

No. 74930-7-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

STEPHANIE F. FERGUSON (f/n/a VANDAL),

Respondent,

v.

JOSEPH H. VANDAL,

Appellant.

FILED  
Nov 14, 2016  
Court of Appeals  
Division I  
State of Washington

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE HELEN HALPERT

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

During the parties' 14-year marriage, the husband worked for an accounting firm, essentially a "one-man business," that he started before the parties married and from which all of the family's expenses were paid. The trial court found that "money flowed in and out of personal and business accounts in an almost indivisible stream" and that the parties had a "casual attitude [ ] towards the segregation of business and personal assets." (CP 228) The wife stayed home during the marriage, first to care for the husband's older children from a prior relationship and then to care for the parties' special needs son.

By the end of the marriage, the most significant asset the parties owned was the business, the value of which was comprised almost entirely of the husband's goodwill, which by all accounts required constant renewal during the marriage. (FF 2.8.2.5, CP 394) No evidence was provided as to the status or value of the business when the parties married, and the trial court found the business lost any character as a separate asset due to commingling with community assets, including the husband's labor. (FF 2.8.2.7, CP 394)

The trial court's characterization of the parties' assets, including the business, as community property, its equal division of the community property, and its order requiring the husband to repay an account that had been set up for the parties' special needs son that the husband emptied in violation of a temporary restraining order, was well within its discretion, supported by substantial evidence, and consistent with the law – as was its award of spousal maintenance and child support for the son based on the standard calculation. This Court should affirm and award attorney fees to the wife.

## II. RESTATEMENT OF FACTS

**A. The parties were married for 14 years and have a son who is diagnosed with autism spectrum disorder. The wife stayed home to care for the son and the husband's children from a previous marriage.**

Respondent Stephanie Vandal (“Stephanie”), age 49, and appellant Joseph Vandal (“Jay”), age 52, married on August 4, 2000. (RP 18, 19; CP 416) They separated on August 2, 2014 after Jay was arrested for domestic violence against Stephanie, who required surgery for the injuries she sustained. (RP 19, 77-78, 82, 86-87)

Stephanie, who earned her bachelor's degree in marketing in 1989, was working as a teacher in Connecticut before moving to Washington to marry Jay in January 2000. (RP 534-35, 537-38) Stephanie had not yet earned her teaching certificate and did not

resume working when she arrived in Washington. (RP 21-22, 538) Instead, Stephanie stayed home to care for Jay's children from his previous marriage, ages 3 and 5, who lived half-time with the parties. (See RP 21-22)

When the parties' son was born on June 25, 2002, Stephanie continued to stay home to care for all three children. (RP 19, 22-23, 538) After the parties separated, Stephanie maintained a good relationship with the older children, who remained close to the parties' son. (RP 34-35, 65, 69-70) The parties' son was diagnosed in 2010 with autism spectrum disorder, which impacts his reading, writing, and speech. (RP 33, 48-49, 710) The parties hired a private teacher to assist the son. (RP 51) By the time of trial, the son, age 13, was reading at third/fourth grade level, but was maturing and improving socially and had begun taking classes at a traditional school. (RP 35, 55, 59-60)

Jay was estranged from his older children, ages 18 and 21, at the time of trial. (RP 883, 917-18) Although he had previously not paid child support due to the equal residential schedule (Ex. 211 at 3-4), at the time of trial Jay was paying child support of \$2,692 for his older children's support pursuant to an order entered September 12, 2014, a month after the parties separated. (RP 883; Ex. 212) A new

child support order was entered after trial reducing Jay's child support obligation from \$2,692 to \$1,438.59, for his older children's post secondary support. (CP 152-53)

**B. The parties own an accounting firm, which the husband started before the parties married. The trial court found the business was a community asset.**

When the parties married in 2000, Jay owned and worked for his business, Joseph H. Vandal, CPA, PS, which he continued to run during the marriage. (RP 22) Jay started the business as a sole proprietorship in 1989 and incorporated in 1991. (RP 854)

Jay provided no evidence as to the status of the business in 2000 when the parties married, but according to the order of child support entered in the dissolution of his previous marriage in April 2000, four months before his marriage to Stephanie, he had been earning \$60,000 annually from the business. (See Ex. 211) When the parties separated, Jay was earning an average of \$318,017 annually, and had two employees. (RP 857, 877-78) Although the business paid Jay a salary of \$70,000 annually, he actually received an average monthly net income of \$18,635.46, or \$26,501.47 gross, from the business. (RP 877, 878, 880) Jay typically left all income in the business account and transferred funds into the parties' joint

account when requested by Stephanie to pay community obligations.  
(RP 703-04, 721-22, 866-67)

Most of Jay's customers are Homeowner Associations (HOAs). The services the business provides are: 80% condominium HOA auditing; 15% condominium HOA tax preparation; and 5% individual tax preparation. (RP 854) Jay testified that he does not have a lot of client loyalty (RP 856, 857, 943), and that the average time an HOA spends with one accounting firm is usually three years. (RP 861) Since the boards governing the HOAs change, Jay must continually renew his existing relationships with HOAs, and cultivate new relationships. (RP 856, 861) Every year, Jay sends out bids to HOAs with whom he has an existing relationship and to HOAs with whom he wishes to form a relationship. (RP 854-55) Because the business does not advertise, Jay must go out and "shak[e] hands" in order to get new clients. (RP 861)

Jay made very little effort to separate the business from the community. For instance, all of the community expenses, including the son's private teacher and family vacations, were paid by business. (RP 66, 704, 705, 721-22, 726, 866-68, 1020) The parties used credit cards that were paid directly by the business. (RP 66, 705-06) Jay

also occasionally drew on the line of credit secured by the family residence to cover short falls for the business. (RP 950-51, 952-53)

