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NO. 60956-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In re the Marriage of Lindsey

DEBORAH LINDSEY,

Appellant,

v.

EDWARD LINDSEY,

Respondent

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Richard McDermott, Judge

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 22

A. Standard of Review.....22

**B. The Trial Court Failed To Correctly Apply RCW
26.09.080.....23**

**1. The Trial Court’s Division of Property Did Not Consider
the Required Factors and Circumstances.....25**

**2. The Trial Court Failed to Fairly Value Each Item of
Community Property and then Failed to Fairly Allocate
Each Item Between the Spouses.....28**

**3. The Trial Court Failed to Justly Allocate Debts Between
the Parties.....32**

**C. The Court Incorrectly Applied RCW 26.09.140 by Awarding
the Wife Fees but Allowing the Husband to Pay Said Fees
Using Community Funds.....33**

V. CONCLUSION 34

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>De Ruwe v. De Ruwe</u> , 72 Wn.2d 168, 433 P.2d 209 (1967)	24, 25
<u>Guarino v. Guarino</u> , 29 Wn.2d 314, 186 P.2d 927 (1947)	26
<u>Hanley v. Most</u> , 9 Wn.2d 429, 115 P.2d 933 (1941).....	27
<u>Hokamp v. Hokamp</u> , 32 Wn.2d 593, 203 P.2d 357 (1949).....	28
<u>In re Marriage of Hall</u> , 103 Wn.2d 236, 692 P.2d 175 (1984).....	25
<u>In re Marriage of Washburn</u> , 101 Wn.2d 168, 677 P.2d 152 (1984).	24
<u>Lucker v. Lucker</u> , 71 Wn.2d 165, 426 P.2d 981 (1967)	29
<u>Luithle v. Luithle</u> , 23 Wn.2d 494, 161 P.2d 152 (1945)	25
<u>Kirsch v. Kirsch</u> , 192 Wash. 156, 73 P.2d 356 (1937).....	25
<u>Mitchell v. Mitchell</u> , 39 Wash. 431, 81 P. 913 (1905)	26
<u>Munroe v. Munroe</u> , 27 Wn.2d 556, 178 P.2d 983 (1947)	26
<u>Murphy v. Murphy</u> , 44 Wn.2d 737, 270 P.2d 808 (1954).....	28
<u>Vanderpool v. Vanderpool</u> , 186 Wn.2d 360, 57 P.2d 1253 (1936)...	26

Washington Court of Appeals Decisions

<u>Davis v. Davis</u> , 13 Wn. App. 812, 537 P.2d 1048 (1975)	22
<u>In re Chavez</u> , 80 Wn. App. 432, 909 P.2d 314 (1996).....	24
<u>In re Marriage of Clark</u> , 13 Wn. App. 805, 538 P.2d 145 (1975)	26
<u>In re Marriage of Gillespie</u> , 89 Wn. App. 390, 948 P.2d. 314 (1996) 24, 25

<u>In re Marriage of Martin</u> , 32 Wn.App. 92, 645 P.2d 1149 (1982).....	30
<u>In re Marriage of Mathews</u> , 70 Wn.App. 116, 853 P.2d 462 (1993) .	29
<u>In re Marriage of Nicholson</u> , 17 Wn. App. 110, 561 P.2d 1116 (1977)	27
<u>In re Marriage of Schweitzer</u> , 81 Wn. App. 589, 915 P.2d 575 (1996)	26, 27
<u>In re Marriage of Stenshoel</u> , 72 Wn. App. 800, 866 P.2d. 635 (1993)..	30
<u>In re Marriage of Wallace</u> , 111 Wn.App. 697, 453 P.3d 462 (2002) .	27

Statutes

RCW 26.09.080.....	22, 23
RCW 26.09.140.....	33, 35

I. INTRODUCTION

Deborah Lindsey, the Appellant, appeals the rulings of the trial court that were contained in the Findings of Fact and Conclusions of Law (CP 142-151) and the Decree of Dissolution (CP 119-128, the Parenting Plan (CP 129-141), Order Denying Reconsideration (CP 215).

II. ASSIGNMENTS OF ERROR

- A.** Assignment of Error No. 1. In Finding of Fact No. 2.8 (1) through (8), the trial court erred when it valued the net equity of each parcel of real property owned by the parties.
- B.** Assignment of Error No. 2. In Finding of Fact No. 2.15, the trial court erred in the manner in which it awarded the wife attorney fees out of community funds.
- C.** Assignment of Error No. 3. In Finding of Fact No. 2.21, the trial court erred in concluding that no credits or debits should be given to either party for funds spent/distributed during the course of the dissolution.
- D.** Assignment of Error No. 4. The trial court erred when it awarded the Arkansas home, the Colorado

condominium and the Arkansas lots to the wife without the present means to maintain the property.

E. Assignment of Error No. 5. The trial court erred when it awarded the timber tracts to the husband.

F. Assignment of Error No. 6. The trial court erred when it assigned debts to the wife without the present means to pay such debts.

III. STATEMENT OF THE CASE

A. Procedural History

Edward Lindsey filed a Petition for Dissolution with King County Superior Court on April 16, 2007. CP 1-8. Restraining orders were put in place at that time and remained through trial. An agreed order was entered on June 7, 2007 which provided for a week on/week off schedule for an interim period. For a variety of reasons, this schedule remained at trial. Trial occurred in May and June of 2009 in King County Superior Court before Judge Richard McDermott.

