

**ORIGINAL**

NO. 36035 - 7 - II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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WILLIAM BRISKEY

Petitioner,

vs.

MARY JO BRISKEY

Appellant/Respondent

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**REPLY**

BRIEF OF APPELLANT RESPONDENT

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## **II. INTRODUCTION:**

Mrs Briskey maintains that the trial court's findings are not supported by substantial evidence and that the findings do not support the trial court's conclusions of law and judgment. *Morgan v. Prudential Ins. Co. of America*, 86 Wash.2d 432, 545 P.2d 1193 (1976). This is an abuse of desecration standard.

The substantial evidence standards requires a sufficient quantum of evidence to persuade a fair-minded person of the truth of the declared premise. *Holland v. Boeing Co.* 90 Wash.2d 384, 390-391, 583 P.2d 621,624 (Wash.,1978); *In re Snyder*, 85 Wash.2d 182, 532 P.2d 278 (1975).

Discretion has been defined as 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.' 1 J. Bouvier's Law Dictionary 884 (3d rev. 1914). The personal judgment of the court is based on an equitable decision of what is just and proper under the circumstances. *Rehak v. Rehak* 1 Wash.App. 963, 964, 465 P.2d 687, 688 (Wash.App. 1970); *State ex rel. Nielsen v. Superior Court for Thurston County*, 7 Wash.2d 562, 110 P.2d 645 (1941).

## **III. CREDIBILITY**

This standard is equally applicable to review of the trial court's determination of the credibility of the witnesses.

Mrs Briskey has acknowledged that she was less than candid at the time of her deposition about her relationship with Mr Strite while living in Everett and how she met him. She apologized for this behavior to the trial court and accepts the reasonable consequences of her actions.

**A. ORAL OPINION**

In her oral opinion the trial court stated;The court finds the credibility of the respondent at issue numerous times during the trial;

1. the computer on line business that she was active with;
2. the relationship she had in Everett after the date of separation;
3. Her shopping and spending habits
4. Her nondisclosure of other person's she was residing with when she made a request for spousal maintenance.

These oral findings were incorporated into the decree in ¶ 2.8 B.

**CREDIBILITY OF THE RESPONDENT.**

These findings were not supported by the testimony or evidence.

Mrs Briskey contends that the trial court's distribution of property and its resolution of these issues in the case show that "fairness and equity " were abandoned in the court's attempt to fulfill its statutory duties.

Dr Briskey argues that the trial court's determination of Mrs Briskey's credibility should in some way dispense with the requirements set forth in the statute regarding award of property (RCW 26.09.080), spousal support (RCW 26.09.090), and attorney fees (RCW 26.09.140).

The trial court's determination of credibility is not one of the statutory standards which the court must apply in making a fair and equitable division of the assets.

A trial court is specifically forbidden by the legislature from considering fault as a factor in making a just and equitable distribution of the property. RCW 26.09.080. Yet Dr Briskey's counsel was permitted to repeatedly interject prejudicial matters into the trial, with assurances by the

court that it could ignore those which were inappropriate.

The dissolution statute does not authorize the trial court to disregard the legislative goals in dissolution proceedings because it has determined that a party is untruthful. Mrs. Briskey is not asking the court to condone his conduct, rather invites it to apply equity in dissolving her relationship with Dr Briskey based upon legal and equitable standards of the statute rather than emotional ones.

She has asked that her time, efforts, opportunities foregone and resources expended in this relationship be acknowledged and her economic circumstances be recognized

Dr Briskey attempts to argue that justice and equity support the result reached by the trial court. He employs thinly veiled attacks on her rather than exploring the proper statutory circumstances in evaluating her relationship with Dr Briskey.

The law is clear however, that the trial court is not allowed to disregard Mrs Briskey's testimony where supported by other credible evidence nor does it suspend the statutory requirements that the court make a fair and equitable distribution of the property. RCW 26.09.080; Matter of Marriage of Crosetto 82 Wash. App. 545, 556, 918 P.2d 954, 959 (Wash.App. Div. 2,1996).

The parties' relative health, age, education and employability are considered in property divisions. The ultimate concern is that the economic condition in which the parties find themselves be fair and just following dissolution decree. *In re Marriage of Mathews*, 70 Wash.App. 116, 121, 853

P.2d 462, *review denied*, 122 Wash.2d 1021, 863 P.2d 1353 (1993).

