

No. 64996-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

OKSANA GARVER,

Appellant,

and

GREGORY L. GARVER,

Respondent.

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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JAMES DOERTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

The wife appeals the trial court's orders dissolving the parties' less than five-year marriage after a four-day trial. The wife fails to assign error to any of the trial court's detailed findings of fact, which support its disproportionate award of the marital estate to the husband, its denial of maintenance to the wife, who is younger and earns more income than the husband, and its award of attorney fees to the husband based on the wife's intransigence in causing the husband to incur unnecessary attorney fees. Accordingly, all of the trial court's findings of fact are considered true on appeal. ***Marriage of Brewer***, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Instead, in challenging the trial court's orders, the wife relies extensively on unsupported arguments, facts that are not in the record, and exhibits that were rejected by the trial court to claim that the trial court erred in making its orders. This court should affirm, and award attorney fees to the husband for having to respond to this frivolous appeal.

II. RESTATEMENT OF FACTS

A. **The Parties Met On The Internet. After Two Meetings, The Wife Moved To The United States From Ukraine And The Parties Married.**

Respondent Greg Garver, age 51, and appellant Oksana Garver, age 44, were married on December 31, 2003, and separated on May 7, 2008. (CP 3, 4, 247) Oksana filed a petition to dissolve the parties' marriage on June 11, 2008. (CP 1) There are no children of the marriage. (See CP 252) Greg has one daughter, Olivia, age 11, from a previous relationship; Olivia's mother is deceased. (RP 525) Oksana also has a daughter from a previous relationship – Marina, age 19. (CP 4; RP 108)

The parties met in 2002 on the internet. (RP 38, 459) Greg, a truck driver, lived in Walla Walla, Washington, with his daughter, then age 4. (RP 461, 494, 525) Oksana, who has a college degree in biology and is qualified to teach biology and chemistry, lived in the city of Kharkiv in Ukraine with her daughter, then age 12. (RP 37, 109, 176-77; Ex. 18) Oksana and Greg communicated by letters. (RP 37, 337) They met only twice in person before Oksana moved to the United States in November 2003. (RP 37, 167-68, 459) The parties married one month after Oksana arrived in the United States on December 31, 2003. (CP 3; RP 167-68)

Approximately six months after the parties married, Greg arranged for Oksana's daughter's immigration to the United States. (RP 476-77) Greg traveled to the Ukraine alone to pick up the daughter. (RP 477) Greg paid for all of the travel arrangements for himself and Oksana's daughter; he also paid the cost for the daughter's visa and other travel documents. (RP 477-79) Greg was in the Ukraine for nearly two weeks due to problems with the daughter's travel documents, and his limited understanding of the language and culture. (RP 592-93)

B. When The Parties Married, The Husband Had Separate Property, Including Liquid Investments That He Had Inherited After His Mother Died. The Wife Had No Separate Property.

Oksana had no separate property when the parties married. (RP 460) Greg had separate property that included a remainder interest in a trust that owns the Walla Walla real property where he resided with his daughter when the parties married. (RP 461) This trust was created in the 1960's when Greg's grandfather died. (RP 461) Greg's father has a lifetime interest in the trust and both Greg and his brother have a "survivor benefit." (RP 44) Any income from this property is paid directly to Greg's father, including the rent that Greg paid while he lived on the property. (RP 462)

At the time the parties married, Greg had approximately \$100,000 in cash in a Bank of America account, and \$170,000 in stock in an A.G. Edwards account, all of which he inherited from his mother. (RP 465-68; Ex. 113, 114) Greg also had two IRAs and a 401(k) plan through his employer. (RP 468-69, 470; Ex. 116, 142, 143) With the exception of his 401(k) plan, Greg made no deposits from any community source to his separate property accounts during the marriage. (RP 468, 469, 472; see Ex. 112)

C. During The Parties' Short Marriage, The Parties Moved Twice To Accommodate The Wife's Career Ambitions. These Moves Financially Disadvantaged The Husband, And Required Him To Use His Separate Assets To Support The Community.

Before the parties married, Greg and his daughter lived on the Walla Walla property that is held in trust for Greg's father's benefit; Greg paid minimal rent of \$300 per month. (RP 461-62) Greg worked at McGregor Trucking where he received benefits, and earned approximately \$35,000 annually. (RP 494-95; Ex. 9) Through McGregor, Greg drove local hauls allowing him to be home in the evening for his daughter, for whom he is solely responsible, and who spent her days in daycare. (RP 494, 525)

Before marriage, Oksana described herself to Greg as being educated as a “neural scientist, [] psychologist, [] biologist, and [] gymnast.” (RP 587) Oksana did not immediately seek employment when she moved to the United States. (RP 479) Before Oksana arrived in the United States, Greg signed an “affidavit of support” ensuring that he would provide support to both her and her daughter. (Ex. 9) Thus, during her period of unemployment, Greg paid for all of Oksana’s expenses as she brought no funds of her own when she arrived in the United States. (See RP 460)