Both the characterization and the value of the business was in dispute at trial. Both parties' experts concluded that Jay had goodwill, which was the most valuable asset of the business, but disputed its value. (See RP 258, 306-07; Exs. 76, 201) Steve Kessler, Stephanie's expert witness, valued the business at \$535,000. (RP 256; Ex. 76 at 5) Douglas McDaniel, Jay's expert witness, valued the business at \$270,000. (RP 298; Ex. 201 at 2) The difference in the experts' valuations largely came down to replacement compensation and capitalization rate. (RP 283-84) Kessler concluded that Jay's replacement compensation was \$200,000 versus McDaniel's determination of \$235,000. (RP 265, 321-22) Kessler calculated a capitalization rate of 22 percent versus McDaniel's calculation of 26.8 percent. (RP 280, 283, 307) Kessler advocated a lower cap rate because of the maturity of the business. (RP 323)

The trial court adopted each experts' valuations in part. While the trial court adopted the analysis of Kessler, it concluded that "a capitalization rate of 26.8% as proposed by Mr. McDaniel more accurately reflects the risk of the business" despite its otherwise long-term success. (CP 230; Finding of Fact (FF) 2.8.2.8, CP 394,

*unchallenged*) The trial court thus found the value of the business was \$446,000. (FF 2.8.2.9, CP 394 *unchallenged*)

The trial court further found the “value of the business is almost entirely based on the goodwill generated by the Respondent. Both valuation experts, Steven J. Kessler for the Petitioner and Douglas S. McDaniel for the Respondent, as well as the Respondent himself, testified that the clientele of the business and thus its goodwill required constant renewal which was accomplished by the community labor of the Respondent.” (FF 2.8.2.5, CP 394) The trial court found that “the husband’s salary of approximately \$70,000 per year, as he historically paid himself, was recognized by both experts and by the Respondent himself as inadequate to compensate the community for his labor.” (FF 2.8.2.6, CP 394)

The trial court found that while the business had been a separate asset when the parties first married, “over the 14 years of marriage, the business lost its characterization as the Respondent’s separate property. It is not possible to trace what separate portion, if any, can be segregated from the overwhelming community ownership. Therefore, the Court concludes that this is wholly community property.” (FF 2.8.2.7, CP 394) In support of its determination, the trial court found that “subsequent to and during

the marriage, there was not a clear separation of the monies paid into or paid from the business. Community monies from lines of credit were paid into the business, although the amounts cannot be determined.” (FF 2.8.2.3, CP 393) The trial court noted that “many of the community and family expenses were paid through the business during the marriage, including both the business and personal lease payments and expenses for use of vehicles for both spouses. The Respondent characterized these monies as loans and stated that the accounts were reconciled at the end of the year, but no financial records or other concrete evidence was offered to support this assertion and the Court does not find his testimony to be credible.” (FF 2.8.2.4, CP 393-94)

**C. The parties separated after a domestic violence incident that resulted in the husband being jailed and the wife requiring surgery.**

The parties’ marriage became strained in 2014 when Jay began drinking heavily, became controlling, and sought to cut off Stephanie’s relationships with friends. (RP 147, 149-50, 152) In the months leading up to the parties’ separation in August 2014, Jay began accusing Stephanie of having an affair. (See Parenting Plan Finding of Fact (PP FF) 2.1.2 (a), (b), CP 453, *unchallenged*) During one incident in June, “the father woke up the mother at night. He

was raging, broke a vase, kicked in a door and accused the mother of having a lesbian affair.” (PP FF 2.1.2 (b), CP 453, *unchallenged*)

The parties separated on August 2, 2014, after Jay, “while intoxicated, [ ] assaulted [Stephanie] by hitting her twice in her shoulder with such force as to cause very substantial injury. [ ] In June 2015, [Stephanie] needed arthroscopic surgery to repair the damage to her shoulder caused by the assault and to remove calcium chips from her shoulder.” (PP FF 2.1.2 (c), CP 453, *unchallenged*) As a result of this assault, Jay was arrested. (RP 86) “Upon his release from jail on August 6, 2014, the father returned to the family home and aggressively tried to enter the home, terrifying his wife and child. After this incident, the mother and child fled to Connecticut to be with her family.” (PP FF 2.1.2(e), CP 453, *unchallenged*)

Stephanie returned to Washington State on August 25, 2014, and obtained a temporary order of protection against Jay. (RP 492; Exs. 2, 3) Stephanie also filed for dissolution on August 29, 2014, and obtained an *ex parte* restraining order against Jay, which included financial restraints that prohibited both parties from, among other things, “transferring, removing, encumbering, concealing or in any way disposing of any property except in the usual course of business or for the necessities of life and requiring

each party to notify the other of any extraordinary expenditures made after the order is issued.” (Ex. 1; Sub no. 13, Supp. CP \_\_\_)

On September 15, 2014, a temporary order was entered expanding on the *ex parte* financial restraints and prohibiting the parties from “withdrawing any monies from checking accounts of either or both parties except in the ordinary course of business or for the necessities of life;” “withdrawing any monies from savings accounts [ ] without the specific written approval of the other party;” and “incurring community debts or obligations without the specific written approval of the other party.” (CP 520; Ex. 4) The order also awarded Stephanie temporary monthly spousal maintenance of \$9,000 and monthly child support of \$1,204.13. (CP 143, 519; Sub no. 37, Supp. CP \_\_\_; Ex. 4) With the exception of the mortgages on the family residence, which Jay was ordered to pay, the parties were responsible for their post-separation expenses and debts. (CP 521; Ex. 4)

A temporary parenting plan was entered providing Jay with supervised visitation with the son. (Ex. 5) The husband is incorrect in claiming in his opening brief that the wife was allowed to relocate with the son “shortly after separation.” (App. Br. 25) Stephanie filed a notice of intended relocation, seeking to relocate with the son to

Connecticut where she grew up and where her entire immediate and extended family reside, on March 5, 2015, 7 months after separation. (Ex. 33; RP 563-64) Because Jay objected to the proposed relocation (Ex. 79), it was an issue that was required to be resolved at trial.

