District Court Denver County, Colorado Court Address: 1437 Bannock Street Denver, CO 80202 In re Marriage of: Petitioner: AMY ELIZABETH MOORE and Respondent: BENJAMIN EMANUEL MOORE	DATE FILED: November 12, 2021 11:21 AM CASE NUMBER: 2019DR30398 ▲ ▲ **COURT USE ONLY** Case Number: 19DR30398 Courtroom: 331

PERMANENT ORDERS

THIS MATTER comes before the Court on Petitioner's request for Dissolution of Marriage and Permanent Orders, and her request for punitive and remedial contempt findings against Respondent.

The Petition was filed on May 28, 2019 by Petitioner "Mother." According to the Affidavit of Service for Summons, Respondent "Father" was served on May 24, 2019. The parties, both represented by counsel, appeared before the Court for a four-day hearing commencing on August 30, 2021 and concluding on September 2, 2021. Both parties filed written closing arguments.[1] The Court dissolved the marriage and issued the decree on September 2, 2021, but reserved ruling on permanent orders related to distribution of the marital estate, child support, decision making, Mother's request for maintenance, and her request for remedial contempt. Both parties filed written closing arguments.

The Court issued oral findings and orders on Mother's request for punitive sanctions, incorporates the oral findings and orders into this Order, and now reduces those and the remainder of its findings and orders to writing. Being familiar with the history of the case, the testimony and reviewing admitted exhibits, and applying statutory and case law, the Court now makes the following findings and orders:

Procedural History

This case presents a unique problem to the Court created by Father's lack of disclosure and lack of credibility. Mother claims Father has always been "very good at making money".

[1] The Court notes that Father/Husband through council stated on several occasions that he had not had enough time to present his case; however, the parties had requested a four-day hearing and the Court granted it. For presentation of evidence relating to permanent orders both sides were given equal time and Father was given an additional half an hour. Furthermore, the closing argument provided by Mother was 61 pages in length. Father's closing argument was less than half of Mother's.

She testified that Father and his cousin, Drue Moore, started Winthrop Intelligence as well as several other businesses. Mother believes the value of the marital estate is upwards of $39 million. Father claims that the marital estate is far less valuable, that he is no longer in control of Winthrop Intelligence, and that he earns approximately $120,000 a year, or $10,000 a month.

From the inception of this case, Mother has argued that Father has intentionally failed to disclose numerous documents required by Rule 16.2. After multiple status conferences where Father would agree to comply with disclosures or sign releases, the Court appointed a Special Master. However, the initial Special Master had to be relieved of his assignment because Father refused to sign the standard contract. The Court then appointed a second Special Master, retired Chief Justice Nancy Rice. Justice Rice was charged with determining whether a trust, the Cushman Trust, should be considered marital property and/or whether it was a fraudulent trust and whether she would recommend that the Court impose sanctions on Father on a few of the contempt citations. Justice Rice was also charged with resolving discovery disputes between the parties.

The Special Master issued findings and recommendations after hearing testimony. Father objected to all the findings and conclusions made by the Special Master and asked this Court to review the Special Master's findings and recommendations *de novo*. The Court granted his request pursuant to C.R.C.P 53(f)(3)&(4), and so took testimony and heard argument on all the findings made by the Special Master.

The Court first heard the punitive contempt citations, then the parties presented evidence related to the dissolution of marriage, division of the marital estate, Mother's request for maintenance, parenting time, decision making, child support and the remedial contempt citations.

Credibility Determination

Although there were a multitude of exhibits provided to the Court, this case rests almost entirely on the conflicting testimony and credibility of the two parties. Ultimately, the orders issued by this Court are based on the Court's finding that Father was at best lacking in credibility and potentially blatantly lying to the Court.[2] Father provided little in the way of documentation to back up many of his claims that his multiple businesses are worthless and that he was living beyond his means. By way of example: Father claims that he only makes $10,000 a month yet signed a real estate contract to purchase a $2.4 million home in October of 2018. In June 2018, Mr. Brooks (an associate of Father's) asserted to MidFirst Bank that Father's monthly income was $123,000. *See* Ex. 38. Further, Father settled a lawsuit for $5.5 million and received a check with a note of "partial" payment for $925,000. He testified that was what he agreed to accept and/or he gave the remainder of the $5.5 million judgment away. *See* Ex. 54 and F5. Father's associates, including his cousin and co-founder of Winthrop, filed two involuntary bankruptcies against him on the eve of punitive contempt hearings, thus stripping the Court of jurisdiction, both of which were subsequently dismissed. A variety of lawsuits were also filed by Mr. Moore

[2] Father most certainly will argue that this Court has found that he has substantially more assets and income then he actually has. The Court notes for Father that all numbers used have come from his own documents. If they are fraudulent numbers all the Court can say is "O, what a tangled web we weave when first we practice to deceive!" *Walter Scott*.

against the businesses or his associates or filed by his associates/businesses against him, all apparently to shield themselves from taxes or creditors. Additional issues relating to Mr. Moore's credibility are addressed though out this order. Regardless, the Court found Mr. Moore, his businesses and his associates highly questionable in their veracity or business dealings.

Accordingly, what documentation was provided relating to Father's evaluation of the values of his multiple businesses was contradictory, at best. On the other hand, the Court found Mother's testimony and evidence to be credible. Father's failure to disclose or respond to discovery and his lack of credibility gives this Court little option but to rely on the information provided by Mother.

Contempt Citations

Mother filed, and the Court granted, seven contempt citations against Father. Contempt #1 alleges that Father failed to sign releases, failed to return money taken from the children's 529 accounts, and failed to give control of the accounts to Mother. Mother seeks remedial sanctions. Contempt #2 was a request for punitive sanctions related to the 529 accounts. Contempt #3 relates to the alleged failure to sign releases and requests punitive sanctions. Contempt #4 relates to allegations that Father failed to make support payments and provide prospective attorney's fees. Mother requests both remedial and punitive sanctions. Contempt #5 again relates to the signing of releases and seeks both remedial and punitive sanctions. Contempt #6 relates to the support payments owed and requests remedial and punitive sanctions. Contempt #7 relates to Father's failure to comply with discovery and requests punitive and remedial sanctions.

The Court referred the issue of Father's alleged failure to sign releases, whether Father failed to make support payments, and whether Father had failed to comply with discovery and request for production to the Special Master. On August 25, 2021, Father filed his *Objections to Findings of Fact and Conclusions of Law in August 18, 2021 Special Master's Order*. In his objection, Father raises two general objections to the procedures which are set forth below.

First, Father claims that "[o]nly a judge or magistrate may determine disputed questions of fact or law or enter orders." citing C.R.C.P. 16.2(c)(3)(B). The Court rejects this argument given that the Special Master did not enter orders but simply issued findings of fact and conclusions of law and recommendations to the Court as to orders recommended to be entered. It is not a violation of the Rule for the Special Master to hear evidence and to make recommended findings and issue recommended orders to the District Court. A District Court must then adopt the recommendations before they become the findings and orders of the Court. *See e.g.* "Referee in dissolution of marriage action acts as master pursuant to rule of civil procedure governing masters, and powers of referee and manner in which trial court must treat referee's findings are governed by such rule and provisions of any local rule in conflict with such rule are a nullity." *In re Marriage of Brantley*, 674 P.2d 1388 (Colo. App. 1983). "Referee's decision with respect to property division in marital dissolution proceeding was but a recommendation, and not an "order" or "judgment," much less "final judgment" and, accordingly, decision was not appealable, where it had never been adopted by the trial court as its own order, notwithstanding language of local rule suggesting that such decisions are appealable to appropriate appellate court and not to the District Court." *In re Marriage of Petroff*, 666 P.2d 1131 (Colo. App. 1983).

"Report of referee is not order but is recommendation; referee has no power to enter orders or decrees." *In re Marriage of Debreceni*, 663 P.2d 1062 (Colo. App. 1983).

Second, Father contends that C.R.C.P. 53 specifically prohibits a Special Master from holding a contempt hearing. He states in his *Objection* "[r]ather, under the rule, a Special Master can *recommend* the issuance of a contempt citation." The Court rejects this argument as Father simply misstates the law. C.R.C.P. 53 (C)(2) states "[t]he Master may by order impose on a party any noncontempt sanctions provided by Rule 37 or 45, and *may recommend a contempt sanction* against the party and sanctions against a non-party."

Father raises a "specific" objection to the procedure of the contempt hearing before the Special Master. Father claims that the Special Master did not separate the punitive contempt hearing from the remedial contempt hearing, and simultaneously heard testimony on a substantive property issue. He claims that he was repeatedly warned about straying into punitive contempt issues during his testimony. Father did not provide the trial court with a transcript from the Special Master's hearing. Accordingly, the Court gives deference to the Special Master given the Court does not have evidence that the Special Master did anything inappropriate.[3] Father also raises specific factual objections to each of the Special Master's recommendations. Those objections are addressed under each specific contempt citation and the Court's consideration of the Cushman Trust.