Oksana eventually decided to seek employment at Washington State University in Pullman, Washington. (RP 479-80; Ex. 103) The family moved from Walla Walla to Pullman in mid-2004 in support of Oksana’s decision. (RP 320, 480, 487, 619) Greg was still able to continue working for McGregor, which had an office in Colfax, maintaining his benefits and work schedule. (RP 496)

The parties briefly lived with Greg’s boss in Pullman while Greg made arrangements to purchase a home in Pullman. (RP 320) Greg decided to purchase a home in Pullman for use by the family, as the parties could not duplicate the inexpensive living

arrangement that they enjoyed in Walla Walla. (See RP 461-62, 480) The deed for the home, which is dated September 10, 2004, was conveyed to "Greg Garver, a Married Man as his sole and separate property." (Ex. 119) On the same day that the deed for the home was executed, Oksana also signed a quit claim deed for the home to Greg "in consideration of establishing separate property." (Ex. 119)

The purchase price of the home was \$146,500. (Ex. 119) Greg funded the down payment of approximately \$31,000 from his separate Bank of America account. (See RP 482-85; Ex. 120) The check from Greg's separate bank account for closing costs was received in escrow on September 9, 2004 (Ex. 149) and cleared his account on September 10, 2004 (Ex. 120). Greg financed the remaining purchase price, and was listed as the only borrower for the mortgage. (RP 486-88; Ex. 115, 119) Greg paid the mortgage on the Pullman home from his separate property Bank of America account. (RP 483-85, 488, 566-71; Ex. 150) As a result of the husband's purchase of the home with his separate property funds, the community lived "rent-free" during the period they resided in Pullman.

The parties ended up only living in Pullman for six or seven months before Oksana was fired from her job. (RP 168-69, 496) Oksana then wanted the family to relocate to the Seattle area, where Oksana was told that there was more available work in her field. (RP 496-97) The family of four moved to the Seattle area in January 2005 so Oksana could obtain employment. (RP 496-97) Rather than sell the Pullman home that he had just purchased, Greg rented out the home, which provided sufficient income to pay both the mortgage and management fees. (RP 75-76, 488-89; Ex. 141)

The family's relocation to the Seattle area forced Greg to resign his employment from McGregor. (See RP 336, 496, 497; CP 106) Neither party immediately had employment when they moved to the Seattle area. (RP 497) Greg started selling his separate property stock to meet the family's living expenses. (RP 497)

Greg could not find employment equal to his employment with McGregor in the Seattle area. (See CP 44, 106) Therefore, Greg bought a truck so that he could drive loads on his own. (RP 77-78, 86) Greg first bought a 1980 Peterbilt truck for \$15,000, which eventually "blew up." (RP 80, 493) Greg later bought a 2000

Peterbilt truck for \$50,000, which he described as “better” than the 1980 truck. (RP 80, 492-93) The start-up costs for this new business were funded from his separate property accounts. (RP 78-84, 492-93) The business had no employees and Greg was the lone driver. (RP 77) The business was not particularly profitable in large part due to the fuel prices at the time. (RP 581-84) By the time of trial, both trucks owned by the business were “junk,” and the business had closed. (RP 77, 493)

Oksana eventually found employment at MDS Pharma Services in Bothell. (RP 172) Oksana earned \$21.50 per hour. (RP 342) Oksana deposited all of her income into an account in her name only. (RP 96, 302, 345-46) Meanwhile, Greg deposited his income into a joint account from which he paid community expenses. (See Ex. 147)

D. The Parties Separated Less Than Five Years After The Parties Married. By The Time Of Trial, The Wife Was Earning More Income Than The Husband, The Parties Had Acquired Very Little In Community Property, And The Husband’s Separate Property Estate Was Significantly Depleted.

At some point in 2007, less than four years after the parties married, Oksana testified that she began planning to leave the

marriage. (See RP 366-67) As part of her plan, Oksana traveled to New York and North Carolina to find new employment. (RP 367)

In May 2008, when Greg was on a road trip with his daughter, Oksana moved out of their home that the parties shared. (RP 526-27) Greg was unaware that Oksana was planning on leaving him. (See CP 44) When Greg and his daughter returned home, Oksana was gone, she had emptied their apartment of nearly everything except his daughter's bed set and some of his clothing. (RP 526-29)

Because Greg had started long haul trucking when the family moved to the Seattle area, he had to stop driving all together because his daughter was still in school and he had no one else to help care for her in the area. (See RP 529, 579) After the daughter's school was out for the summer, Greg and his daughter moved to Dayton, Washington, where his daughter can stay with her aunt while Greg resumed his long hauls. (RP 529)

