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No. 68933-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:  
MICHELLE HUGHES, nka EVANS,  
Respondent/Cross-Appellant,  
v.  
ROBERT HUGHES,  
Appellant/Cross-Respondent.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 FEB 25 PM 1:22

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APPEAL FROM THE SUPERIOR COURT  
FOR SKAGIT COUNTY  
THE HONORABLE SUSAN K. COOK

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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## I. INTRODUCTION

After the end of more than 25 years of marriage, the trial court awarded the husband his interest in a separate property business that provides him with gross monthly income of over \$30,000 “off the top,” and divided the remaining assets 60/40 in favor of the wife. Overall, the husband was awarded 66% of the entire marital estate – nearly twice the assets of the wife - including all of the parties’ income-producing real property. “To address the disproportionate economic circumstances that the parties will be left in,” the trial court also awarded spousal maintenance to the wife, whose average monthly employment income was \$1,723, for eighteen years – seven years at \$12,000 a month, reducing to \$10,000 for the final eleven years.

The husband challenges both the maintenance award and the property division on appeal, but largely does not challenge the trial court’s extensive findings of fact in support of its decision. (*See* App. Br. 2-3) The trial court’s decision, made after considering the relevant statutory factors, was guided by the principle that its decision be “just.” And it was. This court should affirm.

## II. RESTATEMENT OF FACTS

Appellant does not assign error to many of the trial court's findings of fact supporting its property and spousal maintenance awards. These unchallenged findings are verities on appeal. *Marriage of Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Those findings challenged by the husband are supported by substantial evidence. "Evidence is substantial if it exists in a sufficient quantum to persuade a fair-minded person of the truth of the declared premise. So long as substantial evidence supports the finding, it does not matter that other evidence may contradict it. This is because credibility determinations are left to the trier of fact and are not subject to review." *Burrill v. Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007 (2003). The following restatement of facts recites the substantial evidence upon which the trial court based its findings, which themselves fully support its property division and maintenance award:

**A. The Wife Was A Stay At Home Mother For Most Of The Marriage. During The Last Five Years, The Wife Worked For The Husband's Family-Owned Business, Hughes Farms.**

Respondent Michelle Hughes, now age 48, and appellant Robert Hughes, now age 51, met in 1983. (3/12 RP 22; CP 169)

Michelle, then age 18, was working at Hughes Farms, a business owned by Robert's family, wrapping cauliflower. (3/12 RP 22; 3/13 RP 4) Within a year, the parties moved in together, into a home owned by Robert's parents. (3/12 RP 22) They married the following year on June 15, 1985. (3/12 RP 22)

Early in the marriage, Michelle, a high school graduate, worked as a dental assistant. (3/12 RP 34) She stopped working shortly before the parties' oldest daughter was born in October 1986. (3/12 RP 23, 34) Michelle did not return to work after their daughter was born. (3/12 RP 23) Soon after the oldest daughter's birth, Michelle became pregnant again. (See 3/12 RP 23) Their second daughter, who is hearing impaired, was born in February 1988. (3/12 RP 23, 25) The parties' youngest daughter was born in June 1991. (3/12 RP 23) The parties' daughters are now 26, 25, and 21. (3/12 RP 23)

The parties agreed that Michelle would stay home to care for their children. (3/12 RP 28) Even so, Michelle provided some additional income for the family over the years, running a daycare center from the parties' home for five years in the early 1990's after the two older daughters started school and the youngest daughter,

an infant, was still home. (3/12 RP 24) Michelle also periodically did seasonal work at Hughes Farms. (3/12 RP 23-24)

Michelle was busy with the growing daughters, who were very active in extracurricular activities. (3/12 RP 25-28) The parties' two younger daughters competed nationally in horse competitions. (3/12 RP 27) The parties' oldest daughter played soccer, and competed in Europe. (3/12 RP 27, 80) Michelle, and sometimes Robert, traveled with the daughters for these events. (3/12 RP 27-28, 79-80; 3/13 RP 30) The daughters' activities were expensive, and reflected the parties' high standard of living. (3/12 RP 27, 78-79, 80-81) For example, "horse expenses" alone cost the family \$100,000 annually; "horse show clothes" and other clothes for the daughters cost \$20,000 annually. (3/12 RP 78, 81) The parties spent a "minimum" of \$40,000 annually on travel for their daughters' activities. (3/12 RP 79) The daughters' expenses were never an issue between the parties, and Robert never asked Michelle to curtail her spending. (3/12 RP 82)

