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DIVISION II

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STATE OF WASHINGTON

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NO. 44449-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In re the Marriage of:

SAMIR GEORGE AWWAD,

Appellant,

and

ALICE AWWAD,

Respondent.

On Appeal from the Superior Court of Washington for Clark County
The Honorable Judge John Nichols

BRIEF OF RESPONDENT

Submitted by:
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I. RESPONSE TO ASSIGNMENTS OF ERROR

A. THE TRIAL COURT CORRECTLY DETERMINED THE DATE OF THE PARTIES' SEPARATION AS DECEMBER 1, 2010.

B. THE TRIAL COURT'S FINDING THAT THE JEWELRY AWARDED TO WIFE SHOULD BE ASSIGNED NO VALUE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

C. THE TRIAL COURT CORRECTLY DETERMINED THAT HUSBAND SHOULD BE RESPONSIBLE FOR THE $15,000 DEBT RELATED TO THE RING GIVEN TO WIFE'S MOTHER.

D. THE TRIAL COURT CORRECTLY IMPUTED HUSBAND'S NET INCOME FOR SUPPORT PURPOSES AT $5,000 PER MONTH.

E. THE TRIAL COURT CORRECTLY DETERMINED THAT WIFE'S NET MONTHLY INCOME FROM EMPLOYMENT IS $1,500 PER MONTH.

F. THE TRIAL COURT'S FINDING THAT THE VEHICLES AWARDED TO HUSBAND ARE WORTH $2,000 IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

G. THE TRIAL COURT'S FINDING OF A COMMUNITY LIABILITY OF $50,000 OWED TO WIFE'S FAMILY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

H. THE TRIAL COURT'S FINDING THAT WIFE RECEIVED NO BENEFIT FROM THE SALE OF PROPERTY IN VANCOUVER, WA BEFORE THE PARTIES' SEPARATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

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I. WIFE SHOULD BE AWARDED ATTORNEY FEES ON APPEAL UNDER RCW 26.09.140 AND RAP 18.9(a).

II. STATEMENT OF THE CASE

Alice Awwad and Samir George Awwad were married on January 1, 1983 in Lebanon (R.P. 15-16). The parties acquired a condominium in Lebanon, which they still own (R.P. 16). The condominium has a value of $160,000 (Trial Exhibit No. 77). The parties moved from Lebanon to the United States in 1986 (R.P. 17).

The parties have five children. One child is deceased. Three children are now adults. One child, Christopher, age 16, remains dependent upon the parties (R.P. 15).

Wife was a stay at home mother for the majority of the parties' marriage (R.P. 17). While Wife was at home taking care of the family, Husband pursued his career as a professional engineer. During the marriage, Husband completed his master's degree in engineering (R.P. 18).

When the parties' youngest child, Christopher, entered first grade, Wife began attending dential hygiene school at a community college in Harrisburg, PA. The total cost of the program was $4,000. Wife graduated

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from the program in May 2005 and began working part-time two days each week (R.P. 22-23).

In 2005, the parties began discussing relocation from their home in Pennsylvania to the State of Washington. In 2005, Wife's brothers purchased a home in Vancouver, Washington where the Awwad family could reside after they relocated to Clark County, Washington. The purchase price of the home was $215,938.76 and was paid by Ms. Awwad's brother, Ghassan Harb. Mr. & Mrs. Awwad contributed no funds to the purchase price of the property (R.P. 32-37; Exhibit Nos. 2 and 3).

Wife determined that the Vancouver home was not appropriate for the family's needs because it was not located in a good school district. The home was sold. Ms. Awwad received no proceeds from the sale. The proceeds from the sale were deposited into her brother's bank account (R.P. 39).

In the summer of 2006, Mr. and Mrs. Awwad traveled to the State of Washington to prepare for the move. They looked at homes and Husband made contact with engineering companies in the area (R.P. 24-25). Husband obtained his professional engineer's license in the State of Washington on August 17, 2006 (Trial Exhibit No. 1).

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Wife's brother assisted the parties in financing the construction of a home in Camas, Washington. When the Awwads were unable to purchase the home, Wife's brother offered to rent the home to the family (R.P. 29).