Oksana filed a petition for dissolution on June 11, 2008. (CP 1) Greg had lost his health benefits with McGregor after the family moved to the Seattle area. (See RP 530) Greg was concerned that Oksana would terminate Greg's daughter, who is epileptic, from her

employer-provided health insurance plan. (See RP 531; CP 38-47) On December 12, 2008, Greg obtained an order requiring both parties to pay one-half the cost for Greg's daughter's health insurance. (CP 129-30) In violation of the order, Oksana stopped paying for the health insurance for the daughter and the daughter's insurance lapsed on February 28, 2009. (RP 522, 523-24)

In order to obtain health insurance for his daughter, Greg returned to work for McGregor. (RP 522-24) Greg was re-hired on an as-needed basis only, earning \$13.50 per hour. (See RP 519, 595-96) The month before trial, Greg worked only twenty hours. (RP 519-20) By the time of trial, Greg was not working at all because he had torn both ligaments in his ankle and could not drive a truck. (RP 520) Greg was receiving unemployment of \$240 per week. (RP 522)

After the parties separated, Oksana moved to North Carolina and was working for Duke University earning \$15 per hour. (RP 172, 173, 178) Even though Oksana testified that MDS wanted her to remain working for them at the higher pay rate of \$21.50, Oksana chose to leave MDS so that she could work at Duke University. (RP 338, 342)

E. After A Four-Day Trial, The Trial Court Awarded All Of The Husband's Separate Property And A Disproportionate Share Of The Community Property To The Husband And Denied The Wife's Request For Spousal Maintenance.

The parties participated in a four-day trial before King County Superior Court Judge James Doerty. The trial court found that after a less than five-year marriage, the parties had amassed community assets of less than \$10,000 and had community liability of approximately \$6,000. (See CP 263, 266) The trial court acknowledged that the husband's separate property, which had been worth nearly \$310,000 when the parties married, had been reduced by more than 40% to \$127,645 by the time of trial. (See Finding of Fact (FF) 2.21.1(a), (b) (*unchallenged*), CP 252-53; FF 2.21.1(d) (*unchallenged*); CP 256, 266-67) The trial court recognized that the dissipation of the husband's separate property during the marriage was due in part to the moves that were made to accommodate the wife's career, including the fact that the husband went from stable employment with an employer where he had "significant seniority" in Walla Walla to running a marginally profitable long haul trucking business in Western Washington. (FF 2.21.1.e.(c), (d) (*unchallenged*); CP 256)

The trial court found that the parties' marriage was short and considered its goal "to place each party in approximately the same position that he or she would be in had this marriage not occurred." (FF 2.21.1.e.(a), (b) (*unchallenged*), CP 256) The trial court recognized that the husband was in a worse economic condition at the end of the marriage than the wife as he had "depleted a large amount of his separate liquid assets during the marriage," was no longer enjoying the same seniority he had at his employment before the marriage, and "lost the living arrangement he had at the time of the marriage." (FF 2.21.1.e.(c), (d) (*unchallenged*), CP 256)

The trial court awarded all of Greg's separate property to Greg, including the Pullman home purchased during the marriage with his separate funds. (CP 261-62) The trial court awarded the vast majority of the community assets to Greg, who was working so few hours at the time of trial that he was receiving unemployment. (CP 261-62) The trial court awarded the bank accounts in her name to Oksana, and ordered her to pay the community tax liability of approximately \$5,475. (CP 262-63) The trial court found that its property distribution under these circumstances was "fair and equitable." (FF 3.4 (*unchallenged*), CP 257)

The trial court denied the wife's request for spousal maintenance of \$300 per month for four years. (CP 6, 263) The trial court found that the wife was earning more than the husband, who did not have the ability to pay maintenance. (FF 2.12.1-2.12.2 (*unchallenged*), CP 248-50) The trial court found that the wife earned nearly \$44,000 in 2007 and could have earned over \$50,000 in 2008 had she not voluntarily left her employment at MDS. (FF 2.12.1.c (*unchallenged*), CP 249) Meanwhile, the trial court found that in 2007 the husband earned a net profit of \$2,200 from his marginally profitable long haul trucking business. (FF 2.12.2.c (*unchallenged*), CP 25) In 2008, the husband earned a net profit of \$16,721 (FF 2.12.2.c (*unchallenged*), CP 250) By the time of trial, the husband was earning \$13.50 per hour as a truck driver on an "as needed basis," but was currently not working due to an injury and it was uncertain whether he would be able to return to work. (FF 2.12.2.c (*unchallenged*), CP 250)