Once the daughters were older, and starting in 2005, Michelle's efforts turned towards caring for Robert's elderly parents. (3/12 RP 28-33) Robert's father had dementia, and his mother had severe back issues. (3/12 RP 28) Michelle cooked their

meals, drove them to doctor appointments, ran their errands, and helped clean their house. (3/12 RP 30-33) Of all of the family members – the elder Hughes’ four sons and their wives - Michelle was the parents’ primary caretaker. (3/12 RP 30-33) Robert’s father died in 2009. (3/12 RP 33) His mother is still alive. (See 3/12 RP 33)

In addition to caring for Robert’s parents, Michelle began working more regularly at Hughes Farms in 2006. (3/12 RP 35) Michelle became involved in the business after her sister-in-law was fired from the Farm. (3/12 RP 36) Michelle handled a variety of tasks at the Farm, including payroll, human resources, accounts payable, food quality, employee safety, temporary worker housing, and dealing with the Farm’s insurance plan. (3/12 RP 35-36) Michelle was not paid for her work for the first six months, as she was “just coming in to assist the business.” (3/12 RP 36) Although she worked more than half time, the Farm eventually began paying Michelle a salary based on a 20-hour work week. (3/12 RP 36-37) Later, the Farm paid her by the hour, but Michelle did not always seek reimbursement for all of the hours that she worked. (3/12 RP 37-38) Michelle estimated that on average, between 2006

and 2011 the Farm failed to compensate her for approximately 20 hours a month. (3/12 RP 39-40)

Michelle left her employment at Hughes Farms shortly after the parties separated in January 2011. (3/12 RP 40-43) Michelle had hoped that she could continue to work at Hughes Farms just like a former sister-in-law had done. (3/12 RP 42-43) But Robert, who initially wanted to reconcile with Michelle, intimidated Michelle while she was at work, threatening her, and calling her vulgar names. (3/12 RP 40-41) Even though Michelle “loved” her job at Hughes Farms, she was no longer comfortable working with Robert and “felt forced to quit.” (3/12 RP 41-42; 3/13 RP 6)

Michelle sought other employment after leaving Hughes Farms. (3/13 RP 7-8) She could not return to her career as a dental assistant, which she had left nearly 25 years earlier, because of a “nuisance tremor” in both hands that prevented Michelle from grasping the necessary dental instruments. (3/12 RP 34) Michelle eventually found employment at another farm as a market stand manager - a part-time seasonal position paying \$17.50 per hour – an hourly rate significantly greater than she was offered for a job

with more hours. (3/12 RP 53, 55, 56)<sup>1</sup> Michelle acknowledged that while she had good experience from working at Hughes Farms, the fact that she had no degrees to back up her training made it difficult to obtain a similar position. (3/12 RP 53-54) Despite her experience, Michelle was not considered “qualified” for many of the positions for which she applied. (3/12 RP 54)

At the time of trial, Michelle, age 47, had no plans to seek further education because she believed that “by the time I get a degree [ ] I’d still be making probably about what I’m making right now working part-time, maybe a little bit more. Not enough to compensate.” (3/12 RP 56) The trial court acknowledged that “because of the roles of the parties during the marriage, including the fact that the wife raised the parties’ daughters she has not improved her skills or working ability.” (FF 2.29, CP 65, challenged) The trial court recognized that Michelle’s “employment situation is a lot less secure [than Robert’s]... And at this point, she’s just starting out really again in the employment world. She’s

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<sup>1</sup> Michelle opted to work for the market stand, where her hours would vary between part-time and full-time hours, for \$17.50 per hour, rather than work full-time at a health club for minimum wage. (3/12 RP 55, 56)

going to have to work her way up to permanent full-time employment.” (FF 2.24, CP 64, unchallenged)

**B. The Husband Worked For Hughes Farms Throughout The Marriage. The Farm And The Husband’s Compensation Grew Dramatically During The Marriage.**

Although it has existed since 1920, Hughes Farms was first incorporated by Robert’s parents in 1981. (3/14 RP 153-54; 3/13 RP 81, 167-68) Robert has worked at Hughes Farms since he was eight years old. (3/13 RP 167) Robert does an “array of things” for the Farm. (3/14 RP 78) Robert cleans ditches, plows, performs electrical and mechanical work, and fills in for employees. (3/14 RP 78)

Robert holds 8,209 of the 50,000 outstanding shares in Hughes Farms. (3/12 RP 62; 3/13 RP 93) Robert acquired all of these shares through gifts from his parents both before and during the marriage. (3/13 RP 168) The current principals of Hughes Farms are Robert, his brothers, David, Tom, and Jeff, and Robert’s nephew, Michael. (3/13 RP 167) David is the president of Hughes Farms. (3/14 RP 4)

Early in the marriage, Robert worked a second job to supplement the family’s income from Hughes Farms. (3/12 RP 43)