Dr Briskey cites this court to language in the findings and decree in which the trial court evokes statutory and case law to support its findings. This court must look behind this “lip service” and evaluate the results in determining if the trial court has become caught up in the character assassination of Mrs Briskey or has made a sustainable judgement based upon statutory considerations. *Quesnell v. State* 83 Wash.2d 224, 233-234, 517 P.2d 568, 574 - 575 (WASH 1974) (where ‘lip service ’ is paid to certain rights of the accused in mental health hearing ); *Scott Fetzer Co., Kirby Co. Div. v. Weeks* 114 Wash.2d 109, 118, 786 P.2d 265, 270 (Wash.,1990).

A trial court abuses its discretion if its decision *is manifestly unreasonable or based on untenable grounds or untenable reasons.*”*In re Marriage of Muhammad* 153 Wash.2d 795, 803, 108 P.3d 779, 783 (Wash.,2005); *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997).

If this court considers the facts in this case, the resolution of the trial court as to the award of property and/or spousal maintenance, and attorney’s fees is manifestly unreasonable and not supported by the facts or law.

#### **IV.EVIDENCE RE: EMPLOYABILITY AND DISABILITY**

Mrs Briskey presented evidence of her past employment and disabilities in support of her request for a property and/or maintenance award .

##### **A. TESTIMONY RELATING TO EMPLOYABILITY:**

At the time of trial, the parties had been separated almost a year and a

half.

Mrs Briskey testified that she injured her back during the marriage in a horseback riding accident approximately 6 or 7 years before the trial. 319: 4-16; 347:18-23. She testified that she had pain all of the time now. 341: 15.

The pain in her back has become progressively worse running down into her leg. 341: 15-23. She has pain in her knee when she walks. 342:1-5.

She had seen a doctor about this injury and he had treated her, including X-rays and recommended a MRI, physical and message therapy. 342: 6-12.

She testified that at the present time she could not afford to have a doctor or appraiser come in to testify. 342: 13-21.

She testified that she did not feel that she could hold down employment because of her back pain. 348: 3-15.

She testified that the injury had gotten progressively worse over the last two years. 512:14-16; 348: 348: 8-10. This testimony was not disputed.

She indicated that the injury was exacerbated by sitting during the trial. 349: 11-17. Dr Briskey's testified that he saw this during the trial. It seemed more extreme now than at any time at home. 531:24.

Dr Briskey acknowledged this injury and testified that he had seen his wife walk with a limp. 531:6-8. He testified that it had limited her activities during the marriage. 77: 1-5.

**B. TESTIMONY FROM GARY PETERSON, CRC.**

The trial court found that; "Mr Peterson was not made aware of respondent's attempted employment nor did he review any of her medical

records.” ¶ 2.15 Findings of Fact.

Mr Peterson was called as a vocational rehabilitation expert. His C.V. was marked as Exhibit 17. 154: 7-12. He held a degree in psychology (Whitman College 1966) and a masters degree in rehabilitative counseling from the University of Arizona 1972. 154: 7-10.

He has been a certified rehabilitation counselor for 30 years.158: 1.

Mr Peterson testified that he reviewed a declaration by Dr Steven Duncan, MD and Mark Joslin a licensed acupuncture therapist. 164:2-7.

Mr Peterson testified that the information provided by Dr Duncan and Mr Joslin are of the type of medical records which professionals in his field usually relied upon in rendering vocational opinions. 164: 8-21; 165: 1-5.

Mr Peterson specifically testified that he reviewed Mrs Briskey’s medical records and test results. 171:20-23.

Mr Peterson specifically cited Dr Duncan as finding that Mrs Briskey had “. . . osteoarthritis of the right hip, degenerative disk disease in the lumbar spine, which are progressive degenerative processes.” 198:20-199:13.

He gave the opinion that absent extreme medical intervention she would not be employable. 172;8-23.

In cross examination, Mr Peterson stated that he had reviewed medical records from Dr Duncan and Mr Joslin. 180;14-25; 187: 14-22.

The trial initially sustained a hearsay objection concerning this testimony. 164: 10-12. It then allowed the question as an exception to the hearsay rule. 166: 16-17. She then reversed herself and ruled that she would

not let Mr Peterson testify as to what the doctors had said.

ER 703 provides in part that;

**The facts or data in the particular case upon which an expert bases an opinion** or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Nothing in Rule 703 requires that the facts or data relied upon by an expert be admissible as evidence. Thus, for example, an expert may be allowed to express an opinion based upon material that would be objectionable as hearsay, or objectionable under some other rule. 5D WAPRAC ER 703.

