

No. 71119-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

AMBER SCHUBERT,

Respondent,

and

VICTOR SCHUBERT,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE SUZANNE PARISIEN

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

The husband challenges the trial court's fact-based and discretionary decisions on maintenance, child support, property, and attorney fees, made after a 5-day trial, without providing a verbatim report of the entire trial proceedings. His failure to provide an adequate record for review is fatal to his appeal. *Allemeier v. University of Washington*, 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985), *rev. denied*, 105 Wn.2d 1014 (1986); RAP 9.2(b).

Even if this Court had a record sufficient to consider the husband's challenges on the merits, this Court should affirm the decision as well within the trial court's broad discretion. After awarding the husband almost 60% of the marital estate, the trial court did not abuse its discretion in awarding the wife maintenance of \$5,500 per month for four years, plus 25% of any income the husband earns in excess of \$225,000 for eight years. This decision is supported by the trial court's findings that up until a month before trial, the husband had earned \$500,000 annually in the previous five years, and that the husband "is employable at a minimum level of \$225,000 per year" (Finding of Fact (FF) 2.21(A)(4), CP 555) (Appendix), while the wife, who is the primary

residential parent for the parties' two children, "has been out of the work force for almost all of their marriage." (FF 2.21 A.1, CP 553)

The trial court also did not abuse its discretion in establishing child support after imputing income to the husband of \$225,000 annually – the amount that the trial court found he could "at a minimum" earn (FF 2.21 A.4, CP 555), or in awarding child support above the standard calculation after finding that the children have the "need of this level of support," and the husband "has the ability to pay this amount." (CP 615)

This Court should affirm and award attorney fees on appeal to wife for having to respond to this fact-based appeal of discretionary rulings, prosecuted without an adequate record.

## **II. RESTATEMENT OF FACTS**

Trial was over five days beginning June 3, 2013, before King County Superior Court Judge Suzanne Parisien. The parties disputed the property division, maintenance, child support, and attorney fees. The trial court "listened closely to the testimony of the parties and additional witnesses, [ ] reviewed the exhibits admitted into evidence as well as extensive legal briefing and heard closing arguments of counsel." (CP 549-50) Despite challenging nearly all of the trial court's decisions, the appellant nevertheless

designated less than 3-1/2 hours of testimony from the 5-day trial, consisting solely of the testimony of the expert witnesses who testified regarding the wife's work prospects and a limited portion of the cross-examination of the wife.<sup>1</sup>

This restatement of facts is based on the trial court's finding of fact, which are verities on appeal because of the appellant's failure to provide a complete record. *Rekhi v. Olason*, 28 Wn. App. 751, 753, 626 P.2d 513 (1981) ("The appeal has been brought on a short record without a complete verbatim report of proceedings. Accordingly, the trial court's findings of fact are accepted as verities"):

**A. The parties were married for 11-1/2 years. The husband is a patent attorney. The wife stayed home to care for the parties' two children.**

Respondent Amber Schubert, now age 39, and appellant Victor Schubert, now age 51, were married on April 1, 2000 in Newport Beach, California. (FF 2.4, CP 550; CP 613-14) After living in Costa Mesa, California, for most of the marriage the family relocated to Washington in January 2009 for Victor's employment as a patent attorney. (FF 2.21 A.4, CP 554) The parties separated in

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<sup>1</sup> The wife's appellate counsel was not retained until well after the appellant filed his defective Statement of Arrangements, which failed to state the issues he intended to raise on appeal as required by RAP 9.2(c).

December 2011, and Amber filed for dissolution of the parties' marriage on March 28, 2012. (FF 2.5, CP 550) The parties have two children: a daughter and a son, ages 7 and 10 at the time of trial. (FF 2.17, CP 552) An agreed parenting plan entered on February 15, 2013 designated Amber, who had been a stay at home parent, as the primary residential parent and gave Victor one mid-week overnight and alternating weekends starting Thursday after school and return to school on Monday. (FF 2.19, CP 552; FF 2.21 A.1, CP 553; Supp. CP 746)

**B. The wife does not have a college degree and had been out of the work force for almost all of the marriage. When the parties separated, she was no longer qualified to return to her former employment as a dental assistant.**

When the parties married, Amber, who did not graduate from college, was a dental assistant. (FF 2.21 A.2, CP 553) Amber "has been out of the work force for almost all of [the parties'] marriage," staying home as the "primary" parent for the parties' two children – a role that she continued after the parties' separation. (FF 2.21 A.1, CP 553)

Appellant makes much over Amber's supposed lack of effort to return to work as dental assistant in Washington. (App. Br. 6-7) But the trial court rejected the opinion of Victor's expert witness

that Amber could return to the “work force as a dental assistant earning an income of \$40,960 to \$55,290” as “not credible.” (FF 2.21 A.2, CP 554) Instead, the trial court found that it was not practical for Amber to return to employment as a dental assistant, in part because she is “not presently licensed in the State of Washington to be a dental assistant,” “is simply not qualified for such a position, and perhaps more importantly, does not want to be a dental assistant.” (FF 2.21 A.2, CP 553-54)

After the parties separated, Amber briefly worked as a nursing assistant, earning \$10 per hour, as a way to gain experience to pursue her desired career in nursing. (FF 2.21 A.1, CP 553) The trial court found that while Amber was “underemployed in a healthcare position,” it anticipated that such employment would “hopefully increase her opportunities to enter a nursing or technical healthcare program.” (FF<sup>2</sup>, CP 570)

The trial court found that Amber would start classes beginning in September 2013 “so that she can be accepted into a healthcare program at one of the technical colleges.” (FF, CP 571)

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<sup>2</sup> Several Findings of Fact were not numbered. They are referred to in this brief as “FF,” with further citation to the Clerk’s Paper where they can be found. The trial court’s Findings of Fact are at CP 549-74 and are attached as an Appendix to this brief.

Despite Amber's efforts, the trial court was "troubled by the rate at which [she] is progressing toward her goal." (FF 2.21 A.3, CP 554) The trial court found that Amber "has not made earnest academic efforts given that her enrollment in school has been sporadic over the past eight years and she has not achieved the grades typically necessary to gain admission into a nursing program." (FF 2.21 A.3, CP 554) The trial court "question[ed] whether [Amber] is making a serious effort to get a degree and prepare to support herself and the children." (FF 2.21 A.3, CP 554) The trial court also recognized, however, that Amber's "progress may have been hampered by the relocation to Washington in 2009 as well as her need to care for two children." (FF 2.21 A.3, CP 554)

**C. As a patent attorney, the husband had earned an average of \$500,000 annually during the five years prior to trial. His position with Intellectual Ventures ended a little over a month before trial.**

Victor has practiced law since he graduated from law school in 1988, and has worked primarily and consistently as a patent attorney since 1992. (FF 2.21 A.4, CP 554-55) In the five years leading to trial, Victor earned "at or near \$500,000 per year." (FF 2.21 A.4, CP 555) Prior to that, Victor had earned "in excess of \$250,000 since 2000." (FF, CP 570)

On April 30, 2013, 34 days before trial, Victor's position with his employer Intellectual Ventures was eliminated. (FF 2.21 A.4, CP 554-55) Victor negotiated a severance package of "pay equal to 16 weeks of pay and payment of medical insurance benefits for the family through August 2013." (FF 2.21 A.4, CP 555; FF, CP 570) In the brief period between the end of his employment on April 30 and trial on June 3, Victor had not yet located employment. (FF 2.21 A.4, CP 555) However, the trial court was optimistic that Victor would find employment soon after the dissolution action was concluded, noting that he was "actively and earnestly pursuing employment" (FF 2.21 A.4, CP 555), and had already engaged "4 headhunters, industry contacts/networking, search[ed] job board and utilized the services of an employment coach for resume preparation." (FF, CP 571)

The trial court acknowledged that Victor's "niche as a patent attorney is very narrow," and that "due to changes in the industry [his prospects are] not as plentiful as it was in the past." (FF, CP 571) As a consequence, the trial court found that, although he had earned \$500,000 a year recently, Victor now "has an earning ability of about \$225,000 per year" – less than half what he had earned during the previous five years. (FF, CP 571)

**D. After a 5-day trial, the trial court awarded the wife maintenance, the husband a disproportionate share of the marital estate, and child support slightly above the standard calculation.**

By the time of trial, the parties had amassed a marital estate of \$1.657 million, of which over \$430,000 was Victor's separate property. (CP 654) The trial court awarded Victor 59.25% of the entire marital estate, including all of his separate property. (CP 654) Although Amber received less of the overall marital estate, she received a slightly disproportionate share (54.24%) of the community property. (CP 654)

Among the assets awarded to Amber was the parties' rental home in Costa Mesa, California. (CP 646) The expenses for this property exceed the income, and the trial court ordered Amber to be responsible for the monthly shortfall of approximately \$1,400. (FF, CP 559; CP 644) Victor was awarded a lien against the property of \$60,347, for use of his separate funds to make the down payment when it was originally acquired. (CP 644) The trial court ordered that the lien was not payable until August 2015, when the trial court ordered the home either sold or refinanced. (CP 644)

The trial court awarded Victor the family residence in Newcastle, where Amber and the children had been living while the

dissolution was pending. (CP 649) The trial court reasoned that Amber “cannot afford to keep the family home,” for which the mortgage and other obligations exceed \$7,000 per month, but found that “it would benefit the children to have a stable housing situation within the school boundary.” (FF, CP 569-570; FF 2.21 B.2, CP 555)

In considering the parties’ economic circumstances at the end of their marriage, the trial court acknowledged that Victor was currently unemployed, but that Victor could and would soon find employment earning “at a minimum” \$225,000. (FF A.4, CP 555; FF, CP 569) It had only been little more than a month since his position was terminated, and the trial court had heard evidence of Victor’s efforts to find new employment. (See FF A.4, CP 555; FF, CP 571)

