

FILED

SEP 06 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 343219

**COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON**

In re:

Kathleen M. Grant, Appellant,

and

John D. Grant, Respondent.

BRIEF OF APPELLANT

**James Marston
WSBA No. 1283
Attorney for Appellant
3508 N.E. Third Avenue
Camas, WA 98607-2411
(360) 335-1515**

BRIEF OF APPELLANT

TABLE OF CONTENTS

I.	Introduction	6
II.	Assignments of Error	7
	<i>Assignments of Error</i>	7
	No. 1	7
	No. 2	7
	No. 3	7
	No. 4	7
	No. 5	8
	<i>Issues Pertaining to Assignments of Error</i>	8
	No. 1	8
	No. 2	8
	No. 3	9
	No. 4	9

No. 5	9
III. Statement of the Case.	10
IV. Summary of Argument.	25
V. Argument.	26
a. Standard of Review as to Substantive Issues in Case: Appellate Review of Fact and Law Respecting Summary Judgment Decisions is De Novo	26
b. A Provision in a Decree Awarding “the Balance of the Assets” to One Party Does Not Operate to Divest the Community Interest in a Significant Community Asset Unknown to One of the Parties and the Court	27
c. A Party’s Failure to Reveal or Active Conceal- ment of a Community Asset Causes That Asset to be Owned by the Parties as Tenants in Common Following Divorce	33
1. A Spouse Claiming Good Faith in a Transaction With the Other Has the Burden of Proving the Good Faith Claimed	34
2. Spouses Stand in a Fiduciary Relationship With One Another Respecting Their Financial Interests	34
3. The Fiduciary Responsibilities Spouses Owe Each Other Continue During Divorce	35
4. Community Assets Not Disposed of Upon Divorce are Held by Parties as Tenants in Common	36
5. Community Assets Not <i>Disclosed</i> Upon	

	Divorce are Held by Parties as Tenants in Common	36
6.	Undistributed Community Property May be Distributed in an Action for Partition	43
7.	Courts Have Been Lenient Concerning a Party’s Choice of Remedy for Allocating Undistributed Community Property	44
d.	The Trial Court Record Does Not Support the Court’s Imposition of Fees and Costs Against the Appellant	45
VI.	Conclusion.	47

TABLE OF AUTHORITIES

Table of Cases

<i>Aetna Life Ins. Co. v. Wadsworth</i> , 102 Wn.2d 652, 689 P.2d 46 (1984)	32, 42, 43
<i>Ambrose v. Moore</i> , 46 Wash. 463, 90 Pac. 588 (1907)	31, 36
<i>Barros v. Barros</i> , 34 Wn.App. 266, 660 P.2d 770 (1983)	36
<i>Boonstra v. Stevens-Norton, Inc.</i> , 64 Wn.2d 621, 393 P.2d 287 (1964)	39
<i>Byrne v. Ackerlund</i> , 108 Wn.2d 445, 739 P.2d 1138 (1987)	32
<i>Central Wash. Bank v. Mendelson-Zeller, Inc.</i> , 113 Wn.2d 346, 779 P.2d 697 (1989)	26
<i>Chase v. Chase</i> , 74 Wn.2d 253, 444 P.2d 145 (1968)	36
<i>Chemical Bank v. Washington Pub. Power Sup. Sys.</i> , 102 Wn.2d 874, 691 P.2d 524 (1984)	32
<i>deElche v. Jacobsen</i> , 95 Wn.2d 237, 622 P.2d 835 (1980)	32
<i>Devine v. Devine</i> , 42 Wn.App. 740, 711 P.2d 1034 (1985)	36, 43
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 494 P.2d 208 (1972)	34
<i>Hamlin v. Merlino</i> , 44 Wn.2d 851, 272 P.2d 125 (1954)	34

<i>Hoffer v. State</i> , 110 Wn.2d 415, 755 P.2d 781 (1981)	27
<i>In re Estate of Madden</i> , 176 Wash. 51, 28 P.2d 280 34 (1934)	33
<i>In re Marriage of Burkey</i> , 36 Wn.App. 487, 675 P.2d 619 (1984)	40, 41
<i>In re Marriage of de Carteret</i> , 26 Wn.App. 907, 615 P.2d 513 (1980)	36, 39, 43, 44
<i>In re Marriage of Fiorito</i> , 112 Wn.App. 657, 50 P.3d 298 (2002)	46
<i>In re Marriage of Hadley</i> , 88 Wn.2d 649, 565 P.2d 790 (1977)	34
<i>In re Marriage of Knight</i> , 75 Wn.App. 721, 800 P.2d 71 (1994)	46
<i>In re Marriage of Maddix</i> , 41 Wn.App. 248, 703 P.2d 1062 (1985)	35, 39, 40
<i>In re Marriage of Molvik</i> , 31 Wn.App 133, 639 P.2d 238 (1982)	43
<i>In re Marriage of Sanchez</i> , 33 Wn.App. 215, 654 P.2d 702 (1982)	34
<i>In re Marriage of Sievers and Eisenberg</i> , 78 Wn.App. 287, 897 P.2d 388 (1995)	35
<i>Johnson v. Farmers Ins. Co.</i> , 117 Wn.2d 558, 817 P.2d 841 (1991)	26
<i>Jones v. Jones</i> , 56 Wn.2d 328, 353 P.2d 441 (1960)	34
<i>Kaas v. Privette</i> , 12 Wn.App. 142, 529 P.2d 23, 80 A.L.R.3d 1 (1974)	39
<i>Lambert v. Lambert</i> , 66 Wn.2d 503, 403 P.2d 664 (1965)	43
<i>Martin v. Martin</i> , 20 Wn.App. 686, 581 P.2d 1085 (1978)	31, 36, 41, 42
<i>Matthews v. Houtchens</i> , 576 S.W.2d 880 (Tex. Civ. App. 1979)	39
<i>McGill v. Hill</i> , 31 Wn.App. 542, 644 P.2d 680 (1982)	30, 33
<i>Meissner v. Simpson Timber Co.</i> , 69 Wn.2d 949, 421 P.2d 674 (1966)	27
<i>Miller v. Othello Packers, Inc.</i> , 67 Wn.2d 842, 410 P.2d 33 (1966)	35
<i>Mountain Park Homeowners Ass'n v. Tydings</i> , 125 Wn.2d 337, 883 P.2d 1383 (1994)	26
<i>Myser v. Myser</i> , 21 Wn.App. 925, 589 P.2d 277 (1978)	31
<i>Northwestern Life Ins. Co. Perrigo</i> , 47 Wn.2d 291, 287 P.2d 334 (1555)	36
<i>Olsen v. Roberts</i> , 42 Wn.2d 862, 250 P.2d 418 (1953)	36, 43