An expert witness testifying according to Er 703 is not restricted by the usual rule requiring a witness to testify from firsthand knowledge, and he/she may base an opinion on hearsay, such as reports , observation of others, and statements of the patient herself. ER 703 ; 5A K. Tegland, Wash.Prac. Evidence § 304 (2d ed. 1982).

**C.      DISABILITY:**

The court found that ;

The court’s observations contrast directly from those of Mr Peterson.

\* \* \*

The court does not feel that the assessment by Mr Peterson is reliable.”

¶ 2.15, Findings of Fact.

Dr Briskey testified as to the nature of her injury during the marriage and testified to her physical condition at trial. 531:6-8; 531:24

This ruling ignores the undisputed evidence in this case.

**D.      COMPUTER AND ON-LINE JOB**

The trial court stated in ¶ 2.15 that “Mr Peterson was not made aware

of the respondent's attempted employment".

Again in ¶ 2.8 the court found that Mrs Briskey's testimony concerning the "the computer on-line business was not credible." In her oral ruling the court described this activity as "the computer on-line business that she was active with. . . ."

Mr Peterson testified that he discussed the job applications which Mrs Briskey had made during the year or so. 184: 20- 185:5. He recalled that they discussed three applications.

Dr Briskey's counsel repeatedly asked questions about Mrs Briskey's "on line job". He did this despite the fact that there was no testimony to support this question.

Mrs Briskey testified about the subject matter of the internet on two different subjects. The first dealt with purchases made on-line with the use of a Pay-Pal charge card. The second she testified to completing on-line market surveys for which she was paid \$2-3.00 each. She stated that she made a total of about \$500 during the past two years. 346:11-23.

Mrs Briskey testified that she made payments to Pay Pal for on-line for purchases, consumer goods. 431: 11-25. She would charge things on her internet charge card (E-bay) for her daughters and they would repay her. Dr Briskey's counsel asked if she was conducting business on the internet? Mrs Briskey stated "no". 431:11- 432: 13.

Gary Peterson's was asked by Dr Briskey's attorney , "Are you aware that Mrs Briskey is now employed?

A Am I aware that she is now employed?

Q That she is now employed. Are you aware that she is now working?

A Working? That's what you were saying. No, I am Not.

Q She didn't disclose to you that she had a job for the last year, year and a half?

A Doing what? No, she didn't.

There is no evidence of any kind in the record which supports the conclusion that Mrs Briskey has been employed the past one to two years.

Mrs Briskey did testify that she did complete the on line surveys for two to three dollars each and that she had made a total of \$500 during the past two years. 346:3-23.

This finding is unsupported by any fact and is an abuse of discretion.

## **V. DURATION:**

### **A. CONTINUOUS COHABITATION**

The trial court held that; "The respondent's request that a meretricious or cohabitation relationship be found prior to the Marriage (1994) is denied." ¶ 2.29 Findings of Fact.

The court further found that the respondent did not prove the elements set forth in the case of Pennington v. Pennington [infra] . . . specifically continuous cohabitation.

In addressing the issue relating to the duration of the relationship which the court must consider under both RCW 26.080 and 090, Mrs Briskey introduced evidence that the parties began their relationship in the Fall of 1991. 304:20. Dr Briskey was much less certain about the inception date and testified that the parties began living together first in 1985, (Depo. WB p 10, 11 - p 11,

13). Later he testified that it could have been since 1991, he could not remember. 112: 2-5. He also stated that it must have been “one and a half to two years” before their marriage in 1994. (1992-93). 36:7-13.

Mrs Briskey did not argue that this was a “meretricious relationship” since she and Dr Briskey were before the court on a Petition for Dissolution of Marriage. She contended that “intimate personal relationships” (see *In re Marriage of Lindsey*, 101 Wash.2d 299, 302, 304, 678 P.2d 328 (1984)), were only important as an analogy to those in which a marriage existed in the application of equitable principles. Her contention is that this time may not be ignored and should be “tacked” to the period of the marriage in arriving at the full duration of the relationship. To ignore it is arbitrary and capricious.

Mrs Briskey asked the trial court to find that this relationship was one of thirteen years not seven as contended by Dr Briskey. This duration was important to her because she had worked in his private veterinary business with no compensation earmarked to either party. The earnings, expenditures, and acquisitions were not contemporaneously segregated during this entire period. 148;12-15; 525: 12-24. There had been no deposits made on behalf of Mrs Briskey to social security, workers compensation or a retirement other than Dr Briskey’s promise to take care of her. 523:1-10. She has no medical coverage.