Starting in the 1990's, Robert, Michelle, his brothers and their wives secured loans for the Farm to bring production to its current scale. (3/12 RP 48-50) In order to secure the loan, all of the principals pledged their personal assets, signing "unlimited personal guarantees" agreeing to recourse against their separate and community property in the event of default. (3/15 RP 51-52; 3/12 RP 48-50; 3/14 RP 16-17)

As a result of these loans, Hughes Farm expanded production significantly, providing the family with greater and greater income during the course of the marriage. (3/12 RP 50) The trial court found that the family's gross monthly income from Hughes Farms was \$30,747, averaged over the years 2009 to 2012.<sup>2</sup> (FF 2.27, CP 64, unchallenged) The trial court also found that Michelle had "contributed to [Robert's] ability" to "earn a lot of money" from the Farm. (FF 2.29, CP 65, unchallenged)

Hughes Farms compensates Robert exponentially more than his services are worth. (3/15 RP 20) Steven Kessler, who appraised Hughes Farms for Michelle, "fairly generously" calculated the value of Robert's services at \$85,000 per year. (3/15 RP 20) Although

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<sup>2</sup> The trial court found that these years were a good representation of "two good years and two leans years," because "that's what farming is all about." (FF 2.27, CP 64, unchallenged)

Robert throughout his brief claims that he is not paid unless he works (*see* App. Br. 14, 20), there was no evidence that the amount of compensation that he receives was dependent on the type or amount of hours he worked at the Farm. Even during “bad years,” the officers’ compensation “remained steady,” providing the officers with “substantial compensation.” (3/13 RP 101)

The trial court found that “rather uniquely,” the Farm’s “primary value is its ability to generate compensation for the officers above what the market would pay for those services in the real world.” (FF 2.14, CP 61-62, unchallenged) The trial court also found that the “primary value” to Robert was that he “can work for it and make maybe four times what he would be making doing the same work for, say, Sakuma Brothers or for some other farm in the community.” (FF 2.14, CP 62, unchallenged) Using a compromise figure between the parties’ expert valuations, the trial court found Robert’s interest in Hughes Farms to have a value of \$900,000. (FF 2.17, CP 62, unchallenged)

In addition to Robert’s wages from Hughes Farms, the parties also received additional income from real property rent, including from two parcels located on Maupin Road and Mann Road, which Robert alleged he had acquired prior to marriage.

(3/12 RP 44, 56; 3/13 RP 171-72; 3/14 RP 56-57) The trial court found that the Mann and Maupin parcels and the other community property parcels provided the parties with rental income of \$54,000 annually that is paid by Hughes Farms. (FF 2.25, CP 64, unchallenged)

At trial, Michelle asked that Robert's shares in Hughes Farms and the Mann and Maupin parcels be considered community property. (3/12 RP 62-63) Michelle testified that the parties had always treated these properties as their "retirement plan" (3/12 RP 56-57, 62-65; 3/13 RP 13-14), and that they always discussed Robert's interest in Hughes Farms as "ours." (3/13 RP 18) Robert told Michelle that if he stopped working, the Farm shares alone would provide him with \$150,000 annually. (3/12 RP 56-57) Because of Robert's representation regarding these properties as the parties' "retirement," the parties had never saved for retirement, and had no retirement accounts. (3/12 RP 47, 56-57) Robert admitted that he told Michelle that the "farm ground is our retirement," but denied that he told her that Hughes Farms would provide for their retirement. (3/14 RP 76)

The trial court found that the Mann and Maupin parcels and Hughes Farms were Robert's separate property. (FF 2.9, CP 60,

unchallenged; FF 2.10, CP 61, unchallenged) The trial court awarded Robert's interest in Hughes Farms to him "off the top," because it was "maintained as his separate property throughout the marriage, [and was] intended to be maintained as a family farm from generation to generation in the Hughes Family." (FF 2.14, CP 61, unchallenged; FF 2.23, CP 64, unchallenged) However, the trial court included the separate property parcels as part of its property distribution between the parties, because it found that "the real estate that was owned by the parties was essentially their retirement plan, and that the income from those rental parcels was intended to provide retirement income to the parties." (FF 2.9, CP 60, challenged)

**C. The Parties Had A High Standard Of Living During The Marriage. Despite The Family's High Income, They Had Limited Savings And No Retirement Accounts At The End Of The Marriage.**