The trial court found that Victor “has historically had very significant income and there is no reason to expect that he will not continue to earn at a significant level. Upon finalization of this matter, [Victor]’s income will allow him to support himself in a manner similar to that enjoyed during the marriage while continuing to maximize his retirement accounts and increase his assets.” (FF, CP 569) Meanwhile, the trial court found that Amber

“will not, even after obtaining a degree in a healthcare field, have earnings approaching those of [Victor]. [Amber] and the children who are primarily with her, will live a far more modest lifestyle given the limits of [her] income.” (FF, CP 569)

The trial court awarded Amber maintenance based on her need and Victor’s ability to pay. (FF, CP 571; CP 642-43) While the dissolution action was pending, Victor had paid monthly maintenance of \$3,500, as well as the mortgage and expenses for the family residence where Amber was residing with the children. (Supp. CP 742-43) Based in part on evidence that it will cost Amber approximately \$2,500 to secure new housing in the Newcastle area, the trial court awarded monthly maintenance of \$5,500. (FF, CP 570-71; CP 642) The trial court also based the maintenance award on Victor’s “earning ability of about \$225,000, which is much less than” he previously earned. (FF, CP 571) The trial court ordered that in the event Victor earns more than \$225,000 annually, Amber is “entitled to a fair portion of this excess,” and awarded her 25% of the excess for eight years. (FF, CP 571; CP 642)

The trial court awarded Amber child support for the parties’ two children, who were then ages 10 and 7. (CP 612-25) The trial court imputed monthly income to Victor of \$225,000 based on

what it found he could “minimally” earn based on his “historical income.” (FF, CP 570; CP 613) While Amber is going to school, the trial court used her “maintenance received” of \$5,500 per month as income for calculating child support. (CP 614) The trial court ordered Victor to pay monthly child support of \$2,000 – less than \$300 more than the “standard calculation” – finding that the children were “in need of this level of support” and that Victor “has the ability to pay this amount.” (CP 614-15) Overall, the trial court’s decision reduced the amount of support that Victor had previously been providing to the family while the dissolution was pending by \$4,894 a month.<sup>3</sup>

Finally, the trial court awarded Amber attorney fees of \$50,000, based on its finding that Victor had the ability to pay a portion of her fees. (FF, CP 572; CP 643) Prior to trial, Amber had incurred over \$93,000 in attorney fees and had only been able to

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<sup>3</sup> While the dissolution action was pending, Victor paid temporary spousal maintenance to Amber of \$3,500 and paid temporary child support of \$1,596 a month. (Supp. CP 728, 742) Victor also paid the monthly mortgage and expenses on the family residence where Amber and the children resided of \$7,300. (Supp. CP 743) Thus, in total, Victor paid Amber monthly support of nearly \$12,400 while the dissolution action was pending. After trial, Victor was ordered to pay a total of \$7,500 monthly.

pay \$21,000 of that amount. (FF, CP 572) Victor had paid all of the fees that he had incurred. (FF, CP 572)

Victor appeals.

### III. ARGUMENT

#### A. **Appellant's failure to provide an adequate record for review is fatal to his appeal.**

Appellant attempts to challenge fact-based discretionary decisions on maintenance, property, child support, and attorney fees, which the trial court made after “listen[ing] closely to the testimony of parties and additional witnesses [and] hear[ing] closing arguments of counsel,” by providing a report of proceedings of less than 3-1/2 hours of testimony from the 5-day trial. (CP 549-50) Appellant has the burden of perfecting the record so that this Court has before it all of the evidence relevant to the issues he intends to raise. *Allemeier v. University of Washington*, 42 Wn. App. 465, 473, 712 P.2d 306 (1985); RAP 9.2(b). Appellant's failure to provide an adequate record is fatal to his challenges on appeal. *Allemeier*, 42 Wn. App. at 472 (“Without the trial record, it is not possible to view the statement in context with the rest of the evidence presented so as to determine whether Allemeier was prejudiced. Error without prejudice is not grounds for reversal”);

*Olmsted v. Mulder*, 72 Wn. App. 169, 183, 863 P.2d 1355 (1993) (“We cannot reach the merits of Mulder's arguments because he has failed to provide us with a sufficient trial record”), *rev. denied*, 123 Wn.2d 1025 (1994); *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988) (“As appellant, Story had the burden of providing an adequate record on appeal. Since Story failed to satisfy this burden, the trial court's decision as it relates to Story's communications to community members must stand”).

In particular, the husband's challenge to the trial court's finding that it is anticipated that he will continue to earn significant income after trial to allow him to support himself in a lifestyle similar to the one led by the parties as “unsupported by substantial evidence” (App. Br. 16-19) must be rejected, because he has failed to provide the full record, which would likely show the “substantial evidence” relied on by the trial court to make this finding. This argument, which is the crux to his entire challenge to the maintenance award, must fail in light of his failure to provide this court with a full record.

Absent an adequate record, this Court must affirm the trial court's fact-based and discretionary decisions.

**B. Standard of review.**

Even if this Court could consider the appellant's challenges on the merits given the record provided, this Court should affirm the trial court's decisions as within its broad discretion. An award of spousal maintenance 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.

The trial court is also given "broad discretion" in dividing 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). "Appellate courts should not encourage appeals by tinkering with [marital dissolution decisions]. . . . The emotional and financial interests affected by such decisions are best served by finality. The spouse who challenges such decisions bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court." *Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214

(1985). As a consequence, “trial court decisions in marital dissolution proceedings are rarely changed on appeal.” *Marriage of Buchanan*, 150 Wn. App. 730, 735, ¶ 7, 207 P.3d 478 (2009) (citations omitted).

**C. The trial court’s maintenance award was well within its broad discretion in light of the disparity in the parties’ earning capacities.**

**1. The maintenance award was based on evidence of the husband’s immediate past earnings, not conjecture.**

The maintenance award was well within the trial court’s broad discretion in light of its careful consideration of the RCW 26.09.090 factors and its extensive findings of fact, which should be treated as verities on appeal. *Rekhi v. Olason*, 28 Wn. App. 751, 753, 626 P.2d 513 (1981). Here, the trial court awarded the wife, who had been out of the workforce for nearly the entire marriage, maintenance for a maximum of eight years, and a minimum of four years if the husband does not earn more than \$225,000. This award was not based on “conjecture” (App. Br. 11-13) but on evidence that up until a month before trial, the husband had earned \$500,000 annually for the five years prior to trial, and no less than \$250,000 annually since the parties married. (*See* FF, CP 570)

The husband's challenge to the maintenance award is premised on his false claim that the trial court was somehow prohibited from awarding maintenance because he was unemployed at the time of trial. But the trial court is not required to base its decision on a "snapshot" of the parties' financial circumstances at the precise time of trial. Instead, it must consider, among other things, "the future earning prospects of each spouse." *Marriage of Washburn*, 101 Wn.2d 168, 180, 677 P.2d 152 (1984).

This is not "conjecture," as the husband claims, but reflects "the long-standing rule that the economic condition in which a dissolution decree leaves the parties is a paramount concern in determining issues of property division and maintenance." *Washburn*, 101 Wn.2d at 181. In other words, just as the parties' future earning prospects are a "substantial factor" to be considered in dividing the parties' property, so are they a factor to be considered in awarding maintenance. *Marriage of Hall*, 103 Wn.2d 236, 248, 692 P.2d 175 (1984); *Donovan v. Donovan*, 25 Wn. App. 691, 697, 612 P.3d 387 (1980); *Marriage of Roark*, 34 Wn. App. 252, 253, 659 P.2d 1133 (1983); see also *Marriage of Wright*, 179 Wn. App. 257, 261, ¶ 3, 319 P.3d 45 (2013) (affirming an award of maintenance based in part on the husband's anticipated

postdissolution earnings), *rev. denied*, 2014 WL 2575813 (June 4, 2014).

In *Roark*, 34 Wn. Ap. 252, the court rejected an argument similar to that made by the husband here. The husband, who had been laid off from his position with the Milwaukee Railroad at the time of trial, challenged the trial court's decision to award the wife four years of maintenance in light of his current unemployment. Division Two rejected the husband's argument as "unfounded" because of the trial court's "careful consideration" of the factors under RCW 26.09.090, including a finding that the husband was in "good health and his future employment prospects were favorable." *Roark*, 34 Wn. App. at 253, 257. Similarly, in *Donovan*, 25 Wn. App. 691, this Court rejected the husband's challenge to an award of two years of maintenance when he was on uncompensated medical leave from his position as a pilot because the trial court had properly "consider[ed] the probability of [the husband]'s full reinstatement to his pilot's position." *Donovan*, 25 Wn. App. at 697.

Here, the trial court also properly considered the husband's future earning prospects and the probability that he would find employment. The trial court found that the husband, age 50, was

“healthy and able to work” (FF 2.21 A.4, CP 554), and that in light of his history of significant income “there is no reason to expect that he will not continue to earn at a significant level.” (FF, CP 569) Meanwhile, the wife will never have earnings “approaching those” of the husband “even after obtaining a degree in a healthcare field,” and “will live a far more modest lifestyle” than the husband. (FF, CP 569)

The cases relied on by the husband do not support his claim that the maintenance award was based on “conjecture,” and not on the evidence before the trial court. In *Marriage of Rouleau*, 36 Wn. App. 129, 131, 672 P.2d 756 (1983) (App. Br. 11-12), the court reversed an award of “nominal maintenance” to the husband based not on his current need, but on speculation about his future needs. The court held that maintenance cannot be based upon the “conjectural possibility of a future change in circumstances,” where “there are no facts in the record before us on which the court may anticipate change in [the husband]’s needs.” *Rouleau*, 36 Wn. App. at 132-33. Similarly, this Court reversed an award of “placeholder maintenance simply to extend jurisdiction over the parties” in *Marriage of Valente*, 179 Wn. App. 817, 320 P.3d 115 (2014) (App. Br. 12).

