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No. 70439-7-1

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

In Re the Marriage of:

PAMELA MOORE,

Appellant,

Vs.

DANIEL MOORE,

Appellee.

APPELLANT'S OPENING BRIEF

By:

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Pro Se

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INTRODUCTION

Despite the policies underlying Washington's domestic relations law, the specific requirements of statutory law, and the clear mandate of Washington appellate decisions, the trial court in this matter repeatedly and inexplicably ignored its obligations and abused its discretion. For example, the trial court failed to consider all the parties' community and separate property and liabilities in making its property division, and that failure combined with other errors, produced indisputably disparate economic circumstances favoring Dan. The trial court's failure to consider the parties' respective resources and the impact of its property division, combined with other errors, similarly produced indefensible awards of

child support favoring Dan. In the end, the trial court's decisions did not merely violate Washington statutory and case law. By unjustly and inequitably favoring Respondent and disadvantaging Appellant, the trial court's decisions ultimately failed to serve the best interests of the parties' only child, their six year old daughter and must therefore be reversed.

The trial court recognized the family home as the only asset left yet failed to divide the equity in the couple's community home in a fair and equitable manner as required by RCW 26.09.080. The trial court's findings regarding the community home contain arithmetical errors, are self-contradictory and incomplete, and are internally inconsistent, requiring remand for clarification and compliance with RCW 26.09.080. The Appellant asks that the trial court's order be reversed because the order improperly modified the property division of the parties' Amended Decree of Dissolution without meeting the requirements set out by RCW 26.09.170(1) for modifying a property division, thereby resulting in judicial abuse of discretion, and must be reversed accordingly.

PROCEDURAL HISTORY

Pamela K. Moore (Pam) filed for a *Petition for Legal Separation* from Daniel H. Moore (Dan) on August 22, 2011. CP 8-20. On September 9th 2011 the family court Commissioner entered the Temporary Order of Support. CP 123-139.

On October 12, 2011 a motions hearing was heard by the parties' assigned Judge, the Honorable Judge Jeffery Ramsdell. He agreed with the commissioner and upheld the 9-9-2011 order but granted Dan's request to have the GAL act as

parenting evaluator to save the parties considerable cost. CP 145-146. Dan selected the parenting evaluator and Pam agreed. A five and a half week parenting evaluation was conducted and presented to the parties' council on November 26, 2011. The Parenting Evaluators report was titled as "Final". CP 2017-2046.

Dan filed a motion to adopt the Parenting Evaluator's proposed parenting plan. CP 151-164. CP 236-237. The full transcript of the review hearing has been provided as 1-11-2012 RP 1-33.

On February 8th 2012 a motions hearing was held in front of Judge Ramsdell and he revised in part. CP 289-290. A complete transcript of the motions hearing was provided as 2-8-2012 RP 1-44.

Dan filed a motion to reverse child support and to request the family home sold. CP 270-282. At that time he also filed a second financial declaration declaring his income to be \$13,890 gross (per month). CP 283-288. Pam filed a reply as a cross motion after discovering marijuana and related paraphenella in clear presence of their daughter. CP 291, 292-367.

The couple attempted mediation in early March 2012 but the attempts fell through.

Another motions hearing was heard on March 28th 2012 in front of Commissioner Jesske. The Commissioner denied Dan's request. Instead she ordered that Dan take steps to secure a home equity loan. CP 541-542. A complete transcript of the motions hearing has been provided as 3-28-2012 RP 1-33.

Dan filed a motion for reconsideration on April 9, 2012. CP 543-50. Commissioner Jesske denied his request on April 18, 2012. CP 551.

In May 2012 both Dan and Pam agreed to have their respective legal counsel withdraw. Pam had her attorney (Todd DeVallance) withdraw indefinitely while Dan retained his council (Rodney Peirce) to appear for the pre-trial conference on June 15th 2012. Pam was unaware of this until the day of the pre-trial conference in front of Judge Ramsdell.

In June 2012 Pam was unable to re-hire her Mr. DeVallance as she was unable to afford his trial retainer. Instead Pam enlisted the help of a friend (Timothy McGuinness) a criminal defense attorney.

Trial was originally scheduled for July of 2012 but due to the health of Dan's council the trial was postponed to September.

In August 2012 Dan filed a motion using carefully edited emails to assert Pam was ignoring court deadlines. CP 559-563, 612-620. On August 28, 2012 Dan's motion was granted. CP 621-622. The result was that Pam was denied the ability to dispose Dan, the ability to call witnesses as well as the ability to offer any exhibits at time of trial. CP 1977-1995.

Judge Lum was the trial judge and not the couple's assigned judge (Ramsdell). Trial in this matter began on September 24th 2012, and was conducted over four days. The trial court made its oral ruling on September 27th, 2012. RP 137-59 of transcripts titled "Trial Excerpts". The trial court than held a follow conference call October 11th 2011. RP 1-7 10-11-2012.

The trial court set presentation for October 30th 2012 Id. Due the health of Dan's council it was delayed almost five months.

On January 30, 2013 Pam elected to have Mr. McGuinness withdraw and

have a family law attorney represent her at time of presentation. Pam borrowed \$3,500 from her mother's credit card to retain Katherine Jenkins.

On February 14th, 2013, the trial court entered its *initial* Findings of Fact and Conclusions of Law. CP 675-86; Decree of Dissolution. CP 698-707; Order of Child Support. CP 708-27 and Final Parenting Plan. CP 687-97. The trial court also approved Dan's corresponding letter to the bank disbursing funds. CP 947-1053 ex. 1. Complete transcript of presentation hearing - 2-14-2013 RP 1-50.

Pam filed a Stay of on February 19th 2012. CP 728-30, CP 731-48. On February 25, 2013 Pam filed a timely motion for reconsideration. CP 765-835. The trial court denied the stay on 2-28-2013. CP 836-37. However on March 15, 2013 the trial court ordered that Dan reply to Pam's motion of reconsideration. CP 840. On April 8, 2013 trial court granted Pam's motion in part by order dated April 8, 2013. CP 925-26.

On April 15, 2013 Dan's council submitted his notice of withdraw. The proposed supplemental order was presented to the Court on April 22, 2013. On May 14, 2013 Dan re-hired council and filed a motion against Pam for attorney fees incurred to enforce various provisions in the final order and to clarify others. In his motion he also requested an additional \$2,660 in Citibank interest charges. CP 1196-1203, CP 1204-1205. Dan also submitted his Citibank statements. CP 2234-2281. Pam filed a reply CP 1209-1336, 1337.

On June 6, 2013 the trial court granted Dan's Motion. CP 1350-52. This resulted in a Judgment entered on July 16, 2013 awarding Dan not only \$3,850 in legal fees but a vague judgment against Pam for \$2,660 in interest accrued on

Dan's Citibank Loan, CP 1350-1352.

Pam attempted to argue that the proposed distribution still had several errors. The result was an additional \$4,410 and \$2,500 in attorney fees awarded to Dan on July 31, 2013 in addition to the \$3,850 awarded the month prior. CP 1934-39.

ASSIGNMENTS OF ERROR

1. The trial court committed reversible error by awarding Dan "child support" FF 2.20
2. The court erred in finding the Husband's income to be \$5,000 gross [per month]. CP 1358, FF 2.21: 29 and 31.
3. The trial court erred in not recognizing Dan's Bonus. Id.
4. The court erred in only awarding spousal maintenance to Pam of \$1,750 per month for 6 months following a 12-year marriage. CP 1359, FF 2.21: 32, 33, 34 and 35.
5. The trial court erred in approving the February 14th 2013 Letter of Disbursement when allowing a twelve month pro-rated mortgage reimbursement to Dan. CP 1340.
6. The trial court erred in approving the February 14th 2013 Letter of Disbursement when it did not recognize Dan's supports arrears. CP 1340, FF 2.21-27, 28.
7. The trial court erred in not recognizing Dan's unpaid transitional maintenance of \$10,500 as part of the final distribution. FF 2.21-48, 49.
8. The trial court erred in approving the February 14th 2013 Letter of Disbursement when valuing Dan's studio gear at \$9,330. CP 1341, FF 2.21-40.
9. The trial court erred not recognizing the correct value of 401k account. CP 1341.