Both testified that the only break in continuity was a separation of a two to three months during which Mrs Briskey moved to an apartment in Puyallup. Mrs Briskey resided there by herself and Mr Briskey visited her two, three or four times per week. 37-38:1-22. They got over their “squabble and made

amends". 515:19-20. They then lived together in Dr Briskey's home until their marriage in 1997. This arrangement continued until separation in 2004.

Mrs Briskey contended that she worked in Dr Briskey's home and business this entire time, sans the separation period. Dr Briskey sought to suggest that Mrs Briskey lived with another man during this period but there was no admissible evidence to support this allegation. 38: 4-15 thru 40; 1-6. Mrs Briskey stated that she lived alone. 112: 6-10; 520;1-522:25.

This finding by the trial court is without factual support and is arbitrary.

#### **B. MRS BRISKEY'S PRIOR MARRIAGE**

Mrs Briskey was asked by Dr Briskey's counsel about the fact that she was residing with Dr Briskey before her previous marriage had been dissolved.

There was no testimony that this was unknown to Dr Briskey or that she ever returned to that relationship once she began living with Dr Briskey. These were all attempts by Dr Briskey's counsel to mislead the court about the commitment between the parties.

Dr Briskey offered no testimony that he did not know that Mrs Briskey was married when their relationship began. She brought her two daughters with her when she moved in. 37: 19-23.

Dr Briskey introduced no evidence that he was unaware that she was not divorced while they were living together.

He did not testify that he did not know about her prior marriage at the time they reconciled. He never contended that he was unaware of this fact during the divorce trial. This issue was first raised in argument by Dr Briskey's

counsel. There is no evidence which makes it material even if *Pennington* and other cases are to be applied.

The trial court excluded the time the parties lived together prior to marriage because the parties were separated for a few months prior to their marriage. Citing *Pennington*

### C. LEGAL AUTHORITY

The court does cite the case of *In re Marriage of Pennington* 142 Wash.2d 592 in ruling that the relationship was not “continuous”.

Mrs Briskey contends that conclusion is contrary to the law and is not a fair and reasonable ruling on the facts.

In the present cases, we must review and decide whether the trial courts erred in concluding the facts gave rise to meretricious relationships at all. We view this determination as a mixed question of law and fact; as such, the trial court's factual findings are entitled to deference, but the legal conclusions flowing from those findings are reviewed de novo. *In re Marriage of Pennington* 142 Wash.2d 592, 602-603, 14 P.3d 764,770 (Wash.,2000). (citations omitted).

In extensive questioning by the Court, Mrs Briskey testified that she had contributed to the relationship by:

1. Not taking a salary. Neither party drew a salary. All of the earning that came into the practice was deposited with the business and spent directly from the business. 520:14-17.
2. She contributed to the business good will and bring client's to the business. 520: 14-25.
3. She assisted her husband in his practice by being his “right hand man”. 521:21-25 - 522:1-6.

A meretricious relationship is a stable, marital-like relationship in which both parties live together with knowledge that **a lawful marriage does**

**not exist.** In re Marriage of Pennington, 142 Wn.2d 592, 601, 14 P.3d 764 (2000); Connell v. Francisco, 127 Wn.2d 339, 346, 898 P.2d 831 (1995).

The trial court in resolving these “intimate personal relationships” are required to; “[C]onsider five factors in determining whether a meretricious relationship exists: continuous cohabitation; the duration of the relationship; the purpose of the relationship; pooling of resources and services for joint projects; and the intent of the parties. Pennington, 142 Wn.2d at 601; (quoting Connell, 127 Wn.2d at 346). These factors are neither exclusive nor are they hypertechnical. Pennington, 142 Wn.2d at 602 . No one factor is more important at 602, 605.

If a court decides that a meretricious relationship exists, it must then determine the interests of each party in property acquired during the relationship and make a just and equitable distribution. Pennington, 142 Wn.2d at 602. There is a rebuttable presumption that both parties own property acquired during a meretricious relationship. (Cite omitted). \* \* \*

The parties shared financial responsibility for groceries, household and living expenses, and joint projects. They pooled their services by working on various properties and homes together. They were integrated into each other's families. The parties intended their relationship to be long-term, and planned to retire together.

The facts are similar to Warden, where the parties lived both together and separately during their relationship. Warden v. Warden, 36 Wn.App. 693, 694, 676 P.2d 1037 (1984). While they lived apart, the man married someone else, but the woman did not discover this for several years. Warden, 36 Wn.App. at 694-95. The court found a meretricious relationship up through the moment when the woman discovered the man married another. Warden, 36 Wn.App. at 696.