<i>Perry v. Morgan</i> , 109 Wn.2d 691, 748 P.2d 224 (1987)	32
<i>Postlewait Constr., Inc. v. Great Am. Ins. Co.</i> , 106 Wn.2d 96, 720 P.2d 805 (1986)	32
<i>Ross v. Pearson</i> , 31 Wn.App. 609, 643 P.2d 928 (1982)	31, 33
<i>Schaaf v. Highfield</i> , 127 Wn.2d 17, 896 P.2d 665 (1995)	26
<i>Seals v. Seals</i> , 22 Wn.App. 652, 590 P.2d 1301 (1979)	35, 36, 37, 39, 45
<i>Seattle-First Nat. Bk. v. Westlake Park Assoc.</i> , 42 Wn.App. 269, 711 P.2d 361 (1985)	27
<i>Sigman v. Stevens-Norton, Inc.</i> , 70 Wn.2d 915, 425 P.2d 891 (1967)	39
<i>Styner v. England</i> , 40 Wn.App. 386, 699 P.2d 234 (1985)	27
<i>Syrovoy v. Alpine Resources, Inc.</i> , 122 Wn.2d 544, 859 P.2d 51 (1993)	26, 27
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992)	26
<i>Volz v. Zang</i> , 113 Wash. 378, 194 Pac. 409 (1920)	27
<i>Watters v. Doud</i> , 95 Wn.2d 835, 631 P.2d 369 (1981)	32
<i>Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.</i> , 81 Wn.2d 528, 503 P.2d 108 (1972)	27
<i>Yeats v. Estate of Yeats</i> , 90 Wn.2d 201, 580 P.2d 617 (1978)	28, 29, 30, 31, 32, 33, 36, 43

Constitutional Provisions

None

Statutes

Code 1881 Sec. 2397	34
RCW 26.09.070	28
RCW 26.09.140	45, 46
RCW 26.16.210	34

Regulations and Rules

CR 56(c)	26, 27
--------------------	--------

Other Authorities

None

I. Introduction

This is a case about a CPA and a stay-at-home-mother become house cleaner become unsuccessful pizza parlor operator who were divorced in 2010 after a marriage of over 30 years. Husband was a long-standing Washington State Department of Revenue accountant whose PERS retirement entitlements were not mentioned in the divorce decree. Wife reports the extremely brief document distributing the assets was prepared solely by the husband, that she questioned him closely as to whether the assets covered in it were all they had accumulated in 30 years, and he assured her “That’s it.” Husband claims, and the trial court agreed, that a provision in the decree conveying to husband “the balance of the assets” made the PERS his property and that wife’s post-decree partition action should be dismissed on summary judgment.

The trial court record is replete with factual representations from wife that she did not know husband had defined benefit PERS entitlements in addition to his defined contribution Deferred Compensation Program account; that he always referred to “my retirement” in the singular as though there was but one entitlement; and that when he described the parties’ assets upon divorce he never mentioned the PERS and actively represented to her that there existed no assets of which she was unaware.

This appeal questions whether under applicable case law a major community asset entirely unknown to one party and to the court may be distributed by a ‘balance of the assets’ provision and, even if it can, whether the non-disclosures and misrepresentations of husband alleged by wife cause this significant community asset to be held post-decree by the parties as tenants in common.

II. Assignments of Error

1. The trial court erred in entering its Findings of Fact, Conclusions of Law, and Order in dismissing the appellant’s Complaint for Partition of Personal Property with prejudice. (CP 302-311.)
2. The trial court erred in making its Finding of Fact 4 insofar as it found, “Repeatedly during questioning from [the court which approved the parties’ Decree of Dissolution,] [w]ife referred to . . . [h]usband’s retirement” (CP 303.)
3. The trial court erred in making its Finding of Fact 9 insofar as the court found “[t]he separation contract was titled” and “[t]he separation contract provided” (CP 305.)
4. The trial court erred in entering its Judgment and Order Re Attorney Fees and Costs. (CP 312-314.)

5. The trial court erred in entering its Order on Reconsideration denying the appellant's Motion for Reconsideration. (CP 314-325.)

Issues Pertaining to Assignments of Error

1. Issues Pertaining to Assignment of Error No. 1

a. Whether applicable law permits awarding a major community asset unknown to the court and to one party to be distributed by a "balance of the assets" description.

b. Even if a "balance of the assets" description may be sufficient in some circumstances, whether the facts as to non-disclosure and misrepresentation alleged by the wife created a colorable claim of ownership of the concealed community asset by the parties as tenants in common following divorce.

2. Issues Pertaining to Assignment of Error No. 2

Whether the trial court's finding was accurate that the appellant "repeatedly" referred to her husband's "retirement" when the parties' final divorce orders were presented for approval when the total number of such references was but two and the context

tended strongly to show that the appellant was aware of one retirement entitlement and not two. (CP 47, 52, 303.)

3. Issues Pertaining to Assignment of Error No. 3

Whether the trial court was justified in finding that the parties had a separation contract when they divorced when the findings accompanying their Decree of Dissolution expressly determined, “There is no written separation contract” (CP 64, 305.)

4. Issues Pertaining to Assignment of Error No. 4

Whether the trial court record shows an abuse of discretion in imposing fees and costs, and the \$10,158 amount thereof, against the appellant on the basis of either a “consider[ation] of the financial resources of both parties” (RCW 26.09.140) or for intransigence for presenting a meritless claim.

5. Issues Pertaining to Assignment of Error No. 5

a. Whether the dismissal of the appellant’s complaint for partition on summary judgment was error for the reasons summarized in Issues Pertaining to Assignment of Error No. 1, above.

b. Whether the award of fees and the amount and the interest rate applicable thereto were error for the reasons

summarized in Issues Pertaining to Assignment of Error No. 4, above.

III. Statement of the Case

John and Kathleen Grant were divorced on May 24, 2010, in Kittitas County Superior Court cause number 10-3-00010-7 in a case handled entirely *pro se* by the parties. (CP 76.) The marriage lasted 30-1/2 years to the date of the parties' separation on June 23, 2009. (CP 63.) At the time of divorce, Mr. Grant was 56 years of age and Ms. Grant 55. (CP 34.) The three children of the marriage were grown and emancipated. (CP 30, 67.) Mr. and Ms. Grant are now 63 and 61 years of age respectively. (CP 34.)

Mr. Grant is a college graduate, a CPA, and had worked for the State of Washington Department of Revenue for 25 years, with an approximate one-year break in service, by the time the parties separated. (CP 296.) Mr. Grant continues to this day in his employment by the State Department of Revenue. (CP 295, 296.) Mr. Grant's employment with the State of Washington was for 29 of the 30-1/2 years of the marriage, but the record does not reflect where he was employed within the State of Washington besides the Department of Revenue. (CP 90.)

The extent of Ms. Grant's education is not revealed in the record. (CP 1-343.) However, it shows that for a time Ms. Grant was a stay-at-

home mother, then for about ten years a house cleaner working daily at that type of work, and finally the operator of the family's one-off pizzeria, Grant's Pizza Place, in downtown Ellensburg. (CP 158, 218.) Mr. Grant did all the accounting work for the pizzeria. (CP 186, 187.) The pizza business had been operating at a loss for several years, and Ms. Grant finally sold it for only \$5,000 net at some point in time after the parties divorced. (CP 187.) According to Ms. Grant, Mr. Grant often voiced the opinion that Ms. Grant was unintelligent and not good at communicating with people. (CP 185, 186.) The record supports the inference that Ms. Grant was not financially sophisticated, had only a background in homemaking and child rearing followed by a somewhat lengthy period working in menial domestic labor, had no background whatsoever in finance, and ultimately was not successful in operating a small business, even with the financial oversight and assistance of her CPA husband doing all the books and accounting for her. (CP 158,185-187.)

