

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Marriage of

ANTONIO JOSE CARRASCO
Appellant

and

ANNA MARIE CARRASCO
n/k/a ANNA MARIE TARANTINO
Respondent

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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I. RESTATEMENT OF ISSUES

1. The husband fails to show a manifest abuse of discretion in any of the trial court's orders.
2. The court does not need to impute income to the wife in analysis of a maintenance award, but needs instead to consider the statutory factors, which the court here did.
3. The court properly awarded maintenance to the wife to compensate her for the lost benefit of the medical degree the community obtained over the life of the marriage.
4. The trial court properly secured the maintenance award with life insurance payable to the wife for any maintenance remaining to be paid her at the time of the husband's death.
5. The trial court properly used the wife's actual income, i.e., maintenance, for purposes of her child support obligation.
6. The trial court properly entered the parties' CR 2A stipulation and the father fails to demonstrate the stipulation's facial invalidity or any justiciable controversy.
7. The trial court properly valued the retirement as of the date of trial, in accord with Washington law allowing it this flexibility.

8. The court should deny the husband his fees on appeal, but award the wife her fees, based on her demonstrated need and his ability to pay.

II. STATEMENT OF THE CASE

Antonio and Anna were married for 19 years before separation, a duration the court viewed as “significant.” CP 111, 112; RP 364. For all those years, up until the two years before separation, the husband advanced his career through education. RP 364; CP 112. First, he obtained his B.A., then a Ph.D., then a medical degree, followed by four years of residency. CP 112. He obtained full-time employment as a doctor in 2010. CP 112. At the time of trial, he was earning \$85.00 hourly, with the expectation of regular increases. RP 84, 162. He had also taken the opportunity to enhance his income with overtime, at a rate of \$129 hourly. Id.; Exhibit 23. His year-to-date income through September of 2013 totaled \$168,426.53. Exhibit 22 (pay stub); RP 132-135. He does not dispute his monthly gross income is \$16,210.10. CP 146 (child support worksheets). The husband is 44. CP 1.

By contrast, the wife has no college degree and quit her job in 1994, when she gave birth to the first of the parties’ three children. CP 112; RP 173. Antonio expressed his preference that

she stay home with the child, which was more practical for reasons of daycare (especially as the family grew) and his financial aid package. RP 30, 111, 177, 182-183, 192. Moreover, Anna was not a highly skilled worker, having only a high school education, and the family moved a lot to follow Antonio's educational goals. RP 178-184. Accordingly, during the marriage, Anna worked exclusively in performance of the family's domestic labor, including by volunteering at the children's schools for tuition reductions, etc. RP 190-192. The wife is now 47. CP 1.

The parties substantially agreed as to a parenting plan, and the husband raises no challenge to the court's resolution of other parenting issues. CP 125-134. Rather, he challenges the financial aspects of the court's decision. Pertinent to those, the wife and minor children relocated to California, nearer the wife's relatives, where she hopes to make her way back into the workforce. RP 269, 271. The oldest child, a daughter aged 20, intends also to reside with the mother, after completing a program to treat an eating disorder. RP 215. Under the parenting plan, the minor children will spend the majority of their time in the residential care of their mother; they will spend half the summer and holidays (alternating by year) with the father, who may also, at his option,

spend one weekend a month with the children. CP 125-134. There was evidence the father had not exercised optional visitation during separation, even when the family lived in the same city, or make an effort to call the children. RP 202-211, 296-297.

Despite the length of the marriage, there was little in the way of assets available for distribution. The parties owned a home in Minnesota, but it was foreclosed when the family was forced to move because the husband's residency was terminated. RP 183-184, 196-198. The parties purchased a home in Vancouver just months before separation, but the equity was small. RP 197-201. The husband requested and received the house, despite that it large (i.e., three bedrooms, with a bonus room) and the mortgage payment is approximately \$3,000 monthly. RP 71-72, 199-200; CP 168-169. He explained he needed the house for when the children came to stay with him, including when the oldest daughter would be in treatment. RP 130. He agreed to an award to the wife of \$20,000, representing half the equity. CP 116; RP 103. (The court rejected the husband's claim that money given to the parties by his parents for the purchase of the home was actually a loan. RP 345-346.)