The parties had a high standard of living during the marriage. (3/12 RP 81-82, 85, 86) In addition to the many travels for the daughters' horse shows and soccer tournaments, the family regularly took vacations to Hawaii, Mexico, Disneyland, and other locations. (3/12 RP 79; 3/13 RP 30-32, 71) The parties paid cash for nearly everything. They purchased each daughter a new car

with cash when they started to drive. (3/12 RP 47, 81) The parties paid for the daughters' college tuition with cash. (3/12 RP 85) When the parties bought real property, they usually paid the mortgage off within five to seven years. (3/12 RP 47) The parties also paid off "major" debts at the end of each year. (3/12 RP 78) Accordingly, despite their high income and standard of living, by the time the parties separated, they had no retirement accounts and no savings. (3/12 RP 47; 3/15 RP 65) Instead, the parties' estate consisted almost entirely of real properties acquired during the marriage and their interest in Hughes Farms. (See CP 72-73)

**D. After More Than 25 Years Of Marriage, The Trial Court Awarded The Wife A Little Over One-Third Of The Marital Estate Plus Spousal Maintenance Based On Largely Unchallenged Findings.**

The parties separated on January 7, 2011, and Michelle filed to dissolve the parties' marriage on February 2, 2011. (3/12 RP 22; CP 169) At the time of separation, each party received approximately \$102,000 in cash. (3/12 RP 58-59; 3/13 RP 15, 176-77) The parties also received additional amounts during separation. (3/13 RP 15-16; 3/15 RP 53-54) While Robert makes a point in his brief that Michelle spent nearly all of the money that she received

during separation (*See App. Br. 11*), he too spent \$130,000 over the course of the parties' 15-month separation. (3/15 RP 54)

Both parties entered into new relationships after they separated, and they have both provided limited financial support to their new partners. (3/12 RP 103-04; 3/15 RP 43) For example, Michelle's new partner lives with her, she pays rent and utilities, and he contributes to other expenses. (3/12 RP 103-04) Robert has loaned money to his new partner, and has taken her on vacations. (3/14 RP 92; 3/15 RP 43)<sup>3</sup>

The parties appeared before Skagit County Superior Court Judge Susan K. Cook for a five-day trial, commencing on March 12, 2012. The parties had agreed prior to trial that Robert should be awarded all of the real property, and that he would pay Michelle cash for her share of the estate. (3/12 RP 3-4; CP 588, 634-35) The disputed issues at trial were the amount of the cash payment, spousal maintenance for Michelle, and the value of Hughes Farms.

Michelle asked the trial court to divide all of the parties' property, including the husband's separate property, equally between the parties. (*See* 3/12 RP 9) Instead, the trial court

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<sup>3</sup> Respondent does not believe that the parties' new romantic partners are of any relevance, and only mentions them because appellant does. (*See App. Br. 11*)

awarded Robert's interest in Hughes Farms, valued at \$900,000, "off the top." (FF 2.23, CP 64, unchallenged; FF 2.14, CP 61, unchallenged; CP 82) The trial court divided the remaining assets 60/40 in favor of Michelle. (FF 2.14, CP 61, unchallenged) Among the 40% of the marital estate awarded to Robert, he received all of the parties' income-producing real property, including the two parcels that the trial court found were his separate property, and the family residence. (FF 2.9, CP 60, challenged; CP 72-73) In total, Michelle was awarded slightly less than \$800,000, and Robert was awarded more than \$1.554 million, for an overall 34/66 division in favor of Robert:

<u>Asset</u>	<u>Husband</u>	<u>Wife</u>
19864 Dry Slough Road	\$536,000.00	
Tellesbo Property	\$105,000.00	
Maupin Road	\$75,000.00	
Moore Road	\$80,625.00	
Mann Road	\$122,100.00	
Fir Island Road	\$104,932.66	
Skagit City Road	\$105,151.00	
Time Share 510/512	\$47,500.00	
Time Share 216E		\$15,000.00
F-350 Proceeds		\$35,400.00
2008 Audi A-4		\$23,000.00
2005 20' Sundowner		\$10,000.00
1995 MB Boat		\$12,500.00
Quadranner	\$3,000.00	
Horse		\$16,028.00
Funds held in Trust Account	\$107,574.66	

Rental property income held in Trust	\$21,626.80	\$32,440.20
Cash Transfer	(\$654,490.00)	\$654,490.00 <sup>4</sup>
Subtotal	\$654,020.12	\$798,858.20
Hughes Farms, Inc.	\$900,000.00	
<b>Total</b>	<b>\$1,554,020.12</b>	<b>\$798,858.20</b>
	66%	34%

(CP 72-73)