Ms. Awwad and three of the children moved into the Camas home in September 2006 (R.P. 28). Instead of moving to Washington as planned, Husband took a job in Florida (R.P. 25-26). Wife applied for a dental hygiene license in Florida and took three trips to Florida in the fall of 2006. Husband spent Christmas of 2006 in Washington with Wife and their children (R.P. 40). Mr. and Mrs. Awwad celebrated their anniversary on January 1, 2007 by taking a trip to Mount Hood (R.P. 44-45). The next year, they celebrated their 25th wedding anniversary with their children at a party at the Camas home (R.P. 49, Trial Exhibit No. 84) and with a trip to Hawaii (R.P. 46, Trial Exhibit No. 81). Husband spent two weeks in Washington in May 2008, staying with Wife at the Camas home and taking a trip with her to Seattle, where they stayed at the Crowne Plaza Hotel while Husband attended a conference (R.P. 50).

In 2009, the parties were house hunting in Florida and preparing to purchase a home there. Wife spent Easter of 2009 with Husband in Florida. They decided on a home and planned to make an offer. However, the planned relocation to Florida did not take place, as Husband decided to

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resign from employment with Brph to move to Pennsylvania for a new employment opportunity (R.P. 52-53).

In 2010, Wife traveled to Pennsylvania. Husband provided Wife with a folder of homes available for sale in Bethlehem, Pennsylvania that he had picked up from a real estate agent. The parties arranged for Chipman Relocations to assist in moving their personal belongings from Washington to Pennsylvania and planned for Wife to move in the fall (R.P. 55-56; Exhibit Nos. 7 and 8). The planned move did not take place because Wife learned that Husband had informed her parents that he was planning to file for divorce and take custody of Christopher (R.P. 59-60).

Wife filed a Petition for Dissolution in the Superior Court of Clark County, Washington on November 22, 2010 (C.P. 1-6). However, Wife did not serve Husband with the Petition or take any further action to pursue dissolution of the marriage at that time (R.P. 61). Wife traveled to Pennsylvania and stayed at Husband's home when their son, Andy, graduated from college in May 2011. The couple also took a trip to New York City together during this visit. Wife remained hopeful that they could work things out and save their family from divorce (R.P. 62-64).

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III. ARGUMENT

A. THE TRIAL COURT CORRECTLY DETERMINED THE DATE OF THE PARTIES' SEPARATION AS DECEMBER 1, 2010.

The trial court made the following Finding of Fact concerning the parties' separation:

> Husband and wife separated on December 1, 2010. This separation date is based upon the Petitioner/Wife's filing of the Petition for Dissolution on November 22, 2010. Although Respondent/Husband claimed that the parties' date of separation was in 2006, when the parties began living in separate households, he failed to establish that the parties had a mutual intent to abandon the marriage before December 1, 2010 (Finding of Fact No. 2.5., C.P. 374).

Based on the above Finding, the trial court rejected Husband's request to characterize property acquired between 2006 and 2010 as his separate property (Finding of Fact No. 2.5, C.P. 374).

A trial court's characterization of property as either separate or community is a question of law subject to *de novo* review. *Marriage of Skarbek,* 100 Wn.App. 444, 447, 997 P.2d 447 (2000). However, factual findings upon which the Court's characterization is based may be reversed only if not supported by substantial evidence. *Id.* Evidence is substantial if it persuades a fair-minded, rational person of the truth of the finding. *Marriage of Spreen,* 107 Wn.App. 341, 346, 28 P.3d 769 (2001).

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RCW 26.16.140 states, "When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each...." This statute has been interpreted to require a mutual intent to abandon the marital relationship in order for a *de facto* separation to exist. *Parrish v. Jones,* 44 Wn.App. 449, 722 P.2d 878 (1986). In *Marriage of Short,* 125 Wn.2d 865, 890 P.2d 12 (1995), the Court wrote:

> A marriage is considered 'defunct' when both parties to the marriage no longer have the will to continue the marital relationship. In other words, when the deserted spouse accepts the futility of hope for restoration of a normal marital relationship, or just acquiesces in the separation, the marriage is considered 'defunct' so that the 'living separate and apart' statute applies. *Id.* at 871.

The fact that a husband and wife are physically separated, without more, is insufficient to overcome the presumption that property acquired during marriage is community property. *See Rustad v. Rustad,* 61 Wn.2d 176, 377 P.2d 414 (1963). As stated in *Oil Heat Co. of Port Angeles, Inc. v. Sweeney,* 26 Wn.App. 351, 354, 613 P.2d 169 (1980):

> [M]ere physical separation of the parties does not establish that they are living separate and apart sufficiently to negate the existence of a community ... The test is whether the parties by their conduct have exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship.