10. The trial court erred in awarding Dan 100% of the joint home equity loan amount of \$48,000. CP 1340, FF 2.21-54.
11. The trial court erred by awarding Dan 100% of the joint tax refund for 2010 in the amount of \$11,796. CP 1340, FF 2.21-55.
12. The trial court committed reversible error in classifying Dan's Citibank loan as community debt. CP 1341.
13. The trial court erred and abused discretion by not accounting for Pam's post separation liabilities leaving her in debt.
14. The trial court erred in entering the final Decree of Dissolution and relying corresponding Dan's spreadsheet, through which it announced its ruling on characterization, valuation, and allocation of property and debt, is not supported by substantive evidence with respect to several crucial items of property and debt insofar as the trial court relied on information in exhibits introduced solely for illustrative purposes in preparing the spreadsheet and the trial court erred as a result. CP 1348-49.
15. The trial court erred in entering its Order in April 2013 on Pam's Motion for Reconsideration and/or Amendment of Judgment Pursuant to CR 59. CP 925-26.
16. The trial court erred in entering its written decision awarding Dan both retroactive Citibank interest and attorney fees. CP 1350-52.
17. The trial court abused its discretion in entering Judgment and approving Order on Dan's Motion to Enforce Letter of distribution Request for additional Attorney Fees. CP 1934-39.
18. The trial court abused its discretion in awarding Dan legal fees for satisfied

judgment a year prior. CP 1934-39, 1977-1995.

Issues Pertaining to Assignments of Error

1. Whether the trial court committed reversible error by awarding Dan "child support"
2. Whether the court erred in finding the Husband's income to be \$5,000 gross [per month].
3. Whether the court erred in failing to include 10% bonus as part of Dan's gross income.
4. Whether the court erred in finding need and ability and awarding spousal maintenance of \$1,750 per month for 6 months following a 12-year marriage.
5. Whether the trial court erred in approving the February 14th 2013 Letter of Disbursement allowing a pro-rated mortgage reimbursement to Dan.
6. Whether the trial court erred in approving the February 14th 2013 Letter of Disbursement not recognizing Dan's supports arrears.
7. Whether the trial court erred in not recognizing Dan's transitional maintenance of \$10,500 as part of the final distribution.
8. Whether the trial court erred in approving the February 14th 2013 Letter of Disbursement valuing Dan's studio gear.
9. Whether the trial court erred when it valued the 401k account liquidated by Dan \$40,352.
10. Whether the trial court erred in awarding Dan 100% of the joint home equity loan amount of \$48,000.
11. Whether the trial court erred by awarding Dan 100% of the joint tax refund for

2010 in the amount of \$11,796.

12. Weather the trial court erred in classifying Dan's Citibank loan as community debt.
13. Weather the trial court erred and abused discretion by not accounting for Pam's post separation liabilities leaving her in debt.
14. Weather the trial court erred in relying on Dan's corresponding spreadsheet, through which it announced its ruling on characterization, valuation, and allocation of property and debt, is not supported by substantive evidence with respect to several crucial items of property and debt insofar as the trial court relied on information in exhibits introduced solely for illustrative purposes in preparing the spreadsheet and the trial court erred as a result.
15. Weather the trial court erred in entering its Order on Pam's Motion for Reconsideration and/or Amendment of Judgment Pursuant to CR 59 when only reversing a portion of the mortgage reimbursement.
16. Weather the trial court erred in entering its written decision awarding Dan both retroactive Citibank interest and attorney fees.
17. Weather the trial court abused its discretion in entering Judgment and approving Order on Dan's Motion to Enforce Letter of distribution Request for additional Attorney Fees.
18. Weather the trial court abused its discretion in awarding Dan legal fees for satisfied judgment a year prior.

III. STATEMENT OF THE CASE

Appellant Pamela Kay Moore ("Pam") and Respondent Daniel Hardwick Moore ("Dan") started living together in 1997 and were married in 1999. The parties have one child, their daughter born in 2007.

The parties separated in August 2011, and Pam filed a petition for dissolution on August 23rd, 2011. CP 8-20.

On September 9, 2011, a family court commissioner entered a Temporary Parenting Plan [Temporary Plan]. CP116-122. The plan was the version of that proposed by Pam.

During the pendency of the proceeding the Dan was ordered to pay maintenance of \$1,750 per month, child support of \$1037 per month and the mortgage payment. CP 123-139. This amount became undifferentiated after motions hearing on 3-38-12 CP 541. Dan failed to pay child support and maintenance. By the fall of 2010 he was \$22,790 in arrears.

Trial in this matter began on September 24th 2012, and was conducted over four days. The trial court made its oral ruling on September 27th, 2012. RP 137-59 "trial excerpts". The trial court then held a follow conference call October 11th 2011. RP 1-7.

The family home was in foreclosure but sold in December of 2012. . The sales proceeds were held in a money market account pending the final presentation date. Pam was forced to borrow money from her mother and move into a modest rental a few blocks away to stay with-in the school district.

The trial court set presentation for October 30th 2012. On February 14th, 2013, the trial court entered its *initial* Findings of Fact and Conclusions of Law CP 675-86; Decree of Dissolution CP 698-707, Order of Child Support CP 708-27, Parenting Plan Final CP 687-97. The trial court also approved Dan's accompanying letter to the bank disbursing funds 2-14-2013 RP 1-50.

The trial court's property award to Dan included the following: (1) the majority of proceeds from parties' home, (2) the parties' investment and retirement accounts, (3) the parties' Microsoft stock options, (4) three judgments against Pam totaling \$10,652, (5) a right to child support from Pam of \$280.00 per month.

Although the trial court's parenting plan scheduled the majority of the residential time for the parties' child with Dan, Pam continued to have child in her residence the majority of the time. Nevertheless, the court's parenting plan give Dan sole decision-making authority for the child over the following "major decisions": (1) education decisions, (2) non-emergency health care and (3) religious upbringing. CP 687-97.

Pam attempted to illustrate evidence during the reconsideration process that she continued to have the majority of the residential time with the parties' daughter. CP 755-64; 765-835.

Despite the evidence that the parties were operating on an unofficial parenting plan that left their daughter in Pam's care 70% of the time the trial court's property award left her in dire economic circumstances. However the only existing assets awarded to Pam was a fraction of the home proceeds, which had a balance of only \$65,589 at the time of final order to disburse funds based on Dan's motion to

distribute funds. CP 1934-39. And in addition to judgments of \$10,662 against Pam in favor of Dan and her ongoing support obligations, the court also assigned debts to Pam and left her jointly liable for the Dan's Citibank loan used to pay over \$20,000 in payments to his attorney ten months after they had separated (only two months prior to trial).

STANDARDS OF REVIEW

All property, both community and separate, is before the court for distribution in a dissolution action. *Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972). In a dissolution proceeding, the trial court must distribute the marital property in a manner that is 'just and equitable after considering all relevant factors.'" RCW 26.09.080.

The division of property in dissolution proceeding is governed by RCW 26.09.080:

In a proceeding for dissolution of the marriage or domestic partnership . . . 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.

As the court observed in *In re Washburn*, 101 Wn.2d 168, 677 P.2d 152 (1984), the division of property and liabilities under RCW 26.09.080 "is controlled *not* by their character as separate or community, but rather by what is just and equitable, taking into account the economic circumstances of the parties. All relevant factors *must* be considered by the trial court in its attempt to achieve an equitable distribution." *In re Washburn*, 101 Wn.2d at 177 (emphasis added).