In making its property award, the trial court stated that it “considered the statutory factors under [R]CW 26.09.080 in making a just and equitable division of the marital estate, including the two previously defined separate property parcels [ ] described above (Mann and Maupin).” (FF 2.6, CP 59, unchallenged) The trial court reasoned that because Robert was awarded his interest in Hughes Farms “off the top” and other income-producing assets, Michelle was entitled to more of the value of the remaining marital estate, as the property award leaves Robert in a “uniquely powerful position with respect to his controlling his own destiny vis-à-vis the finances.” (FF 2.10, CP 61; FF 2.11, CP 61; FF 2.23, CP 64, *all* unchallenged) The trial court noted that while Michelle was

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<sup>4</sup> The cash transfer payment is interest free to the husband if he paid \$250,000 within six months of the decree, and the balance of \$404,940 within one year of the decree. If either payment is not timely paid, interest of 6% would accrue on the unpaid balance. (CP 80)

awarded some cash, she still has to find something profitable in which to invest; meanwhile Robert “already has an investment in place, earning a good return.” (FF 2.12, CP 61, unchallenged) Further, the trial court found that the “primary value” of Hughes Farms, which was awarded to Robert, was “its ability to generate income for its officers,” including Robert, at “four times what he would [earn] doing the same work” elsewhere, or on average \$30,747 gross per month. (FF 2.14, CP 61-62, unchallenged; FF 2.27, CP 64, unchallenged)

The trial court stated that “in order to address the disproportionate economic circumstances the parties will be left in because the court is awarding the husband his interest in Hughes Farms Inc., which is an asset of significant value with the ability to provide substantial continuing income to husband the court intends to award the wife spousal maintenance in addition to her share of the marital estate.” (FF 2.15, CP 62, unchallenged) At trial, Michelle asked for a lifetime award of spousal maintenance, because she had devoted half her life to the parties’ marriage, the husband’s business, his parents, and the parties’ children. (3/12 RP 93-94) Instead, the trial court awarded her spousal maintenance for eighteen years, until she reached age 66, in a declining amount.

(CP 76) Michelle is to receive \$12,000 per month until July 14, 2019 when she turns age 55 (7 years and three months), and then \$10,000 per month until July 14, 2030, when she turns age 66 (an additional 11 years). (CP 76)

The basis for the trial court's maintenance award was that "there will be gross disparity in the parties' resources regardless of the trial court's property distribution in favor of the wife." (FF 2.27, CP 64, unchallenged) The trial court recognized that the assets awarded to Robert will provide him "substantial continuing income," and that his employment at Hughes Farms was "all but guaranteed for the rest of his work life." (FF 2.23, CP 64 unchallenged; FF 2.15, CP 62, unchallenged) Meanwhile, the trial court recognized that Michelle's "employment situation is a lot less secure. . . And at this point, she's just starting out really again in the employment world. She's going to have to work her way up to permanent full-time employment." (FF 2.24, CP 64, unchallenged)

The trial court found that Michelle's average income was \$1,723 per month, compared to Robert's income from Hughes Farms of \$30,747 per month. (FF 2.27, CP 64 unchallenged) The trial court also found that Michelle will be a "valuable employee" and that she will eventually earn more as time goes on. (FF 2.28,

CP 64, unchallenged) On the other hand, the trial court found that while Robert may not earn significantly more income, he would continue to earn income close to \$30,747 until he retires. (FF 2.28, CP 64, unchallenged)

The trial court noted that the amount of maintenance awarded was based on Robert's average income from Hughes Farms – more than \$30,000 gross per month. (FF 2.25, CP 64, unchallenged) The trial court declined to include the additional annual rental income of \$54,000 that Robert receives in determining the amount of maintenance, because the real property was awarded to him as part of the 60/40 property division and the trial court apparently wanted to avoid “double dipping.” (FF 2.25, CP 64, unchallenged)

The trial court acknowledged that while the amount of maintenance awarded was “a lot of money,” “it's not enough money to equalize the parties' incomes.” (FF 2.29, CP 65, unchallenged) The trial court found that Michelle will earn only half of what Robert earns from his rental income once she invests her cash award. (FF 2.32, CP 65, unchallenged)

A decree dissolving the parties' 27-year marriage was entered on May 11, 2012. (CP 74) Robert appeals. (CP 128) Michelle filed a notice of cross-appeal, but has dismissed it. (CP 166-68)

### III. ARGUMENT

**A. The Trial Court's Award Of Maintenance Was Well Within Its Wide Discretion To Balance The Parties' "Disproportionate Economic Circumstances" When At The End Of Their Long Marriage The Husband Was Awarded Nearly Twice The Assets Of The Wife And All Of The Parties' Retirement.**

An award of spousal maintenance is discretionary, and will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Marriage of Luckey*, 73 Wn. App. 201, 209-10, 868 P.2d 189 (1994). The trial court's discretion in awarding maintenance is "wide;" the only limitation on the amount and duration of maintenance is that, in light of the relevant factors under RCW 26.09.090, the award must be "just." *Luckey*, 73 Wn. App. at 209.

