

NO. 64382-7-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

TAMRA ROBINSON

APPELLANT

v.

TERRY ROBINSON

RESPONDENT

APPELLANT'S BRIEF ON APPEAL

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I. ASSIGNMENTS OF ERROR

Errors pertaining to Characterization

1.1 Error #1. The trial court erred in characterizing the Volvo proceeds as community property instead of Tamra's separate property (gift). *Findings, 2.8(2) and 2.10(5), CP 341-342.*

1.2 Error #2. The trial court erred in failing to allocate as a community expenses: the post-separation costs for the child's Bar Mitzvah celebration, childcare, pet care, and house repair expenses paid by Tamra following separation. *Findings, CP 340-347.*

1.3 Error #3. The court erred in failing to recognize sums received by Husband from community property after separation. *Findings, CP 340-347. \$611—RP 110-111*

Errors pertaining to Valuation

1.4 Error #4. The trial court erred in valuing the Suburban vehicle at \$9,535. *Findings, 2.8(7), CP 342.*

1.5 Error #5. The trial court erred in finding that the community owed \$39,648 on the buy-in of their 45% share of Attorney Messenger & Process Service, Inc. *Findings, 2.8(7), CP 342.*

1.6 Error #6. The trial court erred in finding community debt of \$20,000 owed to Attorney Messenger & Process service, *Findings 2.10(3), CP 343.*

1.7 Error #7. The trial court erred in finding that the Husband owed both a debt to his parents for \$40,000 and a debt for attorney's fees of \$64,375, *Findings 2.11(1) and (2), CP 343*.

1.8 Error #8. The trial court erred in failing to assign a value to the parties' post-separation earnings assigned to each at trial *Findings, 2.9(3), 2.9 second subparagraph 4, CP 342*.

1.9 Error #9. The court erred in establishing a rental value of the family home and finding that value to be higher than the monthly mortgage payment, *Findings, 2.21(2) and (3), CP 346*.

1.10 Error #10. The trial court erred in finding the Chase VISA community debt to be \$23,676, instead of \$22,676 after application of vehicle proceeds, *Findings 2.10(2), CP 343*.

Errors pertaining to Division of Property

1.11 Error #11. The court erred in awarding to each of the parties 50% of the community property and 100% of each party's separate property and separate debt, without any findings as to the post-dissolution economic circumstances that would result to each of the parties, *Decree, 3.2, 3.3, 3.4 and 3.5, CP 315-317. Findings, CP 340-347*.

1.12 Error #12. The court erred in failing to divide the

community portion of the business account (45%). *Decree, CP 315-317.*

Errors pertaining to Spousal Maintenance

1.13 Error #13. The court erred in finding need and ability and awarding spousal maintenance of \$3,000 per month, for 26 months² following a 14-year marriage, instead of the Mother's request for \$6,000/month (combined) for 42 months, *Findings, 2.12(7), CP 344; Decree, 3.7, CP 318.*

Errors pertaining to Child Support

1.14 Error #14. The trial court erred in failing to apply the Child Support Schedule in effect on the date of the Decree, *Decree, 3.12; Findings 2.20, CP 345-346; Order of Child Support, 3.16 (CP 305), Worksheets, CP 307-311.*

1.15 Error #15. The court erred in finding the Husband's income to be \$14,300 gross [per month], *Findings, 2.12 (5), 2.20(2), 2.20(5) and (6), CP 344-345; Child Support Order, CP 301-311.*

1.16 Error #16. The court erred in finding that it would order the same transfer payment regardless of actual income calculations for the Father, *Findings, 2.20(4), CP 345.*

1.17 Error #17. The court erred in failing to include contract-

² Effectively 25 months, because while "ending with the payment on November 1, 2011," and having maintenance payments "due on the 15th of the month," as entered, the Wife does not get maintenance the month of November 2011.

related benefits (health insurance premiums) as part of the Father's gross income, *Findings, 2.20(3), CP 345*.

1.18 Error #18. The court erred in dividing the tax exemptions for the dependent children three to the Father and one to the Mother, *Child Support Order, 3.17 (CP 305)*.

1.19 Error #19. The court erred in allocating proportionate to income only "extraordinary" health care expenses, which is contrary to the statute in effect on 10/1/09. *Child Support Order, 3.19 (CP 305-306)*.

Errors pertaining to Attorney Fees

1.11 Error #11. The court erred in finding that the Husband did not have the ability to pay toward the Wife's attorney fees, and in ordering no fees to be paid. *Findings, 2.15, CP 344; Decree, 317*.

Issues Pertaining to Assignments of Error

- A. Whether there was substantial evidence to support the court's characterization of property
- B. Whether there was substantial evidence to support the court's valuation of property and debts.
- C. Whether the court abused its discretion.
- D. Whether the court's award was fair and equitable.
- E. Whether unsupported characterization and/or values of assets

resulted in an inappropriate division of assets.

F. Whether the court had discretion not to apply the Child Support Statute in effect when the Decree was signed.

G. Whether the court correctly calculated the Father's income.

H. Whether the evidence supports the maintenance award to the Wife.

II. STATEMENT OF THE CASE

2.1 Background and Procedure: This crux of this case is the overall fairness of a property distribution to a stay-at-home mom who was awarded 50% of the marital estate with the only consideration for the disparity in earnings (\$170,000/year to \$40,000/year potential in two years) being just over two years of spousal maintenance, but who is left with less than 40% of the total estate after consideration of separate debts assigned to her. Of note is the absence in the record of any understanding by the trial judge of just what was the value and amount of property awarded to each, nor the resulting economic circumstances for the parties. The Wife challenges some issues of valuation and characterization of assets, as well as the omission of some liabilities and the denial of attorney's fees at issue and the failure to apply the Child Support Schedule in effect at the time of final orders. The dissolution case was tried before Judge Dean Lum in King County Superior Court

July 15-21, 2009. Final orders were entered following a presentation hearing on 10/2/2009. Tamra timely filed her Notice of Appeal.

2.2 Statement of Facts:

Tamra and Terry Robinson met in 1992 while attending the UW as students. RP 38. They were engaged a year later (RP 39), and married before either of them graduated from college. RP 40. They agreed that Tamra would quit school and focus on starting their family, and shortly thereafter Tamra became pregnant with the parties' first child. RP 40-41. Terry went on to graduate (RP 41) with a degree in [].

Tamra bore and raised the parties' four children: Jordan (13), Aiden (11), Alexander (9) and Elena (4) at the time of trial. RP 37. Their 14-year marriage began on August 28, 1994 and ended when Tamra filed for dissolution on August 8, 2008. RP 35. The parties agreed on a Final Parenting Plan prior to trial (RP 38, Exhibit 4), in which Tamra continues to be the primary residential parent.

Neither Terry nor Tamra had substantial assets when they married. Both had some savings from employment during college years—approximately \$15,000 apiece. RP 493. RP 439-440. After marriage, they pooled these savings to purchase their first home. RP 494. RP 439-440. The proceeds from the sale of that home were later applied toward the purchase of the home in which they were living at the time of separation. RP 439. Neither party sought any

reimbursement of separate property savings applied toward the family home. RP 440, 494. Tamra and the four children remained in the home at the time of trial. RP 37. Terry rented a home nearby. Exhibit 10, page 9. Following trial, but before entry of final orders, the parties agreed that the house be sold, rather than awarded to either party. CP 179.

Terry and Tamra were in the process of acquiring a 45% interest in Attorney Messenger Services, Inc., dba LMI and other names, an interest worth \$187,084 at trial. RP 100-101, Exhibit 15. They had been paying \$900/month toward a total obligation of \$105,000.³ RP 397. Exhibit 46. These sums are paid to the deceased former owner, Victor Spino's, estate. RP 291. The Robinsons' \$900/month represents 90% of the full 50% interest; the other 10% is the responsibility of Morris Scharhon (Terry's uncle, RP 291), making him the 55% owner of the company. RP 291. RP 332. RP 397. (This company serves the needs of legal offices by providing supplies, bonding and notary services. RP 395) Mr. Scharhon has no involvement in the day-to-day operations. Exhibit 14, page 9. It is Terry who runs the business. RP 399. For his efforts, he receives a salary, plus 45% of the net company profits. RP 333. There are many other expenses that are paid out by the company on his behalf, such as health insurance, a vehicle lease,

³ Though records to verify that these payments came from the parties and not from the business itself were not offered at trial.

transportation costs, entertainment benefits (sports tickets), telephone expenses, health club dues (RP 403-404) etc. Terry has been the primary breadwinner for the family and has controlled the family's finances (bill-paying, accounting, record-keeping). RP 476. His W-2 earnings for 2008 were over \$122,000 in addition to K-1 earnings of approximately \$65,000, for total gross compensation in excess of \$187,000/year. Exhibits 16, 256. There was in excess of \$40,000 in the business account at the time of trial. RP 380.