Both parties' evidence was that when they discussed divorce with each other they said their objective was to divide everything equally. (CP 29, 95, 156, 160, 187.) Mr. Grant himself directly affirmed that "Our intent was to divide everything 50/50." (CP 160.) The problem in the case is Ms. Grant received dollar-for-dollar compensation for the \$88,000 in Mr. Grant's Washington Deferred Compensation Program account, but

Mr. Grant kept 100% of his Washington PERS defined benefit retirement entitlements for himself without any equalizing compensation to Ms. Grant. (CP 164, 275, 280.) Indeed, the “Asset Distribution” spread sheet Mr. Grant prepared at the time of divorce clearly identifies the \$88,000 in “WA State Deferred Comp,” and provides for its equal division through direct payments from husband to wife post-decree on a note. (CP 164.) However, nowhere in the spread sheet prepared by Mr. Grant is his PERS defined benefit retirement plan listed, valued, or mentioned. (CP 164.) Mr. Grant reported that some form of a valuation or appraisal had been done for the pizza business, and the spread sheet he prepared listed its value as \$100. (CP 164, 277, 280.) Then possibly believing that the court might be as unsophisticated and gullible as Ms. Grant was, Mr. Grant specifically told the court that “[T]he value of my retirement at the time of divorce was intended to offset the value of the pizza business that she was receiving.” (CP 160.)

The origin of the problem as Ms. Grant describes it is that whenever Mr. Grant referred to “my retirement” he always referred to it in the singular and that she only knew of the \$88,000 in the deferred compensation program account but was unaware of the further defined benefit payments Mr. Grant will receive monthly for life upon retirement through the PERS program. (CP 29-30.) Mr. Grant “slipped through” to

himself the award of the Washington PERS by language in the decree Ms. Grant reports he prepared entirely by himself that he received “the balance of the assets . . . ,” after specifying some which were awarded to husband and some which were awarded to wife. (CP 73, 156, 187, 258.)

An extremely short “Agreement for Distribution of Assets” prepared, according to Ms. Grant, exclusively by Mr. Grant, was appended to the parties’ decree and caused the superior court in the marital dissolution case no small amount of concern when it was asked to approve it. (CP 73.) Ms. Grant appeared before the court *pro se* by herself with the proposed final orders executed by the parties, and that proceeding in that separate marital dissolution case was recorded and has been made a part of the record herein. (CP 44-60.) The court at that time expressed concern as to the vagueness and ambiguity of the dispositive language in the decree, the lengthiness of the marriage and the absence of legal counsel involved in the divorce process, and the imbalance of Mr. Grant’s being a CPA and Ms. Grant’s not having comparable analytic resources as to the assets. (CP 46, 56, 57.)

THE COURT: I’m looking at the community property. The parties have real and community property set forth in the copy attached. The husband has real and personal property, copy attached.

It doesn’t describe really what it is.

(CP 46.)

MS. GRANT: . . . I don't understand all the terms, . . .

THE COURT: [W]e need to make sure this is done right. This is – we don't get to come back and redo it if we don't do it right.

(CP 47.)

MS. GRANT: [W]e are going to split his money down the middle. That's what it amounts to. It was done to make it simple.

(CP 49.)

Q [by the court]: . . . I really hate to just enter this the way it's written up, because it's not at all clear to me that this is what is appropriate to do.

(CP 52.)

Q [by the court]: I'm not in the business of imagining what people want --.

(CP 54.)

Q [by the court]: I'm suggesting . . . that you come up with something that is more obviously dealing with all the issues that at you guys have – I'm going to give you these back. I haven't signed the findings of fact and conclusions of law.

And I mean – I'm not exactly sure that you guys have an agreement. You know what I mean?

. . . I take that back.

I'm pretty confident you do have an agreement. I am not sure exactly what it is.

You see what I'm saying?

A [Ms. Grant]: Right.

(CP 55.)

Q.: [T]hat's what I need to know before I enter the final paperwork. That's why we call it the final paperwork, because we don't want to have to do it again. . . . [T]his is a huge deal for you. . . .

. . .

I mean there's all kinds of issues.

You say he is an accountant. But you're not?

A.: No.

Q.: So you are doing some trusting here

(CP 56.)

Q[The Court]: [A]ny lawyer would look at that and go, I don't understand what you are talking about.

So it's going to have to be something that is clear, lay out clearly what it is that you guys are doing with the property.

. . .

(CP 56.)

Q [The Court]: What we are doing in this is we're dividing up the community property. . . . So probably most everything that the two of you each have acquired in your lifetime is you each have an undivided one-half interest in that.

. . . [T]he thing that is attached [the Agreement to Distribution of Assets] is vague.

So it needs to be tied down more clearly. I can't really tell you what it is that I need to see. I just need to be able to see that you guys have thought about the issues to enough particularity so that I don't feel like by my signing I'm taking advantage of one person.

(CP 57.)

Q [By the Court]: Ma'am, does that help? I know –

A.: A little bit.

(CP 58.)

With the misgivings set forth above, the court in the parties' marital dissolution proceeding rejected the proposed decree and directed Ms. Grant to explore whether more satisfactory documents might be worked out between the parties. (CP 58.) However, the same documents were again brought back to the court two weeks later, and the court then approved them. (CP 44, 76.) Those proceedings were not recorded, or if recorded, the recording is unavailable. (CP 305.)

Some of the aspects of the parties' final decision documents in their divorce case which may have concerned the court include these:

The property distribution document appended to the decree provides that Ms. Grant receives the family's pizza business, \$51,000 in two bank accounts, a certain \$20,000 loan receivable, and a \$107,000

demand note from husband to wife at 4% interest. (CP 73.) The writing specifies that husband receives the family home in Ellensburg and “the balance of the assets.” (CP 73.) The writing then confusingly adds in the next sentence:

Note: This agreement does not include personal property which will be divided based on other methods as agreed.

(CP 73.) The writing does not provide any clue as to the parties’ intended meaning and coverage of the term “personal property,” expressly exempted from coverage in the writing; does not clarify the “other methods” for division mentioned; does not state whether the agreement for implementation of personal property distribution has already been agreed or has yet to be agreed; and does not mention Mr. Grant’s PERS entitlements at all. (CP 24, 73.)

The agreed Findings of Fact in the dissolution action expressly found that the parties had no separation contract, but the Decree of Dissolution then contradictorily awards to the husband “the property set forth in the separation contract . . . executed by the parties on . . . Feb[ruary] 1, 2010.” (CP 64, 77.) Wife was similarly awarded the property allocated to her in the “separation contract . . . referenced above.” (CP 78.)

Then-current real estate tax valuation statements for the two real properties distributed in the divorce, the family home and the pizza business real property, are appended to the Decree of Dissolution and show tax assessed values for those properties of \$103,570 (family home) and \$49,294 (pizza parlor real property). (CP 84-85.)

Notwithstanding the parties' 30-year marriage, Mr. Grant's longstanding employment as a CPA but Ms. Grant's operating a pizzeria business at a loss, neither party received any alimony. (CP 80, 187.)

The findings in the parties' divorce action determine that both were entirely debt-free in both their community and separate capacities at the time of divorce. (CP 65.) Debt distribution in the Decree of Dissolution was listed as "Does not apply." (CP 78, 79.) (A financial declaration submitted by Mr. Grant earlier this year advised that he had at that time no mortgage payment or any other debts whatsoever. (CP 297, 299.))