Spousal maintenance is not only intended to support a spouse until she becomes self-supporting (*see* App. Br. 19-20), but is also a "flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *Marriage of Washburn*, 101 Wn.2d 168, 178-79, 677 P.2d 152 (1984). "The

standard of living of the parties during the marriage and the parties' post dissolution economic condition are paramount concerns when considering maintenance and property awards in dissolution actions." *Marriage of Estes*, 84 Wn. App. 586, 593, 929 P.2d 500 (1997) (*citations omitted*).

Here, the husband is correct when he claims that the "court's maintenance award and asset distribution leaves the parties in grossly disparate circumstances." (App. Br. 15) But he is wholly mistaken in claiming that he is the one left in the economically subservient position. As a result of the property award, the wife was awarded little more than half the assets awarded the husband after a more than 25-year marriage, and will have only a fraction of the income of the husband even after the trial court's maintenance award. The trial court's award of maintenance to the wife was well within its discretion and was an appropriate means to balance the parties' economic circumstances after their long marriage.

**1. There Is No Formula For Spousal Maintenance. The Trial Court Here Made A Proper Spousal Maintenance Award Based On These Parties, Their Property, And Their Specific Circumstances.**

The husband attempts to compare the spousal maintenance award in this case to other published cases affirming maintenance

awards to claim that the trial court's award here is "incomparable." (App. Br. 21-29) But there is no formula or standard for an appropriate award of maintenance. Instead, the trial court has "wide" discretion under RCW 26.09.090 to make a "just" maintenance award based on the particular circumstances of the parties before it. *Marriage of Luckey*, 73 Wn. App. at 209.

Unless the trial court fails to properly consider the parties' economic circumstances at the end of the marriage, the only thing those cases cited by the husband prove is that the trial court's decision will be affirmed. *See, e.g., Marriage of Hadley*, 88 Wn.2d 649, 657-58, 565 P.2d 790 (1977) (App. Br. 25-26) (affirming award of ten years of maintenance to wife after 10-year marriage when husband was awarded his separate property); *Marriage of Morrow*, 53 Wn. App. 579, 583, 770 P.2d 197 (1989) (App. Br. 26) (affirming lifetime maintenance award after 23-year marriage when many of the assets were "out of reach" to the wife); *Marriage of Tower*, 55 Wn. App. 697, 689-99, 701, 780 P.2d 863 (1989), *rev. denied*, 114 Wn.2d 1002 (1990) (App. Br. 27) (affirming award of lifetime maintenance after 19-year marriage when the wife's health left her in economic disparate circumstance); *Marriage of Bulicek*, 59 Wn. App. 630, 633-34, 800 P.2d 394 (1990) (App. Br. 27-28) (affirming

award of 13 years of maintenance, until the husband retires, after 22-year marriage).

The husband's reliance on *Marriage of Washburn*, 101 Wn.2d 168, for the proposition that the wife is not entitled to "additional compensation" in the form of spousal maintenance (App. Br. 21-25), is particularly misplaced. As the husband describes, *Washburn* "addressed if and how to compensate a wife who supported her husband through graduate school, but divorced before the husband's education produced the income increase the parties anticipated." (App. Br. 21) But that fact pattern is irrelevant here. The wife did not seek, nor did the trial court award, spousal maintenance based on a theory of "compensation." Instead, the spousal maintenance award was based on the principle of what is "just" under the circumstances of these parties after a careful consideration of the statutory factors under RCW 26.09.090, including the length of the marriage, the properties awarded to each party, the parties' standard of living during the marriage, and the parties' comparative economic circumstances.

The husband complains that "none of the maintenance and property awards in these cases [he cites] equalized the parties' incomes." (App. Br. 28) But neither did the award in this case. In

fact, the trial court made an unchallenged finding that while its maintenance award was “a lot of money. It’s not enough money to equalize the parties’ income[s].” (FF 2.29, CP 65, unchallenged)

The parties here are far from being in “equal” positions at the end of the marriage. The trial court’s property award leaves the husband with nearly twice as many assets as the wife, including assets that provide him with “substantial continuing income.” (FF 2.15, CP 62, unchallenged; CP 72-73) Meanwhile, the wife leaves the marriage with mostly cash that the trial court found she would be required to fully invest in order to receive even half the annual rental income of \$54,000 that the husband receives. (FF 2.32, CP 65, unchallenged)