**D. After a 6-day trial, the trial court entered a parenting plan, awarded child support, granted the wife maintenance, characterized the parties' property, and divided the community property equally.**

The parties disputed all issues, including relocation, parenting, child support, maintenance, and the character, value, and distribution of assets, in a 7-day trial before King County Superior Court Judge Helen Halpert ("trial court").

**1. The trial court allowed the mother and son to relocate, and awarded child support based on the standard calculation.**

The trial court allowed the son to relocate with the mother to Connecticut and entered a final parenting plan. (CP 445, 452) RCW 26.09.191 limitations on the father's residential time were placed based on the trial court's findings that the father has engaged in a "history of acts of domestic violence" and because of the father's "long-term emotional impairment which interferes with the performance of parenting functions." (PP FF 2.1.2, CP 453; PP FF 2.2.1, CP 454; *both unchallenged*) The father does not challenge this decision on appeal. (*See App. Br. 3*)

The trial court ordered the husband to pay the standard calculation of child support of \$1,034.48 for the son. (CP 418) The trial court denied the husband's request for a downward deviation due to his support for his older children, making an unchallenged finding that the husband has "sufficient income to meet all his obligations." (Order of Child Support Findings of Fact (ORS FF) 3.8, CP 419, *unchallenged*) The trial court also denied the mother's request that the father be entirely responsible for the cost of long distance visitation costs, and ordered the parents to proportionally share the cost of travel (56% for the father; 44% for the mother) for the father to exercise his residential time with the son. (CP 421)

**2. The trial court ordered the husband, whose monthly income is \$26,500, to pay monthly maintenance of \$9,000 to the wife for 6 years.**

The trial court awarded the wife monthly maintenance of \$9,000 for 72 months, commencing January 1, 2016. (CP 435) In doing so, it noted the parties' "high standard of living during the marriage," in which they were able to purchase "expensive clothing and jewelry and a share of a race horse. The family also spent generously on the child's education, with a private teacher and a separate classroom." (FF 2.12.7, CP 399, *unchallenged*)

In an unchallenged finding, the trial court found the husband was capable of paying spousal maintenance, based on his monthly income of \$26,501.47 from the community business. (FF 2.12.9, CP 399) The court noted that in addition to his salary, “the business pays for a variety of expenses, such as automobile lease, that relieves the [husband] from payment of those expenses personally. From 2010 through 2013 he has consistently earned W-2 and K-1 personal gross income of over \$300,000 per year.” (FF 2.12.9, CP 399, *unchallenged*)

In finding that the wife has the need for maintenance, the trial court recognized the fact that she “has no realistic possibility of matching the [husband]’s earnings at any time.” (FF 2.12.11, CP 399, *unchallenged*) The trial court found that the wife “has not worked during the marriage. She has previous experience as a teacher prior to 1999 in Connecticut but did not attain a permanent teaching certificate. She did not work during the marriage or go to school, but cared for the parties’ son [and] the children of the Respondent by a prior relationship.” (FF 2.12.3, CP 398, *unchallenged*) The trial court acknowledged the wife’s plans to return to school to obtain her master’s degree and teaching certificate, but recognized that it would

take her five years going part-time to complete her degree due to the son's special needs. (FF 2.12.4, 2.12.5, CP 399, *unchallenged*)

Although the trial court found that both parties were in good health (FF 2.12.1, 2.12.2, CP 398, *unchallenged*), it acknowledged that the husband is "required to engage in certain services, being domestic violence counselling and mental health counseling" and expressed "some concern about [his] ability to maintain his historic rate of earnings." (FF 2.12.10, CP 399, *unchallenged*) Due to this "concern," the trial court adopted the husband's proposed monthly gross income of \$26,501.47 over the wife's proposed monthly gross income of nearly \$29,000. (FF 2.12.10, CP 399, *unchallenged*; CP 243).

The trial court found that the wife's proposed monthly living expenses of \$12,700 in Connecticut were reasonable. (FF 2.12.8, CP 399, *unchallenged*; Ex. 11) Nevertheless, even with her maintenance of \$9,000 (before taxes) and child support of \$1,034, the wife's expenses will exceed her income. The trial court found that the husband's "income far exceeds his personal living expenses" of nearly \$12,000 per month. (FF 2.12.12, CP 399, *unchallenged*; Ex. 215) A portion of the husband's household expenses included those for two women who were living with him at the time of trial, including one woman's two children; the trial court noted that they

do “not contribute to rent but did purchase some groceries.” (FF 2.12.12, CP 399, *unchallenged*)<sup>1</sup>

**3. The trial court characterized most of the parties’ property as community, and divided it equally.**

The trial court found that all of the property owned by the parties was community property except certain gifts of jewelry from the husband to the wife, valued at \$61,479, which it found was the wife’s separate property. (See FF 2.8, CP 392-96, *challenged in part*; FF 2.9, CP 396-97, *unchallenged*) Among the parties’ community property was the accounting business valued at \$446,000 (*supra* § II.B; FF 2.8.2, CP 393-94, *challenged*), which it awarded to the husband (CP 434), and proceeds of \$104,219.63 from the sale of the family residence, which it awarded to the wife. (FF 2.8.1, CP 393, *unchallenged*; CP 434) The only other assets were personal property and bank accounts.

