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No. 71206-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Marriage of:

JULIANNA P. NOBLE n/k/a POZEGA,

Respondent,

and

E. LEE NOBLE III,

Appellant,

and

EDWIN NOBLE, JR.,

Appellant,

and

TALLMAN BUILDING, LLC,
a Washington Limited Liability company,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA BENTON

REPLY BRIEF OF APPELLANT E. LEE NOBLE III

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

Appellant Lee Noble owned several real properties, alone or with his father appellant Ed Noble, before he married respondent Julianna Pozega in 2004. During the parties' 7-year marriage, Lee and Ed sold some of these properties and used the proceeds to purchase others. Despite clear documentary evidence tracing their acquisition to premarital properties, the trial court concluded that all of the properties purchased during the marriage were entirely community property, and that Ed had no interest in any of these properties. The trial court concluded the properties were community property not because Lee had not traced their source to separate property, but because it found that Lee and Julianna had been "undercompensated" by $1.1 million for their efforts managing the properties.

Based on this "undercompensation" theory, the trial court concluded that the community had accumulated assets worth $13.7 million over a 7-year marriage, and refused to give Lee any credit for his separate property contributions to these acquisitions or to acknowledge Ed's interest in the properties. The trial court then awarded Julianna nearly $7 million - $6 million more than the amount the trial court believed the community had been "undercompensated."

This Court should reverse because the trial court not only violated the basic rule that property acquired during the marriage that can be traced to a separate source is separate property, but divested a third party, Lee's father, of property interests established long before Lee married Julianna. Even if the community was "undercompensated" by $1.1 million, this could not change the character of Lee's property, and entitled the community only to an equitable lien for the amount of undercompensation or for the amount that Julianna could prove the community's efforts increased the value of these properties. This Court must reverse and remand for division of the marital estate with the proper character and value of the assets in mind.

II. REPLY ARGUMENT

A. The trial court wrongly concluded that assets traced to Lee's separate property were community property based on the alleged "undercompensation" of the community.

1. "Undercompensation" of the community could not change the character of separate property.

The trial court erred in concluding that every asset acquired by Lee and his father Ed during Lee's 7-year marriage to Julianna was community property based on its determination that "not less than $1.1 million of undercompensated community funds were retained and commingled in the pooled business accounts [and] Lee Noble's Key Bank account." (Finding

of Fact (FF) 2.21, CP 319) The trial court extrapolated from that finding to conclude that *all* of the property acquired by Lee and Ed during the marriage was community property, based solely on this supposed "commingling" of funds. (*See* FF 2.21, CP 319-20)

Julianna does not, and cannot, discredit Lee's proof that these properties were purchased with proceeds from the sale of properties owned prior to the marriage. (*See* RP 811-12) She instead claims that this "analysis ignores that all of the properties at issue were improved with community labor." (Resp. Br. 60; *see also* Resp. Br. 63-67) Even if the community's efforts "improved" the properties, that would not change their character. "Once the separate character of property is established, a presumption arises that it remained separate property in the absence of sufficient evidence to show an intent to transmute the property from separate to community property." *Estate of Borghi*, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009). Here, there was no claim, nor any evidence, that Lee intended to change the character of his separate property – or that Ed intended to give up his interest in the properties.

The evidence was to the contrary: Lee either acquired the properties in the name of LLCs in which he alone was a member or an equal member with his father, or Julianna signed quit claim deeds. (*See e.g.* Exs. 329, 398, 407, 408, 410, 415, 419, 427B, 429, 458, 459, 465A)

That the community may have "contributed" to the improvement or management of these properties by "uncompensated labor" cannot change their character:

> Such contributions may entitle the community to reimbursement for a portion of the increase in the value of the [property] during the relationship, but [the contributions] do not change the character of the [property] itself as separate property.

Byerley v. Cail, __ Wn. App. __, fn. 1, 334 P.3d 108 (2014) (*citing Marriage of Elam,* 97 Wn.2d 811, 816-17, 650 P.2d 213 (1982); *Marriage of Pearson-Maines,* 70 Wn. App. 860, 865, 855 P.2d 1210 (1993)). "Later community property contributions to the payment of obligations, improvements upon the [separate] property, or any subsequent mortgage of the property may in some instances give rise to a community right of reimbursement protected by an equitable lien, but such later actions do not result in a transmutation of the property from separate to community property." *Borghi,* 167 Wn.2d at 491.