Washington courts have repeatedly recognized the long-standing rule that in dividing property in a dissolution proceeding, the trial court's "paramount" concern must be the economic condition of each spouse as a result of the division. *See, e.g., In re Washburn*, 101 Wn.2d at 181; *see also In re Marriage of Dessauer*, 97 Wn.2d 831, 839, 650 P.2d 1099 (1982); *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 408, 433 P.2d 209 (1967); *In re Urbana v. Urbana*, 147 Wn. App. 1, 11, 195 P.3d 959 (2008); *In re Marriage of Gillespie*, 89 Wn. App. 390, 399, 948 P.2d 1338 (1997); *In re Marriage of Williams*, 84 Wn. App. 263, 268, 927 P.2d 679 (1996); RCW 26.09.080(4).

Given the "paramount" concern for the parties' respective economic conditions at the time the decree is entered, a trial court's discretion in making a division of property is not unlimited. While a trial court is not required to divide community property equally, if a dissolution decree "results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred" and the court has therefore committed reversible error. *In re Marriage of Rockwell*, 141 Wn. App. 235, 243, 170 P.3d 572 (2007), *review denied* 163 Wn.2d 1055

(2008); *see also In re Urbana v. Urbana*, 147 Wn. App. at 10; *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1977).

A trial court's division of property in a decree of dissolution is reviewed for a manifest abuse of discretion. *Buchanan v. Buchanan*, 150 Wn. App. 730, 753, 207 P.3d 478 (2009). A trial court abuses its discretion if its decision is manifestly unreasonable, meaning that its decision is outside the range of acceptable choices, or is based upon untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). This Court reviews the trial court's factual findings for substantial evidence, which is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *In re Marriage of Rockwell*, 141 Wn. App. 235, 242, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008). On review, this Court considers whether the property division is fair and equitable based on all the facts and circumstances. *Stachofsky v. Stachofsky*, 90 Wn. App. 135, 147, 951 P.2d 346 (1998), *review denied*, 136 Wn.2d 1010 (1998).

These statutory factors are not limiting and the trial court may consider other factors such as the age, health, education, and employability of the couple. *See In re Marriage of Tower*, 55 Wn. App. 697, 699, 780 P.2d 863 (1989), *review denied*, 114 Wn.2d 1002 (1990).

No single factor is conclusive or given greater weight than the others. *See In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985), *cert. denied*, 473 U.S. 906, 105 S. Ct. 3530, 87 L.Ed.2d 654 (1985); *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 408, 433 P.2d 209 (1967).

A fair and equitable property division does not require mathematical precision. *See, In re Marriage of Crosetto*, 82 Wn. App. 545, 557, 918 P.2d 954 (1996). *See also, In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145, *review denied*, 86 Wn.2d 1001 (1975) (noting the key to an equitable distribution is fairness). Nor does it require the court to divide the property equally. *See In re Marriage of Rockwell*, 141 Wn. App. 235, 255, 170 P.3d 572 (2007), *review denied*, 163 Wn.2d 1055 (2008) (affirming 60/40 property distribution). Instead, fairness is obtained by considering all the circumstances of the marriage and by exercising discretion, not by utilizing inflexible rules. *See Tower*, 55 Wn. App. at 700. Separate property is not generally subject to division between the parties. RCW 26.16.010. Separate property will remain separate property through changes and transitions, if the separate property remains traceable and identifiable *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). Although the character of property is a relevant factor to its distribution, it is not determinative. *In the Matter of the Marriage of Konzen*, 103 Wn.2d at 478.

Child support decisions are reviewed on appeal using the same "abuse of discretion" standard utilized in reviewing a court's division of property. *See, e.g., In re Marriage of Fiorito*, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002).

The amount of child support rests in the sound discretion of the trial court. This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances.

In re Marriage of Fiorito, 112 Wn. App. at 664.

When setting child support, a court is obligated to consider "all income and resources of each parent's household". RCW 26.19.071(1).2 "A trial court's failure to include all sources of income not excluded by statute is reversible error." *In re Marriage of Bucklin*, 70 Wn. App. 837, 840, 855 P.2d 1197 (1993). Pursuant to RCW 26.19.035(4), a trial court is required to use the state's mandatory child support worksheets in calculating child support awards.

Once each parent's net monthly income is computed, the trial court determines the "standard calculation" basic child support level from the tables in RCW 26.19.020.3 RCW 26.19.020 (1998) sets out the presumptive level of child support for combined monthly net incomes up to and including five thousand dollars. According to the statute:

When combined monthly net income exceeds seven thousand dollars, the court may set support at an advisory amount of support set for combined monthly net incomes between five thousand and seven thousand dollars or the court may exceed the advisory amount of support set for 2 RCW 26.19.071 was amended effective October 1, 2009. RCW 26.19.071(1) was not altered by the 2009 amendment. 3 RCW 26.19.020 was amended effective October 1, 2009, and now sets the presumptive support obligations for incomes up to \$12,000 per month. This matter was decided under former RCW 26.19.020 (1998), a copy of which is attached as Appendix 8. combined monthly net incomes of seven thousand dollars upon written findings of fact

Under RCW 26.19.075 a court may elect to deviate from the standard calculation and require more or less than the "presumptive amount of support." *See* RCW 26.19.075(2). The reasons for deviation may include "sources of income" such as "possession of wealth", "nonrecurring income", "debt and high expenses" and "residential schedule". *See* RCW 26.19.075(1).

Under RCW 26.19.0805, a court may also deviate from the "basic support obligation derived from the economic table" (RCW 26.19.080(1)) by ordering parents to share in particular "extraordinary health care expenses" (former RCW 26.19.080(2) (1996)) and/or "day care and special child rearing expenses (RCW 26.19.080(3)).

In making any award of child support, the trial court is required to enter "written findings of fact" supporting its decision. According to RCW 26.19.035(2):

An order for child support shall be supported by written findings of fact upon which the support determination is based and shall include reasons for any deviation from the standard calculation and reasons for denial of a party's request for deviation from the standard calculation. The court shall enter written findings of fact in all cases whether or not the court: (a) Sets the support at the presumptive amount, for combined monthly net incomes below five thousand dollars; (b) sets the support at an advisory amount, for combined monthly net incomes between five thousand and seven thousand dollars; or (c) deviates from the presumptive or advisory amounts.

Written findings of fact are similarly required for any deviation from a parent's basic support obligation. According to RCW 26.19.075(2):

The presumptive amount of support shall be determined according to the child support schedule. Unless specific reasons for deviation are set forth in the written findings of fact and are supported by the evidence, the court shall order each parent to pay the amount of support determined by using the standard calculation.

Written findings are also required by RCW 26.19.075(3):

The court shall enter findings that specify reasons for any deviation or any denial of a party's request for any deviation from the standard calculation made by the court. The court shall not consider reasons for deviation

until the court determines the standard calculation for each parent.

See also former RCW 26.19.020 (1998) ("[T]he court may exceed the advisory amount of support set for combined monthly net incomes of seven thousand dollars upon written findings of fact.")

A. The trial court abused its discretion in awarding "child support" to Dan and in setting the parties' prospective child support obligations

In determining child support obligations, a trial court is statutorily obligated to consider *all* sources of income from *any* source for each parties. RCW 6.19.071(1).

1. The court committed reversible error by failing to consider all of Dan's income and the parties' assets and liabilities in setting child support.

In the trial court's Oral Ruling on 9-27-2012, RP 148-150:

Now, let's talk about the child support. The Court makes certain findings -- let's back up a little bit in terms of income. We had discussed this a little bit earlier, but the mother strongly suspects that the father is understating his income. She thinks -- perhaps with good reason -- she thinks that the father is with a start-up company and is understating his income and could go out and get another job, and will likely go out and get a job a couple days after this -- this dissolution is over; you know, that kind of thing. The father thinks the mother is holding back on getting a job because the father thinks she's strung out this case in order to get maintenance during the -- and live in the house until this case is over and somehow could get a job the day after this case is over.

And I have to say all of that is speculation. I can't tell. There's no evidence that he's holding back on income and no evidence that he could go get another job. And, frankly, no evidence that she's stringing this out. All that's speculation. You know, if somebody was really cynical, one could say all of that stuff. But I can't base my decisions on cynicism or speculation. I just have to go upon what the evidence is.