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<sup>1</sup> One of the women living with the husband was his girlfriend Amber, age 32, and her two children. (RP 907-08; Ex. 70 at 20) The other woman, Jamie, age 25, was apparently a former girlfriend of the husband, who is now a housemate. (See RP 660, 907; Ex. 70 at 21)

- a. **The trial court awarded most of the community bank accounts to the husband, valued on the date of separation, in part because the husband made substantial withdrawals and purchases shortly after separation.**

In dividing the parties' bank accounts, the trial court expressed concern with the husband's unilateral post-separation withdrawals and large purchases made shortly after separation. (CP 240-41) With regard to the withdrawals, the trial court found that the "haphazard record keeping of the husband makes it impossible to determine if any of these withdrawals were truly needed to keep the business solvent or for the husband to meet his obligations under the temporary court orders while still maintaining a reasonable lifestyle." (CP 240)

Some of the husband's withdrawals and purchases from the business checking account occurred prior to entry of financial restraints on August 29, 2014, but after the parties separated on August 2, 2014. The vast majority of these withdrawals and purchases were for the husband's benefit alone. For instance, in the 27 days between the date the parties separated and entry of the *ex parte* financial restraints, the husband paid \$4,035 towards his bail for his domestic violence arrest and \$7,750 to a divorce attorney. (RP 958, 961, 963, 970; Ex. 26 at 84, 91, 94) The husband also spent

approximately \$3,628 at stores such as Hermes, Louis Vuitton, and a store called “Seduce LLC”<sup>2</sup> to “cheer [himself] up.” (RP 959; Ex. 26 at 86, 87, 99) In less than a month after the parties separated, the husband spent over \$15,400 from the business checking account on himself alone.

Even after financial restraints were entered on August 29, 2014, the husband continued to spend extravagantly from the business checking account, despite the restraint prohibiting the parties from “disposing of any property except in the usual course of business or for the necessities of life” and requiring each party to notify the other about any “extraordinary expenditures made.” (See Sub no. 13, Supp. CP \_\_) The husband spent nearly \$3,000 at Best Buy, Nordstrom, Salvatore Ferragamo, David Lawrence, MAC, and “Free People” (Ex. 26 at 100, 111, 122), and over \$575 to have “laser refracting” done on his face to repair sun damage. (RP 973; Ex. 26 at 111) The husband spent nearly \$1,800 on on-line horse racing. (RP 973; Ex. 26 at 100, 111) The husband also paid \$5,000 to his criminal attorney for his domestic violence assault (RP 970; Ex. 26 at 104),

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<sup>2</sup> Seduce LLC is a women’s clothing store in Kirkland (see <http://www.shopseduce.com/>). It appears that the husband’s purchases, totaling nearly \$1,360, were for a female friend, for whom he admitted buying gifts after the parties separated. (See RP 967)

another \$2,000 to the divorce attorney he paid the month before (RP 973; Ex. 26 at 111), and \$5,000 to the divorce attorney, who would later represent him at trial. (RP 970; Ex. 26 at 105)

The husband spent \$9,275 on a “move-in” ring at Tiffany’s, as a gift to a woman he had met a few months before the parties separated and who moved into the family residence almost immediately after the wife and son fled to Connecticut after the husband was released from jail. (RP 194, 493-95, 788, 823, 966-67; Ex. 26 at 100) The husband bought another \$1,202 gift for this same woman from the designer Diane Von Furstenberg. (RP 973; Ex. 26 at 111)The husband spent an additional \$3,752 at Tiffany’s but could not recall on what. (RP 970; Ex. 26 at 105)

On September 3, the husband also paid \$2,886 towards a VRBO, claiming he had to secure a residence, but then less than a week later prepaid rent of \$15,500 for another post-separation residence. (RP 966, 971; Ex. 26 at 99, 105) By the time the business was valued on December 31, 2014 – less than five months after the parties separated – this business checking account had a negative (\$41.61) balance, down from the balance of \$75,814.54 on the date of separation. (Ex. 26 at 89, 125)

Because of these expenditures, which were made in violation of restraining orders and do not even include the many unaccounted cash withdrawals made by the husband, the trial court found that the “most efficient way to account for this is to award the husband all of these accounts [ ] at their value at the date of separation.” (CP 240-41) Based on the date of separation, the husband was awarded the business checking account valued at \$75,814; the business money market account valued at \$59,894; a second business checking account valued at \$23,949; and two other personal accounts valued in total at \$23,244. (CP 394-95) The wife was awarded a personal account valued at \$22,400 as of the date of separation. (CP 239, 395)

**b. In dividing the property, the trial court considered violations of the temporary financial restraining order that resulted in less assets available for distribution.**

In making a just and equitable division of the parties’ property, the trial court also took into consideration other violations of the temporary orders. The trial court found that the husband violated the temporary order by failing to pay the mortgages on the family residence, a total of \$17,167.12. (CP 232) Further, while finding that the temporary order was “ambiguous,” the trial court found that the wife should have, but failed to, pay real estate taxes on the family residence in the amount of \$14,377.74. (CP 232-33) As a

result of these violations, which reduced the amount of proceeds from the sale of the residence available for distribution, the trial court ordered that the non-payments be credited to the party responsible as an “asset.” (CP 378, 395)

The trial court also found that the father violated the temporary order by withdrawing over \$101,000 from a Uniform Transfer to Minors Account (UTMA) that had been opened for the benefit of the parties’ special needs son. (CP 239-40) The wife testified that the parties opened the account because they “had concerns about [the son] and his future” because of his learning disability. (RP 679-80) The parties wanted to assure that the son would have funds for either his future education or to assist him with living expenses when he was older. (RP 519-20) The trial court rejected the father’s claim that the account was not for the son, but was a business account, as “not credible.” (CP 239) The trial court found the withdrawal “improper and unwarranted” and ordered the husband to “repay the \$101,691 he improperly removed from his son’s account. The wife shall open a new UTMA account for Logan’s benefit, on which she shall be the sole custodian.” (CP 240; ORS FF 3.23.1, CP 424, *unchallenged*) The trial court ruled that the

husband's funding of this new UTMA account is separate from the property distribution between the parties. (*See* CP 424-25)

Finally, the trial court found that the husband unilaterally withdrew \$95,000 from the equity line of credit (ELOC) against the family residence in violation of the *ex parte* restraining order. (CP 232) The husband acknowledged that this draw was his separate obligation. (RP 953) The trial court therefore credited the husband for the \$95,000 withdrawal from the ELOC as an "asset," since it reduced the amount of proceeds available for distribution from the sale of the family residence. (*See* CP 232, 395-60)

After considering these different credits, the award of the bank accounts, business, and proceeds from the family residence, the trial court ruled that the parties' community property should be divided equally. To effect an equal division, the trial court ordered the husband to pay an equalizing judgment of \$287,680.37 to the wife. (*See* CP 395-96, 432-33)