As the Court stated in *Aetna Life Ins. Co. v. Boober,* 56 Wn.App. 567, 784 P.2d 186 (1990),

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> Marriage is based on mutual consent. Either party may withdraw consent by dissolving the marriage. Indeed, special provisions have been made for pro se proceedings to minimize financial and procedural impediments to dissolution. Plainly, spouses can best judge the viability of their marriage. When they have not yet chosen to institute dissolution proceedings, the continued integrity of their marriage should be presumed except under the most unusual circumstances.

Similarly, in *Seizer v. Sessions*, 132 Wn.2d 642, 960 P.2d 261 (1997), the Court wrote:

> A deserted spouse who desires that the relationship continue despite desertion or abandonment of the other – a frustration of the deserted spouse's community expectations – should remain protected by the community property rules and should be able to assert an interest in the deserting spouse's after-acquired property. *Seizer*, 132 Wn.2d at 659.

The burden of establishing that the parties are separated and the marriage is defunct is on the party asserting that the marriage is defunct. *See Seizer v. Sessions, supra.* Because all property acquired during marriage is presumptively community property, the party asserting that the marriage is defunct, and that property acquired during the "defunct" marriage is separate property, must do so by clear and convincing evidence. *See Rustad v. Rustad, supra,* 61 Wn.2d 176, 178-179 and *Aetna Life Ins. v. Boober, supra,* 56 Wn.App. 567, 570.

The trial court correctly determined that Husband did not meet his burden of proof in establishing that the marriage was "defunct" in 2006. The evidence showed that Husband obtained his professional engineering

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certification in the State of Washington in 2006 (Trial Exhibit No. 1) and began searching for job opportunities in Washington. The parties looked at homes together in Washington. (R.P. 24-25). After Husband took a job in Florida, instead of moving to Washington, the parties continued to spend substantial time together as a family. They took vacations as a couple. They celebrated their 25th wedding anniversary in 2008 with a party with their children in Camas, Washington (R.P. 49, Trial Exhibit No. 84) and a trip to Hawaii (R.P. 46, Trial Exhibit No. 81). Wife obtained her dental hygienist license in the State of Florida (Trial Exhibit No. 4) and the parties searched for a home to purchase together in Florida (R.P. 52-53). When Husband was then offered employment in New Jersey in 2010, the parties began searching for homes in Pennsylvania and made arrangements with a moving company to move the family's belongings from Washington to Pennsylvania (R.P. 55-56, Trial Exhibit Nos. 7 and 8).

Thus, the trial court's finding that the parties had no mutual intent to abandon the marriage before December 1, 2010 is supported by substantial evidence. Husband failed to meet his burden at trial to establish by clear and convincing evidence that the marriage was "defunct" in 2006. Based on its finding that the parties separated on December 1, 2010, the

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trial court correctly characterized all property acquired between 2006 and 2010 as the parties' community property.

B. THE TRIAL COURT'S FINDING THAT THE JEWELRY AWARDED TO WIFE SHOULD BE ASSIGNED NO VALUE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Husband argues that the Court erred in failing to assign a value to Wife's jewelry and to the ring given to Wife's mother for her 50th wedding anniversary.

Wife testified that she had small pieces of jewelry with a value of around $100-$125 that were given to her during the marriage (R.P. 110). She testified that, on two occasions, Husband purchased jewelry as a gift for her using their credit card and she returned the jewelry because they could not afford it (R.P. 110). Wife denied Husband's claim that she had $100,000 of jewelry in a safe deposit box (R.P. 189). There was no evidence to support Husband's claim that Wife's jewelry is worth $100,000, other than his testimony that he "assumes" this is the correct value (R.P. 302).

The trial court found that the testimony concerning the value of the jewelry was "speculative" and that any jewelry owned by Wife was a gift from Husband (R.P. 492-493).

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The trial court was not persuaded by Husband's testimony and accepted Wife's testimony that the small items of jewelry in her possession were gifts from her husband. A trial court is in the best position to weigh conflicting evidence and assess credibility and its findings should not be disturbed on appeal if they are supported by substantial evidence. *Marriage of Skarbek, supra.* In this case, the trial court's finding that the jewelry in Wife's possession was a gift from her husband and should be assigned no value was supported by substantial evidence.

