

No. 69616-5-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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In re the marriage of  
MASON C. BAILEY, Respondent  
v.  
JACKIE E. BAILEY, Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY  
#10-3-00763-6

**BRIEF OF RESPONDENT**

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## INTRODUCTION

This divorce appeal turns on the credibility of Appellant Jacqueline Bailey. At the close of a two-day bench trial, Whatcom County Superior Court Judge Charles Snyder concluded that Ms. Bailey had not acted in good faith during her relationship with Respondent Mason Bailey.

I cannot find that Ms. Bailey has in any way been acting with any sort of good faith or in any way within the nature of the relationship that this Court could say would be appropriate to grant her an equitable share of the property that may have been accumulated by the parties prior to their marriage.

(II VRP 287) Judge Snyder found that Ms. Bailey's behavior in the relationship conflicted with her testimony after the fact. "Ms. Bailey gave reasons and explanations on the stand, but they do not comport with what she actually did." (II VRP 285).

Ms. Bailey now appeals, arguing "the trial court did not make a just and equitable division of the parties' property." (Opening Brief at 1). Because the trial court acted well within its discretion in holding Ms. Bailey accountable for her actions, Respondent Mason Bailey respectfully requests this court to affirm the trial court's orders, dismiss this appeal, and award him reasonable attorneys' fees.

**I. RESTATEMENT OF ISSUES PRESENTED**

Ms. Bailey's appeal presents three issues:

A. "The spouse who challenges...decisions [in a dissolution action] bears a heavy burden of showing a manifest abuse of discretion on the part of the trial court." Marriage of Landry, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). Ms. Bailey disputes the court's division of property and finding of bad faith. Did the trial court abuse its discretion in reaching these decisions?

B. "A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-663, 935 P.2d 555 (1997). Although she did not have the witness ready, Ms. Bailey offered to call a real estate agent who would appraise the marital home without viewing the property and based solely on Ms. Bailey's description. Did the trial court abuse its discretion by refusing to continue trial to allow the witness to appear and testify?

C. "We defer to the trier of fact on issues of credibility." State v. Zhao, 157 Wn.2d 188, 202, 137 P.3d 835 (2006). Judge Snyder found Ms. Bailey's testimony unbelievable and self serving, concluding she "came before the court with unclean hands in her

request for an equitable division of property acquired by the parties while they lived together before they were married.” (Findings of Fact ¶ 3.8; CP 166). Did the trial court abuse its discretion by finding that Ms. Bailey acted in bad faith?

## II. STATEMENT OF FACTS

Mason “Mick” Bailey is 73 years old; his ex-wife, Jacqueline Bailey, is 51. (I VRP 17) (I VRP 138). They were married for a year and a half, from August 11, 2008 until their separation on February 23, 2010. (I VRP 16). Since early in the marriage, Mr. Bailey suffered from mild to moderate cognitive impairment as a result of dementia and schizophrenia. (I VRP 22). He is a retired longshoreman, living on his pension and social security. (I VRP 17).

### A. Ms. Bailey Moves In With Mr. Bailey And Takes Over His Finances.

In the early 2000s, Mr. Bailey met Jacqueline, a real estate agent, while she was married to Mark Bishop. (I VRP 138) When her relationship with Mr. Bishop ended in March 2004, she moved in with Mr. Bailey. As she described at trial,

Q. [W]as there any issues of domestic violence with Mr. Bishop?

A. Yes.

Q. And did you leave the relationship as a result of that?

A. Yes, I did.

Q. And where is it that you went?

A. I went to Mick's when I left Mark's

Q. And he asked you to move in with him?

A. Yes, he did.

Q. Did you intend to be in a relationship with him?

A. No.

Q. With Mr. Bailey?

A. No.

(I VRP 138-39).

The two lived off and on together until their marriage in August 2008. According to Brett Bailey, Mr. Bailey's son and guardian, the relationship was rocky.

Early on in my dad's relationship with Jackie, on one occasion, he called me in the morning to say that she left to get her hair done, and she hasn't come back, and this was the following day. He didn't know where his car was. So we go to try to find his car, and the neighbor called, and it was sitting at the end of the driveway, no Jackie, just the car. She came back after several days. They continued on.