Some expenditures on company credit cards paid from company accounts were called into question and Terry acknowledged some improper, "unauthorized" expenditures to cover family medical bills. RP 338-339. As a result of this disclosure, amended tax documents were filed and those questioned expenses were reported as income to the business owners on their K-1 tax forms, 45% to Terry and 55% to Mr. Scharhon, resulting in additional taxes owed by each. RP 338-339. Company CPA Rodger Mulholland itemized at trial \$11,368.69 in unauthorized charges (medical, vehicle, travel, cable and health club). RP 342-342, Exhibit 40, Exhibit 252. The amended expenses for 2008 were \$2,252.49 in income for K-1 purposes. Exhibit 252. Terry's 45% portion was \$1,013.62 and this sum is the difference in the original and amended K-1 Forms for 2008. Exhibit 16, Exhibit 256. Mr. Scharhon's

55% share of this added income is \$1,238.87,⁴ income on which he would owe taxes at his filing rate, which was not disclosed. The court found that \$20,000 was owed to the company by the community. Findings, 2.10(3). There was no Note, no interest or repayment terms at the time of trial. RP 474.

In 2006, Tamra began efforts to resume her premarital pursuit of a nursing degree. RP 42. She was expected to graduate in June 2010 and qualify to sit for her exams to become a Registered Nurse (RN). RP 43. Her plans are to continue to obtain a Bachelor's of Science degree in Nursing (BSN) in anticipation of changing regulations that may require that level of education for nurses in the near future. RP 45-46. At the same time, she works one 12-hour shift per week (RP 56) as a Nurse Tech earning \$16.50/hour (RP 55) and 12 hours a month (two Saturdays, six hours each) as a Childbirth and Lactation Educator (teaching expectant families about birthing and breastfeeding), earning \$24.56/hour. RP 52, RP 194. (She continues to experience chronic back pain and is aware that this condition may pose limitations on her ability to perform nursing duties on a full-time basis. RP 46-48.) Some of her educational funding has come through the WorkFirst program for displaced homemakers. RP 57. If she completes her nursing education as expected in June 2011, she will have the potential to earn \$43,000

⁴ \$2,252 minus \$1,013 = \$1,239 in round numbers

per year. RP 43-50.

Tamra's efforts to obtain her nursing degree became a contention between the parties, leading to the decision to divorce. RP 66.

The parties' other disputed property issues consisted of:

A Suburban automobile, current driven by Tamra, she testified was in very poor condition (broken mirror, tears in armrest and seats, bald tires, bumps in body—older and in worse condition than the Volvo which sold for \$11,000), and thus worth approximately \$4,000. RP 72-73. The Kelley Blue Book valuation provided Tamra showed \$7,085 as the value for such a vehicle in "fair" condition. Exhibit 44. The Husband testified that it "was probably somewhere in the range of five to \$10,000" and "could be" worth \$9,500. RP 444. The Husband said nothing about the condition of the vehicle nor the basis for his opinion and provided no rebuttal market report to support his value. He did testify that in earlier efforts to sell the Suburban the parties were not able to get a good trade-in value for it. RP 443.

The 2002 Volvo automobile was purchased in November 2004 (RP 76), around the time of Tamra's birthday (November 25) and Tamra understood it to be her birthday present based on Terry comments to the children a few weeks later during Hanukkah, when they asked why Tamra was not getting presents like everyone else. RP 75. Terry

testified that “No” it was not a gift, without further explanation or detail. RP 444. It was sold after separation for \$11,000 (Exhibit 31), \$10,000 of which was retained by Tamra to be used “at her discretion” and \$1,000 of which was applied toward the community balance on the Chase credit card, pursuant to the parties’ Stipulation and Agreed Order of 1/22/09. Exhibit 6. RP 70-71. The characterization of these proceeds was specifically reserved to trial. Exhibit 6, page 2.

The parties had substantial community credit card debt—\$23,676 on a Chase credit card as of 6/15/09 (Exhibit 236), on which \$1,000 was paid from the sale of the Volvo. RP 71.

After the Petition was filed in August 2008 (CP 1-7), Terry continued to deposit his paycheck into the parties’ joint account until 9/10/08. RP 158. After 9/10/08, he retained his earnings in a different accounts. Exhibit 7, pg 77, 103. Starting November 2008, the parties reached agreement on the payment of interim expenses—Terry paid the mortgage (\$2,091/RP 83, Exhibit 218) and HELOC (\$357 avg/RP 83, Exhibit 29, Exhibit 220), preschool (\$1200/RP 423), VISA payments (\$300/RP 423), and paid Tamra \$1,990/month in undifferentiated family support from which Tamra paid for gas, food, clothing and personal expenses. Exhibit 241. Even after payment of business-related expenses and club memberships, to bring this 7-month average to \$7,586/month according to his own tally, Terry had \$2,805/month left

for his own living expenses and did not incur additional separate debt to make up any shortfall in living expenses. (He incurred \$2,000 in separate debt shortly before trial to purchase household furnishings for his new residence. RP 482)

<i>Nov 08 to May 09 summary</i>		
Monthly salary	\$ 3,503.66	Exh 208
Monthly salary	\$ 1,507.29	
Monthly salary	\$ 666.54	
Monthly dividend	\$ 4,000.00	
total/month	\$ 9,677.49	
x 7 months	\$ 67,742.43	
one-time bonus	\$ 5,000.00	12/31/2008
total/7 mos	\$ 72,742.43	
7-mo avg net	\$ 10,391.78	
7-mos pmts ⁵	\$ (7,586.00)	Exh 241
Left to Terry	\$ 2,805.78	

Over this same period, Terry was able to travel to Boston, Sacramento, Arizona, Hawaii and Cabo San Lucas, Mexico, for pleasure and to pursue his running hobby. RP 469-470.

Tamra asked the court to allocate certain specific post-separation obligations that were not otherwise provided for, including (a) expenses

⁵ These include payments that are not ongoing expenses of Tamra:

JCC Membership	\$ 40.00
Chase VISA	\$ 300.00
Buyout Business	\$ 900.00
Tamra dental	\$ 69.00
Bellevue Club	\$ 216.00
TOTAL	\$ 1,525.00

related to the oldest child's Bar Mitzvah (\$3,055, RP 114-117, Exhibit 27, Exhibit 32); (b) veterinary bills to treat the family pet (\$1,088/RP 120-122, Exhibit 33); (c) counseling expenses for joint counseling that occurred prior to the date of separation (\$1,000/RP 118-120); (d) day care (camp) expenses for their 4-year-old, \$1,200 (RP 112-113, RP 166, Exhibit 27, page 6); (e) school-related nanny expense, \$629 (RP 122-123, Exhibit 33); (f) family expenses during a period in fall 2008 when the children were not in school due to a teacher's strike (RP 124)—charges she made between the time of Terry's last paycheck deposit, 9/10/08 (RP 58) and the beginning of agreed-upon support payments, November 2008 (RP 83); and (g) a sink repair on the family home, \$379 (RP 125, Exhibit 33). Tamra also asked the court to credit Terry with a \$611 check he received from their investment accounts. RP 110-111. The Decree and Findings are silent in regard to these requests. CP 294-300, 340-347.

Tamra incurred substantial credit card debt following separation: \$20,438 on a CapitalOne card (RP 85, Exhibit 28); \$5,271 on a Bank of America VISA (RP 88-89, Exhibit 26); \$14,534 on a USBank VISA (RP 90, Exhibit 27); \$2,300 on a Nordstrom card (RP 90-91, Exhibit 253). She borrowed \$20,000 from Dave Johnson (RP 92, RP 178-179). Her attorney fees through the beginning of trial were almost \$36,000 (Exhibit 35); she requested \$20,000 be paid by Terry. RP 144.

Terry borrowed \$40,000 from his father after separation for litigation costs. RP 452. His fees were \$37,550 on 6/29/09. RP 490. There was no Note to verify the nature or terms of this debt. RP 463. The court included both the debt to Terry's father and the total of Terry's fees as separately listed separate obligations in its findings. *Findings*, 2.11(1) and (2), CP 343.