Motions for citation for contempt of Court are governed by C.R.C.P. 107, which provides for two forms of contempt: direct contempt and indirect contempt. Direct contempt occurs within the sight or hearing of the Court. C.R.C.P. 107(2). Indirect contempt occurs outside of the direct sight or hearing of the Court. C.R.C.P. 107(3). Mother alleges only indirect contempt has occurred.

Colorado law provides for two categories of sanctions for contempt: punitive sanctions and remedial sanctions. C.R.C.P. 107(4-5). Punitive sanctions exist to punish conduct that is found to be offensive to the authority and dignity of the Court and include unconditional fines and a fixed sentence of imprisonment. C.R.C.P. 107(4). Remedial sanctions are intended to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform. C.R.C.P. 107(5).

A motion for contempt is a drastic remedy, which the Court must invoke with caution and self-restraint. *People v. Aleem*, 149 P.3d 765, 785 (Colo.2007). "The power to punish for contempt should be used sparingly, with caution, deliberation, and due regard to constitutional rights; it should be exercised only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice." *In re People in the Interest of Murley*, 124 Colo. 581, 585 (1951).

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[3] The Court notes that it inadvertently overlooked the request for clarification in the *Amended Special Master Report #8.* However, as the Court believes that Mr. Moore incorrectly states the rule allowing the Special Master to make recommendations of contempt sanctions, the Court would have directed the Special Master to proceed with the hearing. The Court heard no additional argument about Father's Sixth Amendment rights being violated and the hearing being held virtually. The Special Masters Reports indicate that "all parties were present for the hearing, although the hearing had to be held at the offices of Sherman and Howard since Mr. Moore was unvaccinated."

The petition and the affidavit must state with particularity what charges the Mother is alleging against the accused. C.R.C.P. 107(6)(d)(2). "Essential to due process in contempt proceedings is the right of one to know that the purpose of the hearing is the ascertainment of whether he is guilty of contempt." *In re Marriage of Peper*, 554 P.2d 727, 730 (Colo. App. 1976). A defendant cannot be convicted of any contempt other than that charged. *Wright v. Dist. Court of Second Judicial Dist., for City & Cty. of Denver*, 561 P.2d 15, 17 (Colo. 1977).

An affidavit against a person for contempt must show on its face facts sufficient to constitute a contempt, or no action can be taken thereon by the Court. *Guiraud v. Nevada Canal Co.*, 79 Colo. 289, 296, 245 P. 485, 488 (1926). If the petition and the affidavit do not state facts that, if true, show that a contempt was committed, then the Court has not acquired jurisdiction to proceed. *Fort v. People ex rel. Co-op. Farmers' Exch.*, 81 Colo. 426 (1927). Therefore, as a threshold matter, the Court must examine the pleadings to determine whether the Mother has alleged a *prima facie* case of indirect contempt of Court.

The elements required for the imposition of punitive sanctions for contempt are: (1) the existence of a lawful order of the Court; (2) contemnor's knowledge of the order; (3) contemnor's ability to comply with the order; and (4) contemnor's willful refusal to comply with the order. *In re Marriage of Nussbeck*, 974 P.2d 493, 497 (Colo. 1999). In the case of remedial sanctions for contempt, the Court must make an additional finding that the party is presently able to comply at the time of the contempt hearing. *In re Marriage of Lodeski*, 107 P.3d 1097, 1102 (Colo. App. 2004).

Contempt #1 and Contempt #2

At a telephone status conference held on August 28, 2019, the Court ordered Father to return the monies that he had removed from Minor Child Juniper's 529 account and to transfer control of Minor Child Isaac's 529 account to Mother. That order was later reduced to writing on September 16, 2019. Mother alleges that Father knew of the order, had the ability to comply with the order, and intentionally failed to comply.

Father makes several procedural arguments regarding what was allegedly served on him with the contempt citation. He also argues that he did comply with the Court's order, as it relates to refunding the monies he had taken from Juniper's account, but that Mother simply did not know he had complied because the monies were returned to his attorney's COLTAF account. He argues that he was unable to comply with the Court's order relating to transferring control of Isaac's account to Mother, because Mother needed to take affirmative action for the control to be transferred.

The Court found evidence there was a lawful order that was issued on August 28th and it was reduced to writing on September 16, 2019. The order required the immediate refunding of the monies taken from Juniper's account and the transfer of control of Isaac's account. The order stated that if the monies from Juniper's account could not be transferred or refunded, then Father should deposit the money owed into his attorney's COLTAF account. Although Father chose not to be present for the August 2019 status conference, his attorney was present. The evidence

showed that Father knew of the order. The evidence presented showed that he had access to resources from which he could have repaid the moneys at the time. Mother claims that Father refused to refund the money from Juniper's account and failed to give her control of Isaac's account. However, testimony presented did not substantiate her claims. Evidence was presented that ultimately the money was provided to Mother and, at some point, said money had been put into prior counsel's COLTAF account. Testimony from Ms. Terrel, an employee of College Invest, convinced the Court that Mother needed to execute documents before Isaac's account could be transferred to her, and she had not yet executed the necessary documents.

Therefore, the Court finds that Father is not guilty of either punitive or remedial contempt related to the 529 accounts.

Contempt #1, Contempt #3 and Contempt #5 RE: Releases

Mother seeks both remedial and punitive sanctions for Father's refusal to execute financial releases that were ordered by the Court's August 28, 2019 Minute Order and September 16, 2019 written order, as well as required by Rule 16.2 in contempt #5. Mother also requested remedial and punitive sanctions for Father's failure to execute two additional financial release forms that were provided to him through council on December 10, 2019. This issue was referred to the Special Master. The Special Master found Father had willfully refused to comply with the Order. She recommended the Court impose a punitive sanction of one month's income, equal to $67,500. Father objected to the Special Masters findings and conclusions and asked this Court to review her findings *de novo*. His request for *de novo* review was granted by this Court.

After hearing testimony and taking evidence, the Court confirms the Special Master's finding of contempt and finds that there were lawful orders requiring Father to sign the Court authorized forms for financial disclosures. Although the written order required a "Court approved, Court authorized form," it was clear what form needed to be signed. The Court notes that this is a Court of equity, and gamesmanship and one-upmanship is unacceptable. Throughout this case, Father seems to have treated this divorce as a game of hide-the-ball and keep-away.

Mr. Moore repeatedly appeared in front of this Court promising to execute the releases or stating that the releases had already been executed just not yet provided to Mother's council. The Court finds that Father had the ability to comply with the Court's order. The Court compared the forms that Father ultimately did sign, the forms that were initially sent by Mother's council to Father, and the JDF forms found on the Court's website. The forms provided by Mother's council to Father are essentially identical to the JDF form. Father signed releases drafted by his attorney, months late; however, those releases do not contain the same authority as either the ones provided by Mother to Father or on the Court's website.

The Court can find nothing more than that Father blatantly refused to comply with the Court's order, causing the parties to spend thousands of dollars of attorney's fees and consuming substantial amount of this Court's time over this single issue. The Court does find that Father's failure to sign authorized releases is offensive to the dignity and authority of the Court. The Court finds Father guilty beyond a reasonable doubt of contempt number three and five. The

Special Master recommended a monetary sanction for his failure to comply. However, Father's conduct throughout this case, has convinced this Court that a monetary sanction will have no impact on him. It seems to this Court that the only thing that *may* convince Father that he must comply with Court orders is incarceration. Therefore, the Court sentenced Father to 30 days in the Denver county jail as a punitive sanction for his failure to comply with this Court order.

At the conclusion of the Court's ruling on contempt #3 and #5, Father finally signed the releases that had been required of him. Therefore, the Court finds that Father has purged the remedial contempt for contempt #1 and contempt #5. Father shall remand himself for his 30 days sentence on the punitive contempt on January 31, 2022 by 4:00 PM at the Denver Downtown Detention Center.

Contempt #4 and #6 Re: Support Payments and Prospective Attorney's fees

On October 22, 2019, the Court issued temporary orders including that Father was to pay spousal support and child support to Mother in the amount of $20,054 per month. Payments were to begin November 1, 2019. In Contempt #4, Mother alleges that Father has failed and refused to make the full payment for November of 2019. Mother also alleges, in Contempt #6, that Father failed to pay the required monthly support for December of 2019. At temporary orders, the Court also awarded Mother $100,000 towards prospective attorney's fees which was to be dispersed from Father's retirement account. Mother alleges that Father has failed and refused to comply with the Court's order. Mother is seeking both remedial and punitive sanctions against Father for his failure to comply with these monetary orders. Father alleges that he did not have the ability to make the payment of the support owed or to provide the prospective attorney's fees, and therefore the Court cannot find him in contempt.

The Court found, on the record, that there did exist a lawful order. The Court also found that Father knew of the order, he was present when the order was issued, and has filed multiple motions and two appeals relating to the support orders.[4] It is clear to the Court that Father had knowledge of the Court's order. The issue then is Father's ability to comply with the order. The Court heard evidence that Father makes in excess of $67,000 a month, although Father claims otherwise. Father presented evidence, in the form of tax filings, indicating that his income is $10,000 a month.