The trial court also did not include a gift to Wife's mother in calculating the property division between the parties. Wife testified that she informed Husband that she was going to purchase the ring for her mother and that Husband approved of the purchase (R.P. 227) and Husband denied knowledge of the gift.

RCW 26.16.030(2) provides that neither spouse has the authority to give community property without the express or implied consent of the other spouse. In this case, Wife testified that Husband consented to the gift and Husband testified that he did not. Based on its analysis of the evidence presented, the trial court correctly declined to include the value of the ring gifted to Wife's mother in the community property awarded to Wife.

Further, any failure to properly value the ring given to Wife's mother would not be a basis for reversal, as long as the division of

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property and debt as a whole is fair and equitable. *Marriage of Pilant*, 42 Wn.App. 173, 709 P.2d 1241 (1985).

C. THE TRIAL COURT CORRECTLY DETERMINED THAT HUSBAND SHOULD BE RESPONSIBLE FOR THE $15,000 DEBT RELATED TO THE RING GIVEN TO WIFE'S MOTHER.

The trial court made the following finding regarding the $15,000 Bank of America debt:

> Before separation, Wife incurred a debt of approximately $15,000 on the parties' Bank of America credit card to purchase a ring for her mother's 50th wedding anniversary. Husband has chosen to pay off that debt in monthly installments, even when he was earning substantial income and had the ability to pay off the debt in full. The remaining balance on this credit card shall be Husband's responsibility (Finding of Fact 2.10, C.P. 376).

Husband earned $160,199 from employment in 2010 (Trial Exhibit No. 10) and Wife earned $29,248 from employment (Trial Exhibit No. 13). Husband earned $13,650 per month from employment in 2011 (Trial Exhibit No. 11) and Wife earned $11,328.55 from employment and $7,917 from unemployment compensation that year (Trial Exhibit No. 14, R.P. 86-87). A trial court has broad discretion in distributing marital property and debt and its decision will be reversed only if there is a manifest abuse of discretion. *Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992). The trial court did not abuse its discretion in assigning the Bank of

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America credit card debt to Husband, considering the differences in the parties' earnings and financial circumstances.

D. THE TRIAL COURT CORRECTLY IMPUTED HUSBAND'S NET INCOME FOR SUPPORT PURPOSES AT $5,000 PER MONTH.

According to the Amended Temporary Orders entered in this case, Husband was ordered to pay spousal maintenance in the amount of $2,250/mo. (C.P 265-276 and C.P. 285-287) in addition to child support ordered in the amount of $1,000/mo. (C.P. 271). Husband's support obligation was reduced based upon his representation to the Court that his hours had been reduced to part-time (C.P 265-276 and C.P. 285-287).

The trial court determined that the effective date of the Final Order of Child Support should be November 1, 2012. The trial court found that Husband was voluntarily unemployed and imputed Husband's net monthly income at $5,000 for child support purposes (C.P. 395-397).

Husband does not challenge that Court's finding that he was voluntarily unemployed. The trial court noted:

> He's capable of working. He was working very recently. The job opportunities – I think for an engineer – he said he's been teaching. He can be a consultant. There's a lot of things out there for engineers. The construction business is picking up. (R.P. 499)

Imputing income to a voluntarily unemployed parent is mandatory. RCW 26.19.071(6). In imputing income, the court should look at the level

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of employment at which the parent is capable and qualified "by examining the parent's work history, education, health, age and other relevant factors. *Marriage of Peterson*, 80 Wn.App. 148, 153, 906 P.2d 1009 (1995).

At the time of trial, Husband was unemployed and testified that he was receiving unemployment compensation of $611 per week (Trial Exhibit No. 12). The evidence showed that he had previously earned over $100,000 per year since obtaining his master's degree in engineering in 2001 (R.P. 267). At his most recent employment with Falcon Engineering, his annual salary was $165,000 before he reduced his hours to part-time and was laid off in the summer of 2012. At his previous employment with Brph, he earned $119,000 per year (R.P. 274).

While Husband claimed that health problems affected his ability to work, the Court rejected the argument that Husband was unable to work. Husband testified that he had been diagnosed with diabetes in 1994 and sleep apnea in 1997 and continued to work full-time afterwards (R.P. 394). There was no evidence submitted to corroborate Husband's claim that he was unable to work due to medical problems.