Several months later, I get, he comes to my house and says, "I need to go get my car. It's at the Scottish Lodge [Motel]. She's with Mark," and I took that as

Mark Bishop, her ex-husband. So I drove him to the Scottish Lodge in Ferndale. He took the spare key, and we left. We got his car. I can't confirm that she was there with him. We, I just dropped him off. He got his car, and we left.

(I VRP 23). Ms. Bailey admitted at trial that she was with her ex-husband. (I VRP 155). Nearly a year after moving in with Mr. Bailey, Ms. Bailey divorced Mr. Bishop. (I VRP 156).

Ms. Bailey controlled Mr. Bailey's finances from the beginning of their relationship. As the trial judge found,

Ms. Bailey by her own admission wrote Mr. Bailey's names on checks of his account that she was not a signatory on. She had control of all the money. She said she wrote all the bills, paid all the bills. She wrote the checks, took care of all the money.

(II VRP 283). On July 23, 2008, one month before marrying, Ms. Bailey tried to become co-holder on Mr. Bailey's American Express account. The Company rejected the request because of her past bankruptcy. (Rejection Letter, Plaintiff's Exhibit 42)\*

B. Mr. Bailey's Health Declines

In August 2008, and again in March 2009, Mr. Bailey had surgery for herniated disc disease. Dr. Douglas Wynne, his doctor,

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\* Respondent has filed a supplemental designation of clerk's papers and a CP cite does not yet exist for this document.

described the surgeries and the cognitive impairments that followed.

The initial surgery was in August of 2008 and the second surgery was in March of 2009. The spouse notes that after the first surgery, he seemed a little confused when he got home from the hospital but that he, within weeks, returned to his "baseline" mental status. The spouse noted that when he came home from the second surgery, that he was more confused than with the first surgery, and even though there was some subsequent improvement, that he remained significantly more confused than his "baseline" mental status.

(7/13/10 Chart Note, Plaintiff's Exhibit 4).

Dr. Wynne documented a sharp decline in Mr. Bailey's cognitive functioning from 2009 to 2010.

When I evaluated the patient on 10/26/2009, he did demonstrate some mild cognitive impairment. Detailed testing was not performed at that time. On 5/5/2010, MMSE (Mini-Mental State Examination) was performed by myself, with a score of 18, corresponding to "Moderate" cognitive impairment.

....In summary, Mason C. Bailey has experienced the recent onset of cognitive impairment/dementia.

(7/13/10 Chart Note). During the year and a half marriage, Mr. Bailey's mental state deteriorated rapidly.

C. Ms. Bailey Takes Advantage Of Mr. Bailey's Condition And His Assets

While Mr. Bailey's health declined, Ms. Bailey accumulated large debts on his line of credit and credit cards. She testified that,

we would go to Costco, and we each had an American Express card, and just because I am more computer literate than he is, I would always use my American Express card.

(I VRP 159). She would also withdraw money on his ATM card.

[W]hen I would go to the grocery store, I would use his ATM card. It got to the point where he didn't even -- I always had his ATM card in my possession. You know, if he needed money, you know, I would go to the ATM and get him money.

(I VRP 159).

Judge Snyder concluded that Ms. Bailey abused her control of Mr. Bailey's finances.

There were large sums of money spend on bills and other things, property, buying merchandise, whatever. That isn't really easily determined, because the bills from the American Express card and other don't specify specifically what was purchased, but this was a common process by Ms. Bailey during the period of time after Mr. Bailey's cognitive impairments had been determined by Dr. Wynne. So she was aware of his dementia and his cognitive difficulties after his surgery.

(II VRP 284).

On October 17, 2009, Ms. Bailey persuaded her husband to transfer three trucks he owned -- a 2005 Dodge Ram, a 1991 Toyota 4Runner, and 2007 Jeep Wrangler – to her. (Transfers of Title, Plaintiff's Exhibits 35, 36, 38, 39, and 40). All three were Mr. Bailey's separate property, purchased in his name before his marriage. Brett Bailey testified that the signatures on the October 2009 transfers of title were not his father's.