Ms. Grant at some point in time following entry of the decree learned that as a state employee Mr. Grant also had to have defined benefit retirement entitlements in addition to the deferred compensation plan entitlements he listed with a value of \$88,000 on the "Asset Distribution" spread sheet he prepared and showed her when the parties were working towards their supposed "50/50" property settlement. (CP 160, 164.) She brought this partition action in the Kittitas County Superior Court on

March 30, 2015, alleging the parties owned the PERS defined benefit retirement entitlements as tenants in common and praying for a partition of the property “according to the respective rights of the parties.” (CP 1-2.) Mr. Grant appeared, answered, and pled the following affirmative defenses:

2.1 [A]ccord and satisfaction, estoppel, laches, payment, waiver, failure to state a claim upon which relief can be granted, and any other matter constituting an avoidance or affirmative defense.

2.2 Defendant reserves the right to amend these affirmative defenses based upon discovery later obtained.

(CP 4.) Mr. Grant never amended his answer to assert any further affirmative defenses in addition to those set forth above. (CP 1-343.)

Mr. Grant estimated a trial of approximately two days’ duration would be required to sort out the many disputed issues of fact and law involved in the case and applied for a trial date requesting trial time of that duration. (CP 5.) The court thereupon scheduled the matter for a two-day trial. (CP 7.)

Prior to trial, however, Mr. Grant moved for summary judgment of dismissal. (CP 8.) The crux of his supporting materials was his claim that Ms. Grant in fact knew all about the PERS and agreed that it was being awarded to Mr. Grant in the portion of the decree granting Mr. Grant “the balance of the assets . . . ,” and, secondly, that it was conclusive without

factual analysis that the quoted decretial provision awarded him the PERS. (CP 8-208.) Interestingly, despite claiming that Ms. Grant actually knew of the PERS, Mr. Grant at one point in his own materials in support of summary judgment equivocated about whether Ms. Grant actually knew of them and said she either knew or “reasonably should have known” of them. (CP 21.)

Ms. Grant served a declaration and memorandum in opposition to summary judgment in which she advanced the contentions that (1) she did not know of the PERS, and Mr. Grant concealed the existence of a community asset he was required to have made known to her upon divorce, and (2) an award of “the balance of the assets . . . ,” was not sufficiently definitive and dispositive to have effected a transfer of the community’s interest in the asset to one party without compensation to the other party. (CP 209-218.) Mr. Grant served reply materials, and the matter was then presented orally to the court on January 15, 2016, in a 31-minute hearing which included in that relatively short space of time both introductions of out-of-county counsel for Ms. Grant and announcement of the court’s oral decision. (CP 281, RP (January 15, 2016) 1-29.) Oral argument on behalf of Ms. Grant addressed the claim that the decretial language did not validly distribute the community interest in the asset. (RP (January 15, 2016) 4-23.) In its order granting summary judgment of

dismissal, the court specifically identified by name and stated it considered in making its ruling all the written materials served and filed by either party prior to oral argument. (CP 302.) The court held that award to Mr. Grant of “the balance of the assets” included the PERS not specifically identified and that no factual disputes which might have a bearing on the outcome of the case remained to be tried. (CP 306.) At a later hearing the court entered judgment against Ms. Grant in favor of Mr. Grant in the amount of \$10,158, bearing interest at 12% per year, as reasonable attorney’s fees and costs for his successful defense of Ms. Grant’s partition action. (CP 312.) A financial declaration filed by Mr. Grant in connection with his application for fees and costs showed that at the time he was awarded fees and costs he had \$252,500 in cash, money on deposit in banks, and stocks and bonds, not counting his “401(k) or retirement”; owned the former family home free and clear; and was able to afford to deposit \$2,000 each month from his gross salary into his deferred compensation account. (CP 297, 299.)

Ms. Grant challenged both these orders in a timely motion for reconsideration which was supported by a memorandum reiterating and refining her contentions that the summary judgment of dismissal and award of attorney’s fees were legal error. (CP 315-322.) In her seven-page memorandum of authorities Ms. Grant again pressed her contentions

that (1) the award to Mr. Grant of the PERS by broad language granting him the “balance of the assets” was not sufficient to divest the community’s interest in the asset to one party; (2) that the record showed that material issues of fact existed as to whether Mr. Grant concealed the asset at the time of divorce and that it was thus subject to partition in this action; and (3) that the award of fees was error. (CP 316-322.) The motion for reconsideration was denied. (CP 324.) Notice of Appeal to this court was timely filed on April 11, 2016. (CP 327.)

In addition to those facts recited hereinbefore, Ms. Grant’s materials in opposition to summary judgment of dismissal included the following:

Ms. Grant directly and positively swore she had no knowledge of the existence of the PERS entitlements when the parties resolved their property issues upon divorce and Mr. Grant “slipped in” that asset to himself in the “balance of the assets” specification to Mr. Grant. (CP 217.) She testified that when he referred during marriage to “his retirement” with the State of Washington he never mentioned any aspect of that besides the \$88,000 in his defined contribution Deferred Compensation Program account and various monies held outside his state employment which had been saved in accounts such as IRAs. (CP 156.)

The responsibilities assigned to Ms. Grant during marriage respecting family finances only involved routine household bill paying, while Mr. Grant handled everything amounting to an investment. (CP 13.) Mr. Grant maintained a room in the family home constituting his office and kept everything involving family financial issues in his office, and Ms. Grant did not think of herself as being welcomed in the office. (CP 186.) Mr. Grant often worked from home and would be at home when the mail arrived, and he took his mail for himself and left the routine household bills for Ms. Grant to deal with. (CP 218.) Ms. Grant worked long hours at the pizza parlor and would often not be at home when the mail arrived. When she did receive the mail, she would leave mail addressed to Mr. Grant for him to open and not inspect it herself. (CP 218.) Ms. Grant reported that if she was ever thought by Mr. Grant to be in any way examining his mail, Mr. Grant would subject her to “a tirade of verbal abuse.” (CP 218.) She would receive the same if she ever asked Mr. Grant questions about anything “he considered to be his business.” (CP 218.) She feared provoking anger from Mr. Grant through questioning him about his work, business, or financial duties. (CP 186.) Ms. Grant became during marriage “strongly motivated not to invoke [Mr. Grant’s] wrath.” (CP 218.) Ms. Grant described that throughout marriage Mr. Grant was constantly verbally abusive and controlling. (CP 186.) Mr.

Grant frequently called her “[d]umb, [s]tupid, and [r]etarded” (CP 186.) Mr. Grant had an alcohol abuse problem which at times caused him to be angry. (CP 186, 257.)

Ms. Grant directly testified she never noticed any paperwork dealing with Mr. Grant’s PERS entitlements.

Ms. Grant is “almost 100% certain . . .” that Mr. Grant’s salary warrant was direct-deposited to a bank account when he returned to state employment after a period of absence. (CP 218.) She at no time saw any pay stubs for Mr. Grant’s salary, on which there presumably would have been entries referencing PERS and deductions for PERS included among the substantial other data. (CP 218.) She never had access to any of his pay stubs. (CP 218.)