Here, the maintenance award was not used as a “placeholder” in the event either party’s circumstances changed. Nor was it based on “conjecture.” By the time of trial, the husband had been unemployed for only 34 days and was less than five weeks into his 16-week severance package. Based on the trial court’s findings of fact, there was clearly evidence that the husband’s unemployment would be brief, and that once the litigation was completed he could focus his efforts to regain employment at which he would “minimally” earn \$225,000. (FF 2.21 A.4, CP 555) There was apparently evidence that the wife had a present need for maintenance since she was taking classes to assist her in eventually obtaining employment in the healthcare field, but was not yet fully employed to capacity. (See FF, CP 571)

The trial court was not required to “suspend” maintenance during his period of unemployment either. *Marriage of Drlik*, 121 Wn. App. 269, 87 P.3d 1192 (2004) (App. Br. 13-14), does not support the husband’s argument. *Drlik* was a modification action, commenced because the husband, who had been ordered to pay maintenance, was stricken with brain cancer and no longer had the ability to pay. The appellate court held that while the trial court could suspend maintenance, there was no evidence that the

husband would ever regain the ability to pay of maintenance, and that therefore a suspension of maintenance “indefinitely” was inappropriate. *Drlik*, 121 Wn. App. at 279.

Here, in contrast, the trial court clearly found that the husband indeed had the present ability to pay maintenance, whether with his severance package, his disproportionate award of assets,<sup>4</sup> or employment income that the trial court was confident the husband would soon earn. Therefore, the trial court was not required to suspend maintenance during the period of the husband’s unemployment.

“Conjecture” is an “opinion or idea formed without proof or sufficient evidence.” *Merriam Webster* online dictionary (<http://www.merriam-webster.com/dictionary/conjecture>). The trial court’s award of maintenance, to the contrary, was based on the evidence, and well within its discretion.

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<sup>4</sup> The husband received over \$300,000 more in assets than the wife. (CP 654) *Marriage of Crosetto*, 82 Wn. App. 545, 559, 918 P.2d 954 (1996) (trial court is entitled to consider the property division in its determination of maintenance, and to consider maintenance in its property division).

**2. The trial court did not make the maintenance award “non-modifiable.”**

The husband’s complaint that the trial court’s maintenance award was nonmodifiable is unfounded. Nothing in the trial court’s order prevents the husband from pursuing a modification of maintenance under RCW 26.09.170 if he can show a substantial change in circumstances to warrant modifying maintenance.

The husband claims that the trial court purportedly “did not consider what would happen if [he] did not become re-employed, nor did it consider what would happen as [the husband]’s resources were depleted by the payment for his own financial needs and the payment of [the wife]’s maintenance and child support.” (App. Br. 15) If that is in fact true (and the wife does not concede that it is), then the husband might be able to petition for modification and try to prove a substantial change in circumstances. *Holaday v. Merceri*, 49 Wn. App. 321, 331, 742 P.2d 127 (“a modification may be made only upon an *uncontemplated* change of circumstances occurring since the former decree”) (emphasis in original), *rev. denied*, 108 Wn.2d 1035 (1987). By its terms, the decree does not prohibit modification of maintenance. That the husband believes

that proving a basis for modification might be difficult does not make the maintenance award nonmodifiable.

- 3. The additional award of maintenance if the husband's annual income exceeds \$225,000 was proper when there was evidence he could earn \$500,000, and the trial court based its maintenance award on him earning only half that.**

The award of additional maintenance of 25% of the husband's gross income in excess of \$225,000 was well within the trial court's discretion, as it considered not only the wife's need and the husband's ability to pay, but that maintenance can be used as a "flexible tool" by which the parties' standard of living may be equalized for an appropriate period of time. *Washburn*, 101 Wn.2d at 179.

During a near 12-year marriage, the husband earned no less than \$250,000 a year, and consistently earned \$500,000 annually in the five years leading to trial. The trial court recognized the wife's need for maintenance, but limited her award to an amount based on income imputed to the husband that was significantly lower than he had earned during the marriage. (FF, CP 571) The trial court would have likely awarded the wife more maintenance but for the fact that the husband's ability to pay greater

maintenance was (most likely temporarily) reduced. The wife certainly showed need, submitting evidence that her monthly expenses were close to \$9,000 per month (Ex. 91), and the \$5,500 maintenance and \$2,000 in child support a month awarded is inadequate to meet her stated needs. If the husband does in fact earn more than \$225,000, the trial court properly awarded the wife what it found was a “fair portion of this excess” (FF, CP 571) as additional maintenance.

This award is not an “escalation clause” like the one prohibited in *Marriage of Edwards*, 99 Wn.2d 913, 665 P.2d 883 (1983) (App. Br. 19). In *Edwards*, the issue was whether a *child support* award, not a maintenance award, could include a clause which automatically adjusts the amount payable to equal a specified percentage of the obligor parent’s income. The Court held that while an award of child support based on a percentage of a parent’s income is valid, it must include a “ceiling,” representing the “maximum amount of child support that would be reasonable and needed in the future.” *Edwards*, 99 Wn.2d at 919.

But maintenance is different than child support, because it is not based solely on “need.” As this Court recently held, “financial need is not a prerequisite to a maintenance award.” *Marriage of*

*Wright*, 179 Wn. App. at 269, ¶ 22. Instead, “[t]he only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be ‘just.’ Maintenance is ‘a flexible tool’ for equalizing the parties’ standard of living for an ‘appropriate period of time.’” *Wright*, 179 Wn. App. at 269, ¶ 23.

Here, the trial court properly recognized that the parties will be in disparate financial circumstances at the end of their marriage. The “base” maintenance award of \$5,500 per month for four years attempts to lessen that disparity, and the trial court properly awarded “additional” maintenance if the husband’s income in fact exceeds \$225,000 annually.

Because the trial court found that monthly maintenance of \$5,500 was the minimum amount of support needed by the wife and maintenance was intended to lessen the disparity in the parties’ economic circumstances, the trial court was not required to impose a “ceiling” on the maintenance award. In *Marriage of Ochsner*, 47 Wn. App. 520, 736 P.2d 292, *rev. denied*, 108 Wn.2d 1027 (1987) (App. Br. 19), the husband’s original maintenance obligation was limited to \$600 per month. After the husband sought to modify maintenance, the trial court reduced his obligation to \$400 per month, with an increase per month based on the husband’s

corporation's gross receipts to a maximum of \$600 as established in the original order. This Court affirmed in part because the "maximum amount" of maintenance set was consistent with what was previously determined to be an appropriate amount of maintenance. But, in this case, the trial court made an initial award of maintenance, not a modification, and it found that \$5,500 was the *minimum* amount of monthly maintenance needed by the wife. *Ochsner*, 47 Wn. App. at 526.

Finally, the other cases cited by the husband also do not support his claim that the trial court abused its discretion in awarding the wife additional maintenance based on a percentage of the husband's income if it exceeds \$225,000. *Marriage of Stoltzfus*, 69 Wn. App. 558, 530, 849 P.2d 685, *rev. denied*, 122 Wn.2d 1011 (1993) and *Marriage of Coyle*, 61 Wn. App. 653, 659-60, 811 P.2d 244, *rev. denied*, 117 Wn.2d 1017 (1991) (both App. Br. 19) held that an "escalation clause" in a child support order and maintenance order tied solely to the Consumer Price Index – not to the obligor's income – was "voidable." The courts in both cases acknowledged concern that tying a support/maintenance award to the CPI does not adequately address either the obligor spouse's

ability to pay or the child or obligee spouse's need. *Coyle*, 61 Wn. App. at 659-60; *Stoltzfus*, 69 Wn. App. at 561.

The trial court's award of additional maintenance if the husband earns more than \$225,000 to the wife was well within the trial court's discretion as a flexible tool to both support the wife and lessen the disparity in their households.

**4. The duration of the maintenance award was well within the trial court's discretion.**

"The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be 'just.' Maintenance is 'a flexible tool' for equalizing the parties' standard of living for an 'appropriate period of time.'" *Wright*, 179 Wn. App. at 269, ¶ 23. Here, the trial court properly awarded the wife a minimum of four years, and a maximum of eight years of maintenance in light of the disparate economic circumstances the parties will be left at the end of their marriage. At the end of the 4 years of "base" maintenance, the children, who live primarily with the wife, will be 11 and 14 years old. In the event that maintenance continues because the husband earns more than \$225,000 annually, the oldest child will have just turned 18 and the younger child would be 15 when the wife's maintenance terminates.

The husband argues that the maintenance award is “excessive” because he believes that the wife could achieve gainful employment sooner if she returns to her former career as a dental assistant (App. Br. 22, 24) – a position that the wife has not worked in for 11 years. (FF 2.21 A.2, CP 553-54) But the trial court rejected the husband’s expert testimony that the wife could immediately return to a career as a dental assistant as “not credible.” (FF 2.21 A.2, CP 553-54) The trial court was not required to base the duration of its maintenance award on the husband’s claim that the wife should return to a career that the trial court found the wife was no longer qualified to perform. (FF 2.21 A.2, CP 554)

Further, spousal maintenance is not only intended to provide for a spouse until she becomes self-supporting, but is also a “flexible tool by which the parties’ standard of living may be equalized for an appropriate period of time.” *Washburn*, 101 Wn.2d at 178-79. “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 length of the maintenance award was well within the trial court's wide discretion in light of the economic circumstances the parties are left. At the end of the parties' marriage, the husband has a significantly greater earning capacity and was awarded more assets than the wife, including the parties' family home. Meanwhile, the wife will need to gain education to pursue a career in the healthcare field, that even when achieved will provide her nowhere near the earnings of the husband. This Court should affirm the maintenance award.