Husband was 62 years old at the time of trial. He testified that it was his mission to attempt to help all of the children, including Christopher, through college and he did not plan to retire until then (R.P. 290-291).

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The trial court's imputation of income of $5,000 per month to Husband was supported by Husband's history of high paying employment, his master's degree in engineering and multiple certifications in engineering, his past employment as an engineer and teacher and the potential availability of consultant work. Husband's own testimony indicated that his health conditions had not affected his ability to work full-time. The trial court correctly considered all relevant factors in imputing income to Husband and its ruling should be affirmed.

E. THE TRIAL COURT CORRECTLY DETERMINED THAT WIFE'S NET MONTHLY INCOME FROM EMPLOYMENT WAS $1,500 PER MONTH.

The trial court determined that Wife's net monthly income for support purposes was $1,500, based on her average historical earnings.

Wife testified that she did not work from the date of marriage in 1986 until 2005 because she was raising the children. After completing a dental hygienist program in 2005, Wife worked part-time two days each week (R.P. 22-23). When Wife moved to Washington, she initially was employed two days per week at Clark County Dental and Denture Clinic, until it shut down (R.P. 84). After that dental office shut down, Wife filed for unemployment compensation and has only been offered temporary employment through dental agencies and offices when regular employees are on vacation (R.P. 85-92).

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In 2010, Wife earned $29,248 from employment (Trial Exhibit No. 13). She testified that she earned more that year because she had regular employment with Clark County Dental and Denture Clinic until it shut down (R.P. 83-84). In 2011, Wife earned $7,917 from unemployment compensation and $11,000 from employment (Trial Exhibit No. 14). As of the date of trial, Wife's average employment income for 2012 was $1,415 per month (R.P. 102).

The trial court correctly determined Wife's income based upon her historical earnings. The Court did not find that Wife was voluntarily underemployed. Therefore, it would not have been appropriate for the Court to impute an income to Wife higher than her actual earnings. RCW 26.19.071(6) provides that:

> The court shall impute income to a parent who is voluntarily unemployed or underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health and age, or any other relevant factors.

In this case, Wife had been a stay at home parent for most of the parties' long-term marriage. She did not begin working until she completed a dental hygiene program in 2005. Since then, she has only been able to obtain part-time employment, despite diligent efforts to locate a full-time job. The trial court's finding that Wife's monthly net income is $1,500 is supported by substantial evidence and should not be reversed.

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F. THE TRIAL COURT'S FINDING THAT THE VEHICLES AWARDED TO HUSBAND ARE WORTH $2,000 IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The trial court's finding that the Mercury Sable, Expedition and 1980 Trans Am awarded to Husband had a combined value of $2,000 is supported by substantial evidence.

Wife testified that the 2003 Mercury Sable had a value of $5,000 (R.P. 131) and Husband testified that the Mercury Sable was worthless (R.P. 306).

Wife testified that she did not authorize the gift of the Ford Expedition to the parties' son and signed a Power of Attorney only to allow Husband to transfer title of the vehicle to another state (R.P. 216). Husband testified that he gave the vehicle to their son, despite a Temporary Order which prohibited the parties from transferring or giving away any property (R.P. 365-366). Wife testified that the value of the Ford Expedition was $4,000 (R.P. 131).

Wife testified that the 1980 Trans Am was a vintage vehicle which had been substantially refurbished during the marriage. She testified that the vehicle was worth $12,000 (R.P. 132). Husband seemed to dispute whether the Trans Am existed.

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After considering all of this evidence, the trial court determined that these vehicles would be awarded to Husband and assigned a combined value of $2,000 to the three vehicles.

Factual findings of a trial court may be reversed on appeal only if they are not supported by substantial evidence. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) *cert. dismissed* 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). The trial court is in the best position to weigh credibility of the witnesses and to resolve conflicting testimony. As the Court wrote in *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 343 P.2d 183 (1959):

> An appellate court, in a law case, will not usurp the functions of a jury, or of a judge acting in the capacity of a jury, and reverse the judgment because the weight of testimony seems to be on the other side, or because, in a case of conflict of testimony, the jury believed the testimony of witnesses that it does not believe. This doctrine is so elementary and so universally pronounced by the courts that it would be idle to enlarge on it or to discuss it further. It is sufficient to say that the jury is the judge of the facts. If the testimony on which the judgment is based is competent, and is legally introduced, and if conceded to be true would sustain the judgment, the appellate court will not inquire further as to its sufficiency. *Quoting Graves v. H. L. Griffith Realty & Banking Co.,* 3 Wash. 742, 29 P. 344, 345.