Before the husband pays maintenance, he will have gross monthly income of at least \$35,000, including income from Hughes Farms and the real property awarded to him. Meanwhile, the wife has monthly employment income of \$1,723, and the potential to earn an additional \$2,250 if she fully invests all of the cash awarded to her instead of purchasing a home, as she had hoped to do with

her award.<sup>5</sup> (3/13 RP 37) After the husband pays maintenance of \$12,000 and later \$10,000—all tax deductible to him – he will still have at least \$7,000 more income each month than the wife. During the first seven years of maintenance, the husband will have monthly gross income of \$23,000 and the wife will have monthly gross income of \$15,973. In the final years of maintenance, the husband will have gross monthly income of \$25,000 and the wife will have gross monthly income of \$13,973. This is far from the providing the parties with “equal income,” as the husband claims. Instead, the trial court’s maintenance award was carefully crafted to lessen the financial disparity between the parties and was not an abuse of discretion.

**2. The Trial Court’s Maintenance Award Took Into Consideration All The Statutory Factors Of RCW 26.09.090, Not Just The Length Of The Marriage.**

The husband is simply wrong when he claims that the “primary reason for the massive maintenance award is the duration of the parties’ marriage.” (App. Br. 30) Instead, it is clear from the trial court’s unchallenged findings that its “primary” reason for

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<sup>5</sup> The parties had agreed that the husband would retain the family residence, which is located on land that Hughes Farms rents from the parties. (3/12 RP 63)

making its maintenance award was the “gross disparity in the parties’ resources regardless of the trial court’s property distribution in favor of the wife.” (FF 2.27, CP 64, unchallenged; *see also* FF 2.15, CP 62, unchallenged: “in order to address the disproportionate economic circumstances the parties will be left in... the court intends to award spousal maintenance to the wife”) This was a wholly appropriate consideration by the trial court in making its maintenance award, as the husband acknowledges. (App. Br. 31: “the ‘paramount concern’ is not the duration of the marriage, but the parties’ relative post-dissolution economic positions.” (*citing Marriage of Vander Veen*, 62 Wn. App. 861, 867, 815 P.2d 843 (1991); *Marriage of Stenshoel*, 72 Wn. App. 800, 812-13, 866 P.2d 635 (1993)).

In any event, the trial court properly considered the length of the parties’ marriage when awarding spousal maintenance. RCW 26.09.090 (1)(d) (a factor to consider is the “duration of the marriage”). Here, the parties were married for more than 25 years. At the end of the marriage, the parties were left with no retirement assets except the real property and interest in Hughes Farms awarded to the husband. Again, far from placing the parties in “equal” positions, the trial court fashioned a maintenance award to

lessen the disparity between the parties, an act that was well within the trial court's discretion. *See Marriage of Rockwell*, 141 Wn. App. 235, 243, ¶ 12, 170 P.3d 572 (2007) (in a long term marriage of more than 25 years, "the court's objective is to place the parties in roughly equal financial positions for the rest of their lives."), *rev. denied*, 163 Wn.2d 1055 (2008).

**3. The Trial Court's Award Of Spousal Maintenance To The Wife Based On The Husband's Income From A Separate Property Business Awarded To Him "Off The Top" Was Not "Double Dipping."**

The trial court properly considered the husband's income from Hughes Farms in making its maintenance award. This was not a "double dip," as claimed by the husband. (App. Br. 32) The trial court did not purport to award any interest in Hughes Farms to the wife. To the extent that it provided her maintenance based on the income received by the husband from the Farm, it was at most a "single" dip. *See, e.g., Marriage of Barnett*, 63 Wn. App. 385, 388, 818 P.2d 1382 (1991).

In *Barnett*, the parties' major asset was a salvage business. The trial court awarded the wife a \$100,000 lien for half the value of the salvage business, plus spousal maintenance. The husband appealed the maintenance award, asserting that it was based on

speculation that he would earn substantial income from the business. The *Barnett* court reversed because the maintenance award was an attempt to distribute the wife's share of the business as realized through future income of the business. 63 Wn. App. at 388. "That distribution had, however, already been effected by the \$100,000 lien to [the wife] for one half of the value of the salvage business. In effect, the same property was distributed twice. This was error." *Barnett*, 63 Wn. App. at 388.

Here, unlike the wife in *Barnett*, the wife received no interest in Hughes Farms. Instead, despite the trial court's acknowledgement that it was in part through the wife's support that the husband was able to receive high income from the Farm, the trial court chose to award this interest to him "off the top," as his separate property. (FF 2.29, CP 65, unchallenged) The trial court could have awarded the wife an interest in Hughes Farms, or included it as part of its 60/40 property division. RCW 26.09.080 (all property, whether separate or community, is available for distribution). In declining to do so, the trial court properly considered this award to the husband, and the income that it provides him, in making its maintenance award.