Q. Is that your dad's signature?

A. No, it's not.

Q. How does your dad sign his name?

A. Mason C. Bailey.

Q. Have you ever seen him sign it Mason Charles Bailey?

A. No, ma'am.

(I VRP 86) (I VRP 84, 87).

At trial, Ms. Bailey explained the transfers as an attempt to keep Brett from taking the vehicles.

[W]e went in and had the vehicles transferred, Chuck [Hamstreet, Northwest Licensing] was concerned, you know, if everything was all right, and Mick says yeah, everything's all right. I just got to keep that kid away from my stuff, and he explained to Chuck that, his belief that Brett was stealing from him, stealing the guns and that he was not going to have him take the vehicles either.

(II VRP 192). These transfers occurred in the same month that Dr. Wynne diagnosed "mild cognitive impairment". (10/26/09 Chart Notes, Plaintiff's Exhibit 4 at 4).

D. Ms. Bailey Leaves Her Husband And Then Places Him In An Alzheimer Care Facility

In March 2010, Ms. Bailey left her husband after an argument and moved in with Mark Hover, a friend. (II VRP 242). In May 2010, while living with Mr. Hover, she sold the 2005 Dodge Ram and 1991 Toyota 4Runner to him for \$500 each. (Plaintiff's Exhibits 39 and 40). Mr. Hover later sold the Dodge Ram to Rallye Motors for \$23,000. (Plaintiff's Exhibit 44). He also sold the 4Runner to Ms. Bailey's mother, Ramona Lockleer, for \$400 (Plaintiff's Exhibit 43 at 2). Mr. Bailey received none of the proceeds.

Mr. Bailey's health continued to decline, and by June 4, 2010, he had lost 22 pounds. (June 4, 2010 Chart Note, Trial Exhibit 4 at 2). On June 21, 2010, Ms. Bailey placed him in Highgate Senior Living, an assisted living facility in Bellingham, Washington. She did this because she felt Mr. Bailey could not care for himself. As she described at trial,

there was a lot of things that happened in a short period of time, and from March until June, you know, he would call, and half of the house, the electrical panel, the electricity wasn't working. The TVs weren't working, you know. I was at work getting these calls, and a friend would go over, and I would go over at lunch and try to figure out what was wrong, and there was several things.

(II VRP 211).

Mr. Bailey stayed at Highgate for less than a month. As soon as she put Mr. Bailey in the facility, Ms. Bailey moved back into the couple's house with Mr. Hover. (II VRP 242). She paid Mr. Hover \$2,150 for "security" and from June 21 to July 16, 2013, withdrew a total of \$1900 in cash from Mr. Bailey's bank account. (II VRP 283-4). She also ran up a \$515.15 bill on Mr. Bailey's cell phone account. (Plaintiff's Exhibit 7\*; I VRP 39).

In late June, Brett Bailey visited his father, discovering that he was unhappy there and wanted to return home. On July 1, 2010, Ms. Bailey filed a petition for a vulnerable adult order for protection against Brett and his uncle, David Bailey. In re Mason C. Bailey, Whatcom County No. 10-2-01617-8 (July 1, 2010). On July 2, 2010, Highgate's Executive Director barred Brett from visiting his father again. (Respondent's Exhibit 73). That same day, David

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\* Respondent has filed a supplemental designation of clerk's papers and a CP cite does not yet exist for this document.

and Brett Bailey filed their petition for a vulnerable adult order for protection against Jacqueline Bailey. In re Mason C. Bailey, Whatcom County No. 10-2-01630-5 (July 2, 2010).

On July 16, 2010, Whatcom County Commissioner Thomas Verge ruled on the two petitions, dismissing Ms. Bailey's and granting Brett's. Brett took his father home that same day, and Mr. Bailey has remained in his home ever since. On July 21, 2010, the Superior Court entered a protection order against Ms. Bailey, requiring her to leave Mr. Bailey's home, relinquish control of his assets and cease acting as his attorney-in-fact. In re Mason Bailey, Whatcom County No. 10-2-01630-5 (Order of Protection, July 21, 2010) (II VRP 281) ("she...created the need for a protection order to prevent her from having access to Mr. Bailey and his property").