The evidence is he makes what he makes, that's what he makes. And there are a lot of people in Seattle who work for start-up tech companies. That's what people do. And

*sometimes they hit it big down the road and other times they got what they got; you know, and they got nothing or they got - you know, half the income they used to have, which is what this gentleman currently has. **That's what the evidence is and so that's what I'm going to use on the child support worksheets.***

In setting child support in this case the trial court did not consider all of Dan's income 2-14-2013 RP 4-6 and 9-26-2012 RP 41-45.

In order to review this matter, this Court should consult RCW 26.19.071. A parent's monthly gross income is determined by considering all income, as verified by tax returns from the preceding two years and current pay stubs. RCW 26.19.071(1)-(2). RCW 26.19.071 details what income sources are included in and excluded from gross monthly income, specifies what expenses shall be disclosed and deducted from gross income to arrive at net income, and discusses imputation of income to parents in certain circumstances.

RCW 26.19.071(6) governs when and how income should be imputed to a parent: "[t]he court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon the parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation." In our case, the trial court adopted worksheets that did not comply with the statute.

Case law above dictates making findings to support the income figures

used by the court. Here the trial court adopted the father's worksheets, using the income figures the father submitted. CP 708-727. This was reversible error.

The trial court erred in not using the correct income and worksheets reflecting Dan's income. Therefore, the trial court should reverse and remand for entry of the appropriate worksheets herein. RCW 26.19.071(1) provides that "[a]ll income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent." "Tax returns for the preceding two years and current paystubs shall be provided to verify income and deductions. Other sufficient verification shall be required for income and deductions which do not appear on tax returns or paystubs." RCW 26.19.071(2). "A trial court's failure to include all sources of income not excluded by statute is reversible error." *In re the Marriage of Bucklin*, 70 Wn. App. 837, 855 P.2d 1197 (1993).

Financial verification is still necessary. Therefore, the court is required to verify income. *Bucklin*, 70 Wn.App. at 840, 855 P.2d 1197. RCW 26.19.071(1) expressly dictates that "[a]ll income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent." In subsection (2), the statute provides that "[t]ax returns for the preceding two years and current paystubs shall be provided to verify income and deductions." RCW 26.19.071(2). Income and deductions that do not appear on tax returns or paystubs shall be verified by "[o]ther sufficient verification." RCW 26.19.071(2).

Thus, the statute requires the court to consider all income and verify such

income based on current paystubs, tax records from the preceding two years, or other sufficient verification. The trial court failed to do so and erred in its ruling.

2. The court erred in finding the Dan's income to be \$5,000 gross [per month] with history of a monthly income of \$14,000 gross [per month].

The trial court committed a reversible error and abused its discretion in its determination that Dan's income had dropped from \$14,000 a month to \$5,000 gross per month. The monthly income listed for Dan on the child support schedule worksheet was \$4,216.24, which consisted of Dan's revised net salary from Greenbutton CP 659-664. In the courts Oral Ruling on September 27, 2012, RP 149:

The trial court abused its discretion when relying only on Dan's testimony. Dan testimony regarding his reduction of income is in "trial excerpts" 9-26-2012 RP 41-45. The trial court was not provided supporting financial evidence as to the reduction in salary. The court's evidence was as follows: One revised Financial Declaration with new income submitted on 9-24-12 CP 569-664 along with checking and savings registers through June of 2012. Monthly income deposited from separation in August 2011 until May 2012 were close to the 14k a month as per all of respondents previous financial declarations CP 68-72, 283-288. The records only reelect one month of his reduced income and even then it is not \$5,000. The last deposit in bank record for Green Button is the wire transfer from New Zealand is for \$5,867 and in addition another check over \$500 for his travel expense CP 755-764.

3. The court erred in failing to include 10% bonus as part of Dan's gross income.

Even if the trial court decided to accept Dan's testimony as evidence as to his reduction in income from \$14,000 a month to \$5,000 a month the court abused its discretion in not including the bonus Dan testified that he received on top of his \$60,000 per year gross salary (\$5,000 a month gross salary).

In addition to relying on Dan's testimony alone as evidence of his dramatically lower income the court abused its discretion in ignoring Dan's own testimony on September 27, 2012. On cross examination Dan testified: RP 42.

"All revenue that is earned for that unit to which I am responsible in my contract, and submitted as an exhibit, clearly states that I earn ten percent of that revenue as a commission on top of a base salary of \$60,000 per year".

Dan did not dispute this upon reconsideration. The trial court never acknowledged that Dan had any income beyond the \$60,000 gross per year (\$5,000 gross per month). This was an abuse of discretion by the trial court.

The appellate court will overturn an award of child support only when the party challenging the award demonstrates that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. In re Marriage of Stenshoel, 72 Wash .App. 800, 803, 866 P.2d 635 (1993). In this case the trial court did not follow the requirements of RCW 26.19.07 (1).

Washington law mandates the inclusion of bonuses as part of gross income for child support purposes. RCW 26.19.071(1) requires that "all" income and resources of each parent's household shall be disclosed and considered by the court when the court determines the child support obligation of

each parent." RCW 26.19.071(3)(r) requires that "monthly gross income shall include income from any source, including ... **bonuses.**" These statutes are intended to benefit the children as recognized by this Court in Stenshoel, 72 Wash.App. 806. the legislative intent behind the child support schedule is to 'insure that child support orders are adequate to meet a child's basic needs and to provide additional child support commensurate with the parents' income, resources, and standard of living.' (citing RCW 26.19.001)").

The WSCSS-Schedule 06/2010 Instructions, page 7 Section 3

clearly reflect this:

Income sources included in gross monthly income:
Monthly gross income shall include income from any source, including: salaries; wages; commissions; deferred compensation; overtime, except as excluded from income in RCW 26.19.071(4)(h); contract-related benefits; income from second jobs except as excluded from income in RCW 26.19.071(4)(h); dividends; interest; trust income; severance pay; annuities; capital gains; pension retirement benefits; workers compensation, unemployment benefits; maintenance actually received; **bonuses**; social security benefits; disability insurance benefits;

[Emphasis added.]

The trial court's failure to include Dan's bonus requires remand for entry of recalculated child support. The court's finding that Dan's gross monthly income for child support purposes was \$5,000 gross per month -- that regular monthly bonus income was excluded from gross income -- was directly contrary to the definitions and standards set forth in RCW 26.19.071 as embodied in section 3 of the WSCSS- Schedule Instructions. For this reason

the trial court's award, which is based on its calculation of the father's gross income as \$5,000 per month. is manifestly unreasonable based on untenable grounds, and granted for untenable reasons. Pam requests this court remand to the trial court for entry of a new Child Support Worksheet and Order of Child Support which retroactively includes as gross income Dan's monthly bonus as reflected in his testimony on 9-27-2012. RP 42.

4. The trial court erred awarding Dan "child support" and in calculating Pam's income and ability to pay child support.

The trial court also erred in assuming Pam had "unemployment" income to input. Pam had not received any income in nearly a decade as she was not in the work force RP 16 of the oral ruling on 9-27-2012.

"So for the purposes of the child support worksheets, we're going to go ahead and use his income as he's stated. We're going to use her income as -- her unemployment income which is slightly above the -- I think it's slightly above the minimum but it's not much. And that's how we'll calculate the child support formula".

5. The court erred in finding need and ability and awarding spousal maintenance of \$1,750 per month for only 6 months following a 12-year marriage.

The court also determined that Pam's maintenance be reduced to \$1,750 for only six months, while imposing substantial debt on her. This is also abuse of discretion.

RCW 26.09.090 directs the court to consider a maintenance order in such amounts and for such periods of time as the court deems just after considering such factors as:

- (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 ...;

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

(d) The duration of the marriage;

(e) The age, physical and emotional condition, and financial obligations of the spouse; 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.

RCW 26.09.090.