And Pennington, 142 Wn.2d 592 where the court found the evidence insufficient to show a meretricious relationship, is distinguishable. In Pennington, the parties' relationship was neither exclusive nor stable. Pennington, 142 Wn.2d at 603-04 . Pennington was married to someone else during much of the relationship. Pennington, 142 Wn.2d at 604. They did not make continuous financial contributions to each other, though they did have a joint checking account . . . . Pennington, 142 Wn.2d at 596, 604-05 . \* \* \*

In 1984, this court discarded . . . *Lindsey*, 101 Wash.2d 299, 678 P.2d 328. *Lindsey* involved a couple who commenced an intimate

relationship in 1974, legally married in 1976, and divorced in 1982. *Lindsey*, 101 Wash.2d at 300, 678 P.2d 328. The court declined to presume that property acquired *before* the legal marriage belonged to the holder of title, instead holding “**that courts must ‘examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property.’**” *Lindsey*, 101 Wash.2d at 304, 678 P.2d 328 (quoting *Latham*, 87 Wash.2d at 554, 554 P.2d 1057). \* \* \*

Under *Connell*, we further established a three-prong analysis for disposing of property when a meretricious relationship terminates. First, the trial court must determine whether a meretricious relationship exists. Second, if such a relationship exists, the trial court then evaluates the interest each party has in the property acquired during the relationship. Third, **the trial court then makes a just and equitable distribution of such property.** Citation omitted) \* \* \*

The duration of the relationship between cohabitants, which was four years and three months, could help support a conclusion that a meretricious relationship existed, though male cohabitant dated other women during the first three years of the relationship, and female cohabitant had been married but separated when she started dating male cohabitant.

Cohabitants **did not have mutual intent to be in a meretricious relationship**, as element for meretricious relationship, where female cohabitant was married to another man during the relationship and the cohabitants knew they were not married and they did not hold themselves out as spouses. In re Marriage of Pennington 142 Wash.2d 592, 14 P.3d 764 (Wash.,2000). \* \* \*

When the factors and evidence are balanced as a whole, the equitable principles recognized in *Connell* are not satisfied by the trial court's findings. While the parties' continuous cohabitation and duration of their relationship do evidence a meretricious relationship, the evidence supporting the **mutual intent** of the parties to be in such a relationship is too equivocal to support such a conclusion.

#### CONCLUSION

We, therefore, hold the facts of these cases do not rise to the level of meretricious relationships as envisioned by *Connell* and *Lindsey*. Furthermore, we hold neither party made a sufficient showing to justify recovery under other equitable theories. The Court of Appeals in *Pennington* is affirmed. The Court of Appeals in *Chesterfield* is reversed.

RCW 26.09.080 provides in part: In a proceeding for dissolution of the marriage . . . , the court shall assign each spouse's separate property to that spouse. It also shall divide community property, *without regard to marital misconduct*, in just proportions after considering all relevant factors including:

- (1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (2) value of the property set apart to each spouse;
- (3) duration of the marriage; and
- (4) economic circumstances of each spouse when the division of property is to become effective , including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children.

In *Aetna Life Ins. Co. v. Boober* 56 Wash.App. 567, 570, 784 P.2d 186,

188 Wash.App.,1990 defined the issue of “living separate and apart”.

There the court said;

Respondent asserts, however, that the foregoing rules are inapplicable and that Alan's earnings (and, hence, his term life insurance policy) were his separate property because Debbie and Alan were living “separate and apart” within the meaning of RCW 26.16.140 at Alan's death. Living “separate and apart” requires more than mere physical separation. In *Rustad v. Rustad*, for instance, the spouses were physically separated because the wife was confined to a mental institution in another state. The husband did not seek dissolution and served as custodian of her estate from 1950 until his death in 1953. The court held land acquired after the husband moved to Washington without his wife was community property because the record was devoid of any evidence showing the parties had renounced their marriage.

The trial court cited the fact that the parties dated each other, attended counseling together, and attempted to reconcile as indications that they “were not together.” However, it is just such facts—especially the attempted reconciliation—that should lead to the conclusion that the marriage was not yet defunct; the parties continued to demonstrate a will to union and had not yet “exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship.” *Oil Heat Co.*, 26 Wash.App. at 354, 613 P.2d 169; Nuss

v. Nuss 65 Wash.App. 334, 345, 828 P.2d 627, 633 (Wash.App.,1992).