Brett Bailey filed a guardian action for his father, and on October 12, 2010, the Whatcom Superior Court appointed Brett guardian. Guardianship of Bailey, Whatcom County No. 10-4-00266-2 (Letters of Guardianship, October 12, 2010). Brett filed this dissolution action on behalf of his father on October 26, 2010, and on February 4, 2011, the Court in the guardianship action approved filing the petition for dissolution. Guardianship of Bailey,

Whatcom County No. 10-4-00266-2 (Order Approving Filing of Petition, February 4, 2011).

On September 24-25, 2012, Judge Snyder held a bench trial to determine a just and equitable division of the couple's property. On October 24, 2012, the trial court entered Findings of Fact and Conclusions of Law (CP 161-169) and a Decree of Dissolution (CP 170-178). Ms. Bailey now appeals.

## **ARGUMENT**

### **III. STANDARD OF REVIEW**

This Court grants substantial deference to the trial court's findings of fact and division of property.

[T]rial court decisions in a dissolution action will seldom be changed upon appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court. The trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.

Marriage of Landry, 103 Wn.2d 807, 809-810, 699 P.2d 214 (1985)  
(citations omitted).

The Court also defers to the trial court's management of its courtroom and reception of evidence.

Trial courts have wide discretion to manage their courtrooms and to conduct trials fairly, expeditiously, and impartially. We review such courtroom management decisions...for abuse of discretion.

Hickok-Knight v. Wal-Mart Stores, Inc., 170 Wn. App. 279, 310 n.11, 284 P.3d 749 (2012). The Court reviews evidentiary rulings for an abuse of discretion. Hickok-Knight, 170 Wn. App at 313 (“we review a trial court's evidentiary rulings for abuse of discretion”).

Finally, “credibility determinations cannot be reviewed on appeal.” Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

#### **IV. THE TRIAL COURT APPROPRIATELY FOUND THAT MS. BAILEY ACTED IN BAD FAITH**

In making a just and equitable division of property, the trial court relied on a primary maxim: “one who seeks equity must do equity.

In other words, if you’re before the Court asking for something that you think is fair, you must come before the court having acted in good faith in all ways and all respects. You cannot come to the Court with unclean hands...”

(II VRP 281). Ms. Bailey challenges the trial court's division of property – both for the relationship before marriage and the marriage itself. But her arguments fail to address or invalidate the

trial court's finding of bad faith. A just and equitable division of property should not reward her for financially abusing her husband.

A. Ms. Bailey Took Advantage Of Mr. Bailey's Diminished Mental Capacity

Judge Snyder's oral ruling at the close of trial detailed four reasons for questioning Ms. Bailey's credibility and finding her actions in bad faith. First,

two other cases in this superior court, Cause Number 10-4-00266-2, a Whatcom County Superior Court cause number involving the guardianship for Mr. Bailey, and Whatcom County Superior Court Cause Number 10-2-01630-5, a vulnerable adult protection order case, have been decided, and in those cases, determinations were made by the court that Ms. Bailey had undertaken to take advantage of Mr. Bailey's conditions and his circumstances, and that she had created the need for a protection order to prevent her from having access to Mr. Bailey and his property, and that there had been a clear demonstration that Mr. Bailey at that time was incapable of properly managing his own financial affairs and needed the assistance of a guardian.

(II VRP 282).

Second, Ms. Bailey improperly put Mr. Bailey into assisted living rather than finding in-home care.

[O]n the 21<sup>st</sup> of June 2010, Ms. Bailey placed Mr. Bailey in the Highgate home. He was there until July 16<sup>th</sup> of 2010. It is clear from what has occurred since that time that Mr. Bailey is capable of caring for himself with assistance as he has with caregivers that have been provided and the assistance of family.

(II VRP 283); (II VRP 287) (“the Court can only conclude that it was for the convenience of having him not around while all these other things were taking place”).

Third, Ms. Bailey abused her control over Mr. Bailey’s finances, culminating with extraordinary expenses while he was at Highgate.