The maintenance award does not evidence a fair consideration of the statutory factors and thus results from an abuse of discretion. Although a trial court need not make specific findings of fact for every statutory factor, some sort of oral or documentary evidence is required to show that the trial court considered all relevant factors under RCW 26.09.090. *Murray v. Murray*, 28 Wn.App. 187, 189-90, 622 P.2d 1288 (1981). As this Court explained in *Murray*, when written findings of fact do not clearly reflect a consideration of statutory factors, resort can be made to the court's oral opinion. *Id.* at 189. Any presumption that the trial court considered the statutory factors is rebutted by the failure of the written findings or oral opinion to reflect any application of the statutory factors. *Id.*

A record which fails to support a trial court's adequate consideration of the two paramount concerns—the parties' standard of living during marriage, and the post-dissolution economic condition—in considering maintenance and a property award, is reversible error. *In re Marriage of Sheffer*, 60 Wash. App. at 57-58. Here, the record reflects no reference to

either paramount concern.

A record which fails to support a trial court's adequate consideration of the two paramount concerns-the parties' standard of living during marriage, and the post-dissolution economic condition-in considering maintenance and a property award, is reversible error. *In re Marriage of Sheffer*, 60 Wash. App. at 57-58. Here, the record reflects no reference to either paramount concern. It reflects no reference to the specific RCW 26.09.090 factors related to a maintenance order. A maintenance award that is not based upon fair consideration of statutory factors constitutes an abuse of discretion. *Spreen v. Spreen*, 107 Wn.App. 341, 348, 28 P.3d 769 (2001).

Remand is required for entry of a maintenance **order which reflects application of the statutory elements**. Because the trial court did not fairly consider the statutory criteria of RCW 26.09.090 when it determined the maintenance, the trial court's award constitutes an abuse of discretion.

This court has authority to remand the maintenance award for application of the statutory elements. Murray, 28 Wn.App. 187.

Accordingly, Pam requests this Court remand the case to the trial court for entry of findings which apply the statutory elements to the evidence and can be effectuated according to the criteria of RCW 26.09.090(1)(b).

B. The trial court erred approving Dan's initial letter of distribution making a property division that awarded 68% of the community property to Dan and 38% to Pam.

The last day of trial was September 27, 2012 and the conference call to

follow up on the court's rulings was October 11, 2012. The presentation date to finalize was set by this court for October 30th 2012.

The actual presentation hearing was on February 14th 2013. The letter of distribution the trial court approved on February 14, 2014 had Dan receiving 68% of the net proceeds and Pam 38%. CP 947-1053 (exhibit 1).

1. The trial court erred when it overlooked that Dan had reimbursed himself for unauthorized mortgage payments of \$33,984.

Dan was ordered to pay the mortgage on September 9, 2011 CP 123-139. There was no subsequent order revising this ruling or providing that he should be reimbursed at some future date. The trial court's order allowing reimbursement of the mortgage payment was an abuse of discretion, resulting in an inequitable result, artificially reducing the value of the community estate and thereby increasing the property awarded to Dan to the detriment of Pam.

Five months prior to presentation, on the final day of trial, the court recognized the only real asset the couple had is the family home. The Trial Court reminded Dan of obligation CP 769-71, RP 153-54 9-27-2012:

"So, frankly, I think what I'd like to see -- you know, the father is going to have to pay the mortgage until this thing is sold because, you know, if you default, then it doesn't do any of you any good. Just you need to get the money out of it and you're the only one with the income. So it's --you know, it doesn't do you any good to go into a short sale or a foreclosure of anything else like that..." "Your client is going to need to pay the mortgage, though, during the pendency of this because I don't know how else it's going to get paid. Right? I don't want to see this thing going into default"

Even though Dan was ordered to make the mortgage payment he stopped

paying the mortgage in April of 2012. His nonpayment of the mortgage resulted in past due interest, late fees and foreclosure costs that would not be owed if Dan complied with court orders to make all mortgage payments. The failure to meet his obligation weighed the additional financial burden of \$ 26,011.32. CP 731-32, 769-71.

In Dan's own testimony he admits to being several months behind in his mortgage obligation. 9-27-12 RP 85 "Trial Excerpts". It was an abuse of desertion to have Pam to not only share in the \$26,011 burden but also reimburse Dan \$33,978 from Pam's share of the equity. In the five month delay the trial court could not recall that it clearly was not persuaded when the augment was first made on October 11, 2012. 10-11-2012 RP 17.

At the time of conference call Dan's council for the first time tried to argue why Dan was justified in asking for the \$33,984 in mortgage reimbursements on payments made before he stopped paying altogether. The trial court did not approve Dan's request; 10-11-2012 RP 17, the trial court told his council "***Frankly I'm not persuaded***" Id. It is undisputed that the COURT was not persuaded and never ordered or approved reimbursing Dan for the payments he made before letting the family home go into Foreclose for quick sale after trial was over.

The Trial Court's decision to reimburse Dan for mortgage payments was an error. The trial court abused its discretion in allowing Dan to take advantage of the five month delay to time of final presentation and he should not have been rewarded \$33,798 for making payments he was ordered to make and stopped making four months prior to trial in September of 2012. On the contrary his nonpayment of

the mortgage resulted in past due interest, late fees and foreclosure costs that would not be owed if Dan had complied with court orders. Not only was it an error of law to allow Dan the \$33,798 but the court also erred in disregarding his failure to comply with all orders cost the community assets \$26,011. CP 769-71.

2. The trial court erred in overlooking orders in place and allowed Dan to reduce his past due support obligation by \$13,490.

The trial court initially erred when it determined that the maintenance and child support arrearage owed by Dan was \$8,250. The Court ordered child support and maintenance on September 9, 2011 in the sum of \$1,750 per month for maintenance and \$1037 per month for child support CP 123-39.

It was undisputed that Dan owed past due maintenance at time of trial. The trial court recognized this in its oral ruling and in follow up conference call. 10-11-2012 RP 4-5 "Conference Call".

THE COURT: *It's also my understanding that the husband owes back maintenance.*

MR. MCGUINNESS: *That's correct, Your Honor.*

THE COURT: *So the maintenance -- so up until -- up until the time we enter the final orders, the temporary order remains in effect. And I think we confirmed that just as counsel were leaving the courtroom at our trial. And, of course, that makes sense as well. So what I'd like to do is have an order that basically splits the community property -- or basically provides for the sale of the house And, of course, the cost of -- cost of sale, the closing costs, the cost of making a house salable, the, you know, the real estate agent costs, those kinds of costs would come off the top and obviously be borne equally by the parties. And then the parties will split the net proceeds of the house 50/50 with the understanding then that the past due and unpaid maintenance that the husband owes the wife, will then subsequently be subtracted or deducted or taken out of the husband's 50 percent share, net share. And then he will also then be responsible for paying an additional sum as maintenance out of his share.*

At the time of presentation Dan's attorney asserted that the \$8,250 in past due maintenance was based on evidence at time of trial and was the trial court's: RP 18

2-14-2013:

MS. JENKINS: *I do have a problem. Mr. Pierce said that he had corrected the unpaid maintenance. And it says it's \$8,250. I thought it*

—
MR. PIERCE: *That was the testimony at trial. That was what was on the exhibits —*

MS. JENKINS: *That she's not owed maintenance from April, '12 until January, '13?*

MR. PIERCE: *I'm just telling you what the evidence was.*

THE COURT: *Well, that's what the evidence is at trial. I mean, she hasn't received anything since then, right? But I think we're only talking about what's at trial.*

MS. JENKINS: *You're talking \$2,737? Or you're talking \$2,737 from September or whenever trial was?*

THE COURT: *Right.*

MS. JENKINS: *September, October, November, December, January?*

THE COURT: *Right.*

MS. JENKINS: *That's more than \$8,250, Your Honor.*

THE COURT: *Right. I understand that. I think. All right. Well I think what we're trying to do is enter these to be reflective of what the trial testimony is and that's really all we can do.*

The trial court would not address what was in the transcript Pam provided for both the trial court and Dan's council.

3. The trial court erred in not recognizing Dan's unpaid transitional maintenance of \$10,500 as part of the final distribution.

Dan owed both past due undifferentiated support of \$21,740 and transitional maintenance of \$10,500. This totaled \$32,240, not \$8,250 the only amount Dan accounted for in his pleadings and corresponding spreadsheet.