Under RCW 26.09.090, “the trial court is not only permitted to consider the division of property when determining maintenance, but it is required to do so. Likewise, the trial court, when dividing the property, may take into account the amount of maintenance it intends to grant.” *Marriage of Rink*, 18 Wn. App. 549, 552-53, 571 P.2d 210 (1977); *see also Marriage of Crosetto*, 82 Wn. App. 545, 559, 918 P.2d 954 (1996) (“The trial court was entitled to consider the property division in its determination of maintenance, and to consider maintenance in its property division.”).

An award of significant long-term spousal maintenance to the wife was appropriate when “so many assets’ were beyond the reach of distribution” because they were the husband’s separate property. *See Marriage of Morrow*, 53 Wn. App. at 583. Here, the husband’s interest in Hughes Farms comprised more than one-third of the marital estate. Because the trial court awarded the husband this interest “off the top,” the wife was left with only half the assets awarded the husband. It was within the trial court’s “wide” discretion to then award the wife sufficient spousal maintenance to “lessen the gap” between the parties at the end of their more than 25-year marriage. (*See* FF 2.23, CP 64,

unchallenged: “in making its maintenance award the court considered the factors of RCW 26.09.080 [sic] including the fact that the husband was awarded his separate property interest in the family corporation ‘off the top.’”)

**B. The Trial Court’s Award Of 60% of the Remaining Property To The Wife After The Husband Was Awarded His Interest In Hughes Farms “Off The Top,” Was Well Within Its Discretion.**

The trial court is given “broad discretion” in the division of property “because it is in the best position to determine what is fair, just, and equitable.” *Marriage of Wallace*, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002), *rev. denied* 148 Wn.2d 1011 (2003). Here, as with its maintenance award, the trial court made extensive findings of fact to support its discretionary decision dividing the parties’ property. In this case, the trial court’s award of 60% of the assets to the wife after awarding the husband’s interest in Hughes Farms “off the top” was well within its discretion. The trial court acknowledged that regardless of the disproportionate award to the wife, the husband was still in a better economic situation since he was awarded all of the income-producing assets, and was in a “uniquely power position with respect to his controlling his own destiny vis-à-vis the finances.” (FF 2.11, CP 61, unchallenged; *see*

also FF 2.27, CP 64, unchallenged) This property distribution, coupled with the spousal maintenance award to the wife, was intended to alleviate that disparity. (FF 2.15, CP 62 unchallenged).

The trial court also did not abuse its discretion in considering the husband's separate property interest in two real property parcels when making its 60/40 property division. RCW 26.09.080 (all property, separate and community, is available for distribution). *See Marriage of Irwin*, 64 Wn. App. 38, 49, 822 P.2d 797 (1992) (affirming property distribution dividing both the community and separate property between the parties), *rev. denied*, 119 Wn.2d 1009. The trial court found, and substantial evidence supports, that these parcels were "essentially [the parties'] retirement plan, and that the income from those rental parcels was intended to provide retirement income to the parties." (FF 2.9, CP 60, challenged; see 3/12 RP 56-57, 62-63; 3/13 RP 67-68; 3/14 RP 76)

At the end of the parties' long term marriage, they had accumulated no other retirement except for the real property that the parties had already agreed would be awarded to the husband. Under these circumstances, the trial court did not abuse its discretion by including the husband's separate property parcels as

part of its consideration in making its property award. RCW 26.09.080 (1), (2) (the court must consider the nature and extent of both the parties' separate property and community property).

**C. This Court Should Award Attorney Fees To The Wife.**

The wife asks this court for her attorney fees and costs for this appeal after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). Here, the wife has only a fraction of the assets and income awarded to the husband. She has the need for her attorney fees to be paid, and the husband has the ability to pay.<sup>6</sup> The wife will comply with RAP 18.1(c).

**IV. CONCLUSION.**

Guided by the principle that its decision be “just,” the trial court made a spousal maintenance award for the wife that alleviated the disparity caused by a property award that provided

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<sup>6</sup> Although the husband assigns error to the trial court's award of \$2,500 in attorney fees to the wife, he fails to make any argument in support of his challenge. (App. Br. 3) His argument is thus waived. *Yakima County v. E. Washington Growth Mgmt. Hearings Bd.*, 146 Wn. App. 679, 698, ¶ 55, 192 P.3d 12 (2008) (“If a party raises an issue but fails to provide argument relating to the issue in his or her brief, the party waives any challenge to the alleged issue.”).

the husband with twice the assets of the wife and a future of “substantial continuing income.” This court should affirm and award attorney fees to the wife.

Dated this 22nd day of February, 2013.

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### DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 22, 2013, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 22nd day of February,  
2013.

  
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Victoria K. Isaksen