B. History of the Parties.

Edward Lindsey was born September 30, 1962 and Deborah Lindsey was born September 20, 1964. RP, May 19, 2009, p. 14. Deborah Lindsey grew up in a stable home with traditional

Southern Baptist upbringing. RP, June 1, 2009, p. 51. After graduating from high school, she attended college in Texas and studied elementary education. RP, June 1, 2009, p. 53. She went home to her parents every holiday and summer. RP, June 1, 2009, p. 55. She met Edward Lindsey during her junior year and they dated long distance that year. RP, June 1, 2009, p. 57-58. They became engaged just before her graduation in 1986 and planned to marry in August of 1986. RP, June 1, 2009, p. 59. This wedding was canceled three weeks before the wedding when he was unfaithful with two different women. RP, June 1, 2009, p. 60. Ultimately, they set another wedding date and were married on August 1, 1987. RP, May 19, 2009, p. 13 and RP, June 1, 2009, p. 63. At the time of marriage, the wife was an elementary school teacher in Texas and he was in management in Walmart. RP, May 19, 2009, p. 15. Over the course of their marriage, the parties moved multiple times, to multiple states (Texas, Arkansas and Washington), always at the request of the husband and always to accommodate his employment. RP, May 19, 2009, p. 15-21. Each move required the wife to leave her employment and leave friends, pack up their home alone, often with very short notice. RP, June 2, 2009, p. 53-54. RP, June 1, 2009, p. 67-74.

The parties had two children, Walker, born January 1, 1996, RP, June 4, 2010, p. 160, and Noah, born January 20, 1999, RP, June 4, 2010, p. 160. By agreement, from the time of her first pregnancy, the wife was a full-time mother and homemaker and did not work outside the home. RP, June 2, 2009, p. 21 and RP, June 3, 2009, p. 8. The wife was the parent who took them to the doctor, stayed with them when they were sick, stayed in the hospital with one child for 12 days in intensive care, was a classroom parent, chaperoned field trips, attended the parent-teacher conferences, planned and executed all play dates and birthday parties, provided transportation to all extracurricular sports and other activities RP, June 2, 2009, p. 23-36. By contrast, the husband traveled extensively with his job and frequently was on the road six days per week, not even returning home at night. RP, June 2, 2009, p. 22-23. Besides making multiple apartments and houses that they rented into homes, the wife's role in the home included extensive care of the homes as well as physical labor/supervision of new construction and/or rebuilding of three properties into homes to make them livable for their family. On one occasion, the wife worked to find a property in Spokane and build a new home there. RP, June 1, 2009, p. 74. This included getting a

functional septic system, finding and working with an architect, finding and working with a builder, and supervising the construction of the home. RP, June 1, 2009, p. 74-76. Later, when they moved to Arkansas, she found a lot, located the draftsman and the builder and supervised the construction process. RP, June 1, 2009, p. 80-81. Later, when they moved to Kirkland, she worked even harder to turn a dirty and unlivable property into a home clean and safe for children. RP, June 2, 2009, p. 7-15. She planned and coordinated its remodeling and completion including locating and supervising an architect, extensive yard work and painting, designing a fireplace, and resolving complex zoning and engineering issues. RP, June 2, 2009, p. 15-20. RP, June 1, 2009, p. 84-87.

By contrast, the husband worked full-time, almost exclusively for Wal-Mart and traveled frequently.

The marriage was marked by domestic violence by the husband against the wife. Emotional abuse included unfounded allegations against her, prohibitions on being late and prohibitions on drinking of any kind. He assaulted her for arriving home late after having a drink with friends at a book club meeting. RP, June 2, 2009, p. 106-108. He assaulted her for talking with a male neighbor who walked her home from a neighborhood party. RP,

June 2, 2009, p. 108-109. He assaulted her after she went to a concert in Eastern Washington and returned home the next day. RP, June 2, 2009, p. 110-115. These assaults were violent, included punching her and kicking her, they left bruises and included ripping her clothes off and shoving her outside. Her bruises on the final and most violent assault were documented by pictures. RP, June 2, 2009, p. 120 and Exhibit 114. The first incident of domestic violence took place in the summer prior to the marriage when he hit her in the face with his hand and hit her with a belt. RP, June 1, 2009, p. 60-61. The husband admitted assaulting the wife in conversations with her friends. RP, June 8, 2009, p 9-10¹

The parties accumulated significant financial assets during their marriage.

The parties owned a home in Kirkland, Washington. It was worth \$900,000 using its highest and best use as of May of 2008 according to an appraisal obtained by the husband. RP, May 26, 2009, p. 11 and Exhibit 48. The monthly mortgage payment is \$2,762. RP, June 4, 2009, p. 50. The husband's appraiser testified that its value had decreased due to a decline in property values.

¹ The husband claimed that the wife assaulted him at his office but she denied this.