Finally, the trial court awarded attorney fees of \$8,661 to the husband for the wife's intransigence, which unnecessarily increased the husband's attorney fees. (FF 2.15 (*unchallenged*), CP 251, 264) The trial court found the wife's two motions to

continue the trial date were last-minute and caused the husband to incur additional fees of “at least \$5,000.” (FF 2.15.1 (*unchallenged*), CP 251; see also CP 157; RP 606-07; Ex. 129) The trial court noted that the wife’s initiation of a second divorce action in North Carolina, after she had already filed an action in Washington State, was “unnecessary” and caused the husband to incur attorney fees of \$1,400 to retain North Carolina counsel. (FF 2.15.2 (*unchallenged*), CP 251; RP 605-06; Ex. 139) The trial court found that the wife’s action for “Innocent Spouse Relief” relating to tax returns filed in 2005 and 2006 was inappropriate, as she “participated in preparation of the tax returns and received the benefits of income earned by the husband” during those years, and this caused the husband to incur attorney fees of approximately \$1,000. (FF 2.15.3 (*unchallenged*), CP 251; RP 518) The trial court also found that the wife’s failure to provide complete financial records increased the husband’s attorney fees and costs by \$1,261.05, as he was required to subpoena the records. (FF 2.15.4 (*unchallenged*), CP 251; RP 607-08; Ex. 129, 130)

The wife appeals all of these decisions.

III. ARGUMENT

A. **The Trial Court Did Not Err In Characterizing The Pullman House As The Husband's Separate Property.** (Response to App. Br. 5-6)

The trial court did not err in characterizing the Pullman house as the husband's separate property. The wife executed a quit claim deed waiving any interest in the home "in consideration of establishing separate property" for the husband. (Ex. 119) The wife claims that the quit claim deed that she executed was not, as stated in the deed, to "create separate property," but due to her "uncertain residency/citizenship status." (App. Br. 6) But the trial court found, in an unchallenged finding, that this deed was signed knowingly and voluntarily by the wife: "[w]ife was advised in advance of the closing that the home was to be husband's separate property and that this was the purpose of the quit claim deed." (FF 2.21.1(c)(ii)(a), CP 255) This finding is a verity on appeal. ***Marriage of Brewer***, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Even if the wife had adequately challenged this finding, there is substantial evidence to support the trial court's finding. (See RP 152, 483)

In any event, regardless of the reasons for the wife signing the quit claim deed, the trial court found that for purposes of

characterizing the Pullman house, “this is not as important as the source of funds used for this property.” (FF 2.21.1(c)(ii)(a), CP 255) While property acquired during marriage is presumed to be community property, that presumption may be overcome by proof that the property acquired during marriage was acquired by the separate funds of one of the members of the community. **Scott v. Currie**, 7 Wn.2d 301, 306, 109 P.2d 526 (1941). Funds are “separate” if owned before marriage or acquired by “gift, bequest, devise, descent, or inheritance.” RCW 26.16.010.

The trial court properly characterized the Pullman house as it found that “the community never invested any financial resources in this property, therefore the community has no interest in this property.” (FF 2.21.1(c)(ii)(a), CP 255) The trial court found that the “husband proved that all funds used for the purchase of this home were from his separate resources. Husband’s separate funds were also used to make monthly payments on the home until it was rented in the spring of 2005. Following this the home was self-supporting paying the monthly mortgage, maintenance, etc. from the rental income.” (FF 2.21.1(c)(ii)(a), CP 255) As with all of the trial court’s findings of fact, the wife did not assign error to these

findings, and they are verities on appeal. **Brewer**, 137 Wn.2d at 766. In any event, there is substantial evidence to support the trial court's finding. (See §II.C *supra*) The trial court properly characterized the Pullman home as the husband's separate property.

B. The Trial Court Did Not Abuse Its Discretion In Declining To Award Maintenance To The Wife After A Short-Term Marriage, When The Wife Was Fully Employed At The Time Of Trial And The Husband Was Temporarily Disabled And Unemployed. (Response to App. Br. 7-11, 13-14, 16)

An award of spousal maintenance is a discretionary decision that will not be disturbed on appeal absent a showing that the trial court abused its discretion. **Marriage of Luckey**, 73 Wn. App. 201, 209-210, 868 P.2d 189 (1994). The trial court's discretion in this area is "wide," the only limitation on the amount and duration of maintenance is that, in light of the relevant factors, the award must be "just." **Luckey**, 73 Wn. App. at 209.

Here, the trial court did not abuse its discretion in declining to award maintenance when it found that "both parties are capable of supporting themselves at this time, but neither party is in a position to pay maintenance to the other party at this time." (FF 2.12, CP 248) The wife did not challenge this finding, nor any of

the other trial court findings, which support its decision denying spousal maintenance to the wife, who is younger and earns greater income than the husband, after a short-term marriage. Accordingly, they are verities on appeal. **Brewer**, 137 Wn.2d at 766.