The husband appeals. (CP 443-44)

### III. ARGUMENT

**A. The trial court properly concluded that the business and its associated goodwill was entirely community property.**

The trial court acknowledged that the business was initially the husband's separate property because he started the business prior to marriage. (FF 2.8.2.2, CP 393) However, the trial court properly found that the business and its value was transmuted to community property because "over the 14 years of marriage, the business lost its characterization as the [husband]'s separate property. It is not possible to trace what separate portion, if any, can be segregated from the overwhelming community ownership." (FF 2.8.2.7, CP 394)

By the time the parties separated in 2014, the business was valued at \$446,000, based on its goodwill of \$407,356 and net tangible assets of \$38,363,<sup>3</sup> and had been providing the community with an average gross annual income of over \$318,000. (CP 84; RP 877-78) While the husband started the business before marriage, he presented no evidence as to its value, its assets, and its client base, when the parties married in 2000. The husband certainly could have

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<sup>3</sup> The net tangible assets value was based on \$122,030 in cash, \$21,307 in collectible accounts receivables, and \$30,000 in supplies and equipment less \$90,619 for a line of credit and \$44,355 in other liabilities. (Ex. 76 at 40)

presented such evidence, as he was divorced only 4 months before the parties married. (See Ex. 211) Instead, the husband presented only his 2000 child support order, which showed gross annual income from the business of \$60,000 – a fraction of its 2014 income. (Ex. 211) The husband, however, did not present the 2000 decree dissolving his first marriage, which presumably would have valued the business as an asset if it had value.

The husband's failure to produce any evidence of the business' premarital value presumably means that the business had no value when the parties married. "When a party fails to produce relevant evidence within its control, without satisfactory explanation, the inference is that such evidence would be unfavorable to the nonproducing party." See *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 689, 871 P.2d 146 (1994) (citing *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977)).

Absent any information regarding the status of the business in 2000 and in light of the 14 years of commingling of community labor, community funds, and business funds, and what the trial court described as "the casual attitude this couple maintained towards the segregation of business and personal assets" (CP 228), the trial court properly found that any separate component to the business was

subsumed by the community property. The trial court's decision was particularly apt when the most significant asset of the business was its goodwill, which was nurtured and developed during the marriage, and the business' minimal net tangible assets consisted largely of cash, which the trial court described as "flow[ing] in and out of personal and business accounts in an almost indivisible stream" throughout the marriage. (CP 228)

**1. The husband's goodwill was community property, as it was developed during the marriage.**

Goodwill is the "expectation of continued public patronage," based upon such intangibles as location, trade name, reputation, organization, and established clients. *See Marriage of Hall*, 103 Wn.2d 236, 239, 692 P.2d 175 (1984). On appeal, the husband does not deny that the business has goodwill, nor does he challenge its value as found by the trial court. Instead, he solely challenges the trial court's characterization of the goodwill as community property.

Even though the business was started prior to marriage, no evidence was presented that the business had goodwill or that the husband's goodwill had any significant value when the parties

married in 2000.<sup>4</sup> However, by the time the parties separated in 2014, there was no dispute that the business had goodwill and that it comprised a substantial portion of the business' value. The trial court properly recognized that regardless when the business was started, any goodwill "required constant renewal which was accomplished by the community labor" of the husband over the parties' 14-year marriage, therefore making it community property. (FF 2.8.2.5, CP 394) *See Marriage of Brooks*, 51 Wn. App. 882, 756 P.2d 161, *rev. denied*, 111 Wn.2d 1021 (1988); *Marriage of Sedlock*, 69 Wn. App. 484, 849 P.2d 1243, *rev. denied*, 122 Wn.2d 1014 (1993).

In *Brooks*, the Court of Appeals affirmed the trial court's decision holding that the husband's goodwill in his law partnership, formed before marriage, was entirely community property. The Court determined that to the extent the husband had any goodwill in his law partnership when the parties married, it was *de minimis*. *Brooks*, 51 Wn. App. at 888-89. Therefore, the goodwill existing at

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<sup>4</sup> Not every business has goodwill or goodwill of value. *See Marriage of Ziegler*, 69 Wn. App. 602, 608, 849 P.2d 695 (1993) (affirming that any goodwill in the husband's medical practice had no value).

the end of the marriage was accumulated during the marriage and was therefore community property. *Brooks*, 51 Wn. App. at 889.

In *Sedlock*, this Court reversed the trial court's decision finding that the husband's goodwill in his accounting firm, acquired before marriage, was 80% separate property and 20% community property. Relying on the wife's expert's testimony, this Court described the husband's goodwill as a "wasting asset" "that has to be continually renewed, continually generated," and is an "ongoing process." *Sedlock*, 69 Wn. App. at 493-94, 495. The wife's expert described goodwill as a "what have you done for me lately?" sort of notion. Nobody in professional practice is resting on what he did ten years ago, five years ago, for that matter. It's a continual relentless effort to nurture, grow or maintain a professional reputation and the ability to attract and service clients." *Sedlock*, 69 Wn. App. at 494.

In reversing the trial court's determination that the goodwill was 80% separate property, this Court in *Sedlock* recognized that the "nurturing of goodwill [was] an ongoing process" that occurred during the marriage. Because there was no evidence of the value of the husband's goodwill as of the date of marriage, this Court held that "all or nearly all of [the husband's] professional goodwill belongs to

the marital community,” therefore, it remanded for the trial court to reconsider its decision finding that only 20% of the value of goodwill was community property. *Sedlock*, 69 Wn. App. at 496-97.

The trial court here properly found that the full value of goodwill was community property because not only did community efforts develop the goodwill during the marriage, there was no evidence that the husband had any goodwill when the parties married or that it had any significant value if it did exist. Absent evidence to the contrary, the more than 5-fold increase in income of the business over the parties’ 14-year marriage can only be attributable to the community’s efforts.