The husband's retirement benefits were modest, given the short duration of his actual employment. RP 97-103. The court valued them as of the date of trial (dissolution) and awarded them to the parties in equal shares. RP 350; CP 121, 123.

The personal property, of nominal value, was distributed. RP 249-251, 346-350. (The husband claimed the furnishings were purchased with "my money," but the wife said most of them were hand-me-downs from family. RP 96, 249-251, 284-285.)

The court also awarded nine years of maintenance to the wife in the amount of \$5,500 monthly, which leaves the husband with a monthly net income of \$7,265. CP 112, 118, 146. The court ordered the husband to secure the award with a life insurance policy, payable to the wife upon the husband's death "in an amount not less than the remaining amount due for maintenance." CP 118. The order does not permit the wife to claim more than what remains owing her in maintenance. CP 119; see, also, RP 367.

The court supported this award with findings structured according to the pertinent statute.¹ CP 112; RP 363-65. The court noted with particularity the wife's lack of an advanced degree, her age and the fact that she has only a "short window of time in which

¹ The relevant statutes, including RCW 26.09.090, governing maintenance, are included in the appendix.

to obtain education and pursue a meaningful career,” as well as the fact that the husband has two advanced degrees and substantial earnings potential over the anticipated 20 remaining years of his career (e.g., \$4 million). *Id.* The court noted the wife will not likely be able to equal that earning capacity, even with additional education. *Id.* The court also found the maintenance to be justified by the fact that, because the parties spent the marriage in pursuit of the husband’s career, “the assets acquired ... are insufficient to compensate the wife for the value” of the husband’s medical degree. CP 112. The court noted the parties, during those 17 years, shared an expectation of benefit from the degree, a benefit that will be realized only after dissolution, to the wife’s detriment. RP 364-65.

The court also ordered child support, using the wife’s maintenance award as her income. CP 146. When the husband’s attorney inquired, for “edification,” why the court did not impute income, the court explained that the wife would be unable to pay her bills even with the maintenance award. RP 373. The husband did not object, at trial, to using the maintenance award alone.

Finally, the court also entered the parties’ stipulation related to their adult daughter, now 20 years old, who suffers from an

eating disorder. The court found the husband stipulated, in compliance with CR 2A, “to paying all expenses related to the adult child Sarah’s medical and mental health treatment related to her eating disorder.” CP 169. The record supports this finding. RP 19-25, 77, 105-06, 130-131, 164-165, 211-214, 279, 287-288.

The husband timely appealed.

III. ARGUMENT IN RESPONSE TO APPEAL.

A. THE SCOPE OF REVIEW AND GENERAL PRINCIPLES GOVERNING THE TRIAL COURT’S DECISIONS.

In the distribution of property and liabilities at dissolution, what controls is the statutory mandate to be just and equitable. RCW 26.09.080. In respect of that goal, the court’s paramount concern when distributing property is the economic condition in which the decree leaves the parties. *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). *See, also*, RCW 29.09.080(4) (court must consider economic circumstances of the parties).

Importantly, “[t]he key to equitable distribution of property is not mathematical preciseness, but fairness.” *In re Marriage of Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989) (quoting *In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145 (1975)). Likewise, a trial court has the authority and discretion to award

maintenance "in such amounts and for such periods of time as the court deems just." RCW 26.09.090(1). And, of course, what is fair and just is generally for the trial court to decide, a decision that will not be disturbed on appeal absent a manifest abuse of discretion. *In re Marriage of Konzen*, 103 Wn.2d 470, 477-478, 693 P.2d 97 (1985); accord *Marriage of Washburn*, 101 Wn.2d 168, 179, 677 P.2d 152 (1984). Thus, in his appeal, Antonio bears a "heavy burden." *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). Simply, he must show that "no reasonable judge would have reached the same conclusion" as did the judge here. *Id.*, at 809-810.