According to Ms. Grant, the attachment to the Decree of Dissolution covering the distribution of property was prepared exclusively by Mr. Grant. (CP 156.) Ms. Grant declared that when Mr. Grant presented this writing to her she questioned him as to whether the writing listed all the assets they had accumulated through 30 years of marriage, and Mr. Grant’s answer was, “That’s it.” (CP 30.) Mr. Grant, according to Ms. Grant, led her to believe the Deferred Compensation Plan was the only retirement plan in which an interest was owned by either party. (CP 185.) She informed the court that Mr. Grant’s statements led her to

believe that no further retirement account beyond the deferred compensation program had been accumulated through Mr. Grant's employment. (CP 15.)

This appeal challenges whether, on the basis of the record before the trial court, summary judgment of dismissal of Ms. Grant's application for partition of the PERS entitlements and entry of judgment against her for reasonable fees and costs were error.

IV. Summary of Argument

a. Long-standing Washington law holds that a provision in a decree awarding "the balance of the assets" to one party does not operate to divest the community interest in a significant community asset unknown to one of the parties and to the court.

b. A party's failure to reveal and/or active concealment of a community asset upon divorce causes that asset to be owned by the parties as tenants in common following divorce. Parties act as fiduciaries to one another respecting the community estate, and that duty continues through the divorce process. The party claiming to have acted in good faith respecting the community estate has the burden of proving he acted in good faith.

c. The record in the trial court does not support its ordering the non-prevailing party to pay any, let alone all, of the prevailing party's attorney's fees, legal assistant fees, and costs.

V. Argument

a. Standard of Review as to Substantive Issues in Case: Appellate Review of Fact and Law Respecting Summary Judgment Decisions is De Novo.

This court is thoroughly familiar with the standards of appellate review of fact and law in a dismissal, as in this case, on summary judgment:

This court reviews the facts and law with respect to summary judgment de novo. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

[T]he appellate court engages in the same inquiry as the trial court. *Syrovoy v. Alpine Resources, Inc.*, 122 Wn.2d 544, 548 n. 3, 859 P.2d 51 (1993). This court will affirm summary judgment if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992), and all questions of law are reviewed de novo, *Syrovoy*, 122 Wn.2d at 548 n.3.

Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994).

[T]he appellate court engages in the same inquiry as the trial court. *Johnson v. Farmers Ins. Co.*, 117 Wn.2d 558, 565, 817 P.2d 841 (1991). An appellate court will affirm summary judgment if “there is no genuine issue as to any material fact”, and “the moving party is entitled to a judgment as a matter of law”. CR 56(c). All facts and inferences are to be considered in the light most favorable to the non-moving party. *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 351, 779 P.2d 697 (1989). On summary judgment, all questions of law are reviewed de novo. See *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1981), *aff’d on rehearing*, 113 Wn.2d 148, 776 P.2d 963 (1989).

Syrovoy v. Alpine Resources, Inc., 122 Wn.2d 544, 548 n. 3, 859 P.2d 51 (1993). See also, *Seattle-First Nat. Bk. v. Westlake Park Assoc.*, 42 Wn.App. 269, 271, 711 P.2d 361 (1985); *Styner v. England*, 40 Wn.App. 386, 388, 699 P.2d 234 (1985).

The motion should be granted only if, from the evidence, reasonable men could reach but one conclusion. CR 56(c). *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 674 (1966).

Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 530, 503 P.2d 108 (1972).

b. A Provision in a Decree Awarding “the Balance of the Assets” to One Party Does Not Operate to Divest the Community Interest in a Significant Community Asset Unknown to One of the Parties and the Court.

"The policy of the law is in favor of community property." *Volz v. Zang*, 113 Wash. 378, 383, 194 Pac. 409 (1920). This principle finds

expression all throughout community property law, not least in a line of Washington cases which illustrate that, in this state at least, one party's interest in a significant community asset may not be released upon divorce without clear identification and specification that it is to go to one party and not the other.

One of the alternative holdings of the *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 205, 580 P.2d 617 (1978), case is that significant community assets may not be distributed by agreement upon divorce by boilerplate language which conceals from the approving court what is being distributed. In *Yeats*, life insurance death benefits totaling \$103,000 were held to be owned by parties as tenants in common following divorce because the only language under which they might be thought to have been distributed to one party was what the Supreme Court expressly described as "boilerplate" language which prevented the court from having any idea as to what was being distributed. *Yeats v. Estate of Yeats*, *supra*, 90 Wn.2d 201, 205 (1978). There the court said:

None of the policies is mentioned, much less fully described in the settlement agreement. The boilerplate language quoted above was not adequate to dispose of the policies. . . . We hold that there must be sufficient specificity in settlement agreements or decrees of dissolution to identify the assets and their disposition. The requisite specificity is not present here inasmuch as the policies were not even mentioned.

...

RCW 26.09.070 encourages . . . separation contracts
However, . . . that statute leaves final authority in the court if it
finds the agreement unfair at the time of its execution. . . .

It is impossible for the court to perform its statutorily
mandated duties if it is unaware of the nature and extent of the
property. Even a general description of the insurance policies
would make known that such assets existed. This is necessary
before the court or the parties can consider them in evaluating the
dispositive scheme.

. . . There was no way for the judge, in approving the
agreement, to know of the existence of the policies . . .

In summary, we hold that a settlement agreement. . . must
adequately identify the assets so as to permit the court to approve
the agreement or make [other] proper division. At minimum, the
documents must put the parties and the court upon notice that the
assets exist. This agreement fails in that respect.

The other holding of *Yeats* is that the language “Wife accepts the
payments specified in . . . this [s]ection in lieu of any interest in . . . any
and all property which [h]usband now owns . . .” was not, in and of itself,
sufficiently definite to confirm that the policies on the life of the husband
were awarded to him. *Yeats v. Estate of Yeats, supra*, 90 Wn.2d 201, 205
(1978).

Any fair reading of *Yeats* will confirm that both of the deficiencies
noted by the court in that case were reasons the court held the death
benefit proceeds were undistributed property held by the parties as tenants
in common following divorce. The *Yeats* court found the dispositive

language to have been too vague, and it also found that the general nature and extent of the property was not known to the court so it could perform its statutory duty of determining whether to approve the agreement or instead decide it was “unfair at the time of its execution.” *Yeats v. Estate of Yeats, supra*, 90 Wn.2d 201, 204 (1978).

In *McGill v. Hill*, 31 Wn.App. 542, 644 P.2d 680 (1982), the Court of Appeals held Pennsylvania rather than Washington law applied to determine whether husband’s Boeing retirement entitlements had been distributed in the parties’ Pennsylvania decree entered by agreement. The record was clear that the Boeing entitlements were known to both parties during the divorce process but that the Pennsylvania decree did not mention them; the only basis for their award to the husband was that wife received under the settlement agreement only specifically identified items and husband received everything else. The *McGill v. Hill* court concluded a Pennsylvania choice of law provision in the settlement agreement controlled and that under Pennsylvania law the distribution of the Boeing entitlements to the husband was adequate. However, citing *Yeats*, the Washington court stated that the result would have been opposite if Washington law had applied:

Under Washington law, a separation agreement must adequately identify the assets and put the parties on notice that the assets exist; the mutual release provision of the agreement before

us would be considered boilerplate language insufficient to dispose of the Boeing benefits. See *Yeats v. Estate of Yeats, supra*, [90 Wn.2d 201, 580 P.2d 617 (1978)].