**D. The child support order was well within the trial court's broad discretion in light of the children's needs and the parties' income and earning capacities.**

Under the unique circumstances of this case, the trial court properly found the husband to be "voluntarily unemployed" and imputed income to him for purposes of calculating child support. RCW 26.19.071(6) provides that when imputing income to a voluntarily unemployed parent, the court shall use "full-time earnings at the historical rate of pay based on reliable information." In this case, the trial court could have imputed income to the husband at \$500,000 – which was indisputably his most recent "historical rate of pay." But instead, it used \$225,000 based on

what it found he will probably earn once he obtains employment. This was well within the trial court's discretion.

The husband complains that the trial court could not find that he was voluntarily unemployed when he had been laid off and was actively searching for employment. (App. Br. 28-29) The test for whether a parent is "voluntarily unemployed" is more than determining whether that parent is "purposely unemployed to avoid his child support obligation." (App. Br. 29) Instead, the test is whether the parent is "unemployable," which would make them *involuntarily* unemployed. See *Marriage of Blickenstaff*, 71 Wn. App. 489, 859 P.2d 646 (1993).

In *Blickenstaff*, the court looked to the statute and the legislature's intent to determine the distinction between a "voluntarily" and "involuntarily" employed parent. The court noted that RCW 26.19.071 provides that "the court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed parent [and] Income shall not be imputed for an unemployable parent." *Blickentstaff*, 71 Wn. App. at 495; RCW 26.19.071(6). Accordingly, the court determined that an unemployed parent should not have income imputed to them if they are "unemployable." *Blickentstaff*, 71 Wn. App. at 495-96. The

court defined “unemployable [ ] as not acceptable for employment as a worker.” *Blickentstaff*, 71 Wn. App. at 496. Here, the husband is certainly employable. Therefore his unemployed status is voluntary for purposes of establishing child support.

Appellant seems to complain that the trial court did not impute income to the wife even though it did establish her income based on her receipt of maintenance. (See App. Br. 28) However, the husband did not assign error to the trial court’s determination of the wife’s income, nor did he raise it as an issue on appeal. (App. Br. 1-3) Accordingly, the husband has waived any alleged error and this Court should not consider this argument. *See Marriage of Griswold*, 112 Wn. App. 333, 349, fn. 7, 48 P.3d 1018 (2002) (appellant waives challenge by failing to assign error), *rev. denied*, 148 Wn.2d 1023 (2003).

Finally, the husband complains that the trial court abused its discretion when it “deviated upward” from the standard calculation of \$1,703 and awarded child support of \$2,000 for two children. (App. Br. 29) But when the parties’ combined monthly net income exceeds \$12,000, the “court may exceed the [standard calculation] [ ] upon written findings of fact.” RCW 26.19.020. Under these circumstances, an award that exceeds the standard calculation is

not a deviation. *Leslie v. Verhey*, 90 Wn. App. 796, 804, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999).

Here, the trial court's award of child support above the standard calculation was proper as it is supported by the trial court's finding that an award of less than \$300 above the standard calculation was warranted because the "children are in need of this level of support" [and] the husband "has the ability to pay this amount." (CP 615) The husband does not assign error to this finding, and it is therefore a verity on appeal. *Brewer v. Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999).

**E. The trial court was not required to deduct the cost of sale when there was no evidence that sale was imminent.**

The trial court was not required to deduct the cost of sale from the value of the family residence. A trial court may only deduct the cost of sale if a sale is "imminent." *Marriage of Stenshoel*, 72 Wn. App. 800, 810-11, 866 P.2d 635 (1993). The sale was not imminent as the husband in his trial brief admitted that he intended to wait for the market to recover before selling the house. (CP 82-83) Absent the record from the trial it must be presumed that the husband's testimony was consistent with the statements in his trial brief. And although after trial, the husband stated that he

intended to immediately sell the house, the trial court was free to find this belated claim not credible when it denied the husband's request to deduct the cost of sale. "Trial court's credibility findings are not subject to review on appeal." *DewBerry v. George*, 115 Wn. App. 351, 362, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003).

**F. The trial court did not have to award interest on the husband's lien against the California rental, which was not payable for 2 years.**

The trial court awarded the husband an equitable lien for his separate property interest in the California rental home awarded to the wife, payable in August 2015 when the trial court ordered the home either sold or refinanced. (CP 644) The trial court was not required to impose interest on this equitable lien. *Young v. Young*, 44 Wn. App. 533, 536, 723 P.2d 12 (1986).

In *Young*, the trial court awarded the wife the family residence and the husband a lien against the home, to be paid when the house was sold or within a year after the youngest child was emancipated. The court rejected the husband's claim on appeal – similar to the one made here – that he was entitled to interest on the lien until it is paid, holding that a "lien is an encumbrance upon property, which secures payment of a debt but confers no property rights or title on the holder. Only when the lien is capable of being

executed upon will it become a judgment entitled to statutory interest.” *Young*, 44 Wn. App. at 536; *see also Aguirre v. AT & T Wireless Servs.*, 118 Wn. App. 236, 241, 75 P.3d 603 (2003) (where a party's right to recover on a judgment does not arise until a future contingency occurs, postjudgment interest only accrues from the date the party has a right to collect the funds), *rev. denied*, 151 Wn.2d 1028 (2004).

Here, the lien is not a judgment on which interest runs because the husband cannot seek payment until August 2015, when the house is either sold or refinanced. The cases on which the husband relies do not support any other result, as in each case the award on which the party was seeking interest was payable when the decree was entered. *See Marriage of Harrington*, 85 Wn. App. 613, 631, 935 P.2d 1357 (1997) (wife awarded equalization award in the form of a 10-year note with monthly payments due upon entry of decree); *Marriage of Knight*, 75 Wn. App. 721, 736, 880 P.2d 71 (1994) (husband awarded attorney fee judgment), *rev. denied*, 126 Wn.2d 1011 (1995); *Marriage of Stenshoel*, 72 Wn. App. 800, 803,866 P.2d 635 (1993) (wife awarded lien that the husband was ordered to pay off monthly after the decree was entered).

Because the lien was not payable until August 2015, the trial court properly denied the husband's demand for statutory interest upon entry of the decree.

**G. The trial court properly awarded attorney fees to the wife.**

The trial court properly awarded the wife attorney fees of \$50,000 based on her need and the husband's ability to pay. The party challenging a decision on attorney fees bears the burden of proving the trial court exercised its discretion in a way that was clearly untenable or manifestly unreasonable. *Marriage of Crosetto*, 82 Wn. App. 545, 563, 918 P.2d 954 (1996).

On appeal, the husband does not challenge the trial court's decision to award attorney fees under RCW 26.09.140. Instead, his challenge appears to be based solely on the amount of fees awarded, specifically the "reasonableness" of the fees incurred. (*See* App. Br. 33) But the trial court did not award the wife all of the fees that she incurred. The wife had incurred over \$93,000 in attorney fees; the trial court only awarded a little over half of the fees incurred. (FF, CP 572) The amount awarded to the wife was nearly the same amount that the husband, himself a lawyer who could aid in preparation of his case, had incurred in attorney fees. (FF, CP 572)

Thus, it is unclear whether he is now also claiming that his fees were “unreasonable.”

The crux of the husband’s argument is that the trial court was “required to use the lodestar method of determining an appropriate award of attorney fees. Under the lodestar method, the trial court must determine a reasonable number of hours worked and exclude from it any wasteful or duplicative hours.” (App. Br. 33) But trial courts are not required to apply the lodestar method in dissolution actions, because the award is based on equitable considerations. *Marriage of Van Camp*, 82 Wn. App. 339, 340, 342, 918 P.2d 509, *rev. denied*, 130 Wn.2d 1019 (1996). This Court should affirm the trial court’s award to the wife of \$50,000 in attorney fees as an “appropriate amount” based on her need and the husband’s ability to pay.

**H. This Court should award attorney fees to the wife on appeal.**

This Court also should award the wife attorney fees based on her need and the husband’s ability to pay under RCW 26.09.140. The wife received fewer assets than the husband. She was awarded maintenance that was intended to support her while she pursues her education and to lessen the disparity in the parties’ households.

The wife should not be forced to use her property or maintenance awards to pay attorney fees to defend the husband's appeal of discretionary decisions by the trial court on an inadequate record for review. The wife will comply with RAP 18.1(c).

#### IV. CONCLUSION

This Court should affirm the trial court's decision in its entirety and award attorney fees to the wife.

Dated this 2<sup>nd</sup> day of July, 2014.

SMITH GOODFRIEND, P.S.

By:   
Valerie A. Villacin  
WSBA No. 34515  
Catherine W. Smith  
WSBA No. 9542

Attorneys for Respondent

**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 July 2, 2014, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Mark D. Olson Olson & Olson PLLC 1601 5th Ave., Ste 2200 Seattle, WA 98101-1625	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 2nd day of July, 2014.

  
Tara D. Friesen

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Marriage of:  
AMBER SCHUBERT,  
Petitioner,  
and  
VICTOR SCHUBERT,  
Respondent.