RP, May 26, 2009, p. 12. Rather than conduct a new appraisal, the appraiser testified as to changes in sale prices in the east side of King County overall and sale prices in relation to square footage. Using that method, he then testified that the property had declined in value by 15% to \$765,000 by the time of trial. RP, May 26, 2009, p. 14-15. On cross-examination, he admitted, however, that view properties such as the Lindsey home were not in a declining market. RP, May 26, 2009, p. 34. There was no evidence that either party intended to sell the home if it was awarded to him or her. Contrary to the testimony of the appraiser, the court placed a value of \$738,000 on the family home by reducing the original appraisal by 18%, a greater reduction than supported by the testimony. Decision of Court, RP, June 22, 2009, p. 2.

The parties acquired a home in Bentonville, Arkansas, when they lived there. The Arkansas home was appraised at \$504,000, in January of 2008, more than one year before trial. Exhibit 12. The first mortgage payment was \$1,826 per month. RP, June 4, 2009, p. 57. The line of credit payment was \$560-700 per month. RP, June 4, 2009, p. 58. The Arkansas utilities, taxes and lawn care were \$520 per month. RP, June 4, 2009, p. 71.

This Arkansas home was the parties' residence during one of their stints in Arkansas. After moving to Washington State, the home was vacant. RP, May 20, 2009, p. 62. The home was listed for sale in 2006, prior to the parties' separation. RP, May 20, 2009, p. 65. The property did not sell when listed at various prices from \$649,000 down to \$509,000. RP, May 20, 2009, p. 66 and June 3, 2009, p. 95. Exhibit 59, 127 and 129. The husband rented the property in March of 2009 without the wife's permission for \$2,500 per month. RP, May 20, 2009, page 66-67 and R, May 26, 2009, p. 59 and Exhibit 129. This was a one-year lease that expired in February of 2010. RP, May 20, 2009, page 67-8 and Exhibit 130. A property management company received \$250 per month from the rental payment. RP, May 26, 2009, p. 59 and Exhibit 131. Both parties wanted to sell the property. RP, May 20, 2009, p. 69 and 135 and RP, June 3, 2009, p. 94-5, 110-122. The housing market in Arkansas was troubled due in part to overbuilding in the area and Walmart having moved out of the area. RP, May 20, 2009, p. 71. The husband wanted to split the equity after sale. RP, May 20, 2009, p. 71. The trial court disregarded the parties' mutual desire to sell the property. The court valued it at \$504,000, and found the debt on the property to be a total of \$373,929, thereby leaving a net

value of \$130,070. The court found the debt on the property to be a total of \$373,929 leaving a net value of \$130,070. Decision of the Court, RP, June 22, 2009, p. 3.

The wife did not actually receive the net value of \$130,070 awarded to her in the dissolution. Since she was given no funds to make the payments, the home was lost to foreclosure after trial.²

The parties owned a condominium in Colorado. The property was appraised by the husband in April of 2008, more than the year before trial at \$280,000. Exhibit 15. The mortgage balance was found to be \$145,257. Decision of the Court, RP, June 22, 2009, p. 3. The monthly mortgage payments were \$950. RP, June 4, 2009, p. 52.

The value of \$280,000 reduced by the \$145,257 mortgage balance would justify an equity determination of \$134,743. The court lowered this net value to \$115,000 based on falling property values all around the country. Decision of Court, RP, June 22, 2009, p. 3-4.

The condominium was rented periodically but that rental income did not cover its monthly payment. RP, May 20, 2009, p.88. Its rental income had greatly reduced in year before trial.

² Additional pleadings will be designated for the Clerk's Papers.

RP, June 4, 2009, p. 52. The husband further testified that the condominium associated dues of \$350-400 per month were deducted from the rental income. RP, May 20, 2009, p. 143 and RP, June 4, 2009, p. 53.

The husband did not want the condominium and the wife wanted the condominium to be sold. RP, June 3, 2009, p. 113. In fact, the wife was surprised the husband had not sought to sell the property prior to trial. RP, June 4, 2009, p. 16. The trial court disregarded the parties' mutual desire to sell the property and, instead, awarded the property to the wife at a value of \$115,000.

The wife did not receive the net value of \$115,000 awarded to her in the dissolution. Since she was not given the funds necessary to make payments on the mortgage or pay its expenses, she had to sell it as quickly as possible. She received far less than \$115,000."³

The parties owned two timber tracts in Arkansas. RP, May 20, 2009, p. 137-8. The tracts were appraised in July of 2008 by the wife at \$268,390. Exhibit 122. The tracts were appraised by the husband in April of 2008, more than the year before trial at \$60,122 (Tract 1) and \$154,870 (Tract 2). Exhibit 13 and 14. This

³ Additional pleadings will be designated for the Clerk's Papers.

total of \$214,992 was considerably less than the appraisal obtained by the wife and was from an older appraisal but the court disregarded the wife's more recent appraisal. In addition, the husband testified that Tract 1 was worth less than the value of his appraisal. RP, May 20, 2009, p. 138. The wife wanted the property in order to sell the timber for money to pay down bills. RP, June 3, 2009, p. 107. The timber needed to be harvested and she needed the money. RP, June 3, 2009 p. 134-5. The husband testified that he wanted both tracts. The court stated it would reduce the appraised value of each tract by 10% and, using the husband's older appraisal figures as the pre-reduction value, then valued Tract 1 at \$56,000 and Tract 2 at \$140,000. Decision of Court, RP, June 22, 2009, p 3. The court disregarded the wife's need for liquid assets and awarded the tracts instead to the husband.