Following trial over the period of four days, Judge Lum awarded various items to each spouse, with the proceeds from the agreed-upon sale of the family home to be used to equalize the net community property to be received by each party. CP 300. Because the family residence was to be sold, the actual amount each party was to receive was not known to the court. RP 583.

III. LEGAL ARGUMENT

CHARACTERIZATION OF PROPERTY

3.1 Standard of Review on Characterization.

Before making a property division, the trial court must determine the nature and extent of the parties' community and separate property. RCW 26.09.080. *Marriage of Hurd*, 69 Wn. App. 38, 45, 848 P.2d 185 (1993). The court must have in mind the character of the property as community or separate. *Marriage of Hadley*, 88 Wn.2d

649, 656, 565 P.2d 790 (1977). If the court fails to bear in mind the true and correct character of the property begin divided, its division is invalid. **Pollock v Pollock**, 7 Wn. App. 394, 499 P.2d 231 (1972). The law favors characterization of property as community property unless there is clearly no question of its separate character. **Marriage of Davison**, 112 Wn. App. 251, 258, 48 P.3d 358 (2002). Assets acquired during the marriage are presumed to be community property. This presumption may be rebutted by showing the assets were acquired as separate property. **Marriage of Griswold**, 112 Wn. App. 333, 48 P.3d 1018 (2002).

The court's classification of property as separate or community is a question of law. **Marriage of Skarbek**, 100 Wn. App. 444, 447, 997 P.2d 447 (2000). Consequently review is *de novo*. **Marriage of Marzetta**, 129 Wn. App. 607, 120 P.3d 75 (2005). When the trial court has incorrectly characterized the parties' property, remand is required only if:

- (4) the trial court's reasoning indicates that its division was significantly influenced by its characterization of the property, and
- (2) it is not clear that had the court properly characterized the property it would have divided it in the same way.

Marriage of Hurd, at 55.

However, factual findings upon which the court's

characterization is based may be reversed only if they are not supported by substantial evidence. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. ***Griswold***, 112 Wn. App. 333, at 339.

3.2 Volvo was mischaracterized as community property.

With regard to the Volvo automobile purchase, the substantial evidence presented at trial, Tamra's testimony, is that the Volvo was intended as a gift to her (it was not a necessity—the parties had a separate automobile, the Suburban, which was not sold at the time the Volvo was purchased, RP 76). Terry simply said "No," and offered as evidence that the Volvo was *not* a gift the fact that it was titled in his name. RP 444. RP 192. However, the Washington State Supreme Court has recently ruled that with regard to determining separate or community property, "no presumption arises from the names on a deed or title" in ***Estate of Borghi***, 167 Wn.2d 479, 490, 219 P.3d 932 (2009). Terry did not rebut or deny making comments to the children affirming the intended gift of the Volvo to Tamra. His actions in not giving her other gifts for either birthday or Hannukah affirm this intent. There were no factual findings identified by the court upon which this characterization is based (such reasons to find

Terry more credible than Tamra), so there is no need to find abuse of discretion in overturning those findings. Based on *de novo* review of the record before it, the trial court erred in finding the Volvo to be community property.

Because the court otherwise awarded 100% of separate property to each spouse, it is not clear that it would have made the same property award if the Volvo had been characterized as the Wife's separate property (e.g., the \$1,000 paid from this separate source toward community debt would create a right of reimbursement to Tamra). At the very least, the value of this vehicle would be excluded from the community total in reaching the court's 50/50 division of community property.

3.3 Expenses paid by Tamra post-separation should have been considered community obligations and allocated/credited accordingly.

Expenses incurred following the point at which the parties live separate and apart are presumed to be separate obligations. This is a rebuttable presumption and Tamra's unrefuted testimony at trial was a sufficient basis for the court to find certain itemized expenses to have been for the community benefit—the Bar Mitzvah expenses for their son, counseling for both parties prior to separation, preschool/day care for the parties' 4-year-old child, living/activity expenses during a school

teachers' strike (and before temporary maintenance was paid), expenses for pet care and home repairs. All of these, totaling \$9,148,⁶ should have been borne in an equitable fashion by the parties together. None of these were contemplated or part of the usual an ordinary expenditures anticipated by the parties in their agreement about how to meet temporary expenses. The court entered no findings in regard to these requests so its basis for denying them was an abuse of discretion, there being no substantial evidence to do so.

3.4 Property received by Husband after separation from community source should have been credited to him.

Tamra testified that a check from an investment account in the amount of \$611 came to Terry after separation. Terry offered no testimony to refute this. The court offered no explanation or findings to support its omission of this item as a community asset from the Findings or Decree. It should be included and credited to Terry in an overall fair

⁶

Expense	Amount	Record
Bar Mitzvah/Hilton	\$ 2,554.92	RP 116, Exh 32
Bar Mitzvah/DJ	\$ 500.00	Exh 32
Day care/June 08	\$ 1,200.00	Exh 27, RP 112-113
Counseling expenses	\$ 1,000.00	RP 118-119
Vet expenses	\$ 1,088.06	RP 120-121, Exh 33
Nanny expenses	\$ 629.00	RP 123, Exh 33
Sink repair expense	\$ 379.86	RP 125, Exh 33
Teachers' strike activity expenses	\$ 1,796.00	RP 123-124, Exh 33
TOTAL	\$ 9,147.84	

and equitable division of assets. Its omission was an abuse of discretion.

VALUATION OF PROPERTY

3.5 Standard of Review on Valuation of property.

Courts have broad discretion in valuing property and will only be overturned if there has been a manifest abuse of discretion *In re Marriage of Gillespie*, 89 Wn. App. 390, 403, 948 P.2d 1338 (1997) and it is not a manifest abuse of discretion if the valuation is within the scope of the evidence. *In re Marriage of Mathews*, 70 Wn. App. 116, 122, 853 P.2d 462, review denied, 122 Wn.2d 1021 (1993). The purpose of requiring that the trial court set forth its valuation of the property in a dissolution action is to provide the appellate court with an opportunity to discover whether there has been an abuse of discretion. *In re Marriage of Hadley*, 88 Wn.2d 649, 657, 565 P.2d 790 (1977). Findings of fact supported by substantial evidence in the record will not be reversed on appeal. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Marriage of Hall*, 103 Wn.2d 236, 692 P.2d 175 (1984).

3.6 Value of Suburban is not supported. Here, as to the valuation of the 2001 Suburban, the court abused its discretion in finding it to be worth \$9,535. Tamra’s testimony had foundation—she was driving the vehicle and had first-hand experience with its condition. RP 72-73. Terry gave no foundation for his opinion. RP 444. Tamra submitted a Kelley Blue Book pricing report (Exhibit 44), which is acceptable evidence of value under ER 803(a)(17). **State v. Shaw**, 120 Wash.App. 847, 850, 86 P.3d 823 (2004). A 2001 Suburban with 100,000 miles in “Fair” was worth \$7,085. Tamra explained why the Suburban was in “Poor” condition—a mirror was broken, seats and an armrest were torn, the body had bumps. RP 72-73. RP 192-193. Terry provided no rebuttal reports or even testimony based on any contrary experience with the condition of the vehicle—in fact, he testified he was unable to get an “appropriate” trade-in on the Suburban at the time of the Volvo purchase. RP 443. Because there is no substantial evidence in the record on which the court could base its finding of a \$9,535 value⁷ for this asset, the court

⁷ At best, buried in Exhibit 8, the Wife’s 3/6/09 Answers to Interrogatories, admitted by stipulation, is an undated Kelley Blue Book report for the Suburban showing \$9,535 for a vehicle in “Fair” condition. There was no testimony or discussion at trial regarding whether this Exhibit was to form the basis of either of the parties’

abused its discretion in doing so.

3.7 Value of liability on business purchase not supported.

The court found the business to be worth \$187,084 based on expert witness Joe McCartney's updated business evaluation, Exhibit 15. The court then deducted the outstanding liability, the amount the Robinsons owed to "buy in" and purchase the 45% share of the business, using the amount of \$39,648. CP 324. This amount corresponds to the 3/15/09 balance owing on the Loan Amortization Schedule, Exhibit 46, page 4. This same exhibits shows that balance owing at the time of trial (7/15/09) was \$36,676. And the balance owing closest to the date of the Decree (9/15/09) was \$35,160. However, the Robinsons were responsible for just 90% of these payments (\$900 of the \$1,000 paid monthly to Mr. Spino). This was not disputed at trial. RP 458-459. Thus for any of the outstanding figures, the actual liability to Tamra and Terry was 90% of the stated sum.