Case No.: 12-3-02078-1 SEA

**AMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
(MARRIAGE)  
(FNFCL)**

I. BASIS FOR FINDINGS

Before the undersigned Judge of the above-entitled Court, this matter came on for trial on June 3, 2013 to June 10, 2013. The Petitioner, Amber Schubert, was represented by attorney Gail Wahrenberger and the Respondent, Victor Schubert, was represented by attorney Mark Olson. The following witnesses testified:

- 1. Amber Schubert
- 2. Victor Schubert
- 3. Ben Hawes, C.P.A.
- 4. Jan Reha, M.A., C.M.H.C.
- 5. William Skilling, M.A., C.R.C., C.D.M.S., C.L.C.P.

The Court has listened closely to the testimony of the parties and additional witnesses, has reviewed the exhibits admitted into evidence as well as extensive legal briefing and heard

1 closing arguments of counsel. In consideration of the foregoing, the Court now makes and enters  
2 the following:

3  
4 II. FINDINGS OF FACT

5 Upon the basis of the court records, the court FINDS:

6 2.1 RESIDENCY OF PETITIONER

7 The petitioner is a resident of the State of Washington.

8 2.2 NOTICE TO THE RESPONDENT

9 The respondent appeared, responded, or joined in the petition.

10 2.3 BASIS OF PERSONAL JURISDICTION OVER THE RESPONDENT

11 The facts below establish personal jurisdiction over the respondent.

12 The respondent is currently residing in Washington.

13 The parties lived in Washington during their marriage and the petitioner continues  
14 to reside in this state.

15 2.4 DATE AND PLACE OF MARRIAGE

16 The parties were married on April 1, 2000 at Newport Beach, California.

17 2.5 STATUS OF THE PARTIES

18 The parties separated as of December 2011. Petitioner filed a Petition for Dissolution on  
19 March 28, 2012.

20 2.6 STATUS OF THE MARRIAGE

21 The marriage is irretrievably broken and at least 90 days have elapsed since the date the  
22 petition was filed and since the date the summons was served or the respondent joined.

23 2.7 SEPARATION CONTRACT OR PRENUPTIAL AGREEMENT

24 There is no written separation contract or prenuptial agreement.  
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1 2.8 COMMUNITY PROPERTY

2 The parties have real or personal community property as set forth in **Exhibits A and B** of  
3 the Decree of Dissolution. These Exhibits are attached or filed and incorporated by  
reference as part of these findings.

4 2.9 SEPARATE PROPERTY

5 The petitioner has real or personal separate property as set forth in **Exhibit A** to the  
6 Decree of Dissolution. This exhibit is attached or filed and incorporated by reference as  
part of these findings.

7 The respondent has real or personal separate property as set forth in **Exhibit B** to the  
8 Decree of Dissolution. This exhibit is attached or filed and incorporated by reference as  
part of these findings.

9 2.10 COMMUNITY LIABILITIES

10 The parties have incurred community liabilities as set forth in **Exhibits C and D** of the  
11 Decree of Dissolution. These exhibits are attached or filed and incorporated by reference  
as part of these findings.

12 2.11 SEPARATE LIABILITIES

13 The petitioner has incurred separate liabilities as set forth in **Exhibit C** of the Decree of  
14 Dissolution. This exhibit is attached or filed and incorporated by reference as part of  
these findings.

15 The respondent has incurred separate liabilities as set forth in **Exhibit D** of the Decree of  
16 Dissolution. This exhibit is attached or filed and incorporated by reference as part of  
these findings.

17 2.12 MAINTENANCE

18 Maintenance should be ordered because the petitioner is in need of maintenance and the  
19 respondent has the ability to pay this maintenance.

20 2.13 CONTINUING RESTRAINING ORDER

21 Does not apply.

22 2.14 PROTECTION ORDER

23 Does not apply.  
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2.15 FEES AND COSTS

The petitioner has the need for the payment of fees and costs and the respondent has the ability to pay a portion of these fees and costs. The petitioner has incurred attorney fees and costs in the amount of \$93,213 as of May 24, 2013.

2.16 PREGNANCY

The petitioner is not pregnant.

2.17 DEPENDENT CHILDREN

The children listed below are dependent upon either or both spouses.

<u>Name of Child</u>	<u>Age</u>	<u>Mother's Name</u>	<u>Father's Name</u>
Madison Schubert	10	Amber Schubert	Victor Schubert
Victor Schubert IV	7	Amber Schubert	Victor Schubert

2.18 JURISDICTION OVER THE CHILDREN

This court has jurisdiction over the children for the reasons set forth below:

This court has exclusive continuing jurisdiction. The court has previously made a child custody, parenting plan, residential schedule or visitation determination in this matter and retains jurisdiction under RCW 26.27.211.

This state is the home state of the children because the children lived in Washington with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of this proceeding.

2.19 PARENTING PLAN

The parenting plan signed by the court on this date or dated February 15, 2013 is approved and incorporated as part of these findings.

This parenting plan is the result of an agreement of the parties.

1 2.20 CHILD SUPPORT

2 There are children in need of support and child support should be set pursuant to the  
3 Washington State Child Support Schedule. The Order of Child Support signed by the  
4 court on this date and the child support worksheet which has been approved by the court  
5 are incorporated by reference in these findings.

6 2.21 OTHER:

7 Based on the testimony and evidence presented at trial on June 2 through June 9, 2013,  
8 the Court specifically finds as follows:

9 *A. BACKGROUND*

10 1. The Court finds that this is a marriage of 11.5 years. The petitioner is 38 years old,  
11 healthy and able to work, but has been out of the work force for almost all of their marriage. The  
12 petitioner has been the primary parent for both children, Madison (age 10) and Victor Schubert  
13 IV (age 7) since their birth and continued to be the primary parent after separation.  
14 Additionally, Petitioner was responsible for the day to day maintenance of the family's home and  
15 rental property in Costa Mesa. An Agreed Final Parenting Plan was entered with the Court on  
16 February 15, 2013 which provides that the petitioner is the primary residential parent of the  
17 children. The Wife briefly worked as a nursing assistant in 2012 at \$10.00 per hour as a way to  
18 gain experience as she pursues a nursing career.

19 2. The Court finds that the petitioner has not worked as a dental assistant for 11 years and is  
20 not presently licensed in the State of Washington to be a dental assistant. There is no credible  
21 evidence to support the contention that the petitioner ever managed a dental or medical office.  
22 The petitioner does not have a bachelor's degree which is necessary to obtain employment for  
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1 this type of position as identified in William Skilling's report. The Court does not find credible  
2 Mr. Skilling's testimony that the Wife is capable of returning to the work force as a dental  
3 assistant earning an income of \$40,960 to \$55,290. The petitioner is simply not qualified for  
4 such a position, and perhaps more importantly, does not want to be a dental assistant.  
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6 3. The Court is troubled by the rate at which Petitioner is progressing toward her goal of  
7 becoming a registered nurse. While the court accepts that Petitioner's progress may have been  
8 hampered by the relocation to Washington in 2009 as well as her need to care for two children,  
9 the Court finds that Petitioner has not made earnest academic efforts given that her enrollment in  
10 school has been sporadic over the past eight years and she has not achieved the grades typically  
11 necessary to gain admission into a nursing program. The transaction reports from the  
12 Petitioner's credit cards for the thirteen month period of December 2010 to January 2012  
13 indicate shockingly high bar tabs ranging from a low of \$503.00 to a high of \$2290.00 per  
14 month. These amounts indicate that Petitioner may have an alcohol dependency issue (although  
15 the Court is aware that Petitioner underwent an alcohol evaluation) and/or is acting irresponsibly  
16 with her social spending. Either way, partying late into the night several evenings a week is not  
17 conducive to pursuing a college degree and/or succeeding in a nursing program. The Court  
18 questions whether Petitioner is making a serious effort to get a degree and prepare to support  
19 herself and the children.  
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22  
23 4. The respondent is 50 years old, healthy and able to work despite undergoing inpatient  
24 treatment for alcohol addiction in November 2011 for 28 days. Until April 30, 2013, respondent  
25 was employed as an attorney, beginning that career following graduation from law school in  
26

1 1988. Respondent worked as a patent attorney at Discovision/Pioneer in Costa Mesa, California  
2 from 1992 through December 2008. He left this position in January 2009 to work at Intellectual  
3 Ventures in Bellevue, Washington and the parties relocated from Costa Mesa, California so the  
4 respondent could pursue this position. Respondent's earnings for the past five years have been at  
5 or near \$500,000 per year. Respondent's position at Intellectual Ventures was eliminated in  
6 April 2013. He has received severance pay equal to 16 weeks of pay and payment of medical  
7 insurance benefits for the family through August 2013. This is the first time in 25 years that  
8 respondent has not been employed. Respondent has not located employment since his  
9 termination from Intellectual Ventures. The Court finds that the respondent is employable at a  
10 minimum level of \$225,000 per year. Based on testimony, the Court found that the Respondent  
11 has been actively and earnestly pursuing employment.  
12

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14 5. The children have special needs and IEP plans have been put in place for both of them at  
15 Newcastle Elementary School. It would benefit both children to remain at their current school.  
16 The petitioner cannot afford to stay in the family home. She will need funds in order to secure  
17 an apartment or home in which she and the children can live.  
18