In this case, the appellate court should reject Husband's request to reweigh the evidence and resolve all credibility questions in his

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favor. The trial court's finding that the vehicles awarded to Husband had a value of $2,000 was supported by substantial evidence and should not be reversed on appeal.

G. THE TRIAL COURT'S FINDING OF A COMMUNITY LIABILITY OF $50,000 OWED TO WIFE'S FAMILY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Wife testified that she borrowed funds in the amount of $155,878 from her family members during the parties' marriage (Trial Exhibit No. 35). In addition to her testimony, Wife provided the following evidence to document these debts: copies of promissory notes (Trial Exhibit Nos. 53, 54, 56, 57, 59 and 61); copies of checks from her family members (Trial Exhibit Nos. 55, 58 and 60); bank statement showing deposit of loan amount into a joint bank account (Trial Exhibit No. 94); copies of checks and wire transfer record showing payment of college expenses from the funds borrowed from family (Trial Exhibit Nos. 62 and 63); rent invoice from Ghassan Harb (Trial Exhibit No. 65) and testimony of the parties' adult son, George Sebastian Awwad.

The Court questioned the rent liability of $57,480 to Ghassan Harb (R.P. 436) and the loan from Today's Outlook of $7,800, noting that collection of the Today's Outlook debt would be barred by the statute of

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limitations. Based on the evidence presented, the trial court determined that the appropriate amount of family debt to be considered in dividing community property and debt was $50,000. This debt was assigned to Wife.

There is a presumption that money borrowed by either spouse during marriage is "for the benefit of the community" *See Marriage of Hurd*, 69 Wn.App. 38, 54-55, 848 P.2d 185 (1993). In this case, Wife testified that the loans benefitted the community by allowing her to meet her living expenses and to pay for college expenses. (R.P. 145-164). Wife testified that Husband was aware of the loans and "was using me to borrow money from my family" (R.P. 184). Husband claimed he was unaware of the loans (R.P. 335-336). As set forth above, a trial court is in the best position to weigh evidence and resolve credibility determinations. Credibility determinations are peculiarly matters for the trial of fact and may not be second-guessed by an appellate court. The role of the appellate court is not to substitute its judgment for that of the trial court or to weigh the evidence or credibility of witnesses. *In re Marriage of Rich,* 80 Wn.App. 252, 259, 907 P.2d 1234 (1996).

In this case, after considering and weighing conflicting evidence presented by the parties, the trial court determined that a community debt

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of $50,000 was owed to Wife's family. This finding is supported by substantial evidence and should not be disturbed on appeal.

H. THE TRIAL COURT'S FINDING THAT WIFE RECEIVED NO BENEFIT FROM THE SALE OF PROPERTY IN VANCOUVER, WA BEFORE THE PARTIES' SEPARATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Wife testified that her brothers purchased a home for the Awwad family in Vancouver, WA in 2005. The entire purchase price of the property was paid by her brothers. Wife eventually determined that the property was not appropriate for the family's needs because it was not located in a good school district. The property was sold in December 2006 and the proceeds from the sale were deposited into her brother's bank account. Wife testified that she received none of the sales proceeds, as she and Husband had contributed nothing to the purchase price of this home (R.P. 32-39).

The trial considered the conflicting testimony offered by the parties and determined that there was not enough evidence presented to establish that Wife received any funds from the sale of the Vancouver property (R.P. 492).

Husband again asks this Court to re-weigh evidence and reassess credibility determinations made by the trial court. This is not the function of the appellate courts. *In re Marriage of Rich, supra.* The trial court's

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finding that Wife received none of the proceeds from the sale of the Vancouver home is supported by substantial evidence and should not be reversed on appeal.

I. THE TRIAL COURT'S DIVISION OF PROPERTY IS FAIR AND EQUITABLE.

RCW 26.09.080 sets forth the following factors for the Court to consider in dividing property and debt:

> (1) The nature and extent of the community property;
>
> (2) The nature and extent of the separate property;
>
> (3) The duration of the marriage or domestic partnership; and
>
> (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective...