In an effort to suggest he had goodwill before marriage, the husband claims that the need to constantly renew client relationships does not necessarily mean that he “lost all his clients every year and had to start from scratch” or that the “clients were necessarily new.” (App. Br. 13) But the husband testified that “the average time an association spends at a management company is three years. So if they go to a management company that you work at, you might get that work for one or two, maybe three years, and then they’re going to switch and they’ll go to a different management company.” (RP 861) The husband also testified that “there really isn’t a lot of client

loyalty,” and to maintain existing relationships and forge new ones he must do “a lot of [ ] just going out there, shaking hands.” (RP 856, 861) Further, the husband presented no evidence that any of his existing clients predated the marriage, or that his existing client base arose from his client base prior to marriage.

Even if the business had goodwill before the parties married in 2000, the trial court valued the goodwill based on the community effort during the marriage. Both experts testified that the “historical” data that they relied on to value goodwill was only from the last 3-5 years of the marriage. (RP 270, 299-300) In valuing the goodwill, the trial court placed little weight on the fact that the business had existed for 11 years before the parties married. The trial court rejected the wife’s expert’s lower capitalization rate, which had been premised on the fact that the husband has “been doing this a long time and his revenue is very stable.” (RP 323; *see also* RP 260: The husband “has been in practice for a long time. He’s grown. His practice is what I call a mature practice.”) (*See* App. Br. 13) Instead, in adopting the husband’s expert’s higher capitalization rate, the trial court found that the “stability of accounting clients that [the wife’s expert] discussed in his testimony does not necessarily apply to the HOA’s that form the bulk of the husband’s practice, even considering

the long-term success of the business.” (CP 230) Further, the trial court adopted the wife’s expert’s lower replacement compensation, which the husband’s expert described as compensation for an individual with only “five to eight years of experience.” (RP 230, 322) Under these circumstances, the trial court properly found that the goodwill value of the business was community property.

**2. The business itself was community property because its assets were commingled with community labor and funds and could not be segregated.**

Beyond the value of its goodwill, which the trial court properly found was entirely community property, the business had limited value except its net tangible assets that consisted largely of cash on hand, furniture and equipment (for which there was no testimony as to when acquired), and accounts receivables for current clients. *See* Ex. 76 at 40) Even if the business had value independent of the community’s goodwill, it is entirely attributable to the community absent the husband proving that its value when the parties separated was due solely to the “rents, issues and profits or other qualities inherent in the business.” *Lindemann v. Lindemann*, 92 Wn. App. 64, 70, 960 P.2d 966 (1998), *rev. denied*, 137 Wn.2d 1016 (1999).

In *Lindemann*, the male cohabitant started an auto body business before the parties began residing together. When the

parties separated, the value of the business was \$218,725. The trial court found that the business had a net value of no more than \$10,000 when the parties began living together. The trial court found that the increase in value during the parties' relationship was entirely attributable to the community based on the male cohabitant's personal efforts, and awarded the female cohabitant half of the increased value. This Court affirmed, noting that the male cohabitant failed to show that the increase in value of his business was due to rents, issues, or profits. *Lindemann*, 92 Wn. App. at 71. Because the female cohabitant proved that the male cohabitant's labor transformed a separate enterprise "into a successful corporation" during the relationship, this Court held the trial court properly treated its increased value as community property. *Lindemann*, 92 Wn. App. at 69.

Likewise here, the trial court properly concluded that the business was community property because the husband failed to prove that its value was attributable to anything other than his efforts during the 14 years the parties were married. Therefore, to the extent the business had value when the parties separated, it was due to efforts by the community during the marriage.

On appeal, the husband argues that the value of the business cannot be attributable to community efforts alone because it employs two full-time employees. (App. Br. 14) First, the husband cites no authority to support his claim that the existence of employees impacts whether the value of the business is separate or community. Second, these employees were first hired in 2008 – 8 years after the parties married. (RP 461, 766) The business grew large enough to require employees *after* the parties married.

In any event, where separate property is a business with which community labor has been combined, the income or increase will be considered community property in the absence of “contemporaneous segregation of the income so derived as between the community and his separate estate.” *Pollock v. Pollock*, 7 Wn. App. 394, 401, 499 P.2d 231 (1972); *Koher v. Morgan*, 93 Wn. App. 398, 403, 968 P.2d 920 (1998), *rev. denied*, 137 Wn.2d 1035 (1999). For a spouse to maintain the separate nature of his pre-marriage business, he must segregate to “the community what in effect would be a reasonable salary for his services. The allocation in the nature of a salary is then considered community income, and the balance of his income remains his separate property.” *Pollock*, 7 Wn. App. at 401.

In this case, the husband never sought to segregate any of the profits from his purported separate property business from the income owed to the community for his services provided to the business during the parties' 14-year marriage. Any monies from the business "flowed in and out of personal and business accounts in an almost indivisible stream." (CP 228) Therefore, community funds that would otherwise be paid to the community as the husband's "reasonable salary" remained in business accounts and commingled with what might have been separate funds. (See FF 2.8.2.7, CP 394) Meanwhile, "community monies from lines of credit were [also] paid into the business." (FF 2.8.2.3, CP 393) When property becomes so commingled that it is impossible to distinguish or apportion it, then the entire amount becomes community property. *Marriage of Shui & Rose*, 132 Wn. App. 568, 584, ¶ 26, 125 P.3d 180 (2005), *rev. denied*, 158 Wn.2d 1017 (2006) (*citations omitted*).

The husband claims that any community efforts were offset by the business' payment of community expenses. (App. Br. 8-12) This Court rejected a similar argument in *Lindemann*, where the male cohabitant produced "evidence of draws and checks he wrote from his business account to pay for family expenses" claiming that this was sufficient to rebut any claim of a community interest in his

separate business. 92 Wn. App. at 74. In rejecting his argument, this Court noted that the male cohabitant did not come into the relationship with a “thriving business” and made “no discernible effort to segregate the income attributable to his community labor from any rents, issues, and profits inherently arising from his incorporate business.” *Lindemann*, 92 Wn. App. at 76. Under these circumstances, this Court held that “by showing that the increase [in value] was due to community labor,” the female cohabitant satisfied her burden, and “it was not necessary for [her] to prove the absence of an offset.” *Lindemann*, 92 Wn. App. at 77.