She withdrew significant amounts of cash during the month that Mr. Bailey was in the Highgate home from the account, and it is interesting that the dates of those withdrawals coincide exactly with the dates of Mr. Bailey’s residence at Highgate, from June 21<sup>st</sup> to July 16<sup>th</sup>, a total of \$1900 unaccounted for in cash. At the same time, she wrote a \$2,150 check to Mr. Hover for quote “security” unquote at the residence.

It is significant that she had been residing with that same gentleman in Mount Vernon for three months prior when she was not with Mr. Bailey. Therefore, the claim that the reason that was paid was to provide security for her is, I think, disingenuous.

(II VRP 284).

Fourth, Ms. Bailey betrayed her husband’s trust by transferring two trucks to Mr. Hover and selling the Jeep for her own benefit.

She transfers the '91 4Runner of Mr. Bailey’s, his separate property, he owned it prior to the marriage, to herself, transfers the Jeep which was purchased in 2007 to herself, transfers the Ram purchased in 2004 to herself, and then transfers the Ram to Mr. Hover

and the documents here said “for \$500 because the repair costs of this vehicle exceeds the practical repair amount,” but it was later sold for \$23,000.

...None of that money made its way into Mr. Bailey's account, nor to Mr. Bailey's benefit.

(II VRP 287).

Based on this, Judge Snyder concluded that Ms. Bailey was not entitled to a share of Mr. Bailey's assets acquired before the marriage.

There may have been such a relationship, but the equitable property division doesn't go automatically. It must also be earned by virtue of behavior, and Ms. Bailey has clearly demonstrated that Mr. Bailey's interests were not hers, and the relationship was not the basis of what she did, not to preserve property, not to maintain the relationship, but for her own gain.

(II VRP 288).

Although she disagrees with this decision, Ms. Bailey provides no compelling argument that the trial court abused its discretion. She claims that the trial court impermissibly penalized her for marital misconduct. “It is Jackie's position that ‘unclean hands’/lack of good faith is equivalent to a determination of marital misconduct.” (Opening Brief at 15). But the case Ms. Bailey cites in support – Marriage of Muhammad, 153 Wn.2d 795, 108 P.3d 779 (2005) says the opposite.

While courts have held that negatively productive conduct that causes the dissipation of *marital assets* can be considered, marital fault alone is not an appropriate consideration. See, e.g., In re Marriage of Steadman, 63 Wn. App. 523, 527–28, 821 P.2d 59 (1991) (holding that the “marital misconduct” at issue in RCW 26.09.080 “refers to immoral or physically abusive conduct within the marital relationship[, not] gross fiscal improvidence, the squandering of marital assets or ... the deliberate and unnecessary incurring of tax liabilities” (footnote omitted)); In re Marriage of Clark, 13 Wn. App. 805, 808–09, 538 P.2d 145 (1975) (taking account of how labor or negatively productive conduct created or dissipated certain marital assets is appropriate).

Marriage of Muhammad, 153 Wn.2d at 804.

Here, the trial court found at least four instances of “negative productive conduct”, including gross fiscal improvidence and the squandering of marital assets. If Ms. Bailey’s argument were correct, a spouse’s fraud, bad faith, or theft of marital assets would be irrelevant to a just and equitable division. That is not the law nor should it be. Marriage of Wallace 111 Wn. App. 697, 708, 45 P.3d 1131 (2002) (“RCW 26.09.080 refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence or the squandering of marital assets”).

The trial court correctly found bad faith and did not abuse its discretion in refusing to award Ms. Bailey property acquired before her marriage.

B. The Trial Court's Division Was Just And Equitable

Next, the trial court made a just and equitable division of the couple's assets. The trial court's division of community and separate property had four components. First, the court required Ms. Bailey to reimburse her husband for the value of the 2005 Ram Truck and 2007 Jeep Waggoner.

[W]hen she obtained the funds for those or obtained the vehicles and then the funds for them, she has received separate property of Mr. Bailey's rather than a division of community property.

I don't anticipate that there is much likelihood that she is ever going to pay Mr. Bailey back the money that she owes him, but I will grant a judgment in the total amount of – let me run this on the machine to make sure I got the proper number for you, \$41,065.

(II VRP 293) (Conclusion of Law ¶ 3.8; CP 166) ("the husband should be awarded a judgment against the wife for the \$41,065 worth of his separate property that she accessed, utilized, and took for her own benefit without his permission").