The trial court ordered Transitional Maintenance of \$1,750 for 6 months or \$10,500 that was to be paid with-in 90 days of the family home selling. Dan did not account for this in the final distribution.

4. The trial court erred in valuing studio equipment as both community and separate property and awarding to Dan.

The awarded of the studio equipment is not mentioned anywhere in both the “Oral Ruling” on 9-27-2012 RP 137-15, and the Conference Call on 10-11-2012 RP 1-17. At time of trial the trial court was not persuaded by Dan or his “expert witness” as to the value and did not address it in its rulings. It was not until the presentation date that the trial judge elected to award Dan. The trial court erred in allowing Dan’s attorney suggest it was part of the trial court’s rulings during the October 11, 2012 Conference Call.

The studio equipment is discussed in the presentation hearing. RP 30-35 2-14-2013. Below a portion of the February 14, 2013 presentation hearing. RP 30.

THE COURT: *I don't recall the spreadsheet as clearly as I recall the testimony.*

But I do recall the question I had. And the reason I made those comments during the phone conference was these were amounts that, again, they were garnered over the course of years, and that, you know, even though I had a clear sense that the wife kind of did a fire sale of these things, I wasn't entirely convinced that they were worth the actual replacement value that the husband stated they were. And so that's the reason for my uncertainty.

MS. JENKINS: *Mm-hmm.*

THE COURT: *Again, you know, I've had a bunch of trial since then.*

MS. JENKINS: *Yeah, of course, you have.*

THE COURT: *But that's –*

MS. JENKINS: *It's personal property.*

THE COURT: *-- my recollection of the testimony. And that's the reason I commented about that. And I had some uncertainty, Mr. Pierce, about your numbers. You know, my feeling at the time was that it probably wasn't as high as the husband was valuing it at. Because that's actually replacement value for even items that he wasn't necessarily, hadn't used for a while. On the other hand, I do think I did get the clear sense that, you know, the wife sold it just to get it out of there. And obviously, she got something for it.*

The piece of equipment Pam sold was worth only \$1,100. What Pam sold

was a fraction of what Dan had in the way of musical equipment and recording gear. The court is basing the value on the testimony of the respondent and his long time college friend of 25 years (Peter Mitchell). In the respondents own answers to interrogatories on page 41 he values all recording equipment and musical gear at \$5,000. The respondent originally wrote \$1,000 but it is crossed out with a \$5,000. RP 52-54 "Trial Excerpts" 9-26-2012. By the time of trial there was allegedly thousands of dollars of equipment that Dan set at \$18,665 and the Court then dropped that to \$9,330 at time of presentation. Dan's testimony and credibility of his expert witness (Peter Mitchell) are not sufficient to warrant an award of almost \$10,000.

The expert testimony the trial court recalled and then relied on was Dan and his college friend of 25 years Pete Mitchell. RP 9-16 "Trial Excerpts" 9-25-2012. During the trial Dan failed to lay any foundation as to what the studio gear was and its value. RP 117-126 "Trial Excerpts" 9-27-2012.

5. The trial court erred when not recognizing the correct value of the Fidelity 401k account. The trial court abused its discretion and committed a reversible error by not adjusting the correct value of Fidelity 401k account depleted by Dan the year prior.

The trial court's error by ignoring the value of the depleted 401k account further awarded Dan a larger portion of community assets. The valuation was not only based on an erroneously admitted trial exhibit and Dan's testimony RP 113, but even if the value had been based on some form of judicial notice, the court committed a manifest abuse of discretion by choosing the lowest of the multiple valuations for the options presented at trial while setting values for other properties at different dates and higher values.

At the time of trial Dan offered very little updated financial information despite the requirements of KCLFLR 10. The last date for which documents were supplied by Dan was June 29, 2012

Dan testified to his trial exhibit #9 and explained the net he received. RP 113 "Trial Excerpts" 9-27-2012. Following the trial court's oral ruling, Pam's attorney asked for clarification regarding the court's valuation of the 401k, noting the discrepancy between Trial Exhibit 9 (valuing the 401k account at \$40,352) and chart utilized by Dan's counsel in his closing argument (valuing the account at \$26,043). RP 100 "Trial Excerpts" CP 1347-48. Rather than resolve the issue raised by Pam's attorney, the trial court would not address the matter. In both the Final Decree CP 703 and Amended Decree CP 1341 approved by the Court valued the Fidelity 401k account at \$24,043.

The wire transfer associated with 401k was \$30,509. The 401k statement provided in Dan's trial notebook is reflective of the net \$30,509 deposited on May 17, 2012. Dan again took advantage of the upper hand using the couple's last investment asset to pay trial retainer and misrepresented to the court in order to reduce wife's reimbursement another \$6,700. This is only based on Dan paying the net of the assets after cost for early withdraw. Even at the corrected amount of \$30,509 versus the \$24,038 this still has Pam assuming equal responsibility for his choice to liquidate the asset.

The trial court breached its paramount obligation to consider the economic circumstances of the parties in making its division and further widened the disparity between the parties' financial situations.

6. The trial court committed reversible error in awarding Dan 100% of the joint home equity loan amount of \$48,000.

The BECU loan obtained by the parties during the pendency of the action was the result of the cross motion brought by Pam since Dan was not paying his maintenance. CP 765-835. The court clearly ordered that \$20,000 of the loan proceeds would be treated as a pre-decree distribution to Mr. Moore. Order dated March 28, 2012, CP 541-542; Underlining motion, declarations in response and reply, CP 270-82, 292-367, 375-462, 470-78, 479-94, 495-516, 533-36.

On March 28, 2012 Dan was ordered to make a good faith effort to obtain a line of credit on the family home in order to REPAY Pam the assets he had already depleted. Transcript from MOTIONS HEARING on 3-28-12: *"Because you both need to have an equal ability to litigate, but I don't want you to spend all the equity of this residence in attorneys' fees"*. RP 26 "3-28-2012".

Dan stalled the process by filing a motion for reconsideration that was later denied by Commissioner Jeske on April 24, 2012. CP 543-50, CP 551.

7. The trial court committed reversible error by awarding Dan 100% of the joint tax refund for 2010 in the amount of \$11,796. In addition the trial court erred in entering a decree of dissolution ordering Pam and Dan to each pay 50% of Federal taxes for 2011 of \$21,960.
8. The trial court committed reversible error and abused its discretion in classifying Dan's Citibank loan as community debt approved Dan's Citibank loan paid from Pam's portion of the home proceeds.

Dan's Citibank loan is not mentioned anywhere in both the "Oral Ruling" on 9-27-2012 RP 137-15, and the Conference Call on 10-11-2012 RP 1-17. This was never ordered by the court and was not to be factored in by the trial court. The only place this is referenced is the Dan's decree as part of a

marital debt. The last time I used Dan's Citibank was days before separation in August 2011. At that time I charged \$12,000 to retain first attorney.

9. The trial court erred and abused discretion by not accounting for Pam's post separation liabilities leaving her in debt.

Pam incurred substantial credit card debt following separation: \$4,982 on a Capital One card, \$5,684 on one Citibank card, \$11,215 on another Citibank card, \$1,800 on a First National card. CP 1517-28. She borrowed over \$20,000 from her mom, Sharon Shaffer. CP 1510-16. Her attorney fees through the beginning of trial were almost \$36,000.

The trial court abused its discretion by making a property division that awarded 68% of what it categorized and valued as the parties' community property to Dan and 38% to Pam. Significantly, the court did not enter any findings in support of its disparate division of the property nor did it offer any explanation for the division in its oral ruling or written decision. Instead, it merely repeated its conclusory belief that such a division was "equitable" without indicating what, if any, of the factors in RCW 26.09.080 it considered, or what other rationale it had for the division.