The wife claims that because her “current ability to be self-sufficient [] was never advanced by the parties’ [sic] as an issue and it should not have been a legal issue meriting as much consideration as it seems to have in the lower Court’s judgment.” (App. Br. 16) First, that statement is false. In his response to the petition for dissolution, the husband specifically argued that the wife has greater ability to support herself than the husband, and asserted that she is in a better “position to pay husband maintenance, not the reverse.” (CP 26) Husband’s counsel emphasized that an award of maintenance to the wife was not appropriate in light of the fact that she earns more income than the husband in closing argument. (See e.g. RP 643-44, 648) Second, the trial court was required as a matter of law to consider the wife’s ability to support herself in considering whether to award maintenance. RCW 26.09.090(1)(a) (requiring the trial court to

consider among other things, “the financial resources of the party seeking maintenance, including [] his or her ability to meet his or her needs independently”).

The wife also challenges the trial court’s decision on maintenance based on her claim that the husband’s counsel incorrectly described the wife’s maintenance request from her petition during closing argument as \$3,000 per month for four years, instead of \$300 per month for four years. (See App. Br. 8-9) But the husband’s counsel corrected her assertion immediately after her mistake was brought to her attention, and noted that in any event *any* maintenance award to the wife was inappropriate in light of the fact that the wife earned more income than the husband. (RP 648)

The wife also claims that the trial court abused its discretion in not awarding the wife maintenance in light of the husband’s “remainder interest in substantial and income-generating farm properties in Eastern Washington.” (App. Br. 7; see *also* App. Br. 13-14) But the trial court properly recognized, and the wife does not challenge, that the husband’s remainder interest in this property “provides no immediate benefit to the husband.” (FF 2.21.1.a, CP

252) As with all of the other unchallenged findings, this is a verity on appeal. **Brewer**, 137 Wn.2d at 766.

Finally, the wife claims that the trial court declined to award the wife maintenance because the trial court did not like her counsel's "humor." (App. Br. 9: "Humor is not illegal, even if it occurs by accident or by-product of otherwise fair objections and oral argument.") In particular, wife points out that her counsel "may have used a humorous method and with a sarcastic tone of voice" when challenging husband's counsel's closing argument. (App. Br. 9) But there is nothing in the record that shows the trial court expressed any displeasure with wife's counsel's behavior during closing argument. (See RP 642-64) The trial court did not "punish" the wife for her counsel's "humor." Instead, in light of the trial court's well thought out and detailed findings of fact, it is clear that the trial court's decision on maintenance was based on a proper consideration of the statutory factors under RCW 26.09.090.

C. After A Short-Term Marriage, The Trial Court Did Not Abuse Its Discretion In Awarding A Disproportionate Amount Of The Property To The Husband Whose Separate Property Largely Supported The Parties During Their Marriage. (Response to App. Br. 7, 12-15,17-21)

Trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings. “The trial court is in the best position to assess the assets and liabilities of the parties and determine what is ‘fair, just and equitable under all the circumstances.’” *Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999). In light of the trial court’s broad discretion, a trial court’s property distribution will not be reversed on appeal absent a showing of a manifest abuse of discretion. *Brewer*, 137 Wn.2d at 769. The trial court did not abuse its discretion in awarding the husband a disproportionate amount of the community property as well as all of his separate property after a short-term marriage. Contrary to the wife’s claim, the trial court was not required to divide all of the marital estate equally. (App. Br. 12) As this court has held, “a property distribution need not be equal to be ‘just and equitable.’ The key to an equitable distribution of property is not mathematical preciseness, but fairness. Fairness is attained by considering all circumstances of the marriage and by exercising

discretion, not by utilizing inflexible rules.” **Marriage of Tower**, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990)(citations omitted).

An award of a greater portion of the total estate to the party with more separate assets after a less than five-year marriage is not an abuse of discretion. Our courts have regularly affirmed awards of this kind. See *e.g.* **Brewer**, 137 Wn.2d at 759, 763, 771 (affirming an award of 88% of the total estate to spouse with greater separate property after a 7-year marriage); **Marriage of Dewberry/George**, 115 Wn. App. 351, 356, 358, 366, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003) (affirming an award of 82% of the total estate to spouse with greater separate property after a 14-year marriage); **Rehak v. Rehak**, 1 Wn. App. 963, 465 P.2d 687 (1970), *disapproved on other grounds by*, **Coggle v. Snow**, 56 Wn. App. 499, 506, 784 P.2d 554 (1990)(affirming an award of 67% of the total estate to the spouse with greater separate property).

Contrary to the wife’s assertion, the trial court did not rely solely on the wife’s petition for dissolution, in which she sought no award of the husband’s separate estate, in dividing the estate. (App. Br. 7) Instead, the trial court recognized that the wife made

no argument until the start of trial that she was entitled to an award of any of the husband's separate property after their short marriage. (See FF 2.21.2.e(a), CP 256) Even at trial, the wife made no significant argument as to why, after a less than five year marriage, she is entitled to any of the husband's separate property other than urging the court to "follow [] a strict and proper 50/50 division" of all of the assets. (RP 637)

While RCW 26.09.080 provides that both community and separate property is available for distribution at the end of a marriage, our Supreme Court recently reiterated, "the right of the spouses in their separate property is as sacred as is the right in their community property." ***Estate of Borghi***, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009). Thus, while "the court is required to consider among other facts the separate property of the parties, [] this consideration does not require the court to invade the separate property." ***Moore v. Moore***, 9 Wn. App. 951, 953, 515 P.2d 1309 (1973).