Father called his CPA who was qualified without objection to testify as an expert. He testified that many of the documents presented to the Court, including a K1 tax form from Winthrop Intelligence, the balance sheets that Father presented to the bank in an attempt to secure a loan, and evidence of a lawsuit settlement worth approximately $5.5 million, had not been disclosed to him when he prepared Father's taxes. The CPA testified that he must rely on the information provided to him by his client when preparing taxes, he does not do a forensic accounting before preparing the taxes. Thus, if the client fails to supply necessary information, the taxes the CPA prepares in reliance on the client's disclosure may not accurately reflect the client's financial situation. The Court, as addressed above, finds Father's testimony and evidence

[4] Father's second appeal regarding the Court's denial of his request to modify temporary support orders without a hearing was denied by a division of the Colorado Court of Appeals on November 4, 2021 in 20CA2152.

presented lacking in credibility.

Mother testified that prior to the petition for dissolution of marriage being filed, the parties, on average, spent approximately $26,000 a month. She said, “I don't understand how we went from a $26,000 a month lifestyle before the dissolution to being totally broke as soon as it was filed?” The Court agrees that the parties’ lifestyle prior to the dissolution of marriage is in stark and unexplained contrast to what Father now claims his financial situation to be.

Father also attempted to argue that the payment of funds from the sale of the marital home satisfies his obligation. However, the Court notes that the payment of funds from the sale of the marital funds was not designated as support payments or prospective attorney’s fees, therefore is not paid in satisfaction of Father’s Contempt obligations. These funds may be otherwise attributed to Mother in resolution of the marital estate, but do not satisfy Father’s obligation regarding support or attorney’s fees.

The Court finds there was a lawful order. The Court finds that Father knew of the order and has made every effort to avoid compliance with it, and he has done so intentionally and willfully. The Court does find that Father's behavior and disregard for the orders of this Court to be offensive to the dignity and authority of this Court. The Court sentences Father to 30 days in a Denver county jail on punitive Contempt #4 and #6. Furthermore, the Court finds that Father has not purged contempt #4 and #6 by paying the full amount of spousal support for November and December of 2019, or for providing the $100,000 ordered in prospective attorney’s fees. The Court will order that Father remand himself to the Denver county jail until such time as he has purged this contempt. In order to purge this contempt, Father must pay the outstanding spousal support from November and December of 2019, as well as provide $100,000 to Mother's counsel as ordered by Judge Teesch-Maguire at the temporary orders hearing. If Father has not purged the remedial contempt on citations numbers 4 and 6 by January 15, 2022, he shall serve a sentence in the Denver County Jail consecutive to his punitive contempt sanction until such time as the Court’s Orders are complied with.

Contempt #7 Re: Discovery Issues

Mother is seeking both punitive and remedial contempt sanctions against Father for the alleged failure to comply with discovery. Mother served three sets of discovery on Father. Initially Father failed to provide any responses by the deadline. Mother filed a Motion to Compel which was granted by this Court and Father did submit partial responses to the outstanding discovery. However, Mother alleges that Father’s responses were incomplete and evasive in violation of the Court's order. The Court did grant Father an extension to file his discovery responses. However, he did not submit any additional responses by the extended deadline.

Contempt #7 was sent to the Special Master for consideration. The Special Master was charged with resolving discovery disputes between the parties. The Special Master found that Father had failed to fully disclose and respond to discovery requests. She wrote “[h]ere the Wife is correct that Husband failed to completely and fully answer discovery requests. The evidence is overwhelming that this happened on many occasions.” The Special Master required Father “submit a letter \ supplement discovery response affirming that his answer to each and every

response are complete." Father objected to the legal conclusions and findings of fact made by the Special Master and requested that the Court review all her findings and conclusions *de novo*. The Court granted Father's request for *de novo* review.

The Court agrees with the Special Master that the evidence is overwhelming that Father failed to comply and fully answer discovery requests. However, the Court is not convinced that the Special Master was able to sufficiently remedy Father's failures to completely and fully respond to discovery requests. Most of the information that was presented to the Court was presented through Mother who obtained the information through subpoenas.

Father has been anything but forthcoming throughout this Court proceeding. It was clear from the testimony of Father's own expert that Father had either lied to the bank to get a loan or he was lying to the IRS. The Court observed a pattern suggesting Father had a plan to hide assets from Mother and that this plan was in place even before the parties began discussing the filing of the petition for dissolution.

The Court noted for the parties during its oral ruling that discovery in dissolution cases is governed by Rule 16.2 and the legislators made it clear that the parties stand in different positions to each other in a dissolution case than if they were in a civil case. Because of this special relationship between family members, the parties owe each other and the Court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case. The Rule goes on to state that the party has an ongoing and affirmative duty to disclose those facts.

The Court finds that Father knew and understood the discovery obligations and orders of the Court. Father selectively decided how to answer discovery and chose what to answer or to disclose. It was clear from the testimony that Father is a savvy businessman (as will be addressed in more detail below). He and his business partners file lawsuits and involuntary bankruptcies against each other at seemingly highly convenient times and Father has used those skills in this case to hide the true value of the parties' marital estate.

The Court finds that Father willfully refused to comply with these orders. This conduct, which has been going on for more than two years, is offensive to the dignity and authority of this Court. The Court therefore sentenced Father to 30 days in the Denver county jail as a punitive sanction for his complete disregard for this Court's orders.

Father argues that Mother already had possession of the information she requested through discovery. However, the Court finds this argument unpersuasive. First, whether Mother had possession of the information does not relieve Father of his affirmative duties. Second, as noted above, the information provided to the Court came primarily from Mother who got the information through *subpoenas* thus convincing the Court that it was not in her possession. Whether Mother had some of the documentation is of little import given the abundance of material that Father has still not properly disclosed.

Father also argues that Mother is not entitled to post-trial discovery, and the Court agrees

that she is not entitled to post-trial discovery in perpetuity.[5] However, the Court does find that requiring Father to remedy his failures to disclose and respond to discovery requests, even though the case is now post-decree, is appropriate pursuant to C.R.C.P 16.2(e)(4),(10). If Father did fail to disclose marital assets Mother may file a motion within the five years prescribed by statute.

Therefore, the Court will find that Father is in remedial contempt of this Court order. If Father has not purged the remedial contempt by January 15, 2022, he shall remand himself to serve a sentence in the Denver County Jail consecutive to any punitive sanction until such time as the Court's Orders are fulfilled.

Division of the Marital Estate

The trial court is required to divide the marital property without regard to marital misconduct in a just fashion, considering the contribution of each party to the acquisition of the marital property, including the contribution of a spouse as homemaker C.R.S. § 14-10-113(1); *see In re Marriage of Miller*, 915 P.2d 1314, 1316 (Colo. 1996). However, the trial court has great latitude to effect an equitable distribution of property based on the facts of each case. *In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo. 2001). The distribution of marital property must be just and equitable but need not be equal. *In re Marriage of Burford*, 26 P.3d 550, 556 (Colo. App. 2001).

The Court must first determine whether an interest is "property," and then whether the property is separate or marital. *Balanson,* 25 P.3d at 35-36. The Court must set aside to each spouse that party's separate property. *In re Marriage of Rodrick*, 176 P.3d 806, 814 (Colo. App. 2007) (Court must set aside separate property). If the property is separate, then the increase or decrease in the value of separate property during the marriage is marital. C.R.S. § 14-10-113(1)(d). All property acquired during the marriage is presumed to be marital, although the presumption can be rebutted in specific ways. §§14-10-113(2) and 14-10-113(3), C.R.S.; *see, e.g.*, *In re Marriage of Martinez*, 77 P.3d 827, 828-29 (Colo. App. 2003); *In re Marriage of Stumpf*, 932 P.2d 845, 847 (Colo. App. 1997). The asset remains separate property if it has never been commingled. *In re Marriage of Corak*, 2014 COA 147, ¶ 11.

Once property is deemed to be marital, the Court must value it in order to make an equitable division. *Balanson,* 25 P.3d at 36. Property shall be valued as of the date of the decree or the date of the hearing on disposition of property if such hearing precedes the date of dissolution. C.R.S. § 14-10-113(5); *Balanson*, 25 P.3d at 38.

However, the Court is limited by the evidence presented. It is the parties' duty to provide the Court with the data it needs to make its determinations. *See In re Marriage of Krejci,* 297 P.3d 1035, 1039-40 (Colo. App. 2013); *In re Marriage of Rodrick*, 176 P.3d 806, 815 (Colo.

[5] Mother's proposed permanent orders include the following: "On a monthly basis Respondent shall provide the following information directly to Petitioner: 1. Copies of all personal and business checking and savings account statements; 2. Copies of all checks written on any account owned, controlled or used by Respondent; 3. Copies of all documentation relating to any wire transfers made or received by Respondent; 4. Copies of all debit card transactions, including but not limited to receipts or invoices paid"

App. 2007). If the trial court does not have evidence before it of the classification or value of an asset, there is no error in omitting such property from the property division. *In re Marriage of Page*, 70 P.3d 579 (Colo. App. 2003). It is the duty of the parties to present the trial court with necessary data to allow the trial court to value marital property; failure by a party to do so does not provide such party with grounds for review. *In re Marriage of Zappanti*, 80 P.3d 889, 582 (Colo. App. 2003).