Washington courts recognize that a disproportionate division of community property is not an abuse of discretion where it is part of an overall result that places the parties in equitably similar post-dissolution financial situations. Thus in *In re Marriage of Davison*, 112 Wn. App. 251, 48 P.3d 358 (2002), the appellate court affirmed a 75/25 division of community property in favor of the former wife because the division of the entire marital estate

(community and separate assets and liabilities) was actually 45.7% to the former wife and 54.3% to the former husband. And in *In re Marriage of Tower*, 55 Wn. App. 697, 780 P.2d 863 (1989), the appellate court affirmed a 63/37 division of community property in favor of the former husband because it preserved the former wife's ability to receive disability Social Security benefits and was balanced by maintenance and child support payments to her that meant "the parties will probably have approximately equal monthly disposable incomes, at least until the youngest child is emancipated." *In re Marriage of Tower*, 55 Wn. App. at 701.

Just as significantly, the appellate court in *In re Marriage of Irwin*, 64 Wn. App. 38, 822 P.2d 797 (1992), specifically *rejected* an argument made by the former wife that she was "entitled to all of her separate property and at least half of the community property":

This contention does not find support in the case law. As noted above, the standard is a "just and equitable" distribution. An examination of the trial court's analysis, contained in the oral decision, shows that the court was trying for an approximate 50-50 division of all assets, whether separate or community, based on the fact that this was a marriage of lengthy duration.

In re Marriage of Irwin, 64 Wn. App. at 48.

The evidence before the trial court was completely inconsistent with any notion that its 68/38 community property split in favor of Dan produced an "equitable" result. In fact, the evidence in this matter only supports the exact opposite conclusion.

Even assuming the trial court properly categorized and valued what it deemed to be the parties' community property, its split of that property in favor of Dan produced a drastically inequitable result.

To grant Dan a 68% share of the community property, the court not only awarded him the majority of the sales proceeds of family home as well all the parties' stock options and investment accounts, it also entered a judgment against Pam totaling over \$10,686 which accrued interest at 12% per year.

Rather than leave the parties in equitably similar post-dissolution financial situations, the trial court's disproportionate community property split in Dan's favor combined with its award to Dan of his separate property resulted in a patent disparity. Unlike the circumstances in *Davison*, *Tower* and *Irwin*, the trial court's disproportionate division of community property was a manifest abuse of discretion that must be reversed.

C. In making its findings, the trial court improperly relied on an exhibit admitted solely for illustrative purposes and as a result some findings critical to the division of property and debt lack the support of substantial evidence.

The trial court erred in entering both the final and amended Decree of Dissolution relying corresponding spreadsheet distributing the home proceeds from family home. CP 148-149; RP 100 "Trial Excerpts".

1. The information contained in illustrative spreadsheet exhibit 20 cannot be used for substantive purposes.

During the course of the trial, Dan frequently referred to a spreadsheet

provided. Not all of the information contained in this exhibit was supported by either testimony or exhibits admitted into evidence. The exhibit (40) was introduced solely for illustrative purposes. RP pp. 4, 100.

Exhibits used for illustrative purposes do not constitute substantive evidence. *Cf In re Woods*, 154 Wn.2d 400, 427, 114 P. 3d 607 (2005); *State v. Lord*, 117 Wn.2d 829, 855-856, 822 P.2d 177, 193-194 (1991).

As a result, to the extent that the information in these exhibits exceeds that which is elsewhere introduced as substantive evidence, it is error to rely on the exhibits as the evidentiary basis for factual findings.

The trial court issued its ruling in part via a spreadsheet in which it characterized, valued, and allocated the couple's property and debt. CP 148-149. Comparing the spreadsheet strongly suggests that the trial court used it as a model for its decision and distribution of assets and liabilities. While this procedure is not improper in itself, the findings of fact made by the court, in Dan's spreadsheet or elsewhere, must be supported by substantial evidence. If such support does not exist for the court's findings, to the extent that the court's decision is based on such findings, it is based on untenable grounds.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; *it is based on untenable grounds if the factual findings are unsupported by the record*; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995) (citing WASHINGTON STATE BAR ASS'N, WASHINGTON APPELLATE

PRACTICE
DESKBOOK § 18.5 (2d ed.1993)), review denied, 129
Wash.2d 1003, 914 P.2d 66 (1996).

In re: Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362, 1366
(1997) (emphasis added).

It is easily seen that such error has been committed here. The spreadsheet contains several entries for which there is no substantive evidence in the record to support them.

2. The trial court ruled on characterization, valuation, and distribution of assets and debts and improperly based on the information contained in the illustrative exhibit provided by Dan.

Even if this decision is based on untenable grounds, there must be a showing that the error in some way prejudiced Pam if the error is to be grounds for reversal. *In re the Welfare of MG*, 148 Wn.App. 781, 791, 201 P.3d 354, 359 (2009), *citing In re Ferguson*, 41 Wn.App. 1, 5, 701 P.2d 513 (1985). It is clear that at least one of these errors significantly prejudiced Pam.

3. The trial court's improper use of the information contained in the illustrative exhibits prejudiced Pam.

The spreadsheet (chart) is what was used at time of presentation to explain to the trial court all assets and liabilities of the parties. With there being no evidence to support these findings of fact and with Pam having been substantially prejudiced by them, the decision is manifestly unreasonable and should be reversed.

D. The trial court erred in entering its Order in April 2013 on Pam's Motion for Reconsideration and/or Amendment of Judgment Pursuant to CR 59.

1. The trial court erred in entering its written decision when only reversing a portion of the mortgage reimbursement written in Dan's decree.

The trial court erred in using the \$26,011 to be reversed in Pam's favor and not the actual amount of 34,798. This was a mathematical error that the trial court gave no explanation for. The mortgage reimbursement of \$33,984 is what Dan was never authorized to take. The \$26,011 is the amount of interest and foreclosure cost associated with Dan's decision to stop paying the mortgage several months before the house was sold.

E. The trial court abused its discretion in entering the June 6th, 2013 Judgment, approving Dan's Request for Attorney Fees and Citibank interest.

1. The trial court erred and abused its discretion when it awarded Dan attorney fees of \$3,850 to clarify between a Supplemental and Amended Decree.

On May 20, 2013 Dan filed a Motion claiming "I have had to incur over 9 hours of attorney fees as a result of the petitioner not preparing an Amended Decree which follows the direction of the court." CP 1196-1203, 1204-1205.

The proposed supplemental order was presented to the Court on April 22, 2013. The supplemental decree was intended to amend only those specific portions of the Decree of Dissolution entered on February 14, 2013. CP 698-707.

The proposed supplemental pleadings prepared by Pam's council were intended to simplify and bring clarity to the Court's orders as delivered on

September 27, 2012 RP 148-157 of “trial excerpts”, February 14, 2013 RP 3-51 of 2-14-2013; and April 8, 2013 CP 925-926. The decision to present a supplemental decree was to assure clarity and specifically address the Court’s decision. Dan’s counsel withdrew April 15, 2013 CP 927-928 and nothing was said or done about the supplemental decree until after Pam filed her strict reply (CP 947-1053) and asked the Court the status of the Judge’s approval and then she also noted the matter for presentation. CP 1158-69. The supplemental documents provided only allowed for the two following chances to be made CP 931-942:

1. *In paragraph one of court’s orders filed on 4-8-2013. The Court grants petitioner’s motion for reconsideration on only two very specific points. See, Exhibit “6”*
 - (a) *The reimbursement of mortgage payments to respondent, requiring an adjustment of \$26,011.32.*
 - (b) *The correct calculation of maintenance and child support arrearages, which should be as reflected on page 7 of petitioner’s motion for reconsideration.*
 - *The amount on page 7 the amount of back support is \$21,740. The amount on respondent’s decree is \$8,250.*
 - *The difference owed to wife is \$13,490.*

Pam attempted again to further illustrate to the trial court that it would be an abuse of discretion in awarding Dan (Respondent) attorney fees in my motion dated June, 16, 2013 CP 1369 (ex 2): ***On May 6th 2013 (ex. 2) Mr. Peirce emailed this court...***

“The respondent will request attorney fees for the additional costs incurred in preparing the Amended Decree and correcting the errors made by the petitioner”.

Later that day the Dan’s email..