The parties owned three undeveloped lots in Arkansas. They were appraised by the husband in February 2008 (more than one year prior to the trial) as \$125,000 (Lot 6); \$96,000 (Lot 7) and \$60,000 (Lot 8). Exhibits 9, 10 and 11. The husband wanted the lots awarded to the wife but expected the wife to sell them. RP, May 20, 2009, p. 140. The wife wanted the lots sold and the proceeds used as their value. She did not want to receive the

property and have the difficulty of selling them. RP, June 3, 2009, p. 135. The trial court stated that the appraisals were over a year old and the economy was clearly slumping and then placed values on them of \$120,000 (Lot 6), \$85,000 (Lot 7) and \$50,000 (Lot 8). Decision of Court, June 22, 2009, p. 3. The wife has not received the value of \$255,000 awarded to her in the dissolution. The properties have been on the market with listed prices lower than the value placed on them by the Court and have not sold for even that reduced amount.⁴

The parties had substantial financial assets, all managed by the husband. The husband represented at the time of filing for dissolution that there was \$18,000 in the bank, \$414,000 in stocks and bonds and \$350,000 in other liquid assets. RP, May 27, 2009, p. 59. Exhibit 185. In fact there was \$183,559.21 in the bank not \$18,000. Exhibit 17. The parties' assets were continuously protected from dissipation by restraining orders in April of 2007, May of 2007 and June of 2007. Exhibit 55, 56, 57. The trial judge erroneously believed the husband was not restrained from expenditures from those assets. RP, May 21, 2009, p. 5.

⁴ Additional pleadings will be designated for the Clerk's Papers

At the time of filing for dissolution, there was a Walmart account associate stock plan with \$133,028.19. RP, May 26, 2009, p. 46. Exhibit 19. This account was also referred to as the Compuserve Account. RP, May 27, 2009, p. 76. The husband later testified that the balance then was \$143,000. RP, May 26, 2009, p. 47. He admitted at trial that the funds were gone at the time of trial. RP, May 26, 2009, p. 47-48. Those funds were withdrawn by the husband between June of 2008 and November of 2008. RP, May 26, 2009, p. 103-104.

Through his employment with Walmart, the husband had a profit sharing account. RP, May 27, 2009, p. 72. As of November 1, 2006, the time of separation, the balance was \$367,589. RP, May 27, 2009, p. 74. Exhibit 18. The husband testified that, at the time of filing for dissolution, the balance was \$365,224. May 26, 2009, p. 46. Exhibit 18. The funds were transferred into a Merrill Lynch account by the husband in July of 2008. RP, May 26, 2009, p.86 and 104-105 and RP, May 27, 2009, p. 75. At that time the balance was \$403,968.21. RP, May 27, 2009. Exhibit 165. The husband withdrew \$101,000, in two installments of \$50,000 and \$51,000) in March of 2009, just before trial, and deposited them into his personal account. RP, May 26, 2009, p. 105-106. The

latter withdrawal was revealed during trial and the court, upon the wife's request, ordered that \$40,000 be paid into his attorney's trust account and \$11,000 be retained by the husband to pay the community mortgages and other expenses. RP, May 20, 2009, p 149. The husband used the funds to pay down his separate automotive debts instead and then asked for an additional \$5,000, RP, June 3, 2009, p. 4. The court allowed payment of the condominium mortgage of \$950 only. RP, June 3, 2009, p.5. The husband did not provide any accounting of his expenditures with those funds.

There was an A.G. Edwards account with approximately \$24,000. RP, May 26, 2009, p. 85. This was the wife's account from her employment in Texas when the parties were first married.

There was another A.G. Edwards account. The husband testified that the account had \$291,583.44 at filing for dissolution. RP, May 27, 2009, p. 78 and RP, May 26, 2009, p. 47. Exhibit 20 and 21.⁵ The husband admitted he withdrew \$21,000 prior to filing for dissolution. RP, May 27, 2009, p. 79. The husband admitted that he withdrew all of the funds and deposited them into his

⁵ Earlier in the trial, he testified that the balance was \$316,000 before trial. RP, May 20, 2009, p. 100. He then admitted withdrawing \$50,000 from this account during trial. RP, May 20, 2009, p. 102.

personal Wells Fargo PMA account in April of 2007 but claimed the amount was \$252,000. RP, May 26, 2009, p. 100-101. During cross-examination, he then claimed he actually withdrew \$267,108.20. RP, May 27, 2009, p. 78. In fact, he withdrew a total of \$311,396.29 during 2007. RP, May 27, 2009, p. 80. Exhibit 21.

The husband had permission to withdraw \$53,500 from these funds in May of 2007. RP, May 27, 2009, p. 82-83. He was authorized to keep \$25,000 for his expenses, pay \$25,000 to the wife and \$3,500 to her then attorney. RP, May 27, 2009, p. 83. Exhibit 50. He actually initially withdrew \$60,834.05. RP, May 27, 2009, p. 83. Exhibit 40. Within five months, he had withdrawn almost another \$100,000 without any permission from his wife or the court and the remaining balance was \$103,000. RP, May 27, 2009, p. 85-86. Exhibit 41. By January 31, 2008, the balance was down to \$46,903.79; the intervening withdrawals all made by the husband without the approval of the wife, her counsel or the court. RP, May 27, 2009, p. 87. Exhibit 167.