The Court may order that each party retain the personal property in his or her possession, without any offset. *In re Marriage of Antuna*, 8. P.3d 589, 595 (Colo. App. 2000).

The allocation of the debts of the parties is likewise part of the property division. *In re Marriage of Booker,* 811 P.2d 405 (Colo. App. 1990), *rev'd on other grounds,* 833 P.2d 734 (Colo. 1992). Generally, marital liabilities include all debts which are acquired and incurred by a husband and wife during their marriage. *In re Marriage of Femmer,* 568 P.2d 81 (Colo. App. 1977). In dividing the marital estate, the Court should ensure that marital liabilities are assigned equitably and not disproportionately to one spouse. *In re Marriage of Kiefer,* 738 P.2d 54 (Colo. App. 1987); *In re Marriage of Speirs*, 956 P.2d 622, 623 (Colo. App. 1997).

Findings

Generally, the Court is provided with a list of assets and debts which the parties believe make up the marital estate. Often one party claims that some asset should be considered separate property, or that some debt should be attributed to the other party as their separate debt. The Court is often called upon to decide the true value of an asset, or to decide if one party dissipated marital property in contemplation of the dissolution proceedings. Then the Court must determine whether the estate should be divided equally or equitably.

Although the value of the marital estate is highly disputed in many cases that come before this Court, this case is unique in that the Court is essentially called upon to determine whether there is an estate at all. Mother claims, as shown in Exhibit 2, that the total value of the marital estate is $40,658,935. Mother believes the total debt to be approximately $282,692. By contrast, Father claims that the total assets are $4,167,589 with the total amount of debt of $863,857.

Winthrop Intelligence LLC and the Cushman Trust

At the heart of this case is Winthrop Intelligence and the Cushman Trust. Winthrop Intelligence LLC was developed by Father and his cousin Drue Moore. Mother testified that her income was partially used for starting Winthrop Intelligence and that “our family” owns it. Apparently, and as discussed further herein, Winthrop Intelligence has done quite well. Both Father and Mother testified that one of Father's goals was to create and grow “generational wealth.” According to Father, he set up the Cushman Trust as a Wyoming qualified spendthrift trust on April 10, 2017. Father maintains that on the same day he signed a Qualified Transfer Affidavit transferring all his rights, title and interest in Winthrop Intelligence LLC to the Cushman Trust. Mother claims the Trust was created with fraudulent intent and is illusory, and/or that Father maintains control of Winthrop and did not transfer it to the Trust as he claims.

The Court referred the issue of the Cushman Trust to the Special Master. The Special Master was charged with determining whether the Cushman Trust should be considered a marital asset. The Special Master determined that the issues presented to her were: 1) whether the Cushman Trust was made with fraudulent intent to defeat the Mother's right in marital property and 2) whether the Trust provisions themselves created an illusory trust. The Special Master found "[a]lthough Husband testified that it was not his intent to defraud his wife, the documentary evidence demonstrates resoundingly that there was such a fraudulent intent and that the Trust itself was illusory." Justice Rice concludes: "The overwhelming evidence presented to the Special Master establishes that the Cushman Trust remains a marital asset. Husband maintained his ownership and control over Winthrop Intelligence. The alleged transfer to the Cushman Trust was illusory and fraudulent. The Cushman Trust was created with the specific purpose of depleting or concealing marital assets in contemplation of these divorce proceedings." *Order RE: Cushman Trust* filed August 18, 2021.

Again, Father objected, arguing first over procedural issues with the Special Master's hearing on the Cushman Trust. Father alleges that 1) that the Special Master is not authorized to hear the issue, referencing C.R.C.P 16.2(c)(3)(B) (only a judge or magistrate); 2) Father claims he did not have notice that the issues regarding the Cushman Trust would be heard at the July 21, 2021 Special Master hearing; and 3) Father claims that the Special Master refused to consider federal law.

The Court granted Father's request to review the Special Master's findings *de novo*. However, the Court will first address the three assertions made above. Father claims that the Special Master does not have the authority to address this issue. He is right that a Special Master cannot issue orders on such an issue. That argument has been previously addressed by this Court earlier in this Order and the Court declines to re-explain its findings. Furthermore, it was Father who specifically requested that if a Special Master was going to be appointed then they should be authorized to address issues related to the Cushman Trust. "The Special Master will also address issues related to the validity of a trust into which Respondent claims to have transferred his interest in Winthrop Intelligence." *See* Order from March 11, 2020 Contempt Advisement Hearing 1(C), issued April 17, 2020. *See also* TR 3/11/2020, p82-5. *See also* Feb 19, 2020 hearing where Father partially objected to a Special Master but *specifically* requested the Court authorize the Special Master to address issues relating to the Cushman Trust.

Second, Father claims he did not have notice that the Special Master was going to address the Cushman Trust at the July 21, 2021 hearing. The Court finds this argument disingenuous. Father claims that a June 30, 2021 order required Counsel to schedule a Zoom hearing on the validity of the Cushman Trust as soon as practicable with the Special Master. He says no hearing was set and "no notice that the July 21, 2021 hearing was converted to include the issue was provided until hours before the hearing." However, the *Special Master Authority to Hear Issue of Validity of Cushman Trust*, issued June 30, 2021, specifically states "Counsel are order *[sic]* to set a Zoom hearing on the validity of the Cushman Trust, which hearing is to be set as soon as practicable. If possible, this issue can be tried on the previously scheduled date of July 21, 2021."

Father claims that it was not until a "procedural" telephone conference on July 20, 2021,

"less than twenty hours before the July 21, 2021 hearing" that the Special Master indicated she would hear issues related to the validity of the Cushman Trust. Father had notice that the issue may be addressed on July 21, 2021, since at least June 30, 2021. Father had not yet deposed Mother, and he claimed he did not have time to subpoena witnesses. Father had from at least June 30, 2021 to prepare his case relating to the Cushman Trust. He could have rescheduled the deposition of Mother, and he should have and could have subpoenaed his witnesses. The Cushman Trust had been at the forefront of this case since day one, and it is an asset which Mother values at approximately $9.5 million. The Court notes that Father's expert witness Carol Warnick was able to attend the hearing and testify although it appears the Special Master found her testimony less than helpful to Father.[6] Father affirms that "the only witness that was able to appear did so at the last minute without any preparation."

Third, Father alleges that the Special Master "refused to consider federal law (including tax law)" and thus "her interpretations of those documents are not based on reality." Father has not provided a transcript of the Special Master's hearing to this Court. Therefore, the Court has no ability to review what may or may not have been considered, and it gives deference to the findings made by the Special Master. "The relationship between a special master and the trial court is the same relationship that exists between the trier of fact and an appellate reviewing body, and it is only if the special master's findings are clearly erroneous, that is, only if they are clearly unsupported by evidence in the record, may they be disturbed by the trial court." *Remote Switch Systems, Inc. v. Delangis,* 126 P.3d 269, (Colo. App. 2006) certiorari denied 2006 WL 380434. "The findings of a referee, master, or commissioner, approved by the Court, will be sustained, unless manifestly against the weight of the evidence." *Perdew v. Creditors of Coffin's Estate*, 52 P. 747, 11 (Colo.App.).

This Court granted the request for *de novo* review. Mother testified regarding the development and ownership of Winthrop and the transfer to the Cushman Trust. She indicated that Drue Moore had the idea of a sports database, and Father, a software engineer, had the technical skills to develop it, so the two began Winthrop. She testified that her commissions went to starting up Winthrop, and the business ultimately took off and was a "cash cow." Neither party had to work. Prior to the divorce, she testified they were traveling the world and she was homeschooling the two children. She testified that the family had private tutors, a housekeeper, and private chefs. While the parties were financially secure because of their ownership of Winthrop, Father was involved in other enterprises which appear to include School of Fish, School of Fish International, CETO, Harvard Cider, EF Global Limited and BlueWater Labs. *See* Ex. 140.

Mother understood Father to be a 50% owner of Winthrop and considered the LLC to be owned by the family. Father had talked to her about wanting to create/secure his generational wealth. But she was unaware of the Cushman Trust, or that Father had given up his interest and ownership of Winthrop to the Trust. She testified that it was her understanding that he maintained the ownership and control of Winthrop after the alleged transfer took place in April of 2017. *See generally* Exs: 35, 36, 37, 38, 39, 41, 45 (showing Father claiming ownership, or control of Winthrop after the alleged transfer date in April 2017). Mother testified that Father

[6] The Special Master states in paragraph 10 of her *Order RE: Cushman Trust* "[t]he testimony of Husband's expert, ostensibly of assistance to his position…"

was "always very good at making money." She ultimately felt that the marriage failed, and she filed the Petition for dissolution because Father was more invested in his businesses and relationship with his business partners then in the family or marriage. Mother now believes that Father had been planning the divorce and had been methodically attempting to hide or shield marital assets from her for years prior to her Petition for dissolution.