McGill v. Hill, supra, 31 Wn.App. 542, 546 (1982).

Another Court of Appeals case interprets *Yeats* as follows:

If the property rights of the parties are not brought before the court in some appropriate manner, such rights are not, and cannot, be affected by the decree. *Ambrose v. Moore*, 46 Wash. 463, 465, 90 P. 588 (1907). There must be sufficient specificity in decrees of dissolution to identify the assets and their disposition; the requisite specificity is not present if an asset is not even mentioned. *Yeats v. Estate of Yeats, supra*, 90 Wn.2d 201, 205, 580 P.2d 617 (1978).

Ross v. Pearson, 31 Wn.App. 609, 612, 643 P.2d 928 (1982).

This court in *Myser v. Myser*, 21 Wn.App. 925, 589 P.2d 277 (1978), allowed a military pension to remain the property of an ex-husband following divorce even though it was not specifically mentioned in the agreed decree because the evidence was clear that both parties were fully aware of the pension and, further, the pension was under the law at the time both husband's separate property and not divisible upon divorce in any event. The *Myser* decision does not in any respect diminish the mandate of *Yeats* that *community* property be distributed by clear, non-boilerplate reference, and it likewise says nothing about community assets which are known to one party but unknown to the other. In *Myser*, the court merely recognized that under the law at the time it was a legal impossibility to award any portion of the military pension to the wife

under any state of affairs, and, possibly less importantly, the wife was fully aware of the pension anyway and agreed to a decree which gave her none of it.

Martin v. Martin, 20 Wn.App. 686, 688, 581 P.2d 1085 (1978), is substantially to the same effect. The Court of Appeals concluded it was not problematical that a military pension was not distributed by specific reference in the decree when the evidence was clear that both parties knew of it and the law at the time did not allow distribution of any portion of it to the non-servicemember anyway.

The Supreme Court has cited its unanimous decision in *Yeats* seven times since that decision was filed and never implied that its holdings there should be limited, restricted, or diminished in any way. *Perry v. Morgan*, 109 Wn.2d 691, 748 P.2d 224 (1987); *Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987); *Postlewait Constr., Inc. v. Great Am. Ins. Co.*, 106 Wn.2d 96, 720 P.2d 805 (1986); *Chemical Bank v. Washington Pub. Power Sup. Sys.*, 102 Wn.2d 874, 691 P.2d 524 (1984); *Aetna Life Ins. Co. v. Wadsworth*, 102 Wn.2d 652, 689 P.2d 46 (1984); *Watters v. Doud*, 95 Wn.2d 835, 631 P.2d 369 (1981); *deElche v. Jacobsen*, 95 Wn.2d 237, 622 P.2d 835 (1980). The Supreme Court's *Yeats* holdings must consequently be seen as governing precedent.

Counsel has also not found any Washington Court of Appeals case which cites *Yeats* and diminishes or criticizes its mandate that community property of financial significance be distributed by clear reference enabling the court to see that the distribution is just and equitable. The foregoing statement applies to the approximately 38 Court of Appeals cases findable through Shepard's which cite *Yeats*, each of which counsel has reviewed, and which are too numerous to make it practical to cite each.

The law in Washington is that community assets of significance must be distributed by clear, specific reference and that boilerplate "all else" and "balance of the assets" language fails to achieve that distribution. *Yeats v. Estate of Yeats, supra*, 90 Wn.2d 201, 205 (1978); *Ross v. Pearson, supra*, 31 Wn.App. 609, 612 (1982); *McGill v. Hill, supra*, 31 Wn.App. 542, 546 (1982). Otherwise, the court asked to approve the distribution has no idea what is being distributed, and the possibility exists one of the parties is likewise unaware.

c. A Party's Failure to Reveal or Active Concealment of a Community Asset Causes That Asset to be Owned by the Parties as Tenants in Common Following Divorce.

**1. A Spouse Claiming Good Faith in a
Transaction With the Other Has the Burden of Proving the
Good Faith Claimed.**

The general rule is that

[C]ourts must examine with great care agreements affecting property rights between husband and wife. *In re Estate of Madden*, 176 Wash. 51, 53, 28 P.2d 280 (1934).

In re Marriage of Sanchez, 33 Wn.App. 215, 217, 654 P.2d 702 (1982).

Part of that careful examination involves a burden of proof statute which has been statutory law in Washington for 135 years:

In every case, where a question arises as to the good faith of any transaction between spouses . . . , whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.

RCW 26.16.210, originally enacted in Code 1881 Sec. 2397. The statute applies to agreements between parties at the time of divorce for distribution of their property. *Jones v. Jones*, 56 Wn.2d 328, 336, 353 P.2d 441 (1960). It also applies to property agreements between parties intending marriage. *Friedlander v. Friedlander*, 80 Wn.2d 293, 300, 494 P.2d 208 (1972); *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954).

**2. Spouses Stand in a Fiduciary Relationship
With One Another Respecting Their Financial Interests.**

The relationship between a husband and wife after marriage is not and is not expected to be an arm's length relationship. That relationship is one of trust and confidence in which the managing husband stands in a fiduciary relationship to his wife. *See Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972) and *Hamlin v. Merlino*, 55 Wn.2d 851, 272 P.2d 125 (1954), . . .

In re Marriage of Hadley, 88 Wn.2d 649, 665, 565 P.2d 790 (1977)

(agreement entered into during marriage) (Horowitz, J., dissenting).

Friedlander v. Friedlander, 80 Wn.2d 293, 300, 494 P.2d 208 (1972)

(good faith and full disclosure are necessary to validity of premarital

agreement); *In re Marriage of Sievers and Eisenberg*, 78 Wn.App. 287,

311, 897 P.2d 388 (1995).

3. The Fiduciary Responsibilities Spouses Owe Each Other Continue During Divorce.

In *In re Marriage of Sanchez*, 33 Wn.App. 215, 217, 654 P.2d 702 (1982), the Court of Appeals, Division III, stated:

Spouses owe a duty to one another not only to enter into agreements in good faith but, as with contracts generally, to deal with each other fairly to that each may obtain the benefit of the other's performance. *In re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977); *Friedlander v. Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972); *Seals v. Seals*, 22 Wn.App. 652, 655, 590 P.2d 1301 (1979). *See also Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 410 P.2d 33 (1966). *This duty does not cease upon contemplation of dissolution. Seals v. Seals, supra at 655.*

(Italics added.) *Semble: In re Marriage of Sievers and Eisenberg*, 78

Wn.App. 287, 311, 897 P.2d 388 (1995) (responsibilities of spouses to one

another during divorce include “good faith and fair dealing”); *In re Marriage of Maddix*, 41 Wn.App. 248, 253, 703 P.2d 1062 (1985); *Seals v. Seals*, 22 Wn.App. 652, 655, 590 P.2d 1301 (1979).