The husband testified he spent \$69,092 from these A.G. Edwards funds during 2008 while they were in his Wells Fargo account ending in 6149. RP, May 26, 2009, p. 52. Exhibit 67.

The husband also testified that he spent \$140,981.20 from April of 2007 through December of 2008 from these A.G. Edwards funds while they were in his Wells Fargo account ending in 2585. RP, May 26, 2009, p. 48-51. Exhibit 66.

The husband also testified that he spent \$83,149 in additional funds through trial. RP, May 26, 2009, p. 53-54. Exhibit 68.

The husband testified that he paid the wife \$54,459 since separation. RP, May 26, 2009, p. 55-57. Exhibit 69.

The parties had an IRA with a balance of \$403,000 when the husband withdrew it and deposited it into a Merrill Lynch account. The husband provided inconsistent testimony about this account. He testified first that he had \$316,000 in an A.G. Edwards account before trial. RP, May 20, 2009, p. 100. He then admitted withdrawing \$50,000 from this account during trial. RP, May 20, 2009, p. 102. On another day of trial, he testified he had \$333,000 in a Merrill Lynch 401(k) retirement plan as of April 30, 2009. RP, June 1, 2009, p. 12. He admitted taking \$50,000 from this account during trial. RP, June 1, 2009, p. 12. On cross-examination, he admitted that the amount was \$341,991.17 as of March 31st and that he had taken out two different withdrawals of \$50,000 just

before trial. He admitted that he had failed to disclose the first withdrawal dated March 3, 2009 in his March 11, 2009 answers to interrogatories. RP, June 1, 2009, p. 23-25. He admitted that this first \$50,000 was deposited in his personal checking account. RP, June 1, 2009, p. 28. He admitted he paid his attorney almost \$64,000 and that such payments were generally made from community funds with some written off as business expenses. RP, June 1, 2009, p. 35-38.

The court determined that there was a total of \$788,836 in liquid financial assets at the time of separation with only \$283,000 remaining at the time of trial. Decision of Court, RP, June 22, 2009, p. 5. Although the difference was \$505,836, the court stated that \$436,826 had been spent on arguably community expenses. Decision of Court, RP, June 22, 2009, p. 5. The court found that the husband had not accounted for all of his expenditures of those funds but that the amount wasn't significant. Decision of Court, RP, June 22, 2009, p. 5. The court did not determine what had happened to the remaining \$69,010. The court later stated that there had been some waste of assets but that it was not significant. Decision of Court, RP, June 22, 2009, p. 12.

The parties owned an Allstate Insurance agency purchased using a line of credit on the Bentonville, Arkansas home. RP, May 21, 2009, p. 100. The court valued the business at \$100,000. Decision of Court, RP, June 22, 2009, p. 4.

The parties had considerable unsecured debts at the time of trial to Wells Fargo (personal and business), Citi Mastercard, Chase Visa, Bank of America Visa, Capitol One and American Express with the total owing of \$49,230.

RP, May 26, 2009, p. 76-77. There were two others, Capitol One and American Express, Exhibit 73. American Express, ending in 6687, had a balance of \$37,269. RP, May 26, 2009, p. 78. Capital One had a balance of \$7,000 and was the wife's personal card; the account was no longer active but payments were being made by her. RP, June 3, 2009, 105-6.

The parties separated in the fall of 2006 following a violent physical assault upon the wife by the husband. There had been other similar instances but the September 2006 assault was particularly severe. For two months the wife tried to get the husband to move out of the family home but he refused. RP, June 2, 2009, p. 132-134. Finally, in November of 2006, the parties separated and the children resided with their mother in a rental

home for six months. During that time, the wife survived financially using a \$15,000 withdrawal from the parties' financial assets and the use of a Citibank credit card. RP, June 2, 2009, p. 64-68. This financial arrangement continued through July of 2008 when the husband began paying the wife \$5,000 per month. RP, June 2, 2009, p. 68. From these funds, because she expected to eventually be awarded the family home, the wife made payments to keep current the building permit for a previously planned remodel of the family home and other expenses for the family home. RP, June 3, 2009, p. 17-18. Exhibit 115 and 116..

In April of 2007, the husband filed for dissolution. At that time, the wife reluctantly agreed to a week on/week off schedule of residential time believing this to be a temporary arrangement of just a few weeks. RP, June 3, 2009, p. 88, 90. She believed she and the children would be returned to the family home within a short period of time. Unbeknownst to her, her attorney was experiencing severe personal problems, problems that ultimately led to his emotional breakdown and replacement by new counsel just before trial. RP, June 3, 2009, p. 89-90. Unfortunately, the parties did not go to court within that short period of time and the week on/off schedule continued. Despite the schedule of week on/off with the

children, the wife maintained involvement with the children throughout all weeks. RP, June 3, 2009, p. 83. For many months of the parties' separation, the wife helped the boys with their homework during the husband's weeks. RP, June 3, 2009, p. 24. She even cooked meals for the boys at their father's home and decorated that home for Christmas. RP, June 2, 2009, p. 138. She was at the family home and the husband's office on multiple occasions at his request and with his knowledge. RP, June 2, 2009, p. 68-69,138-140. On one occasion, when she came to his office for issues related to filing their tax return and after notice to him that she was coming, he had her arrested for doing so. RP, June 2, 2009, p. 143-153. She admitted coming to his office and the charge was dismissed after she committed no crimes for six months. RP, June 2, 2009, p 154-55.