Father called Carol Warnick as a witness who was qualified to testify as an expert in the area of the intersection of trusts and family law. Ms. Warnick also testified before the Special Master. Ms. Warnick testified that the Cushman Trust "is not marital property." She claims it was properly set up in Wyoming and is a qualified spendthrift trust. She testified that Father does not own any interests in the Trust. The beneficiaries of the Trust are "Settlor's spouse and Settlor's descendants." Amy E. Moore is specifically listed as "Settlor's spouse." However, there is a "floating spouse" clause, meaning that the beneficiary "spouse" is the spouse of the settlor at the time of the determination.[7] According to Ms. Warnick, this is a common clause. Ms. Warnick testified that Father cannot become a beneficiary of the Trust without his children's consent and they cannot consent until they are adults. Interestingly, although the family had historically lived off the income from Winthrop, the Cushman Trust has not distributed any monies to any beneficiary since its creation.

The Court notes that Art. 1 Sec. 2G is of concern to this Court. Under "Early Termination" the Trust instrument dictates "[w]ithin 30 days of receiving written direction from the Trust Protector, the Trustee shall terminate any trust specifically identified by the Trust Protector and distribute the principal and any accrued or undistributed net income of any such trust to the Settlor and Settlor's spouse..." When the Court sought to clarify if this clause was some sort of quick release button that would terminate the Trust and release all property allegedly held in the Trust back to the Settlor, Ms. Warnick simply answered "yes."

Drue Moore is currently the Trust Protector, thus authorized to terminate the Trust and order the Trustee to return all property or interests held in the trust back to Father. As discussed under "Credibility Determination," it is this Court's finding that Father and Drue Moore have been in collusion to hide assets from Mother, this Court, and the IRS. This clause in the Trust, along with all the other evidence presented, certainly appears to show that this Trust is not bona fide and was set up with the intent to fraudulently deprive Mother of her portion of marital property.

The Court now adopts the findings and conclusions of the Special Master as contained in *Order RE: Cushman Trust* filed on August 18, 2021. The Court agrees that: "The overwhelming evidence presented…establishes that the Cushman Trust remains a marital asset. Husband maintained his ownership and control over Winthrop Intelligence. The alleged transfer to the Cushman Trust was illusory and fraudulent. The Cushman Trust was created with the specific purpose of depleting or concealing marital assets in contemplation of these divorce proceedings."

[7] Michael Davis who appears to be the attorney for Father's businesses sent an email to Mother's counsel stating in relevant part: "I would suggest you read this email back and then apply it to yourself. I don't think you understand that Ben's generational wealth is tied up specifically with the goal in mind that an ex-wife can't get to it. And there are many attorneys who have worked on that longer and harder than you and I can even imagine with that specific goal in mind." Ex. 46 pg. 2.

The Court is ultimately left with the issue of determining the value of Winthrop Intelligence. Here, unlike the facts of *Kaladic v. Kaladic*, 589 P.2d 502 (Colo. App. 1978), there is no evidence, due to lack of proper disclosure by Father, of what the current value of Winthrop may be. Father testified that he had repeatedly requested tax documents from the Trust, but they either could not find the documents or have not filed taxes since the Trust was created. The Court did not find this testimony to be credible. Father further testified that since he no longer controls Winthrop, he has no idea what the current value is. However, according to the Trust instrument Father retains the ability to review all financial documents relating to the Trust. *See* Ex. 48 Article Nine, § 1, ¶ B.6.

Evidence presented showed that the most commonly referred to valuation of Winthrop Intelligence and the one listed as late as May of 2019 was $9,475,000. The Court thus will use that value and award Winthrop Intelligence in whatever form it currently is in to Father valued at $9,475,000, which is the value given by Father on his personal balance sheets.

In the event Father transferred his interest in Winthrop to the Cushman Trust, the Court finds that his actions were an intentional depletion of marital assets in contemplation of a dissolution of the marriage. Under such circumstances the Court is required to value the depleted asset at the last value it had while part of the marital estate. *In re Marriage of Jorgenson*, 143 P.3d 1169, (Colo. App. 2006). That value would be set at the $9,475,000 as indicated on Father's May 31, 2019 Personal Balance Sheet. *See* Ex. 5.

CETO

One of the other businesses that Father is involved in is CETO. Father claims that CETO was a dream that has not materialized. Father further claims that "all CETO" has is a prototype that is still in development and that, after several years of being in the "prototype phase," he is unsure if the effort would ever get off the ground. The only values ever given were $36,000 and then $19,000,000. Neither party disputed that CETO, in whatever form it may be, is a marital asset. Father argues that the $19,000,000 estimated valuation of CETO provided by Father to MidFirst Bank was mere "puffing." Father claims that because CETO did not produce any gains or losses, file a K-1, or have its own bank account, it could not be worth $19,000,000. No financial information related to CETO was provided. *See* Ex. 12, 15, 16, 17. No response to discovery requests about CETO were provided. Although Father claims CETO does not exist, documents provided by Mother indicate that it does. *See* Ex. 53, 133, 140, 146, U5. Father testified to the Court that he does continue work with CETO.

Mother provided documentation supporting her position that Father continues to be involved with CETO. The documentation also substantiates her position that CETO is not just "a dream that never materialized" but is a marital asset for which she should be compensated.[8] The

[8] The following are documents confirming Respondent's involvement with CETO: Ex. 53 – Federal lawsuit in which Respondent received a judgment of approximately $5,500,000 where he confirms his role as CEO and founder of CETO. Ex. 133 – showing Bluewaters LABs/CETO website indicating its ongoing operations; Ex. 140 – Respondent's CETO business card. Ex. 146 – receipt paid for by one of Respondent's

Court finds that CETO is an ongoing enterprise. Pursuant to C.R.S. § 14-10-113 the question is what value the Court should place on this asset. Per caselaw and statute, when the Court finds that where a party has intentionally attempted to conceal or dissipate assets in contemplation of dissolution, the Court must value the asset based on the last value available. In the absence of documents from Father, Mother asks that the Court accept Father's representation to the bank and use his $19,000,000 valuation for this asset.

Based on Father's lack of credibility[9] and failure to provide documentation relating to CETO, the Court has little choice but to use Father's most recent valuation of the business. *See* Ex. 6 and 6B. As with Winthrop, the Court is required to value the depleted asset, or here the unexplained asset, at the last value it had while part of the marital estate. *In re Marriage of Jorgenson*, 143 P.3d 1169, (Colo. App. 2006). The Court awards CETO or Father's interest in CETO to him and values it as a marital asset at $19,000,000.

School of Fish, School of Fish Global Mobile, & Other Business Entities

Similarly, Father has not provided information relating to School of Fish, School of Fish Global Mobile, BlueWaters Labs, or EF Global therefore, placing a value on BlueWaters Labs, or EF Global is impossible. However, for School of Fish and School of Fish Global Mobile there was evidence presented of monies flowing into and out of their related bank accounts. Rather than placing a value on the entities, the cash flow through the entities shall be attributed to Father as a component of his income. For 2017 and 2018, School of Fish enjoyed at least $500,000 annual cash flow through Father's School of Fish accounts. In the verifications provided to MidFirst Bank, the cashflow for School of Fish Global Mobile was valued at $57,000 a year. *See* Ex. 38, page 3. The bank statements obtained from School of Fish Global Mobile show monthly deposits of $1,842 in 2021, with higher deposits in prior years. *See* Ex. M4. In the absence of any other information, the Court shall estimate that Father receives or could receive additional income of $500,000 from School of Fish and receives or could receive $57,000 a year as additional income from School of Fish Global Mobile.

The Court is without sufficient documentation to value any other entities that may be owned or operated by Father at this time. Thus, the Court declines to value EF Global Limited or BlueWaters Labs.[10] All of these businesses are found to be marital property, and neither party

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credit/debit cards for CETO development expenses. Ex. U5 – providing reams of documents confirming ongoing CETO operations.

[9] Specifically relating to CETO, it appears that Father testified to the Special Master that he was no longer working on anything related to CETO and within days testified to this Court that he does continue to work on projects related to CETO.

[10] The Court is limited by the evidence presented, however. It is the parties' duty to provide the Court with the data it needs to make its determinations. *See In re Marriage of Krejci,* 297 P.3d 1035, 1039-40 (Colo. App. 2013); *In re Marriage of Rodrick*, 176 P.3d 806, 815 (Colo. App. 2007). If the trial court does not have evidence before it of the classification or value of an asset, there is no error in omitting such property from the property division. *In re Marriage of Page*, 70 P.3d 579 (Colo. App. 2003). It is the duty of the parties to present the trial court with necessary data to allow the trial court to value marital property; failure by a party to do so does not provide such party with grounds for review. *In re Marriage of Zappanti*, 80 P.3d 889, 582 (Colo. App. 2003).

disputed that Father has been involved with all of them began during the marriage. *See* Ex. 140.

A Vocational Assessment of Mother was provided to the Court. *See* Ex. W1 and X1. Mother reported having a couple of small businesses including a tea import company, selling air purifiers, and owning Flourishing Funnel. The Court lacked sufficient evidence to specify what companies may be attributed to Mother, regardless, like EF Global and BlueWaters, the Court was not provided evidence of the values of these businesses and thus declines to address them here. The Court will consider the values of any bank accounts held on behalf of Mother's businesses in the bank accounts section of its order.