Under the circumstances of these parties, there was no basis to award the wife any of the husband's separate property. In ***Marriage of Fiorito***, 112 Wn. App. 657, 668, 50 P.3d 298 (2002),

for instance, this court affirmed a property distribution to a wife after a three-year marriage that excluded the separate property of the wealthier husband because “the marriage was short-lived and did not affect Ms. Fiorito's ability to support herself.” *Fiorito*, 112 Wn. App. at 669. Likewise here, the parties’ short marriage did not affect the wife’s ability to support herself. In fact, due to the husband’s willingness to relocate twice during the marriage to accommodate the wife’s career ambitions, the wife’s ability to support herself improved over the marriage. Meanwhile, the husband’s ability to support himself diminished as he was forced to leave his stable employment with an employer where he had seniority. (See FF 2.21.1.e.(c), CP 256)

Finally, the trial court did not “fault” the wife in considering the fact that the husband depleted his separate estate to meet the parties’ living expenses and awarding him a greater share of the community property. (App. Br. 15) At the end of the parties’ marriage, the bulk of the community assets were retirement earnings of the parties of less than \$4,000 each. (See CP 266) In awarding the husband both retirement accounts, the trial court simply recognized that without the husband’s infusion of his

separate estate to maintain the community, neither party would have been able to save for retirement, and there would likely only be debt to divide – debt significantly greater than that incurred by the time of trial.

As the goal of the court in short-term marriages should be to return the parties to the same economic condition they enjoyed at the inception of the marriage, *Washington Family Deskbook*, Volume 2, §32.3(5), 32-17, it was not an abuse of discretion for the trial court to award more community property to the husband in light of the significant reduction of his separate property over the term of the marriage from which the marriage directly benefited. Furthermore, regardless of whether the parties should be or could be returned to the economic condition they were in at the start of the marriage, the trial court's property division was nevertheless "fair and equitable" considering the parties' economic circumstances at the end of the marriage where the wife was younger and earning greater income than the husband, who was at the time of trial not working, older, and solely responsible for the support of his young daughter. (FF 2.21.1.e, CP 256)

D. The Trial Court's Evidentiary Rulings Excluding Evidence Of The Husband's Alleged Alcoholism Were Within Its Discretion. (Response to App. Br. 23-24)

“An appellate court reviews a trial court's evidentiary rulings for abuse of discretion. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. Thus, even where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable.” ***Minehart v. Morning Star Boys Ranch, Inc.***, 156 Wn. App. 457, 463, ¶ 7, 232 P.3d 591 (2010).

The trial court did not abuse its discretion in declining to consider evidence of what the wife describes as the husband's “personal foibles and mistakes and destruction and loss of community property due to both his drinking/cocaine/marijuana use” or “the constant beer can cleanups that we're [sic] a daily duty.” (App. Br. 24, *citing* RP 40-68) None of this evidence was relevant for purposes of dividing the parties' marital estate after a less than five year marriage, especially when the wife could not tie these allegations with any evidence of a dissipation of assets. RCW 26.09.080 (the trial court shall distribute the marital estate “without regard to misconduct”); ***Marriage of Steadman***, 63 Wn.

App. 523, 528, 821 P.2d 59 (1991) (the statutory prohibition against consideration of “marital misconduct” includes “immoral or physically abusive conduct within the marital relationship,” but not “gross fiscal improvidence, the squandering of marital assets,” which can be considered in dividing the marital estate).

The wife’s counsel apparently attempted to elicit evidence of the husband’s alleged “personal foibles” with “drinking/cocaine/marijuana” from the wife’s nineteen year old daughter. (See RP 112-19)¹ But the step-daughter admitted that other than the husband drinking light beer she had not witnessed any drug use by the husband. (See RP 114-15) Furthermore, there was no evidence elicited that the daughter had any personal knowledge of the effect the husband’s alleged “personal foibles” had on the parties’ assets. When the daughter was asked what if “anything [she] knew about the family finances,” her only response was: “I know that [inaudible] wants to pay his rent and health insurance.” (RP 115)

¹ The wife cites to RP 40-68, 81-93 but nowhere in those portions of the record were there any questions regarding the husband’s alleged “personal foibles” with “drinking/cocaine/marijuana.” (App. Br. 23)

The wife also complains that she was prevented from inquiring whether the husband would ask the stepdaughter to pick him up when he had been drinking (App. Br. 24), but the trial court properly noted, “now, we’re establishing that he got somebody to drive for him when he was under the influence. How does that show dissipation of assets?” (RP 117-18) In response, wife’s counsel asserted that it showed “bad judgment.” (RP 118) But whether the husband has “bad judgment” in asking for a ride from a sober driver when he is allegedly intoxicated has no bearing on the property distribution. The trial court properly sustained the objection to the evidence for its lack of relevance.