The trial date was continued multiple times due to the wife's counsel's lack of preparedness (and the ultimate need to replace him) and the husband's lack of cooperation. CP 9-12, 30-31, 32-33, 34, 37-38, 39, 54-55, 56-57, 58-60, 61-62-63, 64-67,68, 69, 70-72, 73, 74-76.

Ultimately, trial took place in late May and early June, 2009. CP 77-88. During trial, the trial judge repeatedly demonstrated that

he had personal knowledge of circumstances in this case that were not part of the evidence. RP, May 21, 2009, p. 7 (costs in Kirkland, costs of second residences, costs of operating specific vehicles); RP, May 21, 2009, p. 31-32 (children's sports teams and coaching); RP, May 21, 2009, p. 72 (erroneously assumed he knew the father of one of husband's witnesses but did not reveal this belief until after the witness had testified).

At the time of trial, the wife had not earned taxable income for over 15 years. Exhibit 108. She had never earned more than \$25,420 in her entire life and had earned more than \$20,000 in a year only two times in her life. By contrast, the husband had significant earnings, at times exceeding \$500,000 in a year. Exhibit 4.

Immediately upon conclusion of the trial, the court issued an informal ruling. RP, June 8, 2009, p. 34-43. In that ruling, the court referred to selling the parties' assets as "Draconian" and "not fair." RP, June 8, 2009, p. 37. The trial judge erroneously believed the Bentonville home to generate a positive cash flow. RP, June 8, 2009, p. 38. The trial judge said that the wife could not return to teaching any time soon since teachers were being laid off and that, instead, the wife would have to be retrained and the husband

should pay for those costs. RP, June 8, 2009, p. 39. The court did not, however, award the wife funds to obtain such training.

The court issued its formal oral decision on June 22, 2009. The court stated then that the wife was competent, intelligent and attractive and would be able to find work. Decision of Court, RP, June 22, 2009, p. 10. After ruling on disputed issues as to presentation of final documents, the final documents were entered (Decree of Dissolution, CP 119-128), (Parenting Plan, CP 129-141), (Findings of Fact and Conclusions of Law, CP 142-151).

The wife filed for reconsideration and/or new trial. CP 152-214. The trial court denied this motion on December 9, 2009. CP 215. This appeal timely followed.⁶

IV. ARGUMENT

A. Standard of Review.

The division of property in a dissolution must be just and equitable. RCW 26.09.080. The trial court has wide discretion and latitude in making this determination. Davis v. Davis, 13 Wn. App. 812, 813, 537 P.2d 1048 (1975) (citations omitted). However, a trial court's decision will be reversed for abuse of this discretion.

⁶ The trial court heard a second motion for reconsideration and/or new trial on September 13, 2010. The court ruled that it would make changes to the allocations of property and debt on or about November 5, 2010 after additional submissions by the parties.

The trial court's division of property in this case was not just and equitable and should be reversed as an abuse of discretion.

B. The Trial Court Failed to Correctly Apply RCW 26.09.080.

The court determined that there should be a 57/43 percentage division of property in favor of the wife. Given the disparity in the parties' earnings and earning capacity, this was a low numerical determination. However, even this determination was flawed in its application.

RCW 26.09.080 sets forth the law the Court must apply when dividing property and allocating responsibility to pay debt in a marriage dissolution.

In a proceeding for dissolution of the marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage or the domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner or lacked jurisdiction to dispose of the property, the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

(1) The nature and extent of the community property;

(2) The nature and extent of the separate property;

(3) The duration of the marriage or domestic partnership; and

(4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.080.

RCW 26.09.080 requires that the Court make an award of property that addresses each party's economic circumstances at the time the division of the property is to become effective. The economic circumstance of each spouse upon dissolution has been labeled the "paramount concern" of a court in making a property division. In Re Marriage of Washburn, 101 Wn.2d 168, 181, 677 P.2d 152 (1984); De Ruwe v. De Ruwe, 72 Wn.2d 404, 408, 433 P.2d 209 (1967); In re Marriage of Gillespie, 89 Wn.App 390, 399, 948 P.2d 1338 (1997). To make this determination of economic circumstance, the trial court is required to examine a variety of factors and considerations. In Re Chavez, 80 Wn. App. 432, 439, 909 P.2d 314 (1996).

1. The Trial Court's Division of Property Did Not Consider the Required Factors and Circumstances.

Future earning prospects of the parties are to be considered by the court in making a just and equitable disposition of the property. De Ruwe v. De Ruwe, 72 Wn.2d 404, 408, 433 P.2d 209 (1967). It is a substantial factor in making a just and equitable division of property. In Re Marriage of Hall, 103 Wn.2d 236, 248, 692 P.2d 175 (1984).