Second, the court awarded Ms. Bailey the separate property she brought into the marriage. (Exhibit A to Dissolution Decree; CP

176-178) (Respondent's Exhibit 79). This includes the eight items at the top of Exhibit A to the decree. (Dissolution Decree ¶ 3.2; CP 171).

Third, the court awarded Mr. Bailey his separate property and all the value and debts associated with his home. Although Ms. Bailey claimed she improved the property's value, the trial court found no evidence in support.

So all of the things that she said she did to improve the value of the property I cannot find or adhere in any way that I can determine a value or an increase in the value of the property.

(II VRP 292) (Dissolution Decree ¶ 3.2; CP 171).

Finally, the court declined to award Ms. Bailey maintenance.

This is a short one and one half (1 1/2) year marriage. Wife is able to work to provide for her needs. During the marriage, wife accessed, utilized, and took the value of \$41,065 of the husband's separate property.

(Findings of Fact ¶ 2.12; CP 164).

Ms. Bailey challenges each of these decisions, alleging either that the trial court erred or abused its discretion. She begins by arguing that the trial court was confused over ownership of the Jeep and Dodge Ram.

Other than the trial court's confusion over the character of the Jeep and Dodge Ram, no evidence was provided to overcome the presumption that all of

the property acquired during the Committed Intimate Relationship was owned by both parties.

(Opening Brief at 9). Her argument fails on a number of grounds.

First, Ms. Bailey's bad faith in persuading Mr. Bailey to transfer title justified the trial court's division. Whether the trucks were separate or community property, Ms. Bailey obtained them through undue influence. The transfer was invalid.

Second, the rules of property division in a marital dissolution do not directly apply to committed intimate relationships.

A committed intimate relationship is not a marriage. Thus, "the laws involving the distribution of marital property do not directly apply to the division of property following a [committed intimate relationship]." But, Washington courts may look to those laws for guidance. Therefore, courts may apply by analogy community property laws to committed intimate relationships.

In re G.W.-F., 170 Wn. App. 631, 637, 285 P.3d 208 (2012). The trial court had discretion to require Ms. Bailey to reimburse her husband for the trucks' market value.

Third, Mr. Bailey bought the trucks with his separate property and Ms. Bailey contributed nothing to their purchase or upkeep. The trial court properly characterized them as Mr. Bailey's separate property.

Next, Ms. Bailey alleges “the division of the parties’ property is not just and equitable because it is not based upon the economic condition in which the decree leaves the parties.” (Opening Brief at 18). This argument also has flaws. First, Ms. Bailey provided no evidence of her financial situation before meeting Mr. Bailey. In contrast, her standard of living increased substantially when she took advantage of Mr. Bailey’s income and assets. It would be both unjust and inequitable to reward her bad faith by requiring Mr. Bailey to continue to fund her married lifestyle.

Second, the trial court imposed the community debts on Mr. Bailey, meaning that he must pay for Ms. Bailey’s expenses during the short marriage. As the trial court found,

[Mr. Bailey] has a great deal of debt that was incurred. That is one of the other reasons I am not awarding property to Mrs. Bailey is Mr. Bailey is carrying all the debt that was run up during the course of the marriage, and she is not obligated to pay any of it, and that is equivalent to an award of property if you don’t have to pay half the debt.

(II VRP 295). Compared to paying the community debts, Ms. Bailey came out of the divorce in reasonable financial shape.

Finally, Ms. Bailey argues that the trial court abused its discretion by not valuing her contributions “to the improvement and

maintenance of Mason's separate property." (Opening Brief at 27).

The trial court gave little weight to Ms. Bailey's estimates of value.

Besides not knowing when those were made, those property improvements must be demonstrated to improve the value of the home, not the cost of them. You can spend \$10,000 painting a house, but it doesn't make the house \$10,000 more valuable.

(II VRP 290). Ms. Bailey provided no expert opinion on the value of her contributions. Instead, she provided only her testimony about the cost of various improvements. (II VRP 239) ("they're the purchase price, not the market value of items? Correct").