Notes Receivable and Payable, Reliance Trust, Father's Civil Lawsuit Against Winthrop, and other Funds

Mother provided documentation of several payments and assets that Father had. This documentation included evidence of: 1) purchase of a Note Receivable for $363,242; 2) payment on a Note Payable for $350,844; and 3) $70,000 spent to acquire a VC Fund. Father testified essentially that he either did not know what these were for or could not remember the transactions. If Father's only income is his $10,000 a month salary, logic dictates that he would have some recollection of these rather large amounts of money. As for the Note Receivable Father testified that he did not write it "Brooks did, and I didn't really understand that." As for the $70,000 to acquire the VC Fund Father stated, "I didn't even know what that was." Again, the Court finds Father's testimony devoid of credibility. Thus, he shall be awarded these miscellaneous and unexplained assets.

Mother introduced Ex. 131 showing $305,848 of undisclosed assets that Father received in 2018. Father did not disclose these assets on his C.R.C.P. 16.2 disclosure statement. *See* Ex. 12. He also failed to identify these funds in response to interrogatories or requests for production. *See* Ex. 16 & Ex. 17. This distribution also does not appear on Father's 2018 tax return. *See* Ex. Z. Father provided no documentation showing the disposition of such funds and thus these funds shall be placed on Father's side of the marital balance sheet.

Finally, Father received a consent judgment from a lawsuit for approximately $5.5 million, and evidence indicated that he received a check for approximately $900,000 with a memo indicating it was an initial payment. *See* Ex. 53 and 54. Father testified that he accepted the $900,000 as a settlement for the $5.5 million he was awarded. On September 1, 2020, the Court authorized Mother to attempt to collect the remaining amount that Father was entitled to from the consent judgment. As of the permanent order hearings, Mother had not been able to collect the remaining monies. The Court finds that there are $4,564,777 of unaccounted proceeds from this lawsuit/settlement. Father failed to provide documentation regarding the receipt or disposition of these funds. In the absence of such documentation from Father, the Court finds that Father either did receive the balance of the judgement, or his agreement to settle for only $900,000 dissipated the marital estate. The Court thus awards Father the entirety of the $4,564,777 that should have been paid to the parties.

The Fillmore St. Lots

Father contends that Mother dissipated marital assets when she sold two lots on Fillmore St, pre-foreclosure auction to a friend for below market value. However, the evidence showed that Father had not been paying the mortgage due and the home was set for auction. Mother testified that she sold the lots because she had an offer, and that the property likely would have gone for less if it went to auction. She notes that she sought Court authorization for the sale during the pendency of this case. There was no credible evidence as to why Father had not been making payments. According to his Personal Balance Sheets and their attachments, he had enough access to cash to make the payments. *See* Ex. 6 and 6B. The parties netted $146,830.53 in profits from the sale of the Fillmore St. Lots. Father contends that Mother should be responsible for "wasting" $682,616 of marital assets. The Court declines to do so. The Court find Mother's sale of the Fillmore Lots was completed in good faith and that the sale preserved marital assets that would have otherwise been lost in a pending foreclosure action. The Court further finds that any loss that might have existed related to the Fillmore Lots was the results of Father's decision to cease making the mortgage payment on the lots.

Father also contends that, because of Mother's sale, he is now exposed to lawsuits relating to a Land and Development Agreement ("LDA"). However, evidence of the Land and Development Agreement was never disclosed to Mother or proven to the Court. The Court again questions whether the LDA exists. *See* Ex. 53, Ex. 6, Ex. 38, Ex. 5 (all relating to the property, never mention LDA). Therefore, the Court finds that Father shall be solely responsible for any liability related to the alleged Land and Development Agreement and shall hold Mother harmless from any liability related to the LDA.

Retirement Accounts/Life Insurance Policies

The parties agree that Mother has a TD Ameritrade IRA #8363 with a value of $128,544. The Court will award that account to Mother. It appears that the parties agree that Father has a Capital Group Roth IRA worth $5,842.11. *See* Ex. 14. This shall be awarded to Father.

Except for the Capital Group IRA, as with most things relating to Father, there is at best lack of clarity of what retirement accounts he has. Father argues that the sum of his retirement is $616,000 and that Mother has "triple dipped" Father's retirement account. Mother believes there is $2,418,000 in retirement. Father had a Roth IRA through Winthrop as of his July 30, 2019 sworn financial statements. He also had a Entrust IRA which appears to Mother and the Court to be the same as the Winthrop IRA. Father claims that money was invested in AVUSA which went bankrupt during Covid-19. He directs the Court to Ex. O5, but O5 shows Liquide Collective filing for bankruptcy, not AVUSA. According to Father's written closing arguments, Liquide Collective was another investor in AVUSA, not AVUSA, but this remains unclear to the Court. The number of bankruptcies that have impacted this divorce proceeding is suspicious to the Court--but for the quantity, this singular event would be unremarkable. Because the Court does not have enough information, the Court will rely on the last clear filing by Father. Thus, Father will be awarded $616,983 for the Entrust/Winthrop IRA, or its value at the time of July 2019 Sworn Financial statement.

For the following retirement accounts, Father did not provide disclosures or explanations as required. Thus, the Court will make an adverse inference at the failure to disclose and allocate

the following accounts to Father: Aspire Winthrop 401(k) $6,425.35; Winthrop Pension $322,747. Mother also asks the Court to consider a Work Simple retirement account of $600,000 and an LCA Roth IRA #8378 of $6,288.74. However, it does appear to the Court that the Work Simple $600,000 and LCA Roth IRA #8378 $6,288.74 are the same as the Entrust IRA and the Aspire 401(k), and thus the Court declines to include them as assets.

Father represented that he had a cash value life insurance policy worth $7,154 on his May 2019 and August 2018 personal balance sheets. He testified he had to get rid of it, but the Court finds reliance on Father's unsubstantiated testimony to lack credibility, and he also did not respond to interrogatories relating to this policy. Therefore, the Court will award that value to Father. Both parties list policies with face values of $1M for Mother and $2M for Father, they shall each retain these policies.

Motor Vehicles

The Subaru leased by Mother shall remain her sole and separate property. Mother had a 2008 Lexus which she sold for $17,999 which shall be attributed to Mother. Father has failed and refused to identify the motor vehicles held in his name or in the name of his companies.

The Court finds that Father's company Winthrop Intelligence has paid another of his companies, School of Fish, Global Mobile Services, a total of $55,359.20 during the pendency of this divorce action for what appear to be automobile expenses. Ex. M4. It appears from the bank statements and Father's testimony that these funds were used to pay for an undisclosed Audi and an undisclosed Mercedes Benz. However, the Court has included the monies flowing through School of Fish and Global Mobile as income to Father, and therefore declines to include this as a distinct asset of Father's here.

Bank Accounts

The Court awards each party all bank accounts held in their separate names.

There appear to be several accounts for which the parties agree on the values. These accounts are Wells Fargo Bank no. 8607 valued at $1,191, Credit Union of Colorado no. 1001 (Less Alone) valued at $25, Credit Union of Colorado no. 1002 (Less Alone) valued at $218, Credit Union of Colorado no. 2001 (Clayton Academy, LLC) valued at $3,025, Credit Union of Colorado no. 2002 (Clayton Academy, LLC), valued at $1,755, Credit Union of Colorado no. 3001 (Flourishing Funnel) valued at $75, Credit Union of Colorado no. 3002 (Flourishing Funnel) valued at $650, and Wells Fargo #7660 valued at $0. Of these undisputed accounts, the parties agree that they all shall be attributed to Mother except for the Wells Fargo #7660 which should be attributed to Father but is valued at $0.00.

There remain several accounts where Mother and Father disagree as to the value. Both Mother and Father identify additional Credit Union of Colorado accounts that they agree should be attributed to Mother. Mother lists two accounts: Credit Union of Colorado no. 1 valued at $64, and Credit Union of Colorado no. 3 valued at $2,668. Father lists four accounts: Credit Union of Colorado Savings valued at $3,746, Credit Union of Colorado Checking valued at

$4,800, Credit Union of Colorado AE Homes Savings valued at $25, and Credit Union of Colorado AE Homes Checking valued at $298. Given the absence of evidence except what is presented by the parties and given the Court has found Mother to be more credible than Father, with regard to these disputed Credit Union of Colorado accounts, Credit Union of Colorado no. 1 valued at $64, and Credit Union of Colorado no. 3 valued at $2,668 shall be attributed to Mother.

There are additional disputed bank accounts listed by Father to which Mother does not attribute a balance. To the extent monies exist in these accounts under Father's separate name, they should be attributed to Father. These accounts listed by Father are Wells Fargo Checking 6581 School of Fish, Inc. valued at $63, Wells Fargo Checking 6599 School of Fish valued at $14, and Wells Fargo Checking 0492 School of Fish Global Mobile Services LLP valued at $2,536. However, since the Court has determined that the monies that flow through these accounts should be calculated as income to Father, the Court does not utilize the amounts in the accounts as assets for the purpose of dividing the estate.