Julianna cites *Hamlin v. Merlino,* 44 Wn.2d 851, 858, 272 P.2d 125 (1954) for the proposition that "where separate property business assets are combined with community personal services rendered without adequate compensation, all the income and increase in value of the business is presumed community property." (Resp. Br. 59) But even if Julianna had proved that the community contributed "$1.1 million worth

of labor" over the course of their 7-year marriage by "managing" properties, she did not prove how much that "investment" increased the value of the properties. Further, the Supreme Court disavowed the expansive interpretation of *Hamlin* relied on by Julianna in *Elam*, 97 Wn 2d at 816-17: "Any increase in the value of separate property is presumed to be separate property. This presumption may be rebutted by direct and positive evidence that the increase is attributable to community funds or labors."

It is not enough to show that Lee's holdings increased in value over the course of the marriage. (*See* Resp. Br. 60) Julianna had to prove with "direct and positive evidence" that the increase was due solely to the community, and not "the natural course of inflation." *Elam,* 97 Wn.2d at 815-17. Julianna failed to meet that burden, and the trial court erred in presuming that the parties' uncompensated labor was the sole source for any increase in value of Lee and Ed's real property holdings during the parties' short marriage.

Julianna also claims that the value of the uncompensated community labor was "indiscriminately commingled" with Lee's separate property, making it all community property. (Resp. Br. 60-61, *citing Koher v. Morgan,* 93 Wn. App. 398, 968 P.2d 920 (1998), *rev. denied*, 137 Wn.2d 1035 (1999)). But although "commingling" funds in a bank

account might make the *account* community property, it cannot transmute the nature of assets traceable to separate assets. *Marriage of Skarbek*, 100 Wn. App. 444, 448, 997 P.2d 447 (2000).

In *Koher,* Dennis Koher owned a separate property business from which he paid himself an artificially low salary during his committed intimate relationship. The trial court found that by not taking a reasonable salary, Koher had commingled "community-like" property with the separate profits of his business by "intermix[ing] large sums of separate and relationship income in his personal and business accounts" from which he acquired property and equipment and funded other investments. *Koher,* 93 Wn. App. at 402-03. Because Koher was "unable to trace any portion of the disputed assets to his separate profits," it was "more appropriate and fair to find that the assets Koher had acquired [during the relationship] were subject to distribution" as community-like property. *Koher,* 93 Wn. App. at 403.

Here, unlike in *Koher*, even if community property (in the form of the community's undercompensation) was commingled with the profits of Lee and Ed's LLCs, Lee was able to trace the assets at issue to his separate property. Lee and Ed did not simply acquire new property from purportedly commingled bank accounts. Instead, Lee and Ed sold pre-marital properties and immediately used those proceeds to purchase the

new properties – often through a 1031 exchange. To the extent proceeds were first deposited into "commingled" bank accounts, Lee traced those deposits back to his separate property and traced them back out to the subsequent purchase. (*infra* § II.A.3)

"Only when money in a joint account is hopelessly commingled and cannot be separated is it rendered entirely community property. If the sources of the deposits can be traced and identified, the separate identity of the funds is preserved." *Skarbek,* 100 Wn. App. at 448 (*citations omitted*). In *Skarbek,* the husband deposited separate funds into an account that also held community funds. The trial court found that the entire account was rendered community property and divided it equally between the parties. Division Three reversed, holding that the husband proved the separate character of the funds by "establishing and tracing, clearly and convincingly, the separate source of funds." *Skarbek,* 100 Wn. App. at 449.

Likewise here, regardless that Lee deposited the proceeds from the sale of separate properties into an account that purportedly held commingled community funds, he clearly and convincingly traced those funds in the account back to those separate properties, and he traced properties acquired during the marriage to his separate property. The trial

court erred in finding that the accounts became entirely commingled and any properties acquired from those accounts community property.

2. Lee clearly and convincingly traced assets acquired during the marriage to his separate property.

Because the community's "undercompensation" could not change the character of Lee's separate property, the trial court erred in characterizing all of the property acquired during the parties' brief 7-year marriage as community property. These acquisitions were Lee's separate property because he presented clear and convincing evidence tracing the acquisitions to separate property owned by him prior to marriage. RCW 26.16.010 (separate property is property owned by a spouse prior to marriage and property acquired by a spouse afterwards by "gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof."); *Marriage of Chumbley,* 150 Wn.2d 1, 6, 74 P.3d 129 (2003) ("property acquired during marriage has the same character as the funds used to purchase it."); *Marriage of White*, 105 Wn. App. 545, 550, 20 P.3d 481 (2001) (property acquired during marriage with "traceable proceeds of separate property" are separate property).