19 **B. CHARACTERIZATION OF THE PARTIES' ASSETS AND LIABILITIES**

20 **1. Costa Mesa Home**

21  
22 The parties have a home located in Costa Mesa, California. The home was purchased in  
23 February 2000, a few weeks prior to marriage, with a down payment of \$60,347.00, including  
24 earnest money paid from the Husband's premarital assets. The parties razed the home and  
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1 rebuilt it in 2004 at a cost of approximately \$474,570, at least \$174,570 came from community  
2 funds. Both parties were actively involved in the building of the new home. The community  
3 paid the mortgage on the home and paid property taxes on the home for 12 years at a total cost of  
4 \$61,596, and additionally paid the shortfall between the rent that they received and the costs of  
5 the home after they moved to California. The respondent quit claimed the property to the  
6 community in December 2008, specifically to "Victor James Schubert III and Amber L.  
7 Schubert, husband and wife, as joint tenants with right of survivorship". The Husband also  
8 asserted in the Quit Claim Deed that this transfer "is a bona fide gift and the grantor received  
9 nothing in return."  
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12 The Court finds that in a marital dissolution proceeding, the state law applied to  
13 determine the characterization of property is that of the state where the couple resided at the time  
14 the property was acquired. *In Re Marriage of Zahn*, 138 Wash.2d 213 (1999) states that, "The  
15 state law applied to determine the characterization of property is that of the state where the  
16 couple resided at the time the property was acquired." In addition, "All questions as to legal  
17 effect of conveyance are determined by law of state of situs of the land." *Rustad v.*  
18 *Rustad* 61 Wash.2d 176 (1963). In this case, the property in question was acquired when both  
19 parties resided in California. The subsequent joint title was also conveyed when both parties  
20 resided in California. It is clear that California law applies. Under California Family Code  
21 §2581, the presumption is that property held as joint tenants, whether purchased during or before  
22 the marriage, is considered community property for the purpose of division of property on  
23 dissolution of marriage. Presumption can be rebutted only in writing. However, a party may be  
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1 reimbursed for that party's contribution to the extent the party traces the contributions to a  
2 separate property source.

3           In California, for the purpose of division of property on dissolution of marriage or  
4 legal separation of the parties, joint tenancies are classified as community property. *In re*  
5 *Marriage of Trantafello*, 94 Cal.App.3d 53 (1979) found that where title to marital residence was  
6 taken in joint tenancy during the marriage, the residence was presumptively community property  
7 for purpose of dividing property upon dissolution of the marriage (quoting code that has since  
8 been replaced). More recently, California Family Code §2581 states that: property acquired by  
9 the parties during marriage in joint form, including property held in tenancy in common, joint  
10 tenancy, or tenancy by the entirety, or as community property, is presumed to be community  
11 property. This presumption is a presumption affecting the burden of proof and may be rebutted  
12 by either of the following:

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15           (a) A clear statement in the deed or other documentary evidence of title by which the  
16 property is acquired that the property is separate property and not community property.

17           (b) Proof that the parties have made a written agreement that the property is separate  
18 property.

19 The comments provide that the presumptions also govern property initially acquired before  
20 marriage, the title to which is taken in joint form or as community property by the spouses during  
21 marriage.  
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1 In this case, the property was re-titled in both party's names in 2008, while the Schuberts were  
2 married and residing in California. The Court finds that there is no written documentation from  
3 Mr. Schubert to rebut the assumption and as such, pursuant to California law, the Costa Mesa  
4 property is community property.

5  
6 California does allow a party the right of reimbursement for contributions traced to  
7 separate property source. California Family Code § 2640 creates a substantive right of  
8 reimbursement that can be relinquished only by an express written waiver by the contributing  
9 spouse. §2640 states in part: "In the division of the community estate under this division, unless  
10 a party has made a written waiver of the right to reimbursement or has signed a writing that has  
11 the effect of a waiver, the party shall be reimbursed for the party's contributions to the  
12 acquisition of property of the community property estate to the extent the party traces the  
13 contributions to a separate property source. The amount reimbursed shall be without interest or  
14 adjustment for change in monetary values and shall not exceed the net value of the property at  
15 the time of the division." These contributions include: down payments, payments for  
16 improvements, and payments that reduce the principal of a loan used to finance the purchase or  
17 improvement of the property but do not include payments of interest on the loan or payments  
18 made for maintenance, insurance, or taxation of the property. *In re Marriage of Carpenter*, 100  
19 Cal.App.4th 424 (2002), found that the husband's quitclaim deed of property to himself and his  
20 spouse did not defeat his statutory right to reimbursement of his separate property to acquire the  
21 house, even when the quitclaim deed stated that the transfer was a gift.  
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24 The Costa Mesa home was appraised in January 2013 for \$859,000. Both parties are  
25 obligated on the \$479,069 mortgage with JP Morgan Chase. Since the parties relocated to  
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1 Washington, they have rented the home. There is a monthly shortfall of \$1,400 per month which  
2 represents the difference between the rent collected and the mortgage, property taxes, property  
3 management fees, and maintenance for the property. Until separation, the community paid this  
4 shortfall and thereafter, the husband paid it. The Costa Mesa house is awarded to Petitioner  
5 who, effective September 2, 2013, will assume responsibility for the monthly shortfall and any  
6 and all costs/taxes associated with the property. The Respondent is entitled to a lien against the  
7 property in the amount of \$60,347.00 representing his down payment contribution from separate  
8 assets. Petitioner does not have to pay the lien until the home is sold and/or refinanced which  
9 shall occur by August 2015.  
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11           2.       Newcastle Home

12           The parties own a home in Newcastle, Washington that they purchased in August 2009  
13 for \$1.2 million during the marriage. Neither party has disputed the character of the property and  
14 the Court finds that the home is community property. This property is awarded to the  
15 Respondent. Alan Pope appraised the home at a value of \$1,080,000 in January 2013. The  
16 parties presently owe \$859,533 on the home. The home has a monthly mortgage payment of  
17 \$5,763 not including property taxes and insurance. Those costs increase the monthly cost to  
18 more than \$7,000 per month. The Court finds that the down payment for the Newcastle home  
19 was comprised exclusively of community assets. The respondent agreed to list the home for sale  
20 in April 2013, but is now requesting that it be awarded to him to enable him to recoup any loss  
21 on this investment, but discounted for the costs of sale. The Husband testified that he wishes to  
22 retain the residence, and during his unemployment, he will service the debt from cash and  
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1 investment accounts awarded to him, and he will hold the Wife harmless from any payment on  
2 the mortgage.

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4 The Petitioner is ordered to vacate the home as soon as suitable housing for her and the  
5 children is obtained but no later than September 1, 2013. The Petitioner is responsible for the  
6 removal of her trash and disposables and will pay for a professional cleaning for the home.  
7 Petitioner will also repair any damage caused by pets which have been in the home for the past  
8 nine months.

9  
10 **Pioneer 401(k)**

11  
12 Merrill Lynch 401(k) Account – Pioneer. This retirement account has a balance of  
13 \$505,120 as of March 31, 2013. Funds were contributed to the account during the marriage.  
14 The Husband made no contributions to this 401(k) after he left the employment of Pioneer in  
15 2008. The account balance at the time of marriage was \$156,765 by reason of the Husband's  
16 premarital employment. That balance appreciated during the course of the marriage, and using  
17 an average rate of return of 4% compounded annually, the reasonable appreciation on said sum  
18 brings said premarital value to \$241,332 as of April 1, 2013. This sum which represents 47.78%  
19 of the total account as of March 31, 2013 is husband's separate property and shall be awarded to  
20 him. The balance of the account, valued as of April 1, 2013 (263,788) shall be divided equally  
21 between the parties including growth/decline since April 1, 2013 such that each receives half of  
22 the remaining 52.22% of the community property. Wife's 26.11% of this account shall be  
23 transferred to her via Qualified Domestic Relations Order.  
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3. **Pioneer Pension Plan**

By reason of the Husband's employment prior to and during the marriage, the Husband accrued a benefit in a Defined Benefit Plan of \$1,931.35 per month. The Husband was employed at Pioneer earning the pension plan for 208 months, of which 93 months of employment occurred prior to the date of marriage, and 105 months of employment occurred after the date of marriage, and therefore 48.28 percent of the monthly benefit was acquired by efforts of the Husband prior to marriage, and 51.72 percent was acquired by efforts of the Husband after the marriage. The Wife's 50 percent share of the community portion is 25.6 percent, to be divided pursuant to the Bulicek formula, which is: 50% of the fraction: total number of years of participation in pension plan during marriage divided by the total number of years of participation in the pension plan. The wife's interest shall be transferred to her via Qualified Domestic Relations Order.

4. **Intellectual Ventures 401(k) Plan**

The respondent has a 401(k) with Intellectual Ventures. The parties have asserted differing values of this account. The Petitioner and Respondent agree the account had a value of \$145,329 on March 31, 2013. It is undisputed that the Respondent made post-separation contributions of \$29,393 to this account which are his separate property and shall be awarded to the husband. This amount is 20.22% of the account. The remaining balance as of March 31, 2013 is \$115,936 which is community property. The parties will share the remaining balance equally including growth/decline since March 31, 2013. This balance is 79.78% of the account. Wife shall receive half of this amount (39.89%) transferred to her via Qualified Domestic Relations Order.

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5. Morgan Stanley Investment Account # 01-073

The parties have a Morgan Stanley investment account which is in both of their names. Neither party disputed that the account, which contains approximately \$29,838, is community property. The parties will share the remaining balance equally.

6. Fidelity Investment Account # 9128

There is a Fidelity Investments account in the name of the respondent which he contends is his separate property. The husband presented evidence that the account had a value of \$82,954 on January 1, 2000 and a value of \$43,730 on December 31, 2000, the year in which the parties were married. \$35,000 was removed at some point in 2000, the exact date which is unclear because the year 2000 statement was incomplete with only the first page summary being presented. The respondent also presented evidence that funds were used from this account to purchase a vehicle for the Petitioner and that a check in the amount of \$15,000 was deposited into this account from community funds to repay the vehicle purchase.