Date	Amount owed	Robinson 90%
8/15/2008	\$44,663.07	\$ 40,196.76
9/15/2008	\$43,960.82	\$ 39,564.74

opinions as to the value of the vehicle, nor whether it remained a current or reliable estimate as of the date of trial.

10/15/2008	\$43,253.89	\$ 38,928.50
11/15/2008	\$42,542.25	\$ 38,288.03
12/15/2008	\$41,825.87	\$ 37,643.28
1/15/2009	\$41,104.71	\$ 36,994.24
2/15/2009	\$40,378.74	\$ 36,340.87
3/15/2009	\$39,647.93 <<	\$ 35,683.14 <<
4/15/2009	\$38,912.25	\$ 35,021.03
5/15/2009	\$38,171.67	\$ 34,354.50
6/15/2009	\$37,426.15	\$ 33,683.54
7/15/2009	\$36,675.66	\$ 33,008.09 <<
8/15/2009	\$35,920.16	\$ 32,328.14
9/15/2009	\$35,159.63	\$ 31,643.67 <<

Courts have broad discretion to pick a valuation date for assets that is equitable. *Koher v. Morgan*, 93 Wn. App. 398, 404, 968 P.2d 920 (1998), *review denied*, 137 Wn.2d 1035 (1999). Judge Lum, however, gave no explanation for choosing a 3/15/09 valuation date for this liability, while at the same time accepting the “updated” business valuation date (Exhibit 15) affirmed as accurate in the trial testimony of Mr. McCartney on 7/20/2009. RP 391. As of the trial date, the Robinsons’ portion of this liability was \$33,008; as of the date of the Decree, it was \$31,644. Based on the evidence before the court, the Robinsons’ liability was never \$39,648 and it was an abuse of discretion for the court to so find.

3.8 Valuation of community debt for unauthorized expenses is unsupported by substantial evidence.

The court found that the parties owed a debt to the business of \$20,000. However, there was no testimony or exhibits presented to Judge Lum to support this sum. At most, \$11,368 were identified as “unauthorized,” non-business-related transactions on the business credit card statements for 2007 and 2008, prompting an amended K-1 Form adding \$2,252 in additional income to the partners, 55:45. At most, Terry would owe to Morris the 55% of this sum that would otherwise have been received by him as income—\$1,238.87. The remainder was already properly “received” by Terry as income—he does not owe that debt back to himself! RP 339, 375. Exhibit 252 shows a similar analysis for 2007 (though Amended K-1 Forms for this year were not offered at trial). The total of added-in expenses is \$9,116.44, of which 45% is Terry’s (\$4,102.42) and the remainder was attributed to Morris (\$5,014.02). Taking the evidence in the light most favorable to Terry (as to whether these amounts are in fact a debt to be repaid), the community would owe Morris \$1,238.87 for 2008 and \$5,014.02 for 2007, a total of **\$6,252.89**. There is no evidentiary or testimonial support for the court’s \$20,000 valuation of this community liability.

There is further no substantial evidence that this “debt” is to be paid back at all. First of all, the sums were already included in an adjusted K-1 and considered income paid to Terry. Secondly, there was no Note or other document verifying terms of any pay-back expectation. RP 375. It’s untenable to conclude there is a debt at all.

3.9 Valuation of Husband’s separate debts includes overlap.

The court listed both a separate liability incurred by the Husband in the amount of \$40,000 (loan from his parents) and attorney fees of \$64,375. CP 343. These debts initially appear to be unrelated, but the \$40,000 from Terry’s parents was for the purposes of litigation expenses, so instead of appearing as a total of \$100,000 in separate debt, the fee balance was in fact reduced by the \$40,000 applied to it.

To some extent the Findings attempt to clarify this by stating “\$18,800 is owing” as of 8/13/09. CP 343. It is important for purposes of determining the final economic position of each party after dissolution that the same underlying debt (attorney fees) not be double-counted by including sums used to pay down those fees as though it were an additional obligation.

3.10 Value of parties’ post-separation earnings was omitted.

To insure an equitable distribution, it is necessary for the trial court to make a valuation of all properties, whether community or separate. *Friedlander v Friedlander*, 80 Wn.2d 293, 494 P.2d 208 (1972).

The court assigned to each party his/her post-separation earnings but did not include a finding about the respective values. According to Exhibit 208, a company register of the net amounts paid to Terry, the value of this asset, over ten months from 8/11/08 to 6/10/2009, was \$106,785.85 (net of all taxes—cash actually received). Projecting at the rate of \$10,678/month through 9/2009 (the date through which the parties' agreed terms were ordered to continue, CP 300), the total awarded to Terry is **\$138,821.60** (net). Exhibit 17 shows Tamra's net earnings through 5/17/09 to be **\$3,163**,⁸ and average of \$351.53 over

8

Date	Gross Earnings	Source	Net
8/9/2008	\$ 425.79	paystubs/Exh 17	\$ 392.54
8/23/2008	\$ 318.58	paystubs/Exh 17	\$ 293.70
9/20/2008	\$ 135.93	paystubs/Exh 17	\$ 125.30
11/15/2008	\$ 141.84	paystubs/Exh 17	\$ 130.75
11/29/2008	\$ 44.00	paystubs/Exh 17	\$ 40.56
12/13/2008	\$ 265.95	paystubs/Exh 17	\$ 245.17
12/27/2008	\$ 184.43	paystubs/Exh 17	\$ 170.01
2/7/2009	\$ 375.00	paystubs/Exh 17	\$ 345.67
3/7/2009	\$ 270.50	paystubs/Exh 17	\$ 249.35
3/21/2009	\$ 331.97	paystubs/Exh 17	\$ 305.99
4/4/2009	\$ 282.78	paystubs/Exh 17	\$ 260.66
4/18/2009	\$ 282.78	paystubs/Exh 17	\$ 260.66

those nine months. Projecting through 9/2009, 4½ months, adds \$1,581.88 for a total of **\$4,744.88** in net income. To be fair, under the parties' temporary agreement, Terry paid the following sums on a monthly basis (RP 83):

Item	Amount/Mo	Nov 08 to Sep 09	Source
Support	\$ 1,990.00	\$ 21,890.00	RP 83
Mortgage	\$ 2,091.07	\$ 23,001.77	RP 83
LOC pmts	\$ 356.92	\$ 3,926.12	RP 83
TOTAL	\$ 4,437.99	\$ 48,817.89	

After deducting \$48,817.89 from \$138,821.60, the sum awarded to Terry is **\$90,003.71**. Nowhere in the court's findings does it indicate it considered the disparity in these sums in finding the overall award to be fair.

3.11 The court should not have established a rental value of home pending sale.

It is not clear the purpose for the court's finding that the family home had a rental value of \$2,200/month. Because the overall division of property was to be 50/50, it could be interpreted to mean that the Wife will be deemed to have "received" as value this sum over the

5/16/2009	\$ 372.22	paystubs/Exh 17	\$ 343.12
9-mo total	\$3,431.77		\$3,163.48
9-mo avg	\$ 381.31		\$ 351.50

months in which she occupies the family home before it is sold (subject to her obligation to pay the monthly mortgage of \$2,142/month). If this is what was intended, this is directly contrary to the court's finding in *Marriage of Nuss*, 65 Wn. App. 334, 339, 828 P.2d 627 (1992) in which the court found it improper to charge a spouse "rent for occupying a portion of community real property" especially in the absence of evidence that would have permitted "a sound determination of rental values." In *Nuss*, the court's determination of rental value assigned to the Wife was reversed. In the present case, the court's intent is unclear, but should there be any means of interpreting this as an "asset" assigned to Tamra, it should be reversed as well.

3.12 Valuation of Chase VISA balance does not appear to credit Wife for payment.

While the record is clear and undisputed that Tamra applied \$1,000 of the Volvo proceeds toward the community Chase VISA balance (CP 342), the court's finding that the balance remained the original amount (\$23,676/CP 343) leaves open whether the court in fact credited Tamra for this payment. Subject to characterization of the Volvo, the community may either owe this sum back to her separate estate, or Terry's portion of it should be offset in reaching an equitable

distribution of assets and debts.