#### **D. MARITAL MISCONDUCT DEFINED**

Dr Briskey's counsel repeatedly interjected the issue of fault. These actions caused the court to make erroneous rulings.

Our courts have stated that the fact that one of the parties may have been in serious fault does not justify the imposition of a severe penalty in the way of deprivation of property.

The "marital misconduct" which a court may not consider under RCW 26.09.080 refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence, the squandering of marital assets or, as here, the deliberate and unnecessary incurring of tax liabilities. In shaping a fair and equitable apportionment of the parties' liabilities the trial court was entitled to consider whose "negatively productive conduct" resulted in the tax liabilities at issue.

In re Marriage of Muhammad 153 Wash.2d 795, 108 P.3d 779 (Wash.,2005), the court in finding abuse of discretion stated;

Trial court's division of parties' property in dissolution of marriage proceeding was an abuse of discretion, **where marital fault was improperly considered**; language in court's oral ruling and written findings of fact, along with questionable aspects of property division itself, established clear inference that court improperly considered former wife's decision to obtain protective order against former husband, which prohibited former husband carrying gun and subsequently caused him to lose his job as sheriff, as "marital misconduct." West's RCWA 26.09.080.

## VI. SPOUSAL MAINTENANCE

The trial court found that Mrs Briskey's request was "*ludicrous*". This is indicative of the entire ruling. ¶ 2.15 of Findings.

Mrs Briskey requested \$2,500 per month until Dr Briskey retires or as other circumstances change according to the statute. 345: 12-16. The trial court awarded \$1,800 for nine months.

Respondent's asked that her contribution of time and efforts in the relationship be evaluated by the court, according to the non-exclusive statutory standards set forth in RCW 26.09.090 and equitable considerations.

The court is to consider the duration of the marriage, the health and ages of the parties, their prospects for future earnings, their education and employment histories, their foreseeable future acquisitions and obligations, the nature and extent of the community and separate property, and the resulting economic circumstances of each spouse when the property is divided. The court's paramount concern is the economic condition in which the decree leaves the parties. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.3d 102 (1999); *In re Marriage of Bulicek*, 59 Wn.App. 630, 633, 800 P.2d 394 (1990); RCW 26.09.080, 090; *In re Marriage of Gillespie*, 89 Wn.App. 390, 399, 948 P.2d 1338 (1997); *In re Marriage of Williams*, 84 Wn.App. 263, 270, 927 P.2d 679 (1996).

## **VII. EVALUATION OF PROPERTY: JUST AND EQUITABLE AWARD OF PROPERTY AND SUPPORT.**

### **A. FIDUCIARY DUTY TO DISCLOSE:**

As a prelude to a discussion of the Orting property as well as the other failure of Dr Briskey to make full and fair disclosures about any financial issues, Mrs Briskey cites the duty her husband owed to her under the circumstances of this case. Dr Briskey has a fiduciary duty to disclose value or factors affecting value.

Dr Briskey sought to minimize the value of his property in order to reduce the chance that his wealth would warrant an award of property, spousal support or attorney fees.

His economic resources are clearly at issue because the court may consider them when evaluating his ability to pay spousal support and attorney fees, but also to consider and adjust the economic circumstances of the parties.

In his opening statement Dr Briskey's counsel acknowledged that the values set forth in his client's pre trial form were as determined by "the [county] tax assessor's value". 26: 11-13.

Husband's fiduciary duty to disclose value or factors affecting value. In re Marriage of Hadley, 88 Wash.2d 649, 565 P.2d 790 (1977); Seals v. Seals 22 Wash.App. 652, 655, 590 P.2d 1301,1303 - 1304 (Wash.App., 1979). This fiduciary duty requires disclosure of both all community assets as well as separate property held prior to dissolution. Seals v. Seals 22 Wash.App. 652,

656, 590 P.2d 1301, 1304 (Wash.App., 1979).

Dr Briskey testified that the value of the Orting property was based *solely* on the assessor's tax appraisal. He submitted assessor's office records supporting his opinion. He did not disclose that this value was hundreds of thousands of dollars below the fair market value of the property.

He hoped to reduce the chance that his wealth would play a roll in an award of property, spousal support or attorney fees to Mrs Briskey.

Dr Briskey's economic resources were clearly at issue. The trial court made erroneous findings as to the value of this property, either because it was misled by Dr Briskey's opinion of value or because she was in error as to the significance of the tax classification on the value of the property.