Julianna claims that unless Lee "persuades this Court that no trier of fact could reasonably conclude that they had failed to show that the alleged separateness of the property at issue was highly probable," then

Lee cannot prevail on appeal. (Resp. Br. 58) But that is not the standard of review. The trial court's characterization of property as separate or community is a question of law that this court reviews *de novo*. *Chumbley*, 150 Wn.2d at 5. This is not a case where Lee must prove that the trial court's findings of fact on his tracing are not supported by substantial evidence. *See Marriage of Schweitzer*, 132 Wn.2d 318, 329-30, 937 P.2d 1062 (1997) (Resp. Br. 58). Lee's challenge is not dependent on the trial court's findings first because the trial court made very few findings on tracing in its 25-page Findings of Fact and Conclusions of Law (*see* CP 299-325), and second because the trial court's findings largely support Lee's tracing.

Rather than address Lee's documentary tracing evidence, the trial court instead based its characterization on what it found was the community's "undercompensation." Julianna acknowledges the absence of findings regarding Lee's tracing, and instead relies on the trial court's generic adverse credibility findings against Lee and his father Ed. (Resp. Br. 41, 60, 64, 66) But a credibility determination necessarily requires the weighing of *competing* evidence. *See Michaelson v. Hopkins,* 37 Wn.2d 453, 456, 224 P.2d 350 (1950) (when evidence is in "sharp dispute," the trial court is in better position to evaluate the credibility of testimony); *Estate of Bussler,* 160 Wn. App. 449, 469, ¶ 44, 247 P.3d 821 (2011)

(when there is "disputed evidence" it is the "trial court's job to weigh all the evidence and to determine credibility of the witnesses"). In this case, Julianna did not present any evidence to challenge much of the tracing, which demonstrated that properties acquired during the marriage were purchased at least in part using proceeds from pre-marital assets that were either owned by Lee individually or by LLCs formed by Lee alone or with his father Ed.

This evidence went beyond "the mere self-serving declaration of the spouse claiming the property in question [was acquired] from separate funds and showing that separate funds were available for that purpose." *Berol v. Berol,* 37 Wn.2d 380, 382, 223 P.2d 1055 (1950) (Resp. Br. 57). Instead, Lee traced his separate property "with some degree of particularity" and extensive documentary evidence that real property acquired during the marriage was purchased with proceeds from pre-marital separate property. *Berol,* 37 Wn.2d at 382.

While Julianna complains on appeal that both Lee and Ed rely on "their own testimony (and on the testimony of experts who uncritically accepted what Lee told them)" to prove Lee's tracing, that was because that was the only available evidence. Julianna presented no evidence to the contrary. In fact, both Julia's trial counsel and expert largely agreed with the tracing performed by Lee. (*See* RP 579, 812-13, 946, 977-78; Ex.

485) Julianna's expert's only objection to Lee's expert's tracing report was that he believed that only $760,000 – not $900,000 – of the Tallman proceeds was used towards the Colorado Building. (*See* RP 811-12) Absent any competing evidence, the trial court erred in rejecting the only evidence available, which was not dependent on the testimony of Lee or Ed, was largely documentary evidence created contemporaneously with each transaction.

3. Property acquired during the marriage can be traced back to proceeds from the sale of properties owned by Lee and Ed prior to marriage.

The trial court's unchallenged findings and the undisputed tracing evidence show that each of these assets (valued as set out in Lee's App. Br. 19-24) can be traced back to property owned by Lee before the trial court found he entered into a committed intimate relationship with Julianna on June 1, 2004:

Tallman proceeds (Julianna awarded remaining $2.18 million):