Moreover, he must carry this burden without retrial of the factual issues, since the trial court's findings of fact will be accepted as verities on appeal as long as they are supported by substantial evidence in the record. *In re Marriage of Thomas*, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991). After all, it is the trial court's role to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of witnesses. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

For all these reasons, decisions in dissolution proceedings will seldom be changed on appeal. *Marriage of Landry*, 103 Wn.2d

at 809. All of these principles apply here to require the trial court be affirmed. The husband acknowledges the trial court's broad discretion to distribute property and award maintenance and acknowledges this Court's deferential review of those discretionary decisions. Br. Appellant, at 12-13, 17, 22. However, he fails to show any abuse of discretion by the trial court.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED MAINTENANCE TO THE WIFE.

The husband makes several complaints about the court's award of maintenance to the wife, which she addresses below, in an order slightly different from how they appear in the husband's brief.

1) The court does not need to impute income for purposes of the maintenance award.

First, the husband complains the court failed to impute income to the wife for purposes of calculating maintenance. Br. Appellant, at 13-16. He combines this issue with a claim regarding the imputation of income for purposes of child support, a claim the wife addresses below in a section on child support. With respect to imputation of income for purposes of maintenance, the husband offers no authority requiring the court to engage in this exercise. The cases he cites relate to child support and other issues. For

purposes of determining maintenance, the court must consider the factors set forth in the appropriate statute (RCW 26.09.090). The court then may award maintenance "in such amounts and for such periods of time as the court deems just." RCW 26.09.090(1).

Here, the court complied with the statute, including by considering the respective earning abilities of the parties, the lack of resources available to the wife, the duration of the marriage ("significant"), the age of the parties, and the ability of the husband to meet his own needs and the wife's needs. RP 363-367; CP 112-113. The husband does not challenge the court's factual findings. Pertinently to the income analysis, the court noted the need for the wife to undertake additional education and training to re-enter the workforce, and noted that, no matter what, she would never be able to command the same kind of income as the husband. RP 363-365. The court was not required to do more than this; specifically, the court was not required to impute income to the wife for purposes of determining maintenance.

- 2) The court properly awarded "supplemental" maintenance in recognition of the wife's contribution to the husband's medical degree.

The husband complains the court justified the maintenance award in part on the value of the husband's medical degree, earned

over the entire course of the marriage and only just beginning to pay a return on the community's investment. Br. Appellant, at 17-22. This complaint ignores that maintenance is "not just a means of providing bare necessities, but rather a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *Marriage of Washburn*, 101 Wn. 2d at 179. Here, as in *Washburn*, the community had little in the way of assets to show for 19 years worth of effort, apart from the husband's medical degree. The husband concedes the court has the authority to "compensate" the wife for the fact that the marriage dissolved before the community could reap the financial benefits of the degree. Br. Appellant, at 18. However, the husband argues such an award is permitted only where a spouse makes a direct financial contribution to the cost of obtaining the degree. Br. Appellant, at 18-22. The authorities he cites do not support this conclusion.

Anna did not pay for Antonio's educational expenses because she had no independent income, being instead employed full-time in the performance of the family's domestic labor. Notably, Antonio also did not pay the cost of his education, but received grants and stipends and loans, which also paid for the family's living expenses – a support scheme he proposed. RP 177,

244-245. Indeed, he once asked Anna not to work so as not to jeopardize this financial assistance arrangement. RP 192.

Granted, he has taken on the obligation of repaying the student loans, but nowhere in his calculations does he account for the opportunities lost (his and hers). Had he entered the job market with only one or two degrees, instead of three, he would have earned sooner and borrowed less. RP 245. Nor does he account for the contributions, financial and otherwise, Anna made to the community. She quit her job to take care of the children, at his request. RP 30, 177. She volunteered at the daughter's school to obtain a tuition reduction. RP 190-191. Her family donated personal property and cash to the family. RP 249-250, 284-285. She maintained the home and cared full-time for the children, saving on daycare and other expenses. RP 189. She moved from one place to another in furtherance of her husband's career pursuits and managed the household paycheck to paycheck. RP 244. The husband fails to show how, under these circumstances (e.g., constantly moving, Anna with only a high school education), Anna could have earned more than it cost them to pay for the domestic work of childcare and homemaking. In short, even if she

did not earn income, Anna contributed substantially to the community's goal of attaining advanced degrees for Antonio.