EQUITABLE DIVISION OF PROPERTY

3.13 Standard of Review on Division of Property.

In weighing the statutory factors for accomplishing a “just and equitable” distribution of marital property, the trial court has broad discretion and its decision will be reversed only if there is a manifest abuse of discretion. *Marriage of Rockwell*, 141 Wn. App. 235, 242-243, 170 P.3d 572 (2007). A manifest abuse of discretion occurs when the discretion was exercise on untenable grounds. *Id.*, at 243. If the decree results in a patent disparity in the parties’ economic circumstances, a manifest abuse of discretion has occurred. *Id.*, citing *In re Marriage of Pea*, 17 Wn.App. 728, 731, 566 P.2d 212 (1977).

In the present case, Judge Lum could not have determined the outcome of the distribution because he did not value all assets assigned, nor know what each party was receiving as a result of his ruling.

3.14 Property division must be just and equitable.

The trial court's distribution of property in a dissolution action is guided by statute, which requires it to consider multiple factors in reaching an equitable conclusion. These factors include:

- (1) the nature and extent of the community property;
- (2) the nature and extent of the separate property;
- (3) the duration of the marriage and
- (4) the economic circumstances of each spouse at the time the division of property is to become effective.

RCW 26.09.080. **Rockwell**, at 242. Primary among those factors is the economic circumstances in which the decree will leave the parties.

In re Chavez, 80 Wn. App. 432, 439, 909 P.2d 314 (1996). All of the parties' property, both community and separate, is before the court for distribution. **Griswold**, 112 Wn. App. 33, at 339. To insure an equitable distribution, it will be necessary for the trial court to make a valuation of all properties, whether community or separate. **Friedlander v Friedlander**, 80 Wn.2d 293, 494 P.2d 208 (1972).

Courts have statutory authority to consider separate property in making a fair and equitable division of property in a dissolution.

Marriage of Landry, 103 Wn.2d 807, 811, 699 P.2d 214.

3.15 The court did not know the value of property awarded to each

party or economic result.

The court appears to have intended to award each party 50% of the community⁹ assets/debt plus 100% of his/her separate property/debt. Tamra had no separate property other than her wedding ring. The court does not know what it awarded to either party, which is required before the court can determine that the overall distribution was fair and equitable to both parties.

MR FEINERMAN: Your Honor, all I'm asking is if the Court intends for a 50/50 division, because this doesn't effectuate it.

THE COURT: Well, we're trying to get close to it. But the problem is we haven't—you know, the problem is we don't know what the house is going to sell for. And we have no idea. So it just—and when you have a situation like that, you can't—you're talking apples and oranges, Counsel.

MR. FEINERMAN: I agree, Your Honor. And the only way—

THE COURT: And what you're trying to do is you're trying to set up for a situation where, you know, it sounds like I'm trying to get a certain division. But you can't really do it that way if you're selling the home in the future, can you? RP 582-583.

MS WHITAKER: And so the Court—and the Court's intent was to divide the property 50/50?

THE COURT: Well, I was trying to get as close to it as I could—

MS WHITAKER: Okay. All right.

⁹ Though "community" is not specified in the court's comments at presentation, this is assumed in Terry's favor for purposes of this appeal. RP 581-582, 584, 588

THE COURT: –with the understanding that I attempted to get close to that with the 52 percent figure, right? Because then I was trying to get an estimate with the acknowledgement that I really couldn't—I didn't know how much the house was going to sell for.

MS WHITAKER: Right.

THE COURT: I don't know what the net was. RP II:33.

MS WHITAKER: Right. So if the Court is telling us that you want to achieve a 50/50 division of the property and if the Court is instructing me to look into this issue and check the figures out, I will do that.

THE COURT: All right. Let's do that. RP 589.

It is clear from this portion of the transcript that Judge Lum had no idea, even in eventually stating his intent that the parties each end up with 50/50 (whether community property, or all property is not stated), what that actually meant to each party in terms of their post-dissolution financial circumstances. Such a “blind” ruling is, on all counts, an abuse of the court's discretion. There was no analysis of any kind about how much the Wife would have in assets or in cash (whether community or separate), how or whether she would be able to support herself and meet expenses for the children, and whether that result would be equitable. The court made no finding about what the total net estate value was, even with an estimated home value of \$675,000. Nowhere is this summarized or quantified in any way such that the net economic effect for the parties was considered. Here is a

truncated summary of the assets and values listed in the court's findings
(see complete chart from Decree/Findings at Appendix A):

	VALUE	TO TERRY	TO TAMRA	RECORD
PROPERTY subtotal	\$302,050.00	\$289,884.00	\$ 12,166.00	
CP subtotals	\$274,733.00	\$218,791.00	\$ 55,942.00	
House value (675,000 - 292,000 - 110,300)	\$272,700.00			CP 341
(Sale costs/8.5% est)	\$ (23,179.50)			
Net home proceeds	\$249,520.50	\$ 43,335.75	\$206,184.75	CP 296, 341
Total community	\$524,253.50	\$262,126.75	\$262,126.75	
Husband's SP	\$ 71,093.00	\$ 71,093.00		
Wife's SP	\$ (43,776.00)		\$ (43,776.00)	
TOTAL PROPERTY	\$551,570.50	\$333,219.75	\$218,350.75	
Net division		60.4%	39.6%	

It is noteworthy that the trial court initially ordered that 52% of the net home proceeds from the house be awarded to Tamra, in the expectation that this would "get close" to a 50/50 award of property. In fact, that would have resulted in a 65:35 split in Terry's favor:

	VALUE	TO TERRY	TO TAMRA
PROPERTY SUBTOTAL	\$302,050.00	\$289,884.00	\$ 12,166.00
Community property subtotals	\$274,733.00	\$218,791.00	\$ 55,942.00
House value (675,000 - 292,000 - 110,300)	\$272,700.00		
(Closing costs/unknown . . . 8.5% estimate)	\$ (23,179.50)		
Net home proceeds (estimate)	\$249,520.50	\$119,769.84	\$129,750.66
Total community property	\$524,253.50	\$338,560.84	\$185,692.66
PERCENTAGE CP		64.6%	35.42%
Husband's separate property	\$ 71,093.00	\$ 71,093.00	
Wife's separate property	\$ (43,776.00)		\$ (43,776.00)
TOTAL PROPERTY TO EACH	\$551,570.50	\$409,653.84	\$141,916.66

Net division of property			74.3%	25.7%
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The court's distribution was manifestly unreasonable given the facts and circumstances presented at trial and should be reversed.

3.16 The court failed to award CP account funds in business.

The court heard testimony about cash retained by the business in the range of \$40,000 to \$47,000 from Mr. Mulholland. RP 380. The Robinsons' 45% share of this account balance was between \$18,000 and \$21,150. This cash balance was not included in the business valuation that was prepared by Terry's expert, Exhibit 15. The court erred in failing to include and equitably dividing the community interest in this account.

SPOUSAL MAINTENANCE

3.17 Standard of Review re Maintenance.

The court has discretion when awarding maintenance. The party who challenges a maintenance award must demonstrate that the trial court manifestly abused its discretion. A trial court abuses its discretion when it does not base its award upon a fair consideration of the statutory factors under RCW 26.09.090. *Marriage of Marzetta*, 129 Wn. App. 607, 624 (2005). RCW 26.09.090 requires the court to

consider:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

These are non-exclusive factors. *Marzetta*, at 624. Of primary concern are the parties' respective economic positions following dissolution. *In re Marriage of Washburn*, 101 Wn.2d 168, 181, 677 Pl2d 152 (1984).

The court's decision on maintenance is governed strongly by the need of one party and the ability of the other party to pay. *In re Marriage of Foley*, 84 Wn.App. 839, 845-846, 930 P.2d 929 (1997). Maintenance

is not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time. *Marriage of Morrow*, 53 Wn. App. 579, 585, 770 P.2d 197 (1989).