Dr Briskey's counsel acknowledged that property evaluation and division were important issue in his opening, 24:13-19. The same holds true for the requirement that the value of the husband's assets play a roll in the court's determination of an award of spousal support and attorney fees.

"[T]he post-dissolution economic condition of the parties is a paramount concern in determining issues of property division and maintenance." *In re Marriage of Sheffer*, 60 Wash.App. 51, 55, 802 P.2d 817(1990).

All property regardless of the characterization as community property or separate is before the court. The court is required to divide property in a fair and equitable fashion given the factors set forth in RCW 26.09.080.

Accurate determination of value is essential to division of assets and determination of amount and duration of spousal support.

**B. UNDERLYING FACTS:**

At trial Petitioner gave his opinion of the value of the real estate which he owned in Orting, Washington. The property was generally agreed to be Dr Briskey's separate property, however, Mrs Briskey testified that property payments were made from funds earned during the relationship and a line of credit was taken out and repaid from community earnings without segregation.

The issues presented to the court by Respondent concerning the Orting real property values were;

1. Should the court consider the contribution of community money and/or the failure to make a contemporaneous segregation of community funds expended on Petitioner's separate property?
2. Should the community be compensated for onerous labors expended upon Petitioner's separate property by both parties in making the property division regardless of the characterization?
3. Should the value of the Orting real property be accurately fixed by the court before its determination of the amount and duration of spousal support and /or attorney fees?

Legal authority in Washington requires that the court to set a fair and reasonable value of the property before it before awarding it. In re Marriage of Martin 22 Wash.App. 295, 296-297, 588 P.2d 1235, 1236 (Wash.App., 1979).

The court abused its discretion in setting the value of the real property.

**C. COURT'S FINDINGS:**

The Decree set values on the property awarded to the husband. These values are not supported by the evidence and do not provide a fair and reasonable consideration of the testimony.

¶ 3.2 PROPERTY TO BE AWARDED THE HUSBAND provides;

6. Real property located at 27216 Orville Rd., Orting, Pierce County, WA valued at \$194,600. Parcel No. RO518311701 . . .
7. Real property located at 26611 Orville Rd., Orting, Pierce County, WA valued at \$ 500 Parcel No. RO518304005 . . . .
8. Real property located at 15901 275<sup>th</sup> St. E, Orting, Pierce County, WA valued at \$68,800. Parcel No. RO518311010 . . .

The total value found by the trial court was \$263,900. The trial court did not specify a date for the evaluation. They do correspond to Dr Briskey's Ex 10 which fixes values by the 2004 Pierce County.

These findings of value constitute an abuse of discretion because it fixes the value based upon a value other than fair market value and it ignores the value at the time of trial as it relates to establishing economic fairness in setting spousal support and attorney fees.

At no time during his case did either Dr Briskey or his counsel disclose that these values were artificially set under RCW Chapter 84 or that those values were hundreds of thousands of dollars below the fair market value.

**D. EVIDENCE OF VALUE:**

Dr Briskey described his property in Orting, as a residence and 40 acres. 43:17-18. Dr Briskey testified that the home was paid off before the marriage in July '95, but he presented no evidence concerning payments made during the parties "intimate personal relationship". 45:13-20.

He took these values from the tax assessments statements. 59:2-8.

Dr Briskey then testified that he "believed that the assessed values that [he had listed] correlate with what the property could be sold for?" 60: 2-4.

Caught in this ruse his testimony was not discredited by the court.

At that point counsel for Mrs Briskey objected that the question and opinion because they were not in the proper form of ‘fair market value’ as violating hearsay and best evidence rules. 60:5-6.

Mrs Briskey’s counsel continued to object to Ex 1 on the basis that it did not allocate contribution of community funds or that the values listed were not the opinion of the owner as to fair market value but were adopted by Dr Briskey from the 2004 property tax statement. 71:2-25 thru 72:20.

Dr Briskey was asked if he had an opinion of the value of the Orting real property “independent of what the tax assessment says”. 121: 16-24. He answered “ No.” 121:21-25.

At that point Mrs Briskey’s counsel moved to strike his testimony concerning the values of these [Orting] properties. The trial court overruled the objection. 121: 25 thru 122.

Dr Briskey was then asked if he had done anything to defer his property taxes under state laws such as RCW Chapter 84 as forest and timberlands. His answer was “absolutely”. 123: 17-25. Dr Briskey had no opinion as to the value of the timber on his land. 124:4-15.