Finally, the wife complains that the husband was “a recalcitrant and uncooperative witness who was [sic] not only clearly committed perjury at certain pints [sic] but who was allowed by the Judge below to get away with such evasiveness, time-wasting, and refusal to answer relevant questions.” (App. Br. 23) But “trial judges have wide discretion to manage their courtrooms and conduct trials fairly, expeditiously, and impartially. [This court], therefore, review[s] a trial judge's courtroom management decisions for abuse of discretion. Trials must be fair but they need not be

perfect.” *Marriage of Zigler and Sidwell*, 154 Wn. App. 803, 815, ¶ 30, 226 P.3d 202, *rev. denied*, 169 Wn.2d 1015 (2010).

Here, it is evident from the record as a whole that the trial court properly managed the trial, interjected when necessary, and sustained appropriate objections. The trial court accurately noted that wife’s counsel’s argumentative (and often convoluted) questioning was in part the reason the husband had difficulty responding to the questions. The trial court stated: “Maybe he’s refusing to answer the questions because you use every opportunity making snide, snotty, personal little comments about drug abuse, alcoholism, lying. I mean there’s no reason for him to ... It’s completely understanding the way you’ve behaved counsel, that that witness would be repugnant to answer your questions in any forthcoming fashion.” (RP 165-66) The trial court also on several occasions interjected to assist wife’s counsel to ensure that husband responded to relevant questions. (See *e.g.* RP 53, 69, 77, 93) As wife’s counsel expressed at trial, the court’s assistance was appreciated as its questions were “much more well-phrased than mine and they’re cutting to the chase.” (RP 54)

E. The Trial Court's Valuation Of The Two Peterbilt Trucks Was Not An Abuse Of Discretion. (Response to App. Br. 23)

The trial court found that the value of the two Peterbilt trucks, which the husband purchased with his separate property funds and were used for his now defunct business, were "unknown." (CP 267) While there was testimony that one truck was purchased in 2004 for \$15,000 (RP 493), and the other was purchased in 2005 for \$50,000 (RP 492), the husband also testified that the first truck "blew up" before trial (RP 493), and the second truck was also "junk." (RP 493) Neither party presented any other testimony regarding the current value – if any - either truck had, and the trial court did not abuse its discretion in finding that its value was "unknown." Even if the trial court was required to place some value on the trucks, an erroneous valuation does not require reversal of the otherwise fair and equitable distribution of the marital estate.

Marriage of Pilant, 42 Wn. App. 173, 181, 709 P.2d 1241 (1985).

F. The Trial Court's Award Of Attorney Fees To The Husband Based On The Wife's Intransigence Was Supported By Substantial Evidence. (Response to App. Br. 22)

The trial court did not abuse its discretion in awarding attorney fees to the husband based on the wife's intransigence.

Regardless of the financial resources of the parties, the court may make an award of attorney fees based on one party's intransigence during the proceeding. **Marriage of Crosetto**, 82 Wn. App. 545, 563, 918 P.2d 954 (1996). The party challenging the trial court's decision bears the burden of proving the trial court exercised its discretion in a way that was clearly untenable or manifestly unreasonable. **Crosetto**, 82 Wn. App. at 563.

The wife does not challenge any of the findings of fact, all of which are supported by substantial evidence, that were the basis for the award of attorney fees to the husband. (See FF 2.15.1-4, CP 251; See also §II.E *supra*) They are thus verities on appeal. **Brewer**, 137 Wn.2d at 766. Without challenging these findings, the wife simply cannot meet her burden of proving the trial court exercised its discretion in a way that was clearly untenable or manifestly unreasonable based on the unchallenged findings of fact. **Crosetto**, 82 Wn. App. at 563.

In support of her challenge, the wife makes the illogical argument that the trial court abused its discretion in awarding the husband attorney fees because the husband filed an "alienation of affection" lawsuit in North Carolina – where such a suit is permitted

– against a gentleman who resides in North Carolina, based on his claim that the gentleman “had improper relations [with the wife] during the marriage.” (RP 631) The wife makes no rational argument why the husband’s lawsuit, to which she is not a party, supports her claim that the trial court abused its discretion in awarding him attorney fees. Instead, the wife’s counsel argues that “it is present counsel’s understanding that [the husband] is mad at work with lawyers in that state: depositions, investigators and moving forward with determined aggression. He is extremely, extremely angry at Oksana for leaving him.” (App. Br. 22) There is clearly no support in the record for this claim and it should be stricken from the brief. In any event, this allegation is irrelevant to her claim that the trial court abused its discretion in awarding the husband attorney fees for her intransigence based on unchallenged findings of fact.