Factors in assessing future earning prospects include work history and vocational training. Luithle v. Luithle, 23 Wn.2d 494, 161 P.2d 152 (1945); Kirsch v. Kirsch, 192 Wash. 156, 73 P.2d 356 (1937). In this case, the wife had not worked outside the home for sixteen years. RP, June 3, 2009, p. 8. The wife was trained as an elementary school teacher but did not qualify for certification in Washington State. RP, June 3, 2009, p. 8-9. To obtain her Washington teaching certification would have required two additional years of education. RP, June 3, 2009, p. 84. No teaching jobs were available due to school closures and other educational cutbacks. RP, June 3, 2009, p. 85-86. The wife needed further education to enter any other field but had no funds for vocational training in another field and had no job prospects.

RP, June 3, 2009, p. 9. She testified that she considered becoming a realtor but did not have the funds for the necessary schooling. RP, June 3, 2009, p. 86.

Factors in assessing future earning prospects include health of the spouses. Shay v. Shay, 33 Wn.2d, 408, 410, 205 P.2d 901 (1949); Guarino v. Guarino, 29 Wn.2d 314, 324, 186 P.2d 927 (1947); Munroe v. Munroe, 27 Wn.2d 556, 178 P.2d 983 (1947); Mitchell v. Mitchell, 39 Wash. 431, 81 P. 913 (1905); In re Marriage of Schweitzer, 81 Wn. App. 589, 915 P.2d 575 (1996), affirmed, 132 Wn.2d 318 (1997). Factors also include age. Vanderpool v. Vanderpool, 186 Wash. 360, 57 P.2d 1253 (1936); In re Marriage of Schweitzer, 81 Wn. App. 589, 915 P.2d 575 (1996), *remanded*, 132 Wn.2d 318 (1997). In this case, the wife had high blood pressure, an ovarian cyst and low potassium levels. RP, June 3, 2009, p. 78. She had a lump in her neck that was being tested and was on multiple medications. RP, June 3, 2009, p 92-94. She had no funds to pay for insurance to obtain medical care for her conditions.

The court is to consider whether a spouse wasted or dissipated marital assets. In Re Marriage of Clark, 13 Wn. App. 805, 538 P. 2d 145, *review denied*, 86 Wn.2d 1001 (1975). The court can also consider whether a spouse concealed assets. In Re

Marriage of Wallace, 111 Wn. App. 697, 708, 45 P.3d 1131 (2002), review denied, 148 Wn.2d 1011 (2003). In Re Marriage of Nicholson, 17 Wn. App. 110, 561 P.2d 1116 (1977). In this case, the husband solely managed the parties' community assets during separation. He was required to act in good faith when doing so and to act in the community interest. In re Marriage of Schweitzer, 81 Wn. App. 589, 597, 915 P.2d 575 (1996); Hanley v. Most, 9 Wn.2d 429, 461, 115 P.2d 933 (1941). The court found that the husband had wasted assets but did nothing to compensate the wife for the husband having done so. Although approximately \$500,000 had been spent by the husband with less than \$60,000 of that paid to the wife, the court did not find that the husband's wasting was significant. The husband had systematically gutted nearly every significant account the parties had acquired during marriage. He placed the accounts in his own name and failed to account for thousands of dollars of those community funds. He loaned money to a stranger and failed to disclose stock that he obtained in that transaction. RP, May 27, 2009, p. 60-64. Exhibits 186 and 187. Yet the husband was not held accountable for these wrongs and the wife was not properly compensated for her related losses.

2. The Trial Court Failed to Fairly Value Each Item of Community Property and Then Failed to Fairly Allocate Each Item Between the Spouses.

The parties owned a number of pieces of real property. The court's allocation of such properties was starkly unjust. The husband was awarded the family home and the income-producing timber tracts. The wife was given property that she could not afford to maintain and virtually no time to sell them.

First, there were several pieces of property which both parties agreed would be sold. The trial court had the authority to order the sale of the property and provide for the division of the proceeds. Murphy v. Murphy, 44 Wn. 2d 737, 270 P.2d 808 (1954); Hokamp v. Hokamp, 32 Wn.2d 593, 203 P.2d 357 (1949). Yet, the court did not do so and, instead, the court awarded the wife those properties in Arkansas and Colorado that were to be sold. Those properties had collective monthly mortgage payments totaling \$3,467 per month. RP, May 26, 2009, p. 106. The wife was given no liquid assets with which to make any payments on these two properties. The Arkansas property was rented for \$2,500 per month but the lease was only through February of 2010. Furthermore, a percentage went to the property management company each month. There were considerable expenses

associated with maintaining all of the properties awarded to the wife and, again, she was given no liquid funds with which to maintain them.

By contrast, the husband was given the timber tracts in Arkansas with their immediate source of cash. He was given the family home as well as the family business with an income stream sufficient to maintain the mortgage on the family home.

In addition to unjustly allocating the assets between the spouses, the court failed to fairly value each asset. To sustain a division of assets, the trial court must value the assets within the scope of the evidence. In Re Marriage of Mathews, 70 Wn.App. 116, 122, 853 P.2d 462 (1993).