3.18 Tamra's needs and Terry's ability justified greater award

Tamra's monthly expenses were \$6,443 according to her testimony at trial and her Financial Declaration, Exhibit 35, none of which were challenged at trial. (The court entered no findings about either party's monthly expenses.) Terry's stated monthly expenses were \$7,988 according to Exhibit 249, yet at trial he acknowledged that for some items, he was "not sure how that was calculated," RP 480 [day care]; he was "not actually spending that" RP 481 [clothing]; and others were "anticipated" RP 482 [vacations]. Terry's net monthly income was found to be \$11,063.80 before maintenance (CP 308), and he had demonstrated his ability to contribute toward Tamra's and the children's expenses a total of \$6,061¹⁰ per month based on the parties'

¹⁰ Terry's chart of expenses, Exhibit 241, less those Tamra would not continue to pay: \$7,586 minus \$1,525 = \$6,061:

7-month average	\$ 7,586.00	Exh 241
JCC Membership	\$ (40.00)	
Chase VISA	\$ (300.00)	
Buyout Business	\$ (900.00)	

temporary agreement—see chart below. Because the cost of preschool (\$1,200/month) has been replaced by full-day kindergarten (\$300/month) and there is some breathing space built-in for Terry in that he'll only pay his proportionate share of those actual costs.

3.19 Terry had the ability to pay what Tamra requested.

At trial Terry claimed that he was only able to make these payments because he was in a temporary housing situation that enabled him to do so. He claimed that he was paying \$1,500/month and no utilities. RP 425. Yet his lease at the time, page 9 of Exhibit 10, shows that he was in fact responsible for his utilities.¹¹ At the time of trial his rent went up to \$1,725—an increase of \$225/month. This was not a substantial change in his financial outlay, meaning that he still had virtually the same ability from his net earnings to continue maintenance and support payments at the same combined level as before.

Tamra's need was significant—\$6,443 per month. Providing for her maintenance of \$3,000 plus child support of \$1,499, a total of \$4,500,

Tamra dental	\$ (69.00)	
Bellevue Club	\$ (216.00)	
Subtotal expenses		\$(1,525.00)
TOTAL remaining	\$ 6,061.00	

¹¹ "Utilities: Tenant shall pay for service and utilities supplied to the premises

left her with a monthly shortfall of \$1,943. Because of her anticipated school schedule as well as caring for the children, she was not expected to increase her earning potential until after receiving her BSN in summer of 2011 (projected). Thus she had no feasible way to cover this shortfall—something the court does not appear to have given equitable weight. This in turn will jeopardize her ability to obtain the nursing degree that will give her the anticipated income stream if she must quit school in order to work more to make ends meet. Terry agreed that maintenance was appropriate. RP 483. The court did not, however, provide maintenance in an amount sufficient to allow Tamra to obtain her degree without serious financial hardship. Terry, on the other hand, with the children much less of the time and with fewer expenses as a result, ends up with a surplus, when his stated expenses are adjusted to reflect the evidence:

Expense	Terry says	Should be	Difference	Reason
Water/sewer/garbage	\$ 150.00	\$ 50.00	\$ 100.00	unsupported
Food for 5	\$ 1,300.00	\$ 900.00	\$ 400.00	Mother's budget with children 71% of the time is \$1,250 total; Fa's total reduced by 30%
Day care	\$ 900.00	\$ 210.00	\$ 690.00	70% of 300/kindergarten

except _____ which will be furnished by Landlord.”

Clothing for kids	\$ 400.00	\$ 50.00	\$ 350.00	unsupported
Nanny/babysitter	\$ 253.00	\$ 177.10	\$ 75.90	70% of 253
Other child-related	\$ 200.00	\$ 50.00	\$ 150.00	unexplained
uninsured health (children)	\$ 219.00	\$ 153.30	\$ 65.70	70% of 219
Uninsured health (Terry)	\$ 100.00	\$ -	\$ 100.00	unsupported
Clothing (Terry)	\$ 200.00	\$ 50.00	\$ 150.00	anticipated
Clubs/recreation	\$ 350.00	\$ 256.00	\$ 94.00	Exh 241/RP 481
Gifts	\$ 200.00	\$ 50.00	\$ 150.00	Inflated
Home furnishings/impvmts	\$ 200.00	\$ -	\$ 200.00	one-time/RP 482
Vacations	\$ 200.00	\$ -	\$ 200.00	excessive
Charitable contributions	\$ 100.00	\$ -	\$ 100.00	unsupported
LMI office buy-in	\$ 900.00	\$ -	\$ 900.00	included as debt to reduce business value awarded to H (a double-count of same debt) or paid by business on H's behalf (thus income)
TOTAL overstated expenses in 7,988 total Actual monthly exp	\$4,263/month		\$3,725.60	

With net income of \$11,063, and covering his actual, not inflated, expenses of \$4,263/month, Terry has \$6,800 left over to contribute toward the expenses of Tamra and the children, more than the \$6,000 total Tamra was requesting at trial.

3.20 Duration of maintenance was inequitably short

As to duration of maintenance, Tamra requested 3½ years (42 months). This would allow her not only to complete her education but time to find work and become established in her career. It would also

give her the benefit of the income stream the community worked together to acquire, thus rewarding her efforts as the stay-at-home parent enabling Terry to ensure the business' success for the intended benefit of the entire family. Maintenance is also a "flexible tool" in situations where property division alone is insufficient to leave the parties on equitable financial footing. It goes without saying that Tamra is not expected to ever match Terry's earnings in her career, especially not with a 14-year delay in entering the workforce. It is equitable to provide at least a minimal period of income benefit from the income stream resulting from joint efforts during the marriage. Once maintenance terminates, Terry's standard of living will increase dramatically while Tamra's will undoubtedly decrease.

This is a situation much like the *Morrow* case¹²—in which the Wife helped the Husband through school to completion of his degree, where the Wife then stayed home to raise the family's children, where the business resulting from the Husband's efforts provided a comfortable standard living for the family, where the Husband used the business as a tax shelter for many expenses to minimize his income, where the Wife sacrificed her earning potential by becoming a homemaker and

forfeited economic opportunities as a result. Mrs. Morrow had a physical limitation on her ability to work full-time, as does Tamra to some degree, and the court found that the Wife was not like to achieve the same financial independence as the Husband even with additional education and training. (In short, she cannot get back the time and opportunities that have been lost.) In **Morrow**, the court upheld an award of lifetime maintenance of \$2,200/month, only slightly less than the temporary sum of \$2,500/month the Husband had been paying. **Morrow** involved a 23-year marriage and some questionable property transactions by Mr. Morrow, but the parallels to the present case are notable and certainly one would expect a higher and longer period of maintenance for Tamra by comparison.

Marriage of Hurd¹³ also has similar facts to the present case. This was a 14-year marriage, in which the Wife quit her job at the time of marriage, became pregnant six months later, and stayed home to raise the parties' children. The court divided the property so that Ms. Hurd received "a little over half" of community property plus three years of maintenance (\$500/month plus the cost of health insurance). The case

¹² 53 Wn. App. 579, 770 P.2d 197 (1989)

¹³ 69 Wn. App. 38, 848 P.2d 185 (1993)

was remanded because the trial court failed to properly consider separate property characterization and the donative intent behind certain transfers. Other omitted items were to be considered on remand as well.

3.21 **Resulting economic disparity should have been offset by longer term maintenance.**

A disproportionate award of property in favor of the only spouse with any significant earning capacity would be an abuse of discretion were it not balanced by long-term maintenance. *Marriage of Tower*, 55 Wn. App. 697, 701, 780 P.2d 863 (1989). In *Tower*, the Husband received 63% of the assets, but the court ordered ongoing maintenance that would terminate on death or remarriage (essentially permanent). Here, the overall property division falls in Terry's favor, but there is no balancing long-term maintenance award to Tamra.

CHILD SUPPORT

3.22 **Standard of Review re Child Support.**

The court reviews child support orders for a manifest abuse of discretion. To succeed on appeal, the appellant must show that the trial court's decision was manifestly unreasonable or based on untenable grounds or reasons. *Marriage of Marzetta*, 129 Wn. App.

607 (2005).

3.23 No discretion but to apply law in effect.

RCW 26.09.100 requires the court to order payment of support in an amount determined by RCW 26.19. RCW 26.19.020 contains an economic table for establishing support which is presumptive for households with total net incomes up to \$12,000 per month. For net combined household incomes over \$12,000 per month, the amounts in the table may be exceeded upon written findings of fact. The effective date of this table is 10/1/2009. The Order of Child Support in the Robinson case is dated 10/2/2009, but the Worksheets in support of that Order do not reflect the table in effect at the time the Order was entered.