The trial court appropriately found this testimony unpersuasive. (II VRP 291) ("there are no specifics provided to this Court that allows it to make a determination about some of the values of these things"). The court acted well within its discretion when it awarded Ms. Bailey her separate property, and Mr. Bailey both the value and debt on his home.

**V. THE TRIAL COURT CORRECTLY REFUSED TO CONTINUE TRIAL TO ALLOW MS. BAILEY TO PRESENT QUESTIONABLE EXPERT TESTIMONY**

At the close of her case, Ms. Bailey asked to continue trial to locate Kent Thomas, a real estate agent, and have him testify. (II VRP 246). Ms. Bailey offered his testimony "to determine how the...work, the improvements to the property would have made the

property more valuable.” (II VRP 246). Mr. Thomas never viewed the property, produced no expert report, and would value the improvements based solely on Ms. Bailey’s estimates. (II VRP 246-247). As Ms. Bailey’s counsel conceded,

[w]e don’t have the receipts or those things that were done. I mean, some of the things were done for cash, but we don’t have access to receipts or those sorts of things.

(II VRP 247).

The trial court refused to continue trial again to allow the questionable testimony.

No report or other information has been provided to the Petitioner for the Petitioner to be able to cross-examine or have his report evaluated by their own expert. He has been asked to give an opinion based entirely upon information provided by Ms. Bailey without a view of the property, and with his only contact with the property, his only information about the property coming through Mr. Follis’ [Petitioner’s Expert] appraisal.

....[W]e have a case that is now a year and a half or more old that’s been filed. Mr. Bailey because of his condition is treated and viewed by the court as a person whose case should receive priority for resolution and decision.

(II VRP 258).

Ms. Bailey objects to the ruling, arguing that “the increased value of Mason’s separate real property is an essential element of

Jackie's case that is beyond the expertise of lay witnesses." (Opening Brief at 29). Certainly, competent testimony would be relevant, but Ms. Bailey fails to prove that the trial court abused its discretion in refusing to continue trial. She, like Mr. Bailey, had to have her witnesses ready for trial. Her failure to have her witness present does not entitle her to extra time, especially when the expert did not have adequate grounds to reach an opinion. (II VRP 279) ("without a view of the property, without any way to evaluate whether or not the things she said were done to the property were done, to what level they were done, and what quality they were done, and whether those improvements remain").

The trial court acted well within its discretion to hold to the trial schedule.

**VI. MR. BAILEY DESERVES AN AWARD OF ATTORNEYS FEES ON APPEAL**

The trial court did not award attorneys' fees at trial under RCW 26.09.140. Because Ms. Bailey did not prevail at trial, she was not entitled to reasonable attorneys' fees.

On appeal, Ms. Bailey is not the prevailing party and also not entitled to a fee award. Marriage of Mansour, 126 Wn. App. 1, 17, 106 P.3d 768 (2004) ("the arguable merit of the issues on appeal").

Mr. Bailey requests an award on appeal for a different reason. Under RAP 18.9(a), this Court may award fees for filing a frivolous appeal.

An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced the appeal presents no debatable issues upon which reasonable minds could differ, and that it is so devoid of merit that there is no possibility of reversal.

Crystal Lotus Enterprises Ltd. v. City of Shoreline, 167 Wn. App. 501, 507, 274 P.3d 1054 (2012). Here, Ms. Bailey's arguments amount only to disagreement with the trial court's discretionary decisions. Because she has provided no reasonable response to the trial court's finding of bad faith, her appeal is devoid of merit.

### **CONCLUSION**

Mason Bailey was married to Jacqueline Hall Bailey for one and one half years. During that time, he suffered significant financial and physical losses, while his wife took advantage of his declining health. The trial court appropriately found that Ms. Bailey acted in bad faith throughout the couple's relationship.

Respondent Mason Bailey respectfully requests the Court to affirm the trial court's division of property, dismiss this appeal, and award reasonable attorneys' fees under RAP 18.9(a).

DATED this 21<sup>st</sup> day of October, 2013.

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By 

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### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Brief of Respondent to:

David G. Porter  
103 E. Holly St., #409  
Bellingham, WA 98225

DATED this 21<sup>st</sup> day of October, 2013.

  
Philip Buri