Here, there was no evidence that the business was “thriving” when the parties married. Instead, the evidence shows that the husband was earning only a fraction of the income he earned when the parties separated. The wife proved that it was due to community labor that when the parties separated, the income from the business was five times the amount as when they were married. Therefore, the trial court properly found that the business was community property.

**B. The trial court did not “double count” by awarding the husband the value of the business accounts as of separation and the business as of December 31, 2014.**

The trial court did not “double count” by awarding the husband both the business, valued as of December 31, 2014, and the

three business accounts, valued as of August 2, 2014 – the date of separation. (App. Br. 17-21) The husband claims this is “double counting” because the net tangible asset value of the business of \$38,363 already included the cash in these same business accounts on December 31, 2014. First, there is no evidence of how the “cash” of \$122,030 in the business on December 31, 2014 was determined. According to the husband’s expert, he based this figure on the “balance in [the business] accounts as of December 31, 2014” as represented by a balance sheet provided to him by the husband. (CP 384) But this balance sheet was never provided at trial, and in fact, the total balance of the business accounts as of December 31, 2014 was \$148,930.38 – nearly \$27,000 more than the “cash” included in the value of the business. (See Exs. 24, 25, 26) Specifically, on December 31, 2014, the business checking account (2823) held \$18,394.70 (Ex. 24), the business money market account (7334) held \$130,577.29 (Ex. 25), and the second business checking account (0058) held negative \$41.61. (Ex. 26) Thus, the husband in fact received an additional \$27,000 that was not accounted for in the business.

Second, there is no evidence that the \$148,930.38 in those three accounts on December 31, 2014, includes any of the \$159,657

that were in the accounts on the date of separation over which the husband had sole control.<sup>5</sup> (*See* Exs. 24, 25, 26) The husband never sought to prove that any of the “cash” in the business valuation included funds awarded to him in the accounts as of the date of separation. The trial court invited the husband to file a proper motion for reconsideration of the final orders to prove his claim of “double-counting” (*See* RP 1172, 1186-88), but he chose not to do so.

It is more likely that any cash on hand on December 31, 2014 is from post-separation deposits. For instance, excluding any transfers between business and community accounts, a total of nearly \$300,000 was deposited into the bank accounts between the date of separation and December 31, 2014. (*See* Exs. 24, 25, 26; RP 987) During this same time, the husband was not only continuing to pay his personal expenses from these accounts but was also withdrawing cash and transferring funds to personal accounts that he would later be awarded based on their values on the date of separation.

It was well within the trial court’s discretion to award the husband both the value of the accounts as of the date of separation,

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<sup>5</sup> Husband claims the total amount awarded to him was \$198,657 (App. Br. 17), but that figure was based on values in the trial court’s memorandum decision, which were corrected in its final decision. (*Compare* CP 239 and CP 395)

and whatever cash was held by the business as of the date of its valuation nearly 5 months later. In the nearly 5 months between the date of separation and date of the valuation of the business, the husband had nearly approximately \$460,000 available to him - cash on the date of separation, plus the amounts deposited after separation – while the wife only had maintenance and child support of approximately \$10,000 per month.

Further, as the trial court acknowledged in awarding the bank accounts based on their values as of the date of separation, the husband's unilateral withdrawals and extravagant purchases within the first couple of months after separation, in violation of restraining orders, substantially reduced the amounts in these accounts. (*See CP 240-41*) If, as the husband urges, the trial court awarded the bank accounts to the husband based on their values on December 31, 2014, it would not take into account the community property he wasted in those first few months of separation, and the wife would have to bear half the cost of the husband's post-separation shopping spree, including the more than \$10,000 in gifts to another woman, the costs associated with the husband's domestic violence assault on the wife, and his post-separation residence, which he shares with two other women.

The husband failed to prove any “double counting” that would warrant reversing the trial court’s decision to award the value of the accounts as of the date of separation, and the date the business was valued. The trial court’s decision was well within its discretion because it accounted for the fact that the husband unilaterally controlled both the funds in the accounts at the time of separation and deposits made thereafter.

**C. The trial court did not abuse its discretion in dividing the community property equally, awarding maintenance to the wife, and ordering child support.**

The trial court has “broad discretion” to both distribute property and award maintenance because it is in the best position to determine what is fair, just, and equitable. *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), 148 Wn.2d 1011 (2003); *Marriage of Luckey*, 73 Wn. App. 201, 209, 868 P.2d 189 (1994). RCW 26.09.080 (court will make a “just and equitable” distribution of the parties’ property and liabilities); RCW 26.09.090 (the court will make a “just” maintenance award). In challenging the trial court’s decision, appellant “must demonstrate that the trial court manifestly abused its discretion” by showing that “its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons.” *Wallace*, 111 Wn. App. at 707.

Here, without assigning error to any of the trial court's findings of fact supporting its decisions, the husband challenges the trial court's fact-based, discretionary, decisions awarding maintenance to the wife, ordering child support for the son, ordering the husband to repay the over \$100,000 he took from the son's account in violation of restraining orders, and dividing the parties' community property equally between the parties. These decisions were well within the trial court's "broad" discretion in ensuring adequate support for the parties' special needs son and maintenance for the wife, who has been out of the work force since the parties married, and in making a just and equitable division of the parties' assets and liabilities. Further, the trial court's unchallenged findings support these decisions, and these findings are supported by the evidence. (*See e.g.* ORS FF 3.8, CP 419: "The Court determines the Respondent has sufficient income to meet all his obligations and therefore denies his request for deviation" of his child support obligation; FF 2.12.12, CP 399: The husband's "income far exceeds his personal living expenses"; CP 403: "The award of property and liabilities is fair and equitable")

The husband complains of the trial court's decisions requiring him to pay maintenance to the wife and child support based on the standard calculation. (App. Br. 22) But even after these payments, the husband's net monthly income exceeds the resources in the wife's household, which she shares with the parties' son. After paying maintenance of \$9,000 to the wife, the father still has monthly net income of \$12,484 available to him to pay his monthly child support obligation of \$1,034. (CP 427) The mother's maintenance after taxes leaves her with approximately \$7,043,<sup>6</sup> and with child support, she will have only \$8,077 available in her household – nearly a third less than the father. (CP 427) Even considering the child support he must pay for his older children of \$1,438, the father still has net income of more than \$10,000 available to him.