This court faced a similar issue in *Marriage of Vander Veen*, 62 Wash. App. 861, 815 P.2d 843 (1991), in which the economic table adopted by Skagit County had taken effect 2/1/1989, and yet the August 1989 Orders dissolving the marriage and setting child support failed to follow those tables. As in the present case, the effective date of the new tables fell between the date of trial and the date of entry of final orders. Due to the mandatory language in the RCWs, the Order was

reversed because the law in effect at the time was not followed. The same should occur here.

3.24 **The court failed to include all income to the Father.**

The court did not include as income to Terry the sum of \$10,800 (\$900/month x 12) paid by the company to Mr. Spino for his share of the 45% interest buy-in. This item was raised by Ms. Saunders in her testimony, RP 291-292, and a summary of these payments is included page 26 of Exhibit 45. Terry had the opportunity to document that \$900/month was paid in or deposited separately to the business account before these payments came out, but did not do so. RP 397-398. Nor do regular \$900 monthly payments appear in any of the admitted bank statements. "Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him." ***Henderson v. Tyrell***, 80 Wn. App. 592, 606, 910 P.2d 522 (1996). The court must infer that if these payments were made as Terry stated, there would be some supporting record to that effect that he would

have produced. Because he did not, and these records were under his control, the court must conclude the evidence would not in fact support his testimony.

The records provided to and reviewed by Ms. Saunders, including a check register detail report (RP 286) did not show regular deposits to cover these payment. RP 292. (An electronic Quickbooks file was not provided to Ms. Saunders for review. RP 287.) \$10,800 should be added to Terry's annual income (\$900/month) for payments made by the company for his benefit.

3.25 The court should not have excluded W-2 income.

Nor did the court include the health insurance payments made on his behalf which are indisputably "income" to Terry—they are included as wages on his W-2 Form (Exhibit 16). Backing out certain expenses is allowable for purposes of business taxation, but not for determining gross and net income for child support purposes. While the court, in excluding health insurance costs as income to the Father then appropriately denied his request to still take the medical insurance deduction, it should have done the reverse—included all health insurance benefits as income (using W-2 income plus K-1

income, *before* deducting retirement contributions) and then determined child support based on net income as allowed by statute.

Once an appropriate level of child support and maintenance was determined, the cost of health insurance premiums was then to be shared proportionate to income under the new tables, and the Mother would be responsible for her share which, if paid by the Father, would be appropriately credited to him.

3.26 The court should have exceeded the economic table.

The court at presentation referenced a “package” though the details of said package are not part of the record. RP 574. Based on the dialogue from counsel, it appears they did not expect that total ordered (\$3,000 maintenance plus \$1,499 support, or \$4,500/month in round figures) would have changed regardless of income considerations or applying the new economic tables. If this is the case, then once again the court demonstrates that it did not know (or consider) the effect on Tamra of (a) having to claim and pay taxes on a higher portion of maintenance in this “package” than under the new tables; or (b) the resulting shortfall (\$1,592/month¹⁴ before payment on debts/Exhibit) in the Mother’s home that will significantly lower

the children's standard of living, a consideration that warranted reversal in *Marriage of Krieger*, 147 Wn. App. 952 (2008).

The court should remand for the inclusion of all income to the Father (Spino payments, if not verified as paid from Father to the company, and health insurance attributed as income to him) and the correct application of the effective child support statute, as well as considering the effect of the total transfer payment on the children's standard of living, including whether or not the tables should be exceeded in this situation where household net income exceeds \$12,000 per month. Another difference required under these changes is that all medical expenses, not just "extraordinary" expenses are to be shared between parents proportionate to income. Thus Tamra should not be obligated to pay the first \$114/month of uninsured health care expenses for the children.

3.27. The court should have awarded two tax exemptions to each parent.

Tax exemptions for dependent children are generally considered to be an element of child support. *Marriage of Peterson*, 80 Wash. App. 148, 155, 906 P.2d 1009 (1995). A child's best interests are

¹⁴ Tamra's average income is \$351 net

served when the financial situations of the parents are maximized. To ensure that an exemption is used efficiently as tax laws, income levels, and child support obligations change, the trial court must retain the authority to allocate exemptions to the party who will benefit most from them. *Id.*, at 156. The court made no findings about the relative benefits to either party from taking the tax exemptions for the children, but in light of the maintenance upon which Tamra will have to pay taxes (especially if reversed to more equitably meet her needs), there is no evidence in the record to support allocating one exemption to her and three to Terry. They should be divided two to each parent.

ATTORNEY FEES

3.28 Standard of Review re Attorney Fees

The awarding of attorney's fees is within the sound discretion of the trial court, and its determination will not be reversed on appeal unless untenable or manifestly unreasonable. *Dakin v Dakin*, 62 Wn.2d 687 (1963).

3.29 Attorney fees should have been awarded to Tamra at trial

Trial courts have authority to award attorney fees an expenses in

marriage dissolution proceedings. RCW 26.09.140. The purpose of this statute is to allow parties to fully litigate issues related to their dissolution without regard to the ability to afford legal bills. **Marriage of Irwin**, 64 Wn. App. 38, 65, 822 P.2d 797 (1992) (an award of \$75,000 in fees to the Wife upheld because Husband had a greater ability to earn a living than Wife, so could better afford legal bills)The general equity of the fee given the disposition of the marital property is also considered. **Marriage of Davison**, 112 Wn. App. 251, 259, 48 P.3d 356 (2002). A spouse's receipt of substantial property or maintenance does not preclude the spouse from also receiving an award of attorney fees and costs when the other spouse remains in a much better position to pay. **Marriage of Morrow**, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

Because, as demonstrated above, the trial court did not have a complete understanding of the resulting financial ability of either party to pay attorney fees, it was an abuse of discretion to deny Tamra's request for \$20,000 of her fees to be paid by Terry. Terry had surplus monthly income and assets from which fees could be paid, whereas the fund available to Tamra for fees were also assigned to her as part of the asset award (Volvo proceeds of \$10,000, BECU funds of \$5,000).

3.30 Attorney fees on appeal should be awarded to Tamra.

RAP 18.1 allows this court to award fees where it is statutorily

allowed.

RAP 14.2 allows for costs to the prevailing party and RAP 14.3 includes reasonable attorneys fees as allowable costs. If Tamra prevails, she should be awarded her costs.

RCW 26.09.140 authorizes this court, in its discretion, to award reasonable fees on appeal after considering the financial resources of the parties. ***Marriage of Wright***, 107 Wn. App., at 489. . An appellate court may order a party to pay for the cost to the other party of maintaining the appeal and attorney fees in addition to statutory costs. ***Marriage of Griffin***, 114 Wn. 2d 772, 791 P.2d 519 (1990).

In awarding attorney fees on appeal, the court should examine the arguable merit of the issues on appeal and the financial resources of the respective parties. ***Griffin***, 114 Wn.2d, at 779.

The significant disparity in the parties' earnings puts Terry in the position of having much greater ability to pay Tamra's attorney fees. She must preserve what assets she can in order to tide her over until she completes her education and finds full-time employment, while at the same time bearing the majority of child-rearing. (Payment of attorney fees may leave a party in an economically disadvantaged position in comparison with an ex-spouse. ***Marriage of Bulicek***, 59 Wn. App. 630, 640, 800 P.2d 394 (1990). The disparity in income is also relevant—Terry receives the benefit of at least \$170,000/year;

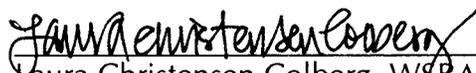
Tamra's best projection by 2011 will be \$43,000. Until then, her only resources are \$351/month income plus maintenance and support. Her financial declaration will be submitted in accordance with RAPs.

IV. CONCLUSION

The court abused its discretion in this dissolution proceeding on several levels, paramount of which is its total lack of understanding of the economic circumstances its decision would leave the parties in after dissolution—leaving Tamra with no feasible economic means to “make it” to her goal of sufficient training and education to make even a modest living. Items were omitted from the court's findings and decree without explanation, other valuations are not supported. The overall division of assets and maintenance award cannot be said to have been within a discretionary ruling in light of all of these errors. This matter should be remanded or portions reversed to accomplish a fair and equitable resolution in light of the overall economic situation facing each party after dissolution.

DATED this 18th day of May, 2010.

MICHAEL W. BUGNI & ASSOCIATES



Laura Christensen Colberg, WSB

#26434
Attorney for Appellant/Mother

CERTIFICATE OF SERVICE

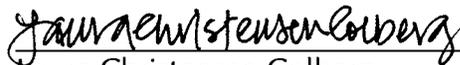
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Laura Christensen Colberg

NO. 64382-7-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

TAMRA ROBINSON

APPELLANT

v.