The Court finds that the respondent has not met his burden of proving that the account is his separate property. Washington law is clear that the burden of overcoming the community property presumption rests upon the spouse asserting the separate nature of the property, and convincing evidence is "not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose." *Berol v. Berol*, 37 Wn.2d 380, 382, 223 P.2d 1055 (1950). A party who claims that the property at issue is his or her separate property may overcome the community property presumption by "clear and convincing proof" that the property is properly

1 characterized as separate property. *Estate of Madsen v. Commissioner of Internal Revenue*, 97  
2 Wash.2d 792, 796, 650 P.2d 196 (1982), overruled sub nom. on other grounds by *Aetna Life Ins.*  
3 *Co. v. Wadsworth*, 102 Wash.2d 652, 659-60, 689 P.2d 46 (1984), cited in *Connell*, 127 Wash.2d  
4 at 351, 898 P.2d 831. A party asserting separate property must be able to trace 'with some degree  
5 of particularity' the separate source of the funds used for the acquisition." *In re Marriage of*  
6 *Hurd*, 69 Wash.App. 38, 50, 848 P.2d 185 (1993). The parties will share the remaining balance  
7  
8 equally.

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11 **7. Wells Fargo Wachovia Account # 8498**

12 The respondent has a Wells Fargo account with a balance of \$36,740 as of April 30, 2013  
13 and presented statements going back as far as 2009. Respondent testified that there was a  
14 Morgan Stanley account that he owned prior to marriage which is a precursor account. Morgan  
15 Stanley accounts were introduced into evidence which showed that on the date of marriage, the  
16 account contained 100 shares of Lucent stock valued at \$6,125. By the end of December 2000,  
17 the Lucent stock had dramatically decreased in value so the Morgan Stanley account only had a  
18 value of \$1,433. The Court finds that the Respondent has not met his burden of proof (clear and  
19 convincing standard) which would establish this asset as separate property.  
20

21 **9. Bank of America CD**

22 The petitioner has a Bank of America CD in her name with a balance of \$10,519 as of  
23 April 13, 2013. Petitioner testified that she received the funds to purchase the CD from a life  
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1 insurance policy received from her grandmother. The respondent also testified that this CD is  
2 the separate property of the petitioner.

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4 10. Disney Stock

5 The petitioner received a share of Disney stock valued at \$54. The petitioner claimed  
6 that she received it as a gift, a claim that was not disputed by the respondent.

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9 11. Morgan Stanley IRA

10 Petitioner has a Morgan Stanley IRA in her name with a value of \$12,723 which she  
11 testified was accumulated by reason of her employment prior to marriage. The court finds the  
12 account to be petitioner's separate property.

13  
14 12. E-Trade Investment Account #7318

15 This account was accumulated by the Husband prior to marriage, and the account balance  
16 has appreciated during the marriage based on the following: The Husband produced statements  
17 showing stock held in Brown and Company stock account and that there were stocks delivered to  
18 E-trade when E-trade acquired Brown and Company. Husband testified that cash was transferred  
19 to E-trade also. The account went from \$37,000 to \$45,723 in April 2013. The increase in  
20 value is appropriate for the 13 year time period involved and Husband testified that no earning or  
21 fund accumulated during the marriage were deposited to this account. The Husband's testimony  
22 is credible and there are sufficient statements to support the testimony. This account is the  
23 Husband's separate property.  
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13. **Franklin Templeton Account**

This account was accumulated by the Husband prior to marriage, and the account balance has appreciated during the marriage based on the following: Statements for this account prior to marriage who invest of 359.02 shares and the statements show what dividends paid on said shares accumulated in the account until there were a total of 668.692 shares in March of 2013. Husband testified that no earnings were deposited to this account during marriage and is all separate property. The Husband’s testimony is credible and there are sufficient statements to support the testimony.

14. **Joint Bank of America Accounts (2528) and (2580)**

There are two joint Bank of America accounts which were utilized by the parties during marriage. At present, both accounts have insignificant balances. On March 23, 2012, the California account (2528) had a balance of \$11,711. The April 27, 2012 Temporary Order provided that the respondent have use and access to the funds in the California account to pay California house expenses, specifically “which shall be used exclusively to pay for California house expenses.” The Court finds that the respondent would have utilized these funds to pay the monthly shortfall needed to maintain the Costa Mesa home post-separation. To the extent there are any funds remaining in either of these accounts, it is awarded to the Petitioner to use towards the Costa Mesa home.

15. **Bank of America Accounts Standing in the Name of the Wife**

There are three Bank of America accounts standing in the name of the Wife: #2187, #2442, and #9084. These accounts consist of the post-separation maintenance received by the

1 Wife from the Husband, and total \$306, \$3,348, and a de minimis variable amount, respectively.  
2 These accounts remain the separate property of the Wife.

3 16. Non-Salary Compensation

4 The April 27, 2012 Temporary Order provided that the respondent was to preserve any  
5 funds in excess of his regular salary, specifically "Any sums received by husband over standard  
6 earnings on Child Support Order shall be held in separate account for subsequent resolution."  
7 Respondent received five payments, detailed below, which apparently were not segregated but  
8 rather deposited into his separate checking account (8985). As of May 28, 2013 there is  
9 approximately \$193,165 in the account. Each payment is detailed below:  
10

- 11 1) **IV 2011 Profit Sharing.** The profit-sharing grant, net amount received in  
12 February 2012 of \$4,604, was used for the payment of the 2011 federal income  
13 tax liability of approximately \$5,000 on or about April 15, 2012. The sum of  
14 money no longer exists;
- 15 2) **IIF/IFM Annual Bonus Plan.** The Husband's personal performance bonus for  
16 2012, net amount of \$29,089 was received by reason of the Husband's personal  
17 efforts during the year 2012 in which he was separated, and it is the separate  
18 property of the Husband earned entirely after separation.
- 19 3) **Long Term Cash Incentive Plan.** When the respondent began employment at  
20 Intellectual Ventures, the Long Term Cash Incentive Plan was funded with  
21 \$384,900. At the end of 2009, an additional \$144,300 was added to the plan.  
22 Mr. Hawes testified that he analyzed the plan documents and the cash in the  
23 account and determined that all of the funds in the account were granted during  
24 the marriage. Mr. Hawes further testified that the payouts from this plan are  
25 based on how Intellectual Ventures performs as a whole, not on how an individual  
26 performs. The remaining balance in the plan, \$293,064, was relinquished at the  
time that the respondent terminated his employment with Intellectual Ventures,  
resulting in a loss to Petitioner of any access to these funds. Mr. Hawes  
conclusion was that any funds disbursed from the account were community assets  
based on the plan details and the dates on which Intellectual Ventures granted the  
entitlement to the plan and funded the account. The respondent did not present  
an expert to testify about the plan.

1 The respondent received net proceeds of \$101,435 on December 28, 2012 from  
2 this plan which is community property to be divided equally.

3 4) **IV 2012 Profit Sharing.** The respondent received net proceeds of \$8,117 on  
4 January 10, 2013 which represents the 2012 Profit Sharing. The respondent  
5 testified that profit sharing is received for work performed the preceding year.  
6 The Court finds that the parties were separated for the entire year of 2012 and  
7 therefore said grant is the separate property of the Husband.

8 5) **Vacation Pay.** The respondent received 70 hours of vacation pay from  
9 Intellectual Ventures with his final check which the Court finds to be Husband's  
10 separate property.

11 6) **Severance Pay.** The Husband's severance payment net amount is \$74,399.54.  
12 It is undisputed that the parties were separated prior to the Husband's receipt of  
13 severance pay. Pursuant to *Bishop*, 46 Wn.App. 198 (1986), the court finds that  
14 the Husband's severance package is his separate property. This finding is  
15 consistent with the recognized purpose of severance pay, which is to alleviate the  
16 financial loss of the person enduring the loss, the Husband in this case.

17 **17. HSA Account/September 2011 Medical Bill**

18 The respondent has a Health Savings Account with Aetna with a balance of \$6,247 as of  
19 February 28, 2013. The Court finds that this account is community property. After separation,  
20 the petitioner received a \$2,139 medical bill for uninsured expenses incurred in September 2011,  
21 before the parties separated. Respondent is responsible for payment of that bill out of the HSA  
22 account and the remainder shall be divided equally.

23 **18. Life Insurance**

24 The Court finds that there may be term life insurance insuring one or both parties which  
25 do not have any intrinsic value. The Court finds to the extent that either party has any term life  
26 insurance on his or her life, it should be awarded to the insured party subject to securing the  
support obligations described below.

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19. Automobiles

The Court finds that the community owns two automobiles, a 2001 Dodge Caravan which has been used by the respondent since separation and a 2000 Toyota 4Runner which has been used by the petitioner since separation. The Court finds the vehicles to have values of \$3,500 and \$3,134, respectively. The party in possession of each of the vehicles is awarded said vehicle.

20. Personal Property

The Court finds that the parties have personal property in the Newcastle home which both have testified should be divided. The parties testified that they can agree to division of these items. Based on the testimony at trial, the Court further finds that each party has separate personal property. The petitioner's jewelry, engagement ring, clothing and personal effects, grandfather clock and china are her separate property. The respondent's jewelry, watches, clothing and personal effects, woodcut, calligraphy print, and coins are his separate property.

21. 2011 California State Tax Refund

The Court finds that the petitioner received the 2011 California State tax refund in the amount of \$2,468.

22. 2012 Income Tax

The parties testified that there will be taxes owed in 2012 and indicated agreement to file a joint tax return. The Court finds that it is appropriate to use the 2012 California State tax refund toward payment of the 2012 federal tax obligation. To the extent not fully covered by the California tax refund, the parties shall equally pay any sums due on the 2012 tax return and shall equally share the cost of tax preparation.