Father also identifies two Wells Fargo joint checking accounts (2616 and 7193). Father indicates that there are no funds in the 2616 account, and there is $125 in the 7193 account. To the extent that this account exists and is jointly held, it shall be divided between the parties with $63 attributed to each party on their side of the balance sheet.

The bank accounts and 529 accounts which are for the benefit of the minor children shall not be included in the Court's calculation of the marital estate.

Debts

Mother claims that the parties have debt totaling $282,692. She claims $22,041 of debt on a Chase United x1734, Husband claims that a United Mileage Plus x1734, Court presumes they are the same card, has a balance of $18,961 and was used for Wife's attorney's fees. Neither party directs the Court to an exhibit relating to this credit card, but since both parties allege there is a debt associated with this card, the Court includes in the spreadsheet as a debt to Mother. The Court presumes the debt to be a marital debt. Mother lists two additional debts, one to Anne and Matt Gardner for $30,000, and one to Nancy and Mike Lyner for $26,000, which the Court presumes to be marital debt. However, the Court did not hear testimony nor was evidence presented relating to these dates, therefore the Court declines to divide them. The remainder of the debt alleged by Mother, $204,651, is owed to Sherman & Howard for attorney's fees. The Court will address that amount when addressing attorney's fees.

Father claims that the parties have substantially more debt. In Father's Property Division Worksheet Ex. S5, he claims $1,857,342 of debt should be awarded to him and $815,708 should be awarded to Mother. Father claims to have a promissory note owed to Winthrop for $600,000, as well as $400,000 revolving line of credit with Winthrop, and he lists a $50,000 "Revolving Line of Credit" with no further identification. He also claims to have a debt to R. Scott Brooks relating to the Fillmore Lots for $812,042. Having addressed Winthrop previously, the Court finds the claimed debt to Winthrop to be questionable at best and will not include it as part of the marital estate. Likewise, the Court finds the claimed debt to Brooks to be suspect and will decline to include that in the estate. As for the unidentified $50,000 revolving line of credit, no

testimony or documentation was presented so the Court declines to include that value as well. Similarly, the Court does not include the Capital One x8019 Card with a debt of $39, the Nordstrom's Card apparently with a credit of $8.00, or the ULTA x8244 Card with a debt of $35 as no evidence was presented regarding these accounts. Father also lists a JP Morgan Chase account, with no associated account number, with a debt of $19,393. The Court does not have any bank statements from JP Morgan or testimony relating to this debt and declines to include this debt. Again, it is the parties' obligation to provide the Court with enough information for the Court to determine if the debt is marital or separate and its value. Here the Court has no information as to whether it is marital or not and so declines to include it.

Father lists the following debts which the Court will include as part of the estate: LL Bean x2930 in the amount of $5,609, and the debt related to Mother's Subaru for $7,787.

Equitable Property Payment

The Court finds Father owes Mother the sum of $17,476,893 to equalize the parties' assets. The Court finds that the outstanding balance on these funds shall accrue interest at the rate of 8% per annum, starting on December 1, 2021 until paid in full.

The Court orders that all payments made to Mother in satisfaction of this property payment shall first be applied to the outstanding principal and then only after the principal is paid in full, shall such payments be allocated to the accrued interest.

Parental Responsibility – Decision Making & Parenting Time

The allocation of parental responsibility is governed by C.R.S. § 14-10-124(1.5)(b). The decision is based on the Court's determination of what is best for the minor children. The first factor identified in this statute is "Credible evidence of the abilities of the parties to cooperate and to make decisions jointly." C.R.S. § 14-10-124(1.5)(b)(I).

Husband argues, and the Court notes, that in the multitude of filings in this case over the span of this protracted litigation, neither party has raised concerns about co-parenting, and co-parenting has remained an undisputed issue. Mother did testify that Father refused to allow the children to remain in their private school. Father claimed they could not afford it. When Mother got the children scholarships, Father continued to refuse to allow them to remain in their school.

Mother argues that Father has demonstrated an inability to place the needs of the children above his own and that his deception makes it impossible for the parties to effectively co-parent. Based on Father's actions, Mother requests that the Court find it is best for the children that Mother be granted sole decision making for all major decisions affecting the children. She also suggests that if there is evidence that the parties can make mutual decisions for the children, the Court would consider modification of this order under the best interest standard not the endangerment standard. Although the Court has concerns about the parties' ability to cooperate given the level of contention and animosity during this divorce, the Court declines to grant Mother's request. The legislature made it clear that conduct that does not affect the parties' relationship with the child shall not be considered. C.R.S. 14-10-124(2).

The Court does find Father's refusal to allow the children to remain in their school concerning; however, given the lengths Father has gone to hide the marital assets from Mother it seems this was just another attempt to convince Mother that the parties were destitute, and was not evidence of Father being unable to consider the best interests of the children. Once litigation is over[11] and the estate divided, the Court finds that it is likely Father will be able to put the children's needs before his own as he has historically done.

The Court notes that Father's deceit throughout this case has related specifically to the financial aspects of the divorce, not the children. However, the magnitude of his deceit does raise concerns for the Court that he may use similar tactics against Mother in the future such that it would impact joint decision making. However, the parties have been making joint decisions regarding the minor children consistently since their birth. Father listed multiple decisions made by the parties both before and after their separation regarding the children's medical/mental health, education, and extracurricular activities. Therefore, the Court will order joint decision making for all major decisions relating to the children. The parties are strongly encouraged to use a parental coordinator and decision maker until such time as they can effectively co-parent on their own. If there is a dispute the parties cannot resolve, the parties shall go to mediation before returning to Court, pursuant to C.R.S. 14-10-124(8).

The parties have been successfully exercising the 5-2-2-5 schedule for approximately two years, and the children are thriving in school, at home, and in their community. The Court finds that continuing the current 5/2/2/5 parenting time schedule is in the best interest of the children. Father shall be required to quarantine for a period time after any term of incarceration. The length of time he shall quarantine shall be the period then recommended by the CDC guidelines. Father shall not be permitted to see the children following incarceration until he has provided Mother with a negative COVID test.

Maintenance

In determining an award of maintenance, the Court is guided by C.R.S. § 14-10-114. Consideration of the statutory formula and guidelines for the term of maintenance are neither mandatory nor presumptive. *See*, *In Re the Marriage of Vittetoe*, 2016 COA 71 (Colo. App. 2016). The statute contemplates a two-step process for a maintenance award. First, the Court must make findings concerning the following: (1) the amount of each party's gross income; (2) the marital property apportioned to each party; (3) the financial resources of each party, including income from separate or marital property; (4) reasonable financial need as established during the marriage; and (5) whether the maintenance award would be deductible for federal income tax purposes by the payor and taxable income to the recipient.

Next, the Court must determine the amount and term of the maintenance, considering the statutory guidelines for the term and amount of maintenance and all other relevant factors. The relevant factors include the following: (1) the financial resources of the recipient spouse; (2) the financial resources of the payor spouse; (3) the lifestyle during the marriage; (4) the distribution

[11] The court notes that between Father's apparent appetite for law suites and his attorney's willingness to support it, this case will likely be litigated for years causing untold damage to the estate and more significantly emotional damage to the children.

of marital property; (5) both parties' income, employment and employability; (6) the historical income of a party; (7) the duration of the marriage; (8) the amount and term of temporary maintenance; (9) the age and health of the parties; (10) significant contribution to the marriage or to the advancement of a party; (11) whether the parties' circumstances warrant a nominal amount of maintenance; (12) any other factor that the Court deems relevant; and, (13) whether the party seeking maintenance lacks sufficient property to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment, or is the custodian of a child whose condition or circumstances make it inappropriate for the spouse to be required to seek employment outside the home. In determining the amount and duration of maintenance, the Court must balance all relevant statutory factors.

After considering these provisions, the Court shall award maintenance only if it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to him or her, to provide for his or her reasonable needs and is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it inappropriate for the spouse to be required to seek employment outside the home. § 14-10-114(d), C.R.S.

A spouse is not required to consume his or her property before being entitled to maintenance. *In re Marriage of Banning*, 971 P.2d 289, 293 (Colo. App. 1998). It does not mean the minimum requirements to sustain life but is "dependent upon the particular facts and circumstances of the parties' marriage." *In re Marriage of Weibel*, 965 P.2d 126, 129 (Colo. App. 1998) (citing *In re Marriage of Olar*, 747 P.2d 676, 681 (Colo.1987)). Further, "an appropriate rate of savings to meet needs in the event of a disaster, to make future major acquisitions . . . and for retirement *can*, and *in the appropriate case* should, be considered as a living expense when considering an award of, or reduction in, maintenance." *Id* at 29-30 (emphasis added).