- On May 17, 1999, Lee and Ed formed the Tallman Building, LLC as equal owners. (Ex. 310) (FF 2.21, CP 305)
- In 1999 and 2003, Tallman purchased two parcels for a total of $1.78 million. (Exs. 314, 315) (FF 2.21, CP 305)
- In 2006, Tallman acquired additional properties for $1.25 million. (Ex. 327; RP 933) (FF 2.21, CP 305) To purchase these

properties, Tallman obtained a commercial loan for $800,000 (Exs. 329, 330, 331, 332, 333, 334; RP 933-35), $21,000 from the central business account (Exs. 327, 335; RP 937), and $321,583 in 1031 exchange credits from the sale of two properties owned by Lee prior to marriage. (Exs. 327, 336, 337, 337A, 339, 342, 345, 346, 351, 352, 485; RP 938-36, 938-39, 943, 975-80)[1]

- In April 2013, all of the Tallman properties were sold for $8.75 million. (Exs. 361, 363; RP 986) (FF 2.21, CP 305)

Leary Way proceeds:

- On March 18, 1998, Lee and Ed formed Carstens Building, LLC as equal owners. (Ex. 388) (FF 2.21, CP 305)

- From the 1990's through March 2003, Carstens acquired an assemblage of properties on 8th Avenue NW in Seattle. (Exs. 389, 390, 391, 392, 394; RP 1043)

- In May 2006, Carstens sold its properties and received $1.1 million in net proceeds. (Ex. 393) Carstens used $1 million from these proceeds towards the purchase of the Leary Way property for $1.5 million. (Exs. 395, 398; RP 1044, 1050) (FF 2.21, CP 305) Lee signed a

[1] Maple Valley, one of the properties used in the 1031 exchange, was conveyed to an LLC in which Lee and Ed were members on June 4, 2004 – 3 days after the trial court found Lee and Julianna's committed relationship commenced. (Ex. 352) However, Lee had paid for the property on May 27, 2004. (Ex. 351)

promissory note for $500,000 as an individual and as a member of Carstens. (Exs. 396, 397) (FF 2.21, CP 305) This note was paid off in September 2011 using $405,000 from the Tallman proceeds. (Exs. 6, 364, 485; RP 579, 946, 993)

- On December 5, 2011, Leary Way was sold for $2.5 million. (Exs. 399A, 400) (FF 2.21, CP 305)

Dayton Building (awarded to Julianna):

- On November 18, 2011, less than 3 weeks before Julianna filed her petition for dissolution, Dayton Building LLC acquired the Dayton Building for $800,000, using a mortgage of $660,000 with the LLC as the obligor, and $140,000 from the Tallman proceeds. (Exs. 136, 442, 443, 485; CP 1) (FF 2.21, CP 308)

Pullington (awarded to Julianna):

- On May 9, 2007, Lee formed the Pullington LLC as its sole member. (Ex. 410)

- On May 31, 2007, Pullington acquired the Pullington Building for $2.2 million, using an $800,000 loan, and $1.5 million line of credit. (Exs. 411, 415; RP 1067-69) The line of credit was secured by the property itself, the Merit Building (a pre-marital asset), and 1515 Leary Way (described above). (Exs. 412, 485; RP 1071) The line of credit was

paid off using proceeds from the Tallman and Leary Way sales. (Exs. 364, 401, 485; RP 994)

Colorado Building (awarded to Julianna):

- In July 2004, Lee formed the Colorado Building LLC as its sole member. (Exs. 419) (FF 2.21, CP 307)

- In July 2007, Colorado acquired 5021 Colorado Avenue South for $1.8 million, funding the acquisition with a $1.1 million loan and a $900,000 line of credit. (Exs. 420, 422, 485; RP 1073) The Tallman properties secured the line of credit. (Exs. 422, 485; RP 1079) $900,000 of the Tallman proceeds was used to pay the line of credit. (Exs. 363, 364, 365, 485; RP 992-93)

5000 East Marginal Way:

- On June 28, 2008, Lee formed East Marginal Way Building, LLC as a "married man as his separate estate." (Ex. 427) (FF 2.21, CP 307)

- Also on June 28, 2008, East Marginal Way purchased property on 5000 E. Marginal Way for $2 million with a $1.5 million seller-financed first note; $250,000 seller-financed second note; $50,000 down payment from the central account; $170,655 from loans and draws from lines of credit; and a credit for $32,605 for repairs that Lee agreed to make himself. (Exs. 89, 429A, 430, 433, 434, 436, 437, 485; RP 1081-87,