4. Community Assets Not Disposed of Upon Divorce are Held by Parties as Tenants in Common.

It is a well-known and longstanding rule that community property not distributed upon divorce is held by the parties as tenants in common following divorce. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 580 P.2d 617 (1978); *Chase v. Chase*, 74 Wn.2d 253, 444 P.2d 145 (1968); *Northwestern Life Ins. Co. Perrigo*, 47 Wn.2d 291, 287 P.2d 334 (1955); *Olsen v. Roberts*, 42 Wn.2d 862, 864, 250 P.2d 418 (1953); *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588 (1907); *Devine v. Devine*, 42 Wn.App. 740, 742, 711 P.2d 1034 (1985); *Barros v. Barros*, 34 Wn.App. 266, 268, 660 P.2d 770 (1983); *In re Marriage of de Carteret*, 26 Wn.App. 907, 908, 615 P.2d 513 (1980); *Martin v. Martin*, 20 Wn.App. 686, 581 P.2d 1085 (1978).

5. Community Assets Not Disclosed Upon Divorce are Held by Parties as Tenants in Common.

The Division III case *Seals v. Seals*, 22 Wn.App. 652, 590 P.2d 1301 (1979), may be the appellate decision in this jurisdiction nearest to the issues in the case at bar respecting the consequences of active

concealment of community assets. There a divorce decree awarded to a party “All assets used by [husband] in conjunction with his business” Following the entry of the decree, the husband argued that that language awarded him three bank accounts and shares of stock in certain companies, as they directly related to his business. Husband had revealed the existence of none of the accounts and stock in his answers to interrogatories. Wife brought an action for partition of the unrevealed assets and prevailed in the trial court and also on appeal.

The court first reminded that parties divorcing deal with one another as fiduciaries: “A fiduciary duty does not cease upon contemplation of the dissolution of a marriage.” *Seals v. Seals, supra*, 22 Wn.App. 652, 655, 590 (1979). The court expressly held that a duty to disclose assets exists and that it extends to both community and separate property. *Seals v. Seals, supra*, 22 Wn.App. 652, 656, 590 (1979). The court further held that a partition action was appropriate and necessary as the form of action to address and distribute the undisclosed property: “Since the property . . . was undisclosed, the partition action was necessary for its disposition.” *Seals v. Seals, supra*, 22 Wn.App. 652, 655, 590 (1979). The court also held that the language “All assets used by [husband] in conjunction with his business” did not operate to distribute the questioned assets to the husband, as he did not disclose them

to the court or the other party. *Seals v. Seals, supra*, 22 Wn.App. 652, 656, 590 (1979). Finally, the court held that discovery initiatives such as third party subpoenas were not required of the party who did not learn of the undisclosed assets, as the party ignorant of the assets was entitled to rely on the representations of the party who knew of them. *Seals v. Seals, supra*, 22 Wn.App. 652, 655, 590 (1979).

Not much differentiates *Seals* from the case at bar except the husband's nondisclosure and concealments in *Seals* were in writing and on oath while Mr. Grant's nondisclosure was both oral ("That's it." (CP 30)) and written (the schedule he exhibited to Ms. Grant which listed and valued the defined contribution deferred compensation entitlement but omitted any reference whatsoever to the defined benefit PERS entitlement (CP 164)), but not on oath. Mr. Grant's references both to Ms. Grant and even to the court below to his "retirement" in the singular as though it was a single asset is highly corroborative of an intent to conceal and absolutely opposite the duty of a fiduciary of full disclosure. Mr. Grant's attempt to hide behind the "balance of the assets" language in a document he drafted himself begs the question of whether he had met his clear duty of full disclosure, which it is perfectly obvious, on Ms. Grant's description of events, he did not. (CP 73, 156, 187, 258.)

It is exceptionally difficult to understand why fiduciary duties of full disclosure could be said to have been met through untrue oral and written misrepresentations and non-disclosures so long as they are not on oath. To hold otherwise would be tantamount to the adoption of a principle that a fiduciary may lie and conceal as to the matters concerning which he has a fiduciary duty of full disclosure so long as he does not perjure himself. The *Seals* court as much as said this could not be the principle when it referenced non-fiduciary relationships which nevertheless required truthful and complete, but unsworn, full disclosure:

The trend has been towards requiring a duty to disclose in commercial transactions, even though here is an absence of a fiduciary relationship, particularly if one of the parties has superior knowledge of business affairs. *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 918, 425 P.2d 891 (1967); *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 625, 393 P.2d 287 (1964); *Kaas v. Privette*, 12 Wn.App. 142, 147-48, 529 P.2d 23, 80 A.L.R.3d 1 (1974).

Seals v. Seals, supra, 22 Wn.App. 652, 655, 590 (1979).

Significantly, in *In re Marriage of de Carteret*, 26 Wn.App. 907, 910, 615 P.2d 513 (1980), the Court of Appeals quoted with praise the following from a Texas appellate case, *Matthews v. Houtchens*, 576 S.W.2d 880 (Tex. Civ. App. 1979), in which that court observed that either concealment or non-distribution of a community asset causes that asset to be owned by the parties as tenants in common following divorce:

After divorce, if it develops that there was community property *concealed or not adjudicated* pursuant to the divorce proceedings, the former husband and wife become co-tenants or joint owners of the property just as if they had never been married; and they would own undivided interests in the property like unto the relation of tenants in common, subject to all the rules and regulations strangers bear to each other where they are in that relation.

(Italics added.)

Two other Division III cases provide some further guidance:

In *In re Marriage of Maddix*, 41 Wn.App. 248, 703 P.2d 1062 (1985), the Court of Appeals, Division III, held that misrepresentation by one party of the value of an asset upon divorce might or might not merit revisiting and revising post-decree an agreed property distribution. Wife claimed husband represented the value of his business was zero during the negotiations, but wife discovered post-decree that evidence was available which showed that the value of the business might be between about \$25,000 for her share and about \$93,296 for the entire business. The court held that upon remand the trial court was required to ascertain whether the husband's alleged value misrepresentation amounted to fraud and whether the fraud caused wife not to pursue adequate evaluation of the value. *In re Marriage of Maddix, supra*, 41 Wn.App. 248, 254 (1985). The court sharply distinguished between possible misrepresentation as to the *value* of an asset as contrasted with failure to disclose the *existence* of an asset, stating that the latter would make a significantly better case for redress

post-decree. *In re Marriage of Maddix, supra*, 41 Wn.App. 248, 254 (1985).

In re Marriage of Burkey, 36 Wn.App. 487, 675 P.2d 619 (1984), is a decision of Division III of the Court of Appeals in which there was no evidence that either party had better information than the other to value the assets distributed by agreement upon divorce and the parties relied on their own opinions as to value. Each party knew of the existence of all assets distributed in their agreement. The superior court granted post-decree relief because it found that counsel for the party seeking relief was represented by ineffective legal counsel and that the opposing party failed to provide the moving party with accurate values for the assets distributed; the Court of Appeals reversed and held the reasons did not justify post-decree relief. *In re Marriage of Burkey, supra*, 36 Wn.App. 487, 488 (1984). The Court of Appeals said, however:

This situation is unlike that in *Seals v. Seals*, 22 Wn.App. 652, 590 P.2d 1301 (1979), where the court held the husband had breached his fiduciary duty by failing to disclose to his wife the *existence* of certain property prior to dissolution. The full disclosure mandated by the fiduciary relationship assumes that one party has information which the other needs to know to protect his interests.