Nevertheless, the husband argues the cases lay down a more restrictive rule, requiring that the spouse financially support the education and that the compensation be either reimbursement for that compensation or a contribution to the contributing spouse's own education. Br. Appellant, at 21. This distorts the applicable law. Under the statute, the only limitation on the court's ability to award maintenance is that the amount and duration be "just," considering all the relevant circumstances. *Washburn*, 101 Wn.2d at 178. If the legislature wishes to narrow the circumstances, it may do so, but there is no reason for the court to trench upon the flexibility of maintenance as a tool for achieving a just outcome at dissolution of a marriage, nor have the courts done so. For example, this Court viewed compensatory maintenance justified where a husband had converted community property to his own purposes, depriving the wife of her vested interests in the property. *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989). In other words, if the equities require compensation, whatever the reason, the law on maintenance permits it.

In any case, the cases the husband cites do not actually subscribe to the rule the husband wants this Court to adopt. Prominently, *Washburn* itself reads as an ode to flexibility. The court offers four nonexclusive factors as guidance to trial courts in assessing compensatory maintenance, but nowhere does the court impose the kind of rigid rule advocated by Antonio or otherwise limit compensatory maintenance to the facts of that case. Here, Anna did not contribute work for money during the marriage, but the community's funds – stipends and grants and gifts and loans – certainly were spent funding the husband's education. Certainly, too, the community sacrificed earnings as the husband completed two degrees in addition to his B.A. and incurred greater loans. These years of effort left the parties with hugely disparate earning prospects, factor four in the *Washburn* analysis. Here, the court had no means other than maintenance, by which to equalize the long postponed benefit of the husband's education and thus address the "paramount concern" of the court: the parties' future economic circumstances. *Washburn*, 101 Wn.2d at 181.

Likewise, *Fernau* and *Gillette* do not lay down the kind of boundary that the husband proposes. Notably, the facts of those

cases are both like and unlike this case, reminding us that it is to the specific facts of a case the trial court must respond.

In *Gillette*, the companion case to *Washburn*, the wife worked for the seven and one-half years spent by the husband in pursuit of a veterinary medicine degree. 101 Wn.2d at 172. However, the cost of the husband's education was paid also by his part-time earnings, disability payments, and gifts from his father. *Id.* The parties had no children. The wife lost employment opportunities when they moved for the husband's education. They had some property, but agreed to its manner of distribution; thus, like the trial court here, the trial court in *Gillette* had only one tool to achieve what, in its view, was a just result: what it called "restitution" for the wife's inability to realize the benefit of the husband's degree. *Id.*, at 182. The award had nothing to do with supporting the wife's pursuit of an education. The Supreme Court affirmed because, given all these circumstances, it could not say the trial court's award was a manifest abuse of discretion. In other words, it upheld what the trial court viewed as a just result.

In *Fernau*, the wife had a profession (nursing) and an advanced degree and was pursuing a second master's degree. *In re Marriage of Fernau*, 39 Wn. App. 695, 697-698, 694 P.2d 1092

(1984). The parties had only one child. *Id.* The trial court ordered the husband, with his medical degree, to pay maintenance to the wife while she completed her second master's degree, which the appellate court upheld against the husband's challenge. There, he argued no maintenance was permitted because the wife had the ability to support herself, an argument the court rejected. 39 Wn. App. at 705. Again, this case underscores the flexibility of maintenance as a means to achieve a just outcome. The court did not rest its decision solely on the financial contribution the wife made to the husband's education; far from it. In fact, the husband's "medical education was financed primarily by benefits received from the Veterans Administration, and by earnings from summer employment, savings, loans, and contributions from [the wife]." The trial court, considering all these factors, ordered maintenance so that the wife could finish her degree. This is a permissible reason, but that does not mean it is the only permissible reason. Rather, the trial court's rationale fell within the broad range of its discretion. *Fernau* does not limit the trial court's discretion in this case.