In this case, the trial court considered the community and separate property of the parties. The trial court's division of property and debt resulted in Wife receiving a net amount of $404,045.70 and Husband receiving $368,259.81, before the property division was adjusted for payment of Husband's back support debt. (C.P. 380). This resulted in Wife receiving 52% of the community property and Husband receiving 48% of the community property. The Court also awarded an additional $25,000 to Wife as partial satisfaction of Husband's support debt (C.P. 375 and 381).

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A trial court has broad discretion in distributing marital property and its decision will be reversed only if there is a manifest abuse of discretion *Marriage of Kraft,* 119 Wn.2d 438, 832 P.2d 871 (1992). An award of 52% of the property to Wife is only slightly "disproportionate" and the slight difference in the property award is justified considering the parties' long-term marriage, during which Wife had stayed home to care for the children, and the parties' disparate financial situations, with Husband having advanced engineering degrees and certifications and a long history of high paying employment and Wife having a limited history of part-time employment with limited income. The Court also considered the higher amount of property to be awarded to Wife in determining the amount of spousal maintenance to be awarded to Wife and in denying Wife's request for payment of her attorney fees (C.P. 377). The trial court properly considered all factors relevant to division of property and this division should be affirmed on appeal.

J. WIFE SHOULD BE AWARDED ATTORNEY FEES ON APPEAL UNDER RCW 26.09.140 AND RAP 18.9(a).

RCW 26.09.140 allows the Court to award attorney fees based upon consideration of the parties' financial resources.

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As of the date of trial, Wife had incurred over $15,000 in attorney fees in this matter. She had to borrow funds in order to pay fees. (R.P. 173). Wife has incurred additional fees in the appeal of this matter.

As set forth above, Husband has a history of high earnings and potential for continued high earnings in the future. He has the ability to pay Wife's attorney fees in this matter and fees should be awarded to Wife under RCW 26.09.140.

In addition, RAP 18.9(a) allows an award of attorney fees incurred to respond to a frivolous appeal. A frivolous appeal is one in which there are "no debatable issues upon which reasonable minds might differ, and so totally devoid of merit that there is no reasonable possibility of reversal." *Marriage of Penry*, 119 Wn.App. 799, 82 P.3d 1231 (2004). In this appeal, Husband asks the Court of Appeals to act as a substitute fact-finder for the trial court and to re-weigh evidence and re-assess credibility determinations in Husband's favor. This is not the function of an appellate court. An award of attorney fees to Wife is justified under RAP 18.9(a).

IV. CONCLUSION

For the reasons set forth above, Alice Awwad respectfully requests that the decision of the trial court be affirmed and that Samir George Awwad be ordered to pay attorney fees incurred by Alice Awwad in this appeal.

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Respectfully submitted this 18th day of June, 2013

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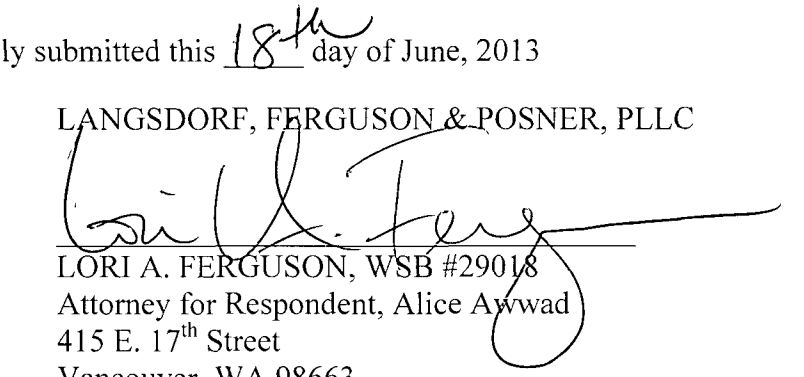

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CERTIFICATE OF SERVICE

On the date below, I served the following document(s) on the attorney(s) or person(s) identified below:

Documents

Brief of Respondent

Person and Address	Method of Service
Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402	First class mail
Josephine Townsend Attorney at Law 211 E. 11th Street, Suite 104 Vancouver, WA 98660	First class mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date: 6/18/2013

Place: Vancouver, WA

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