.1, separate and

apart from any request for fees due to a frivolous appeal (RAP 18.9) or through statutory authority (RCW 26.09.140). She asks for fees.

**B. Frivolous appeal**

Mrs. Cummings also asks for fees under RAP 18.9. Where a party files an appeal without reasonable cause, this Court may require him to pay the prevailing party expenses, including fees that party incurred in opposing the action. RCW 4.84.185. “An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” Chapman v. Perera, 41 Wn.App. 444, 455-56, 704 P.2d 1224, review denied, 104 Wn.2d 1020 (1985). See also Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980) (in determining frivolous nature of appeal, court should consider that: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no possibility of reversal).

A close review of the evidence and of the trial court’s oral ruling shows that the trial court was well within its discretion to rule as it did,

and that Mr. Cummings has failed to cite case law or an accurate factual scenario that would result in anything less than affirmance. Sanctions are appropriate in a case such as this one.

**C. RCW 26.09.140**

Pursuant to RCW 26.09.140 and RAP 18.1, Mrs. Cummings asks that this Court order Mr. Cummings to pay her attorney fees on this appeal. To make such an order, the Court of Appeals will examine the arguable merit of the issues on appeal as well as the financial resources of the respective parties. In re Marriage of CMC, 87 Wn.App. 84, 89, 940 P.2d 669 (1997).

Mrs. Cummings will provide a financial affidavit in a timely manner, as required by RAP 18.1, to demonstrate her need for her fees to be paid. The merits of her defense of Mr. Cummings' appeal are set forth above, and justify an order of fees at this level.

**V. CONCLUSION**

For the foregoing reasons, Mrs. Cummings ask that this Court deny Mr. Cummings' appeal and grant her attorney fees. Please note that Mrs. Cummings is not a party to that portion of Mr. Cummings' appeal that he pay attorney fees to his lawyer, and therefore she has not addressed that issue.

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