(Italics in original.) *In re Marriage of Burkey, supra*, 36 Wn.App. 487, 490 (1984). The Court of Appeals observed that the party resisting post-decree relief did nothing to misrepresent value or prevent the party granted

relief in the trial court from determining value on her own, so the appellate court held the original decree would be the final adjudication of rights between the parties.

Martin v. Martin, 20 Wn.App. 686, 581 P.2d 1085 (1978), illustrates that a party's knowledge of the existence of a community asset is directly connected to whether any relief may lie if the party does not receive a part of it in the decree. In *Martin*, the appellate court had other unrelated reasons for denying relief to the party seeking post-decree partition of the omitted pension, but it added the further justification for its decision that the party clearly knew of the asset and elected not to be awarded any part of it in the original decree. The Court of Appeals said,

Mrs. Martin clearly knew about the pension because she mentioned it in her pleadings. . . . [S]he fail[ed] to claim a community property interest in the pension, This conduct is sufficient to constitute either a voluntary and intentional relinquishment of her right to the pension, . . . or the conduct warrants application of the doctrine of equitable estoppel.

Martin v. Martin, supra, 20 Wn.App. 686, 690 (1978).

Aetna Life Ins. Co. v. Wadsworth, 36 Wn.App. 365, 368, 675 P.2d 604 (1984) (*rev'd on other grounds*, 102 Wn.2d 652, 689 P.2d 46 (1984)), illustrates that even relatively clear dispositive language in a decree may not be the end of an inquiry as to whether the asset was divided if an issue remains as to whether the asset was known to both parties. There a

dissolution decree awarded to the husband “[a]ll life insurance policies insuring [his] life” *Aetna Life Ins. Co. v. Wadsworth, supra*, 36 Wn.App. 365, 368 (1984). However, the Court of Appeals considered it was relevant whether the particular policy in question was known to each party:

The policy was not specifically identified . . . , but a review of [the evidence] reveals that the policy was known to both parties and considered in the property division. . . . [I]t is reasonable to conclude the parties knew of and intended to dispose of [the] life insurance benefits.

Aetna Life Ins. Co. v. Wadsworth, supra, 36 Wn.App. 365, 368 (1984).

See also *Devine v. Devine*, 42 Wn.App. 740, 743, 711 P.2d 1034 (1985) (pension).

6. Undistributed Community Property May be Distributed in an Action for Partition.

The court in *Devine v. Devine*, 42 Wn.App. 740, 743, 711 P.2d 1034 (1985) held:

Washington . . . permit[s] the adjudication of rights and community assets not disclosed to the divorce court, and not distributed in the property division, by an independent action for partition or for declaratory relief.

The undistributed asset in *Devine* was a pension.

Undistributed property is to be addressed in an action separate from the marital dissolution proceeding seeking partition or other

declaratory relief. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 206, 580 P.2d 617 (1978) (policies of life insurance); *Lambert v. Lambert*, 66 Wn.2d 503, 510, 403 P.2d 664 (1965) (capital stock); *Olsen v. Roberts*, 42 Wn.2d 862, 864, 259 P.2d 418 (1953) (nature of property not stated); *In re Marriage of Molvik*, 31 Wn.App 133, 135, 639 P.2d 238 (1982) (savings bonds and cash); *In re Marriage of de Carteret*, 26 Wn.App. 907, 909, 615 P.2d 513 (1980) (state retirement entitlement).

7. Courts Have Been Lenient Concerning a Party's Choice of Remedy for Allocating Undistributed Community Property.

The appellate courts have been lenient, however, respecting a party's choice of the wrong form of action seeking distribution of omitted community property following divorce. For example, in *In re Marriage of de Carteret*, 26 Wn.App. 907, 615 P.2d 513 (1980), the court forgave a litigant's joining in the original marital dissolution action a request for partition of an undistributed asset along with an application for modification of child support:

The issues in this case have been beclouded because the request for partition of the undistributed property was improperly addressed to the "divorce" court along with Mrs. de Carteret's request for increased support. The partition action should have been made the subject of an "independent action;" *in any event we have treated it as such.*

(Italics added.) *In re Marriage of de Carteret, supra*, 26 Wn.App. 907, 910 n. 2 (1980).

d. The Trial Court Record Does Not Support the Court's Imposition of Fees and Costs Against the Appellant.

The superior court awarded attorney's fees, legal assistant fees, and costs in the amount of \$10,158 in favor of Mr. Grant, which was the full amount reported to have been incurred on behalf of Mr. Grant in this case. (CP 286, 289, 291, 312.) Mr. Grant told the court he considered Ms. Grant's action to have amounted to "bad faith, . . ." as he considered the distribution of his pension to have been resolved "by agreement years ago." (Emphasis in original.) (CP 293.) The court's only clarification as to the basis for its ruling was that fees would be awarded "pursuant to RCW 26.09.140 . . . and as set forth in *Seals v. Seals*." (RP (February 26, 2016) 8.) The court set the interest rate at 12%. (RP (February 26, 2016) 10. CP 312-313.)

Ms. Grant does not take issue with the court's conclusion that reasonable attorney's fees may be imposed in a proper case under RCW 26.09.140 and *Seals v. Seals*, 22 Wn.App. 652, 656, 590 P.2d 1301 (1979), but entirely disagrees that this is such a case.

First, consideration of Mr. Grant's financial resources showed that when he was awarded fees he continued in his full-time employment as a

CPA; had \$252,500 in cash, money on deposit in banks, and stocks and bonds in addition to his “401(k) or retirement”; owned the former family home free and clear; and was depositing fully \$2,000 per month into his deferred compensation account. (CP 297, 299.) Ms. Grant, on the other hand, had had to sell the business she operated on a loss for years for only \$5,000 net. (CP 187.) The record clearly does not make a case for an award of fees based on a “consider[ation] of the financial resources of both parties.” RCW 26.09.140.

Intransigence would consequently have been the only basis for a fees award in the circumstances, but the standards for a finding of intransigence are high and absolutely not present in this case. Absent a finding of intentional delay or obstructionism, the only other basis for intransigence is that the merits of the case advanced are frivolous. But the court in *In re Marriage of Fiorito*, 112 Wn.App. 657, 669, 50 P.3d 298 (2002), held that the standard for intransigence due to frivolity are that “there are no debatable issues upon which reasonable minds might differ” and the position offered by the party against whom fees are awarded is “totally devoid of merit . . . ,” circumstances utterly not present in this case.

Finally, the court’s imposition of 12% interest on the fees award was the maximum rate which was an option for the court, and the court

had discretion to set a lower interest rate but did not do so and did not explain itself. *In re Marriage of Knight*, 75 Wn.App. 721, 731, 800 P.2d 71 (1994).

VI. Conclusion

Washington law does not permit a significant community asset to be distributed by “boilerplate” language which fails to make clear to the parties and the court exactly what is distributed. Additionally, Ms. Grant’s declarations and the reasonable inferences therefrom support her claim she was unaware of the significant community asset in question and that Mr. Grant actively concealed its existence from both her and the court, or at the very least breached his fiduciary duty to ensure the asset was known to both parties at the time of divorce. Summary judgment of dismissal was thus error.

Finally, the award of attorney’s fees and costs is without legal or factual justification on the basis of the record before the superior court.

Dated: September 2, 2016.

Respectfully submitted,



JAMES MARSTON

WSBA No. 1283

Attorney for Appellant