On cross examination Dr Briskey testified that the values set by the assessor upon land designated as timber land was substantially below the market price. 124: thru 127; 17. Dr Briskey testified that he had given the exempted value for the property and that *he had no opinion as to the market*

*value of the property.* 127: 14.

Ex 14 unlike Dr Briskey's Ex 10B shows the assessed value of the property as exempt timberland verses the assessed value of non-exempt property. 131: 22 - 132: 1. The difference is more than \$302,300.

The parties had invested extensive community labors and money on Dr Briskey's property. 519:23-521:25.

During the period the parties were together, Dr Briskey made payments against his separate property. 306:1-4. This included \$400 per month on the mortgage for the house. 306:6. The parties took out an equity line of credit against the home. 306:23-25.

Mrs Briskey asked that community contribution to Dr Briskey's business and separate property be acknowledged. . 520: 1- 521:25.

She presented evidence that the real estate had a fair market value of \$650,000. 337:20 was based upon knowledge of sales in the area. 338:4-7..

She presented evidence of significant improvements made during their relationship to Dr Briskey's property such as the drive way. 322; 7-24.

The question of whether a particular out-of-court statement is hearsay cannot be determined in a vacuum. Whether the statement is hearsay depends upon the purpose for which it is offered. If it offered to prove the truth of the matter asserted—*i.e.*, offered to prove the *content* of the statement—the evidence is hearsay. If it is offered for some other purpose, it is not. 5B WAPRAC ER 801

The underlying reasons for adherence to the rule are well stated in S.

Grad, Jones On Evidence s 7:1, at 86 (6th ed. 1972):

Underlying the rule are the presumptions that impugn the motive of a party who withholds primary evidence and attempts to substitute therefor evidence of an inferior grade, the innocent, sometimes sinister, fallibility and inaccuracy of human understanding and memory- particularly that of persons interested in the result- and the possibility, often strong of error in copies of documents which may be of the highest importance in the litigation. Enforcement of the rule serves the double purpose of providing the most satisfactory evidence which is available and of preventing the frauds which would frequently attend the proof of the contents of writings by oral testimony.

Another important aim of the best evidence rule is to allow, whenever possible, the opponent to examine the documentary original. State v. Modesky 15 Wash.App. 198, 203-204, 547 P.2d 1236,1240 (Wash.App.,1976).

**D. FOREST LAND:**

Dr Briskey sought and obtained a designation to both his farm and timber land to avoid significant taxes under the provisions of RCW 84.33.130.

The forest land values are to be adopted by rule according to the Washington Administrative Procedure Act, RCW 34.04 . County assessors use the values thereby established in implementing their ad valorem taxation process. RCW 84.33.120.

Respectfully submitted this 30<sup>th</sup> day of November 2007.



James M Caraher WSBA# 2817

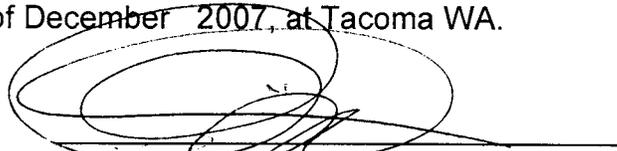
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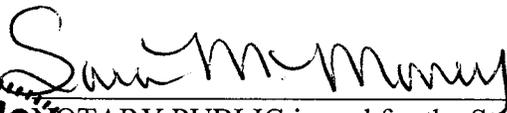
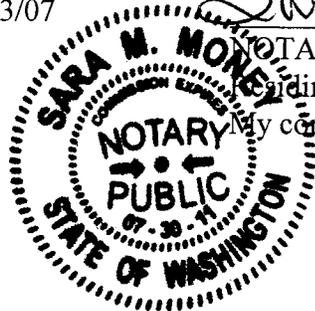
6 SIGNED this 3<sup>rd</sup> day of December 2007, at Tacoma WA.

7   
8 Pennie M. Faiivae

11 STATE OF WASHINGTON )  
12 ) SS.  
13 COUNTY OF PIERCE )

14 I certify that I know or have satisfactory evidence Pennie M. Faiivae is the person who  
15 appeared before me and said person acknowledged that he/she signed this instrument and  
16 acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in the  
17 instrument.

18 Dated: 12/03/07

19   
20 SARA M. MONEY, NOTARY PUBLIC in and for the State of Washington  
21 My commission expires: 7/30/11  
22 

27 AFFIDAVIT OF SERVICE -2-

28 James M. Caraher  
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