1089-91) The $170,000 payment came in part from a $50,000 advance on rental income from the Miller/Warren apartments; $30,000 from a line of credit against the Commodore Lot; and $15,000 reimbursement check from Pierce County for the Merit Building, properties all found by the trial court to be Lee's separate property. (Exs. 433, 434; RP 1089-90; CP 324) The remaining amount came from loans from his parents and friend. (Exs. 433, 434) The $250,000 seller-financed second note was paid off with Tallman proceeds in September 2011. (RP 993; Exs. 6, 364)

In addition to those properties that were funded with the Tallman and Leary Way proceeds, Lee traced the acquisition of other properties to either pre-marital assets, or proved that the only funds available to purchase the property were Lee's separate property:

Perkins Lane:

- On March 2005, Lee acquired the property on Perkins Avenue with $743,400 in loans and $69,000 in cash, which Lee drew from the equity of the Gay Avenue home, which the trial court found was his separate property. (Exs. 445B, 446, 458, 460; CP 324) Julianna quitclaimed any interest she had in this property to Lee as his separate

estate (Ex. 459), although she denied that she signed the deed to change the character of Perkins. (RP 1532)[2]

Maple Valley:

- On May 27, 2004 (5 days before the trial court found Lee and Julianna's committed intimate relationship commenced), Lee paid $130,140 towards the purchase of Maple Valley. (Ex. 351) The purchase closed on June 4, 2004, three days after the committed intimate relationship commenced. (Ex. 352)

7201 Marginal Way (aka Ellis Garage):

- On June 29, 2004, Lee purchased 7201 E. Marginal Way. (Ex. 407) There is no evidence that there were any community or community-like funds available to fund this $850,000 purchase, which occurred 28 days after the trial court found the committed intimate relationship commenced. *Fite v. Fite*, 3 Wn. App. 726, 732, 479 P.2d 560 (1970) (husband proved property acquired during the marriage was separate property when there was "uncontradicted evidence that separate assets were all that was available to account for those purchases"), *rev. denied*, 78 Wn.2d 997 (1971).

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[2] Julianna asserts that the quit claim deed is not in the record (Resp. Br. 65) but it was admitted as Ex. 459. (RP 1170)

The trial court erred in failing to characterize these assets entirely, or in part, as separate property, because Lee traced the acquisition of these assets to his separate property with "some degree of particularity." *Berol,* 37 Wn.2d at 382. Even if Lee could not trace the payments towards any of the mortgages to his separate property, the trial court still should have acknowledged that a large portion of the proceeds was Lee's separate property and the community was only entitled to reimbursement for any payments made on the properties. *See Marriage of Wakefield*, 52 Wn. App. 647, 652, 763 P.2d 459 (1988) (Lee App. Br. 35).

B. The trial court could not punish Lee for any alleged marital misconduct by purportedly "awarding" him Ed's share of the proceeds from the sale of Leary Way and Tallman as his half of the "community" property.

The trial court also erred in purportedly "awarding" proceeds already distributed to his father Ed to Lee as part of his "half" of the community property. (CP 324) Ed received $1 million from the Tallman proceeds pursuant to a court order to which Lee and Julianna (but not Ed) agreed. (Ex. 504) These proceeds were distributed to Ed without reservation or condition, unlike the pre-distributions to Lee and Julianna from the same proceeds. (*See* Ex. 504) Similarly, the court denied Julianna's request for an order requiring Ed to "disgorge" the Leary Way proceeds. (Ex. 504) Julianna never challenged that order, which allowed

Ed to retain the Leary Way proceeds. Therefore, as addressed in Ed's appeal, these proceeds were not before the trial court, and it could not award these proceeds to Lee. "If one or both parties disposed of an asset before trial, the court simply has no ability to distribute that asset at trial." *Marriage of White*, 105 Wn. App. 545, 549, 20 P.3d 481 (2001).

Julianna acknowledges that the trial court cannot award an illusory asset as part of its property distribution, but claims that this "distribution" was a penalty to Lee for his "misconduct and waste of assets in gifting nearly $2 million in community funds to Ed prior to trial." (Resp. Br. 68) But the distributions to Ed were not a "gift." Julianna's expert acknowledged that Ed was entitled to at least what he had already received from the proceeds. (*See* RP 717, 742; Ex. 17) The only issue before the trial court was much *more* Ed was entitled from the proceeds. (RP 717, 742, 1597; Exs. 17, 77) Even if honoring his business arrangements with his father could be considered "misconduct" on Lee's part, the trial court could not penalize Lee by awarding him a non-existent asset. *White,* 105 Wn. App. at 549.