1           23.    Credit Cards

2           The Court finds that the parties each have a credit card which they have utilized post-  
3 separation. The petitioner has incurred separate debt on the United Mileage Visa in her name  
4 and the respondent has incurred separate debt on the American Express Card in his name.  
5

6           **PROPERTY DIVISION**

7           In disposing of the assets and liabilities of the parties in a marital dissolution, RCW  
8 26.09.080 provides that the Court shall “make such disposition of the property and the  
9 liabilities of the parties, either community or separate, as shall appear just and equitable  
after considering all relevant factors including, but not limited to:

- 10                   (1)    The nature and extent of the community property;
- 11                   (2)    The nature and extent of the separate property;
- 12                   (3)    The duration of the marriage; and
- 13                   (4)    The economic circumstances of each spouse or domestic partner at the  
14 time the division of property is to become effective, including the desirability of  
15 awarding the family home or the right to live therein for reasonable periods to a  
16 spouse or domestic partner with whom the children reside the majority of the  
time.

17           The Court also considers the income of the parties and their earning potential when  
18 dividing the parties’ estate. *In re Marriage of Olivares*, 69 Wn.App. 324, 329, 848 P.2d  
19 1281 (1993). In this matter, the Court finds that the respondent has historically had very  
20 significant income and there is no reason to expect that he will not continue to earn at a  
significant level. Upon finalization of this matter, respondent’s income will allow him  
support himself in a manner similar to that enjoyed during the marriage while continuing  
to maximize his retirement accounts and increase his assets.

21           The petitioner, on the other hand, will not, even after obtaining a degree in a healthcare  
22 field, have earnings approaching those of the respondent. Petitioner, and the children  
23 who are primarily with her, will live a far more modest life given the limits of petitioner’s  
income.

24           RCW 26.09.080 (4) puts a lot of onus on maintaining the family home for the children.  
25 In this case, the petitioner cannot afford to keep the family home, although the Court  
26 finds that it would benefit the children to have a stable housing situation within their

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school boundary. It is reasonable for the division of property to provide the petitioner with the means and resources to provide stable housing for the children at the conclusion of this matter.

***CHILD SUPPORT***

The petitioner has not worked outside of the home until the parties separated. She is presently underemployed in a healthcare position which will hopefully increase her opportunities to enter a nursing or technical healthcare program. RCW 26.19.071 Standards for Determination of Income at (6)(e) provides that income shall be imputed at a median level based on census data when a party does not have a sufficient work history on which to base income.

Until April 30, 2013, the respondent had been continuously employed as an attorney since 1988, a period of 25 years. The respondent's income has averaged over \$500,000 per year for the past five years. He has had earnings in excess of \$250,000 since 2000. Respondent will continue to receive income from his previous employer through August 2013. He is actively seeking a new position. RCW 26.19.171 (6)(b) provides that the Court may look at historical income from reliable data when imputing income to a party who is unemployed.

The temporary Order of Child Support is modified slightly to reflect child support transfer payment in the amount of \$2,000 per month. The percentage sharing based on proportional share of income is 80% to the respondent/father and 20% to the petitioner/mother.

In addition to the child support transfer payment to the petitioner, the children will have additional expenses for childcare, medical insurance, uninsured medical, education, and extracurricular activities. These should be shared by the parties on a pro rata basis, line 6 from the Child Support Worksheets signed by the Court.

Tax exemptions for the children should be allocated and unpaid child support should be secured by life insurance or as a lien against the estate to the extent that Social Security benefits do not cover the support.

***MAINTENANCE***

The respondent is presently paying \$3,500 per month maintenance and \$1,596 child support per the temporary orders entered with the Court on April 27, 2012. In addition, the respondent has also been paying the mortgage, property taxes, and insurance on the home in which the petitioner and the children are residing at a cost in excess of \$7,000 per month. The petitioner has indicated that it will cost approximately \$2,500 per month

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to rent a home in which to live with the children after she leaves the Newcastle home. The Court finds this amount to be reasonable given market conditions.

The Husband's employment position at Intellectual Ventures (IV) was eliminated and a new position was created for which the Husband was not suited. In order to receive a severance package, he negotiated his severance from IV. He has been diligent in searching for employment, using 4 headhunters, industry contacts/networking, searching job boards and utilized the services of an employment coach for resume preparation. The Husband is 50 years old and his niche as a patent attorney is very narrow; due to changes in the industry is not as plentiful as it was in the past.

The Husband has an earning ability of about \$225,000 per year, which is much less than he earned at IV.

The Court finds that the petitioner is in need of maintenance and the respondent has the ability to pay. The Court is increasing the monthly award of maintenance to \$5,500 to account for the Petitioner's need to pay rental expenses. Maintenance is awarded for a period of 48 months commencing September 1, 2013.

The petitioner will be attending classes beginning September 2013 so that she can be accepted into a healthcare program at one of the technical colleges located in the Seattle/Bellevue area.

Until she moves from the home, the respondent should continue to follow the terms of the April 27, 2012 Temporary Order which provides the respondent pay \$5,096 per month, pro-rated for the day that she moves from the home at which time maintenance should be increased to reflect that she will need an additional \$2,500 to pay rent. The Court finds that the petitioner is in need of maintenance of \$5,500 per month for a period of 48 months commencing September 1, 2013.

In addition, in recognition that this amount of maintenance is based on Respondent receiving \$225,000 in earnings, to the extent Respondent earns more than \$225,000 in earnings, Petitioner is entitled to a fair portion of this excess, which is deemed to be 25% of the Respondent's gross earnings for a period of eight years from the date of this Order. This Court will retain jurisdiction of issues of when earnings are calculated, appropriate documentation, appropriate deductions from earnings and other related issues.

**EDUCATION EXPENSES**

The Court finds that the petitioner will have education expenses of between \$10,500 and \$17,250 and will need assistance from the respondent to pay these expenses. Providing

1 funds for the expenses associated with obtaining a health care decree is fair and  
2 reasonable under the circumstances. Petitioner is to provide receipts for educational  
3 expenses including tuition, fees, books and lab expenses to the Respondent verifying the  
4 amount paid/owing. The parties are free to arrange their own method of payment (e.g.  
5 whether Petitioner pays and Respondent reimburses or Respondent pays directly).  
6 Regardless of how the parties arrange payment, Respondent shall pay within seven days  
7 of receipt of the expense invoice. The Respondent will not be responsible for any  
8 amount over \$17,500.00 nor will he be responsible for paying any educational expenses  
9 beyond September 2015.

### 10 **ATTORNEY'S FEES**

11 At trial, petitioner testified and presented evidence that she was in need of attorney's fees,  
12 having incurred \$93,213 as of May 24, 2013 and having only been able to pay \$21,073 of  
13 those fees. In a dissolution, the court has wide discretion to award attorneys' fees and  
14 litigation costs to a party who has a financial need for the award balanced against the  
15 ability of the other party to pay. RCW 26.09.140; *Marriage of Pollard*, 99 Wn.App. 48,  
16 56, 991 P.2d 1201 (2000). Respondent testified that his attorney fees had been paid in  
17 full since inception of the case and those fees totaled more than \$48,000. The Court finds  
18 that the respondent has the ability to pay a portion of petitioner's attorney's fees.

19 The Court finds that an award of attorney's fees to the petitioner in the amount of  
20 \$50,000 is appropriate under the circumstances.

### 21 III. CONCLUSIONS OF LAW

22 The court makes the following conclusions of law from the foregoing findings of fact:

#### 23 3.1 JURISDICTION

24 The court has jurisdiction to enter a decree in this matter.

#### 25 3.2 GRANTING OF A DECREE

26 The parties should be granted a decree.

#### 3.3 PREGNANCY.

Does not apply.

#### 3.4 DISPOSITION

The court should determine the marital status of the parties, make provision for the support of any minor child of the marriage entitled to support, consider or approve

1 provision for maintenance of either spouse, make provision for the disposition of  
2 property and liabilities of the parties, and make provision for the allocation of the  
children as federal tax exemptions. The distribution of property and liabilities as set forth  
in the decree is fair and equitable.

3 3.5 CONTINUING RESTRAINING ORDER

4 Does not apply.

5 3.6 PROTECTION ORDER

6 Does not apply.

7 3.7 ATTORNEY'S FEES AND COSTS

8 Each party will pay his or her own attorneys' fees except Respondent will pay \$50,000  
9 towards Petitioner's attorney fees within 30 days of this Order.

10 3.8 OTHER:

- 11 1. See above Paragraphs: 2.21 B (1) Applicable Law for Costa Mesa property;  
12 Paragraph 6 and Paragraph 16 (6).
- 13 2. In applying RCW 26.09.080, no single factor such as the duration of the marriage  
14 or the extent of separate property is to be given undue weight. Rather the statute  
15 "directs the trial court to weigh all of the factors, within context of the particular  
16 circumstances of the parties to come to a fair, just and equitable division of  
17 property. The character of the property is a relevant factor which must be  
18 considered but is not controlling. *In re Marriage of Konzen*, 103 Wn2d. 470  
19 (1985).
- 20 3. The assets and liabilities of the parties are characterized and valued and shall be  
21 disposed of as outlined in the findings above and the attached appendix.
- 22 4. During the next ten days, the shall work to agree upon the form of the necessary  
23 final orders to effectuate the rulings indicated herein and submit them to the court  
24 for entry. Certainly any additional matters that the Court has neglected to address  
25 should be incorporated into the Decree, as should any necessary corrections to the  
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Court's arithmetic errors. If agreement is not possible, alternative proposals may be submitted along with a cover letter/email explaining any disagreements that remain. Based on these submissions, the Court will enter the Decree of Dissolution and any other necessary orders.

Dated: August 22, 2013



THE HONORABLE SUZANNE PARISIEN

Suzanne Parisien