The husband also complains of the health insurance premiums he must pay in support of the parties' son and the monthly payments on his business line of credit. (App. Br. 22-23) However, neither of these payments are paid by him personally. Instead, they are paid directly by the business either as a deduction or from

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<sup>6</sup> The mother's monthly net income does not include the \$2,714 in monthly net income imputed to her for purposes of child support since she does not actually receive this amount. (See CP 417-18, 427)

retained earnings and do not impact the income allotted to the husband from the business. (*See e.g.* Exs. 74, 75, 209)<sup>7</sup>

Despite complaining of the monthly obligations imposed on him by the trial court, the husband's personal income still exceeds his claimed monthly expenses.<sup>8</sup> (Ex. 215) In fact, his excess income is even greater because the expenses in his financial declaration are inflated, in part because he includes monthly rent of \$4,500 for a home that he shares with two women he testified would soon start contributing towards its payment. (*See* RP 909-10)<sup>9</sup> At the same time, the mother's monthly expenses for her and the parties' son, which the trial court found reasonable, will exceed her income, including child support, by more than \$4,600 per month. (FF 2.12.8, CP 399; *See* Ex. 11)

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<sup>7</sup> That the husband does not pay either of these expenses from his personal income is evident from his financial declaration submitted at trial (Ex. 215), which excludes these obligations as monthly expenses.

<sup>8</sup> He claims monthly expenses of \$9,275, which excludes his previous payment of \$2,692 in child support for his older children. The father's net income after paying maintenance and child support for all of his children is \$10,011.

<sup>9</sup> The husband testified that one woman previously contributed \$600-900 towards rent, and that she would once again contribute once she obtains a job. (RP 909-10) The husband also testified that the second woman, his girlfriend, would likely start contributing \$500 per month once she returned to work at a Montessori school the month following trial. (RP 909-10)

The husband also complains of the trial court's equal division of the community property. But as the trial court noted, under the circumstances, "where the husband has a much higher income potential than does the wife," it in fact would be expected that there would be an "uneven distribution of community property" in the wife's favor. (CP 242) The trial court reasoned that a just and equitable distribution warranted an equal division of the community property because the wife was awarded \$61,479 in separate assets. (CP 242) The trial court also took into consideration the wife's maintenance award, the future financial circumstances of the parties, their incomes, and the husband's requirement to engage in domestic violence and mental health counseling. (CP 402) Finally, in dividing the community property equally, the trial court considered the fact that the "husband will be required to pay transfer payments for monies taken by him during the pendency of this action." (CP 402) The trial court's consideration of these facts and its decision, which favors the husband, is neither manifestly unreasonable nor based on untenable grounds or for untenable reasons. (CP 402)

The husband also complains that the equal property distribution was effected by a judgment (App. Br. 24), but he fails to

acknowledge that the amount of the judgment was due in part to his violations of temporary restraining orders, which reduced the sale proceeds when the home was sold. (*See* CP 240, 402) Because there was less property available to distribute to the wife, the trial court had to order the husband to pay a transfer payment to equalize the community property distribution. There is nothing “manifestly unreasonable” in awarding one party a judgment when the other party receives the bulk of the assets. *See e.g. Marriage of Wallace*, 111 Wn. App. 697, 45 P.3d 1131 (2002) (affirming an equalizing judgment of \$240,000); *Marriage of Wright*, 179 Wn. App. 257, 319 P.3d 45 (2013) (affirming an equalizing judgment of \$1.7 million), *rev. denied*, 180 Wn.2d 1016 (2014); *Marriage of Larson and Calhoun*, 178 Wn. App. 133, 313 P.3d 1228 (2013) (affirming an equalizing judgment of \$27 million), *rev. denied*, 180 Wn.2d 1011 (2014).

Finally, the husband complains that he was ordered to repay the son’s UTMA, which he drained during the dissolution action in violation of the temporary restraining order. But the trial court has discretion to order a parent to repay a child’s account in a dissolution action. *Marriage of McKean*, 110 Wn. App. 191, 196, 38 P.3d 1053 (2002) (affirming trial court’s court decision ordering the wife to

reimburse daughter's trust account from the wife's share of the property settlement). The husband fails to demonstrate that the trial court abused its discretion in ordering him to repay the son's account.

The trial court's financial decisions were well within its discretion, supported by its factual findings, which were in turn supported by substantial evidence. This Court should affirm.

**D. This Court should award the wife attorney fees for having to respond to this appeal.**

This Court should award attorney fees to the wife on appeal. RAP 18.1(a). The wife has the need for her attorney fees to be paid, and the husband has the ability to pay. This Court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). Despite his complaints on appeal, the husband has more resources than the wife. She should not be required to use the maintenance and property awarded to her to defend the trial court's discretionary decisions. The wife will comply with RAP 18.1(c).

**IV. CONCLUSION**

This court should affirm the trial court's decisions in their entirety and award attorney fees to the wife on appeal.

Dated this 14<sup>th</sup> day of November, 2016.

MOSCHETTO & KOPLIN INC.,  
P.S.

SMITH GOODFRIEND, P.S.

By:  \_\_\_\_\_  
Marijean Moschetto  
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Valerie Villacin  
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Attorneys for Respondent

**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 14, 2016, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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 type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
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**DATED** at Seattle, Washington this 14<sup>th</sup> day of November, 2016.

  
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Patricia Miller