Nor does *Marriage of Wallace,* 111 Wn. App. 697, 45 P.3d 1131 (2002), *rev. denied*, 148 Wn.2d 1011 (2003) (Resp. Br. 68-69), support the trial court's decision. In *Wallace,* the trial court found that the husband had fraudulently quitclaimed certain real property to his father during the

dissolution action. The trial court awarded the property to the wife at zero value, acknowledging that she would need to file a separate action to set aside the transfer. Division Two affirmed, holding that substantial evidence supported the award at zero value because the husband himself testified that the property was worth $600,000, but had "future reclamation costs" of $685,000, and the wife would have to incur additional attorney fees to realize her property award, thus further diminishing any value of the property. *Wallace,* 111 Wn. App. at 709.

Here, even if Lee had committed misconduct that the trial court could consider in making its property distribution (which Lee does not concede), it could not make an illusory award of non-existent property. The proceeds already given to Ed were no longer before the trial court, and could not be "awarded" to Lee. And by crediting Lee with this non-existent asset, the trial court further compounded its error by not properly considering the parties' economic circumstances at the time of division of the marital estate, as required by RCW 26.09.080(4).

C. A rote *Shannon* finding does not "moot" the trial court's gross mischaracterization of assets.

The trial court's award to Julianna of half of all of the property before it after a brief 7-year marriage was an abuse of discretion, clearly guided by its erroneous characterization of the marital estate as all

community property. The trial court's finding that "if the LLCs and properties in which Lee Noble held an interest had been found to be separate property, it would be equitable to divide the property in the same proportion" (CL 3.8, CP 322) cannot "moot any error in characterizing the assets." (Resp. Br. 72)

In *Marriage of Shannon*, 55 Wn. App. 137, 143, 777 P.2d 8 (1989), this Court remanded for redivision of the marital estate because it was "unwilling to say that the court's division of this asset is so evidently fair that it obviates the need for remand" in light of the short duration of the marriage and the fact that the husband had supplied all of the funds required for the down payment. 55 Wn. App. at 142. Likewise here, there is nothing "evidently fair" in depriving Lee and his father Ed of interests in property established years before Lee's relationship with Julianna, particularly when their marriage was of such short duration.

If the trial court had properly characterized the property, it would have determined that the vast majority of the marital estate was Lee's separate property. And if the trial court would have *still* awarded half of this property to Julianna, this would be an abuse of the trial court's discretion. The "right of the spouses in their separate property is as sacred as is their right in their community property." *Estate of Borghi*, 167 Wn.2d 480, 484, ¶ 8, 219 P.3d 932 (2009) (*quoting Guye v. Guye*, 63

Wash. 340, 352, 115 P. 731 (1911)). There was no basis to award so much of Lee's separate property to Julianna after a short marriage, particularly when she leaves the marriage relatively young, in good health, and capable of finding employment based on the skills she acquired during the marriage.

Cases where significant amounts of one spouse's separate property are awarded to another are few. In those cases, the marriages are of long duration. For instance, relying on *Marriage of Irwin,* 64 Wn. App. 38, 822 P.2d 797, *rev. denied*, 119 Wn.2d 1009 (1992), Julianna claims that it was "within the trial court's discretion to determine that the fairest distribution was an approximately equal division of all property, whether separate or community." (Resp. Br. 72) But in *Irwin,* the parties had been married for 27 years, had five children together, and the trial court concluded its property distribution was fair "based on the lengthy duration of the marriage." 64 Wn. App. at 41, 48.

Similarly, in *Marriage of Larson/Calhoun,* 178 Wn. App. 133, 313 P.3d 1228 (2013), *rev. denied*, 180 Wn.2d 1011 (2014), this Court affirmed an award of a small portion of the husband's vast separate estate to the wife when the parties had been married for 24 years. The trial court in *Larson/Calhoun* found "it necessary to award a portion of Larson's separate estate to Calhoun to achieve a 'just result.' [ ] This was, after all,

a long-term marriage in which the wife made a major contribution to all that the community accomplished, measured in terms of their children, their foster children, their impact in the broad community, and their more narrow business interests." 178 Wn. App. at 144-45, ¶ 25.