In determining the value of an asset, the trial court cannot ignore the depreciation in the value of an asset that has occurred at the time that it divides the asset. Lucker v. Lucker, 71 Wn.2d 165, 168, 426 P.2d 981 (1967). In this case, both parties testified that the home in Arkansas was not worth the value stated in the outdated appraisal. Yet the court did not determine the depreciation in value or provide for the home to be sold and the sale proceeds used as the value for the court to apportion between the parties.

The trial court further erred by failed to deduct costs of sale despite the knowledge that the wife would be selling the property awarded to her. In re Marriage of Martin, 32 Wn. App. 92, 645 P. 2d 1149 (1982) (deducting costs of sale when property would not be sold was reversed). In Re Marriage of Stenshoel, 72 Wn. App. 800, 866 P.2d 635 (1993)(costs of sale should be deducted if need to sell is for financial reasons).

The court was inconsistent in its valuation determinations. The court provided no explanation of the use of varying reductions from appraised values.

The husband received the family home and the income-producing timber tracts. The court reduced the family home appraised value by 18% in determining its value. The court valued the timber tracts at \$196,000 (27% below the wife's appraisal) and awarded them to the husband.

The wife received a home in Arkansas, a condominium in Colorado and three unimproved lots in Arkansas. The court did not reduce the appraised values of those properties in the same manner or the same rate as the court did for the properties awarded to the husband.

The Arkansas home awarded to the wife had been listed for sale at approximately the value used by the court but, significantly, the property had not sold at that price. Both parties agreed the assets would be sold but, obviously, at a lower price.

The Colorado condominium's net equity was valued at approximately 14% below its appraised value (reduced by the mortgage debt). This 14% was well below the percentage reductions given the husband and still did not take into account the maintenance payments required each month.

The three unimproved lots were valued approximately 9% below their appraised values. This 9% was well below the percentage reductions given the husband.

Beyond the inconsistent percentage reductions to appraised values, there was a fundamental flaw in the court's allocations of property. Each piece of property awarded to the wife came with a mortgage or maintenance costs or both and yet, incredibly, she was not given any sufficient source of funds from which she could make these mortgage and/or maintenance payments. While the wife was awarded a total of \$3,334.23 in support and maintenance, her expected monthly expenses for basic living far exceeded that amount. Exhibit 124. The wife, therefore, had no ability to make

payments on the condominium in Colorado, the home in Arkansas or maintenance on the three lots in Arkansas. A piece of property whose payments cannot be maintained each month will either be lost in foreclosure, sold quickly at a low price or have equity lost due to maintenance liens. This was true for each and every property awarded to the wife.

As a result of the trial court's decisions, the division of assets that was to be a 57/43 percentage division of property in favor of the wife actually resulted in the wife receiving substantially less than 50% of the community property.

3. The Trial Court Failed to Justly Allocate Debts Between the Parties.

The trial court awarded the wife all debts on the real property awarded to her. These included almost \$600,000 in mortgages yet, as described more fully above, no funds whatsoever to make such payments. In addition, the court ordered her to pay \$31,000 in credit card debts to Chase Visa and Bank of America. In addition, she was required to pay other credit card debts, whose amounts due were not specified. The wife was not employed, had no expectation of employment and no liquid funds to make payments on such debts. This allocation of debts to the wife included the

debt on the Arkansas home used to buy the business awarded to the husband. By making this allocation of debt despite an abundance of evidence that the wife would have no ability to pay such debts, the court abused its discretion.

C. The Court Incorrectly Applied RCW 26.09.140 by Awarding the Wife Attorney Fees but Allowing the Husband to Pay Said Fees Using Community Funds.

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

RCW 26.09.140.

Given that the wife was not employed, had not been employed for sixteen years, had no employment prospects and no liquid assets and given that the husband was given income-producing property and a thriving business and had an earning history that exceeded \$500,000 per year, it was appropriate that the wife be awarded substantial attorney fees. RCW 26.09.140 provides for the financially able spouse to pay such fees to the financially need spouse. The trial court failed to do so. In this case

the court, instead, condoned the husband's blatant violation of a restraining order and actually rewarded him for doing so.

The husband had withdrawn community funds of \$51,000 immediately before trial. This withdrawal was in violation of the restraining orders and was done without the wife's knowledge or permission. Nonetheless, the husband was allowed to either keep the funds or use them to pay his obligation to pay towards his wife's fees. By doing so, the husband received 100% of the benefit of these funds. This was an abuse of discretion. The court should have treated the entire \$51,000 as a community asset, divided it accordingly and required the husband to pay the legal fees out of his share of the community property.

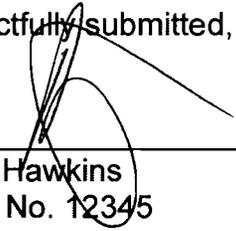
V. CONCLUSION.

The trial court failed to adequately take into account the wife's lack of employment opportunities, the debt burdens on property awarded to the wife and the husband's substantial dissipation of community assets in violation of restraining orders. The court's determinations were not supported by substantial evidence and were an abuse of discretion. The trial court should be reversed and this case remanded for further proceedings.

The wife should be awarded attorney fees and costs on appeal as allowed by RCW 26.09.140. The trial court determined that the wife had the need for attorney fees and costs and that the husband had the ability to pay such fees and costs. CP 148.

Dated: October 25, 2010.

Respectfully submitted,



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