Finally, the wife claims that the trial court abused its discretion in awarding attorney fees based on the parties’ “agreement” that the wife would stay the North Carolina divorce action that she filed *after* she filed the Washington action. (App. Br. 22) But there was no agreement. Instead, the trial court *ordered*

the wife to either stay or dismiss the North Carolina proceeding while the Washington matter was pending. (CP 156-57)

The trial court properly awarded attorney fees to the husband based on the wife's intransigence due to her resistance to discovery, filing an unnecessary divorce action in North Carolina, filing an unwarranted request for relief as an "innocent spouse," and making last minute motions for continuance. To the extent the wife's actions increased the husband's legal fees, the trial court did not abuse its discretion in making its award. ***Marriage of Burrill***, 113 Wn. App. 863, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003); *see also Marriage of Greenlee*, 65 Wn. App. 703, 829 P.2d 1120, *rev. denied*, 120 Wn.2d 1002 (1992) (award of fees is warranted when one party made the trial unduly difficult and increased legal costs for the other party by his actions).

G. This Court Should Award Fees To The Husband On Appeal.

This court should award attorney fees to the husband for having to respond to the wife's appeal, which is frivolous. RAP 18.9(a) (authorizing terms and compensatory damages for a frivolous appeal); RAP 18.1. The wife's challenge to the trial court's fact-based discretionary decisions are without merit. She has failed

to assign error to any of the findings of fact which support these decisions, nor does she substantively challenge those findings in her brief. The wife's challenges to the trial court's decisions are based on "facts" that are not supported by the record, (See e.g. App. Br. 22, discussing the husband's alleged actions since trial), and in some instances on exhibits that were rejected at trial. (See App. Br. 6, citing Ex. 12; App. Br. 22, citing Ex. 48) The wife should be ordered to pay all the husband's attorney fees for having to respond to this appeal, because it is wholly frivolous. RAP 18.9(a); RAP 18.1; **Marriage of Healy**, 35 Wn. App. 402, 406, 667 P.2d 114, *rev. denied*, 100 Wn.2d 1023 (1983) (an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees).

At a minimum, this court should award fees as a sanction against the wife and/or her counsel for relying on rejected exhibits in support of her arguments on appeal. For example, in support of her challenge to the trial court's characterization of the Pullman residence, the wife relies on an exhibit that the trial court rejected at trial as support for her claim that she executed the quit claim deed for reasons other than those specifically stated in the deed. (App.

Br. 6, *citing* Ex. 12) The trial court properly rejected this exhibit, which was an unsworn letter from the broker who assisted with the purchase of the Pullman house that was written two years after the sale closed, as hearsay that could not be authenticated. (RP 138-39) Nevertheless, the wife relies heavily on this exhibit to claim that the trial court erred in characterizing the Pullman house. (See App. Br. 6, *citing* Ex. 12 three times)

In support of her challenge to the trial court's award of fees to the husband for her intransigence, the wife relies on another exhibit that was rejected at trial. (App. Br. 22 *citing* Ex. 48) Exhibit 48 was a copy of a complaint that the husband filed against a gentleman in North Carolina a month before trial. The trial court properly rejected this exhibit as having little evidentiary value in light of the husband's testimony regarding that lawsuit. (RP 631)

This court should sanction the wife and her counsel for relying on these rejected exhibits for her claims in her brief, especially when she fails to bring to this court's attention the fact that these exhibits were rejected, and she makes absolutely no argument as to why the trial court should have considered them. Reliance on an exhibit that was not admitted at trial by appellant's

counsel "runs perilously close to violating paragraph 5 of the Oath of Attorney as set forth in APR 5(d): *I will never seek to mislead the judge by any artifice or false statement.*" **Port Susan Chapel of the Woods v. Port Susan Camping Club**, 50 Wn. App. 176, 185, 746 P.2d 816 (1987) (emphasis in original). The circumstances here are even more egregious than those in **Port Susan**, because here the wife's counsel in this court represented her at trial, and there is no dispute that he knew that Exhibits 12 and 48 were not admitted at trial. (See CP 150)

IV. CONCLUSION

The trial court orders regarding maintenance, property division, and attorney fees were all well within its discretion and are supported by substantial evidence. This court should affirm and award fees on appeal.

Dated this 12th day of November, 2010.

EDWARDS, SIEH, SMITH
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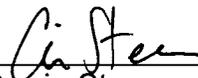
DECLARATION OF SERVICE

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

That on November 12, 2010, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

| | |
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| Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
| Robert Stark Stark Law Offices 155 108th Ave NE Ste 704 Bellevue, WA 98004 | <input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail |
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DATED at Seattle, Washington this 12th day of November, 2010.



Carrie Steen