This, on the other hand, was a short-term marriage, and the vast majority of the assets distributed were acquired with the proceeds from the sale of properties that Lee and Ed had acquired long before Lee's marriage to Julianna. Julianna was handed nearly $7 million in assets even though the trial court found that the community was only allegedly undercompensated by $1.1 million. (FF 2.21, CP 319, 324-25) An award of $6.884 million, including Lee's separate property and Ed's property, is clearly excessive, and made worse by the trial court's failure to take into consideration nearly $1.5 million in tax liability associated with the Tallman sale. (*See* Exs. 488-002)[3] The trial court abused its discretion in awarding Julianna properties that were worth more than four times the amount the trial court found the community was "undercompensated" earned over the short life of the marriage. Remand cannot be avoided by the trial court's rote *Shannon* finding.

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[3] The trial court awarded all the remaining Tallman proceeds, $2.183 million, to Julianna, yet failed to assign her any responsibility for the tax liability. *See Dizard & Getty v. Damson*, 63 Wn.2d 526, 530, 387 P.2d 964 (1964) (Lee App. Br. 44-45).

D. The trial court erred in awarding attorney fees to Julianna for Lee's alleged "recalcitrance."

Finally, the trial court erred in awarding $150,000 in fees to Julianna. (FF 2.15, CP 302) Julianna failed to present any evidence how she incurred $150,000 in fees for Lee's alleged intransigence, and the trial court failed to make adequate findings to support its award. Although the lodestar method is not required in dissolution actions (Resp. Br. 73, *citing Marriage of Van Camp,* 82 Wn. App. 339, 340, 918 P.2d 509, *rev. denied,* 130 Wn.2d 1019 (1996)), a party seeking fees based on intransigence must still demonstrate how the fees were incurred. *See, e.g., Mahler v. Szucs,* 135 Wn.2d 398, 435, 957 P.2d 632 (1988) (Lee App. Br. 49).

In *Van Camp,* the court affirmed the trial court's rejection of the lodestar method as a basis to award attorney fees in a dissolution action, holding that the "lodestar approach focuses on the market value of the attorney's services," but in awards of attorney fees in dissolution cases "the primary consideration [ ] is equitable." *Van Camp,* 82 Wn. App. at 342. Nevertheless, in calculating the basis for fees in a dissolution action, the court should consider "the factual and legal questions involved; (2) the time necessary for preparation and presentation of the case; and (3) the amount and character of the property involved." *Van Camp,* 82 Wn. App. at 342. Further, an award of attorney fees based on intransigence must be

separated "from those incurred by other reasons." *Marriage of Crosetto*, 82 Wn. App. 545, 565, 918 P.2d 954 (1996).

Here, there is no evidence that the trial court took any of the *Van Camp* factors into consideration, and Julianna presented no evidence to support her claim for $150,000 in attorney fees. Julianna did not even disclose her attorney's hourly rate, nor how many hours he claimed were necessary to address Lee's alleged intransigence. Further, as Julianna acknowledges, she had already been compensated by being awarded attorney fees "at various points prior to and during trial." (Resp. Br. 74) These fees were based on the same conduct for which the trial court awarded fees at the end of trial: Lee's supposed "participation in collusive collateral lawsuits" (*See* CP 22-24) and "violation of court orders" (*See* CP 9-11). Because Julianna has already been compensated for fees incurred to set aside the judgments in Ed's lawsuits, as well as for Lee's failure to abide by pretrial orders, no further fees were warranted.

E. Julianna is not entitled to fees on appeal.

Lee is not intransigent in challenging the trial court's gross mischaracterization of the marital, or in challenging the trial court's award of nearly $7 million to Julianna after their brief 7-year marriage. The trial court's decision was contrary to the law and ignored undisputed evidence. No fees should be awarded to Julianna on appeal.

III. CONCLUSION

This Court should reverse and direct the trial court to properly characterize properties traced to Lee's premarital assets as his separate property, and to divide the community property in a just and equitable manner in light of the marriage's short duration.

Dated this 22nd day of December, 2014.

By: _____

David B. Zuckerman, WSBA No. 18221
Attorney for Appellant E. Lee Noble III

CERTIFICATION OF SERVICE

I hereby certify that on December 22, 2014, I served in the manner listed below, one copy of the foregoing document on the following:

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Dated this 22nd day of December, 2014.

Peyush Soni, Legal Assistant