When considering whether a spouse meets the statutory threshold for maintenance, the standard of living enjoyed during the parties' intact marriage must be considered by the Court. "Reasonable needs" must be determined based on the particular circumstances of the parties in each individual case. *In re Marriage of Thornhill*, 232 P.3d 782 (Colo. 2010). C.R.S. § 14-10-114(3)(a)(I)(D) ("Reasonable financial need as established during the marriage") and C.R.S. § 14- 10-114(3)(c)(III) (lifestyle during the marriage). Prior to the divorce filing, the parties were in a $5,000 a month rental which they were planning to purchase for $1,200,000 while they were awaiting the construction of their new home. *See* Ex. 11.

In the year before the divorce was filed, the parties were traveling the world with their children. They had private chefs, private tutors, maids and other staff to help support their lifestyle. Mother testified that they spent about $26,000 per month. The parties had enough funds to support an affluent lifestyle and such funds only "disappeared" once this case was filed.

Prior to the divorce proceeding Mother was a stay-at-home parent. At the Temporary Orders hearing, the Court imputed income to Mother at $50,000 a year. *See* Ex. 84 (Minute Order from Temporary Orders). At the time the case was filed, Mother was a stay-at-home

Mother. Mother is now working as a realtor.[12] Mother testified that she estimates her income as $100,000 per year based on an average of 10 real estate transactions a year. Father requests that Mother's income be imputed at $160,000 a year. He presented evidence of Mother's current real estate listings including: 1052 Michener Way, Highlands Ranch, 2.8% commission on $2.195 million home=$61,460; 536 Cook Street, Denver, 2.5% commission on $1.56 million home=$39,000; 1275 S. Filmore, Denver, 1.2% commission on $1.6 million home=$19,200; 35 S Ogden Street, Denver, 1.2% commission on $1.19 million home=$14,280. *See* Ex. T pg. 18-21. Based on that the Court finds that imputing Mother's income at $160,000 is reasonable.

As discussed at length above, Father's income or potential income is almost impossible to determine based on his refusal to disclose his business interests or his current assets. The Court, based on what information it does have, determines that Father's actual income, or his potential income, is $1,000,000 a year. C.R.S. § 14-10-114(8)(c)(IV). The Court notes that this figure is substantially less than what Father presented on his documents to MidFirst bank where he claimed his monthly income was $123,000, or $1,476,000 a year.

The Court finds that Mother meets the threshold requirements for maintenance as she is not able to meet her reasonable needs as established during the marriage on her own.

Accordingly, the Court finds an award of maintenance in the amount of $19,000 a month starting September 1, 2021, is appropriate. Maintenance shall be paid for a period of ten years, or earlier as an operation of law pursuant to CRS 14-10-114. The Court declines to award Mother permanent maintenance as requested. Mother has been awarded a substantial equalization payment and her real estate business in likely to continue to grow. The Court therefore finds it is reasonable to presume that Mother will be able to support herself comfortably when maintenance terminates.

Child Support & Extraordinary Expenses

As set forth previously, the Court finds that Mother's income is $160,000. Father's income is $1,000,000 a year. Based on the standard of living the children would have enjoyed if the parties remained married and the financial resources of the noncustodial parent, the Court shall enter an award of child support to Mother in the amount of $2,175per month starting September 1, 2021. *See* Ex. 3. "The judge may use discretion to determine child support in circumstances where combined adjusted gross income exceeds the uppermost levels of the schedule of basic child support obligations; except that the presumptive basic child support obligation shall not be less than it would be based on the highest level of adjusted gross income set forth in the schedule of basic child support obligations." C.R.S. 14-10-115. With Mother's award of maintenance of $19,000 a month, the Court finds that $2,175 a month will allow the children to enjoy a lifestyle similar to that which they were accustomed to during the marriage. Father shall be required to maintain health insurance for the minor children, and Father shall be solely responsible for all uninsured medical expenses incurred on behalf of the children. The

[12] Father notes that Mother did not disclose her real estate career until her deposition in July of 2021. Although, this is concerning to the Court as Mother has the same affirmative and on-going disclosure requirements as Father the Court is granting Father's requested amount for Mother's income. Father also testified that Mother would actually be earning far more then Father, the Court is not persuaded.

parties shall share all extracurricular expenses for the children on a 33.3% (Mother)/66.7% (Father) basis. The parties shall reimburse the other for their share of children's expenses within 30 days of being presented with verification of payment.

Dependency Exemptions and Tax Benefits

Father acknowledged that he claimed the children on his taxes for tax years 2018, 2019 and 2020. Accordingly, Mother shall be entitled to claim both children for the next three tax years. Starting in tax year 2024, Mother shall claim Juniper and Father shall claim Isaac. Once the oldest child is emancipated the parties shall alternate claiming the younger child pursuant to C.R.S. 14-10-115. Mother shall claim the child in even years and Father shall claim the child in odd years. Father shall be prohibited from claiming a child if he has any child support arrearages.

Support Arrearages

One of Father's four appeals in this matter, 21CA357 which was filed on March 9, 2021, deals with the allocation of support arrearages between child support and maintenance. That appeal is still pending before the Appellate Court. Therefore, this Court will not rule on child support arrearages or maintenance arrearages at this time. Once a mandate has been issued, the Court shall address arrearages accordingly.

Security for Support Payments – C.R.S. § 14-10-118

Father shall obtain and shall maintain a $5,000,000 life insurance policy to secure the Court's maintenance award. Father shall also obtain and shall maintain a $1,000,000 life insurance policy to secure the Court's child support awards. Father shall name Mother as the irrevocable beneficiary of these policies. C.R.S. § 14-10-118. Father shall provide annual statements confirming that the premiums for these policies have been paid in full. Father shall direct the insurance company to provide Mother with written notice of any missed premium payments or any cancelation of the policy. Father shall also sign an authorization requiring the insurance company to provide any information in their possession directly to Mother upon her request.

Attorney's Fees

The Court finds it appropriate to award Mother some of her attorney's fees incurred in this action. The Court bases this determination on 1) Father's vexatious litigation, including his intentional deception and fraudulent actions. *See generally* C.R.S. 13-17-101 and 2) the financial disparity between the parties. *See In Re Marriage of Rose*, 134 P3d 559 (Colo App. 2006) *and* C.R.S. 14-10-119.

First, Father needlessly and repeatedly increased the costs and duration of these proceeding. The Court had to appoint two Special Masters, Father then requested all findings and recommendations of the second Special Master be reviewed *de novo*. Father to date has not made full disclosures to Mother forcing her to issue subpoenas to secure some information and requiring countless Court appearances and hearings. In collusion with his business associates, Father filed two potentially fraudulent bankruptcies to prevent this Court from being able to

proceed on contempt citations, and Father created the Cushman Trust for the sole purpose of hiding assets from Mother in contemplation of divorce.

Second, when this proceeding began, Mother was a stay at home mother with no income. At Temporary Orders, the Court imputed her to $4,166 per month (or $50,000 a year) and found Father's income to be approximately $67,000 a month. Mother has since worked diligently to improve her own income and now is able to earn $160,000 per this Court's findings. However, but for Father's actions, this case should have been resolved within months, not years.

The Court finds that Mother would have incurred some attorney's fees even if Father had complied with Court orders and that Mother can pay some of her fees. Therefore, the Court finds that Mother should be responsible for $75,000 worth of the total fees incurred for this litigation.

If Father requests a hearing on the reasonableness of the fees requested, he shall file an appropriate Motion. However, if Father is not requesting a hearing on the reasonableness of the fees requested, he is ordered to pay Mother the sum of $264,306 to cover her outstanding professional fees.[13] Any amount not paid within 30 days shall be reduced to judgment and shall accrue interest at the statutory rate of 8% until paid in full. The Court finds that Father has failed and refused to satisfy the outstanding attorney fee judgments awarded on December 27, 2019 by this Court. As ordered above, Father has been found to be in remedial contempt for his failure to pay the previously awarded attorney's fees. If Father fails to purge this contempt he will be incarcerated until he complies with the Court's orders.[14]

The Court has determined that the division of the marital estate is fair and equitable to both parties and that the award of maintenance to Mother is justified based on Father's income and the lifestyle the parties led during their marriage. The parenting time and decision making ordered by this Court is in the best interests of the minor children. This Court shall retain such further jurisdiction over this matter as is provided by Colorado law.

[13] Father provided documentation that approximately $100,000 of Mother's attorney's fees for Sherman & Howard may have been spent on other litigation and legal services, the Court therefore would not have jurisdiction to award those fees in this action. If Father seeks to dispute those fees, Father shall file an itemization of the fees in dispute along with his Motion.

[14] The Court notes, that evidence was presented that Father's attorney's fees were being paid by Equal Justice Wyoming Foundation. The Court has ethical concerns about Father's use of funds from this 501(c)(3) Foundation. Per their website the Foundations stats: "Our guiding principle is that every individual should have full and equal access to justice, regardless of his or her financial means." When describing the grants that are available the Foundation state the purpose is to provide "civil legal services to the poor of Wyoming, who would otherwise be unable to obtain legal assistance." *See* https://www.equaljusticewyomingfoundation.org/

SO ORDERED BY THE COURT

Done this 12th day of November, 2021 *nunc pro tunc* to September 2, 2021

Lisa C. Arnolds
District Court Judge