“I did all this without talking or discussing with Rod...I decided to try and save some legal fees”.

“The only thing Rod did was help me get all of this into a presentable form...I was the one doing all the calculations and verifying on what Kathryn was presenting”.

Dan's attorney fees were directly attributable to his lack of candor with the Court, his counsel's continued attempt to confuse and distort the Court's orders. It was Dan's mathematics that the reason the Motion for Reconsideration was necessary CP 1209-1336.

2. The trial court abused its discretion in awarding Dan retroactive Citibank interest of \$2,660.

Dan was paying interest because he made the choice to use this same credit card to make an additional \$33,501.25 in purchases as can be seen on the statements he provided on May 11th 2013. The statements provided by Dan reflect the purchases that he was paying said interest on: In respondent's sealed financial record's he provided that back in February 2012 the balance on this credit card was \$23,752.26.

Ten months post separation in June 2012 Dan's Citibank loan had a balance of \$9,107. A year later when he filed his motion the balance owed on the respondent's credit card is \$27,600.41. CP 1196-1203; 1209-1336; 1366-1457; 1458-1509.

The amended decree (A) provides for the parties to pay 24k on the Citibank debt as follows:

Citibank. The obligation owing to Citibank was \$23,640 (\$11,640 was for community obligations and \$12,000 was for the wife's removal of said sum for attorney fees at the time of separation.

In June 2012 the balance on Citibank loan was \$9,107.03. The Citibank account was used to pay an additional \$23,500 to Rod Pierce one year ago.

- On July 2nd 2012 a \$10,000 PayPal to Rod Peirce.
- On July 7th a \$6,000 PayPal payment to Rod Pierce.
- On August 8th 2012 a \$3,500 PayPal payment to Rod Peirce

F. The trial court erred in when it approved and entered Dan's Amended Decree of Dissolution July 31st, 2013.

The effect of the trial court's order was that the Amended Decree of Dissolution dated July 31, 2013 was effectively modified resulting in a substantial increase in the property distribution awarded to Dan (the respondent). A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment. *Kern v. Kern*, 28 Wn.2d 617, 619, 183 P.2d 811 (1947).

This court has determined that while a clarification of the property distribution in a Divorce Decree is proper, a modification of the property distribution is outside the scope of judicial power and constitutes an abuse of discretion. "A clarification merely defines the rights and obligations that the trial court already gave to the parties in their dissolution decree." *In re Marriage of Christel*, 101 Wash.App. 13, 22, 1 P.3d 600 (2000). In contrast, a modification extends or reduces those rights and responsibilities. *Christel*, 101 Wash.App. at 22, 1 P.3d 600 (citing *In re Marriage of Rivard*, 75 Wash.2d 415, 418, 451 P.2d 677 (1969)). In this matter, the trial court effectively increased Respondent's share of the property distribution by awarding the Respondent the aforementioned increases in property distribution. The trial court followed the request for relief in Dan's motion which was flawed in its valuation of property and analysis.

G. The trial court erred in making an award of attorney fees to Dan and abused discretion in entering the July 31st, 2013 Judgment and

**approving Order on Dan's Motion to Enforce Letter of distribution
Request for additional Attorney Fees \$4,410.**

1. The trial court abused its discretion and committed reversible error in awarding Dan additional attorney fees.

A trial court's award of attorney's fees will be reviewed for an abuse of discretion. *Emmerson v. Weilep*, 126 Wn. App. 930, 940, 110 P.3d 214 (2005). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Id.* Here, the trial court abused its discretion in both the award of the fees and the amount of the award. All legal fees awarded to Dan were an abuse of discretion and should be reversed. CP 1934-39 resulted in:

1. 8/11/2112 \$2,500 Order re Failure to Follow Case Schedule.
2. 6106113 3,850 OrderreCitibankInterestand Fees
3. Present 4,410 OrderreDisbursementofFunds

The trail court abused its discretion in not awarding legal fees to Pam yet awarded Dan a total of \$10,686 in legal fees. In CP 1868-1909. "Had Dan recognized he owed \$21,740 and not the \$8,250 back in 2012 for starters I would not have incurred all the additional legal costs".

On **January 13, 2013** (EXHIBIT 2){CP 1868-1909} email from Dan:

*"The difference between what you believe you are owed and what we are claiming you should be paid might be the removal of child support.... As I've always said, you have every right to contest it, but that might be the reason you are coming up with a different figure. I don't know that for sure, but it is plausible.
There were five months of past due maintenance when trial occurred (counting September) so $\$1750 \times 5 = \8750 , which I believe is the number Rod came up with. And there you have it."*

Dan did not acknowledge the past due undifferentiated support until **May 6th 2013**

in his email (EXHIBIT 3):

“The amount of back, ‘owed’ maintenance was correct per your calculations (which I think was around \$21k or so)”.

Dan would have never acknowledged this had I not filed a motion for reconsideration that on April 8th 2013 accounted for his mistake. Email from Dan on **January 18th 2013 (EXHIBIT 3){CP 1868-1909}**:

“I am not going to go back through all these documents and make modifications.

Again – I am not going to modify anything further at this point.

And, finally – I am not going to modify anything further at this point”.

H. The trial court abused its discretion in entering the July 31st, 2013 Judgment and Order on Dan's Motion for 2012 satisfied judgment to receive additional Attorney Fees \$2.500 from Pam's portion of remaining assets.

On July 29th 2013 Pam stated *“the amount presented by Mr. Peirce was not part of these proceedings”*. CP 1928-33. This was a 2012 judgment satisfied at escrow. CP 672-73. Immediately following Pam's reply Dan filed his objection by father to late reply which states *“however to conclude this matter the he is asking the court not to do anything further with this”* CP 1940-41.

I. Pam is entitled to an award of attorney fees and costs on appeal.

Pursuant to RCW 26.09.140, a court "after considering the financial resources of both parties" may order a party to pay a reasonable amount for the costs and attorney's fees incurred in a dissolution proceeding. The statute further provides that an appellate court has the discretion to "order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs." *See also*

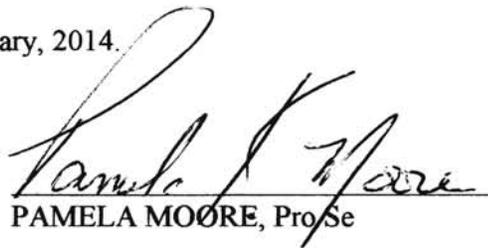
RAP 18.1(c).

In light of the multiple reversible errors by the trial court, the significantly disparate financial circumstances of the parties, and the substantial resources available to Dan but not Pam, this court should exercise its discretion under RCW 26.09.140 and award reasonable attorney's fees and costs on appeal to Pam. Pursuant to RAP 18.1(c),

CONCLUSION

It is true that in family law matters, the trial court "sits in equity." But there was nothing equitable about the final orders entered after Dan's default. The inequity occurred when Judge Lum ignored Dan's intransigence, dishonesty and manipulations and granted an order leaving Pam in financial crisis. Failing to reverse the trial court thereby requiring Pam to essentially begin the litigation (with its attendant costs and delays) again would compound the inequity.

DATED at Seattle, Washington this 28th day of February, 2014.



PAMELA MOORE, Pro/Se

Petitioner/ Applicant

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, I served by email one copy of the

foregoing document on the following:

DANIEL H. MOORE, Respondent
918 North 67th Street
Seattle, WA 98103
Danmoore1969@live.com

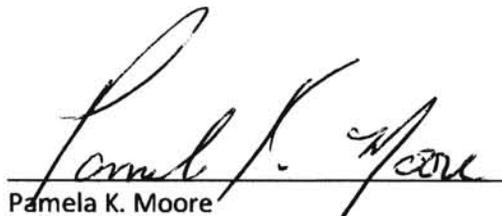

Pamela K. Moore

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, I served by email one copy of the

foregoing document on the following:

DANIEL H. MOORE, Respondent
918 North 67th Street
Seattle, WA 98103
Danmoore1969@live.com


Pamela K. Moore