TERRY ROBINSON

RESPONDENT

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AMENDED "APPENDIX A" TO APPELLANT'S BRIEF ON APPEAL

Laura Christensen Colberg, WSBA #26434
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ROBINSON
Decree Results Summary – Amended Appendix A

Asset	Value	SP	to Husband	to Wife	Decree	Findings
Business (AMPS, LMI, etc.)	\$ 187,084.00		\$ 187,084.00		3.2(1)/CP 295	2.8(2)/pg 2
LMI Education seminars	zero		x		3.2(2)/CP 295	2.8(3)/pg 3
Pacific Life term policy x5220	zero		x		3.2(3)/CP 295	2.8(4)/pg 3
Pacific Life term policy x5610	zero			x	3.3(1)/CP 296	2.8(4)/pg 3
AXA Life insurance policy x5306	\$ 10,800.00		\$ 10,800.00		3.2(4)/CP 295	2.8(5)/pg 3
Bk of Am x9055 chkg/svgs	not valued		x		3.2(5)/CP 295	2.8(6)/pg 3
Bk of Am x2380 chkg/svgs	not valued			x	3.3(2)/CP 296	2.8(6)/pg 3
Bellevue Club Membership	\$ 2,500.00		\$ 2,500.00		3.2(6)/CP 295	2.8(9)/pg 3
Jewish Center Club Membership	zero value		x		3.2(7)/CP 295	2.8(10)/pg 3
ING accts x4951, x3552, x3560	\$ 89,490.00		\$ 44,745.00	\$ 44,745.00	3.2(8)/CP 295; 3.3(6)/CP 296	2.8(12)/pg 3
Cash from BECU account	\$ 5,000.00		\$ 5,000.00		3.2(9)/CP 295	2.8(13)/pg 3
Sports memorabilia collection	not valued	x	x		3.2(10)/CP 295	2.9(1)/pg 3
Fortis Junior Whole Life policy	\$ 5,000.00	x	\$ 5,000.00		3.2(12)/CP 295	2.9(2)/pg 3
Personal property/furnishings	not valued		x	x	3.2(13)/CP 295; 3.3(5)/CP 296; 3.3(13)/CP 296	2.8(11)/pg 3
Family photos	not valued		1/2 to each	1/2 to each	3.2(12)/CP 295; 3.3(5)/CP 296	not listed
Post-separation earnings (8,064/month net of maintenance, over 15 months, 8/8/08 to 10/2/09)	\$ 112,893.00	x	\$ 112,893.00		3.2(14)/CP 295	2.9(3)/pg 3; CP 308
Employment-related benefits (health insurance 19,000 - 7,000 = 12,000)	\$ 12,000.00	x	\$ 12,000.00		3.2(15)/CP 295	not listed
Post-separation property acquired	not valued	x	x		3.2(14)/CP 295	2.9(4)/pg 3
Proceeds from home sale to reach 50% of community estate (Note: contrary provision in Decree) \$272,700 net equity before sale	unknown		x		3.2(16)/CP 296	2.8(1)/pg 2
2004 Suburban automobile	\$ 9,535.00			\$ 9,535.00	3.3(3)/CP 296	2.8(7)/pg 3
2003 Volvo sale proceeds	\$ 10,000.00			\$ 10,000.00	3.3(4)/CP 296	2.8(8)/pg 3
Cash from BECU account	\$ 5,000.00			\$ 5,000.00	3.3(7)/CP 296	2.8(13)/pg 3
Diamond engagement ring	\$ 4,700.00	x		\$ 4,700.00	3.3(9)/CP 296	2.9(1)/pg 3
Diamond necklace	not valued	x		x	3.3(10)/CP 296	2.9(2)/pg 3
Painting and desk from gparents	not valued	x		x	3.3(11)/CP 296	2.9(3)/pg 4
Post-separation earnings/main- tenance (1,990 from Nov 08 to Sept 09)	\$ 21,890.00			\$ 21,890.00	3.3(13)/CP 296	2.9(4)/pg 4
Employment-related benefits	none	x		x	3.3(14)/CP 296	not listed
(Chase VISA min payments/to come from home proceeds)	not valued		1/2 to each	1/2 to each	3.4(1)/CP 296	
(Chase VISA card balance/to come from home proceedsL 23,676 less 1,000 paid from Volvo proceeds)	\$ (22,676.00)		\$ (11,338.00)	\$ (11,338.00)	3.4(1)/CP 296	2.10(2)/pg 4; 2.8(8)/pg 3
(Unauthorized expenses owed back to business)	\$ (20,000.00)		\$ (20,000.00)		3.4(2)/CP 297	2.10(3)/pg 4
(Debt to Husband's parents)	\$ (40,000.00)	x	\$ (40,000.00)		3.4(3)/CP 297	2.11(1)/pg 4
(Husband's attorney's fees/costs)	\$ (18,800.00)	x	\$ (18,800.00)		3.4(4)/CP 297	2.11(2)/pg 4
(Post-separation liabilities)	not valued	x			3.4(5)/CP 297	2.11(3)/pg 4

ROBINSON
Decree Results Summary -- Amended Appendix A

(Obligations on assets)	none id'ed	x			3.4(6)/CP 297	not listed
(HELOC house payments until sale)	not valued		1/2 to each	1/2 to each	3.4(7)/CP 297	2.8(1)/pg 2
(Nordstrom credit card/CP portion)	\$ (2,000.00)			\$ (2,000.00)	3.5(1)/CP 297	2.10(4)/pg 4
(Nordstrom credit card/SP portion)	\$ (2,300.00)	x		\$ (2,300.00)	3.5(1)/CP 297	2.11(5)/pg 4
(Bk of Am CapOne x2569 card)	\$ (20,800.00)	x		\$ (20,800.00)	3.5(2)/CP 297	2.11(1)/pg 4
(USBank VISA x2067)	\$ (15,000.00)	x		\$ (15,000.00)	3.5(3)/CP 297	2.11(2)/pg 4
(Bk of Am VISA x8495)	\$ (5,000.00)	x		\$ (5,000.00)	3.5(4)/CP 297	2.11(3)/pg 4
(Debt to Dave Johnson)	\$ (20,000.00)	x		\$ (20,000.00)	3.5(5)/CP 297	2.11(4)/pg 4
(Wife's attorney fees)	\$ (7,730.00)	x		\$ (7,730.00)	3.5(6)/CP 297	2.11(6)/pg 4
(Post-separation liabilities)	not valued	x		x	3.5(7)/CP 297	2.11(7)/pg 5
(Obligations on assets)	none id'ed	x		x	3.5(8)/CP 297	not listed
(Mortgage payments on home until sale/2,142 x 8 months Sept 09 to May 10)	\$ (17,136.00)	x		\$ (17,136.00)	3.5(9)/CP 297	2.21(3)/pg 7
(Rental value of living in home @ \$2,200/mo)	\$ 17,600.00	x		\$ 17,600.00		2.21(2)/pg 7
PROPERTY SUBTOTAL	\$ 302,050.00		\$ 289,884.00	\$ 12,166.00		
Community property subtotals	\$ 274,733.00		\$ 218,791.00	\$ 55,942.00		
House value (675,000 - 292,000 - 110,300)	\$ 272,700.00					2.8(1)/pg 2
(Closing costs/unknown . . . 8.5% estimate)	\$ (23,179.50)					
Net home proceeds (estimate)	\$ 249,520.50	x	\$ 43,335.75	\$ 206,184.75		
Total community property	\$ 524,253.50	x	\$ 262,126.75	\$ 262,126.75		
			50.0%	50.00%		
Husband's separate property	\$ 71,093.00		\$ 71,093.00			
Wife's separate property	\$ (43,776.00)			\$ (43,776.00)		
TOTAL PROPERTY TO EACH	\$ 551,570.50		\$ 333,219.75	\$ 218,350.75		
Net division of property			60.4%	39.6%		

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2010, the original of the foregoing document was transmitted for filing with the Court of Appeals, Division I, via Facsimile, and that copies were served as follows:

Attorneys for Respondent via Facsimile and US Mail:

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Laura Christensen Colberg
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Re: Robinson; Appeal No. 64382-7-1

Please see attached *Amended Appendix A to Appellant's Brief on Appeal*

Thank you.