In short, these cases cannot be read to require either of the rules the husband proposes, i.e., that compensatory maintenance is permitted only where a spouse has made a tangible financial

contribution or permitted only to achieve a specific educational goal of the receiving spouse. Rather, compensatory maintenance is permitted where the trial court, after consideration of the statutory factors, determines such maintenance is the means to a just result. That is exactly the case here.

Finally, the husband argues a case at complete odds with the facts of this case. See Br. Appellant, at 19, *citing In re Marriage of Kim*, 179 Wn. App. 232, 317 P.3d 555 (2014). In *Kim*, even the appellate court noted the “facts bear little resemblance to *Washburn*.” *Id.*, at 252. The parties both had professional degrees, obtained during the marriage, but agreed the wife would stay home with their three children. The husband challenged the property division because it failed to “compensate” him for the value of the wife’s education. He ignored “that [the wife’s] labor as a full-time parent to the children and as a homemaker allowed [him] to vigorously pursue his career at the expense of hers.” *Id.* Her “sacrifices ... enabled [him] to put in long work hours and achieve success in his career.” 179 Wn. App. at 253. Under these facts, the trial court did not abuse its discretion when it rejected the husband’s request for compensation in the property distribution. *Id.* If anything, *Kim* supports the result reached here.

Here, after 19 years of marriage, the parties have little in the way of financial wealth apart from the husband's earning potential, and his earning potential is the result of 17 years of community effort. The husband has at least 20 years in which to realize the return on this investment, which will run to the millions of dollars. RP 365. The wife, at 47 and with only a high school degree, cannot hope to gain that kind of earning power ever. RP 173, 363-364. The husband does not dispute these important facts. "Absent erroneous factual findings, a trial court's award of spousal maintenance and child support or its equitable division of property will be overturned only if there has been a manifest abuse of discretion." *In re Marriage of Macdonald*, 104 Wn.2d 745, 751, 709 P.2d 1196, 1199 (1985). The court did not abuse its discretion. The court properly awarded Anna maintenance both to allow her to rehabilitate as a worker and to compensate her for her contributions to the husband's medical degree.

- 3) The trial court has the authority to secure the maintenance award with a requirement that the husband maintain insurance.

The husband resists the court's requirement that he secure the maintenance and child support awards with life insurance. He has consistently demonstrated his desire not to provide this benefit

to the wife, going so far as to substitute his father as beneficiary on the community-purchased life insurance policy during the pendency of the dissolution. RP 137-139. On appeal, Antonio argues Anna will receive a windfall if, on his death, she receives the full life insurance proceeds. Br. Appellant, at 24-25. Not only does he make this argument for the first time on appeal, the argument seems to misapprehend the facts. In its oral ruling, the court ordered Antonio to name Anna “as the beneficiary in the amount to be paid on the maintenance – it’s a five hundred thousand dollar policy so as you pay it off you can change the policy to – if you can – to designate her the beneficiary every declining year until it’s paid off.” RP 368. The decree reflects this intention, declaring the husband “shall maintain sufficient life insurance on his life naming the wife as irrevocable beneficiary in an amount not less than the remaining amount due for maintenance.” CP 118 (emphasis added). Several paragraphs later, the decree further states:

In the event of the death of the husband prior to the end of the maintenance, despite any provision to the contrary in the law or the parties’ Decree of Dissolution of marriage, the wife shall receive from the life insurance proceeds an amount equal to the monthly maintenance times the number of months remaining in the maintenance period described in the Decree of Dissolution of Marriage.

CP 119. In the next paragraph, the decree precludes the wife from making a claim upon the proceeds if she has “received all of the maintenance to which she is entitled....” CP 119. From this language, it appears the court has addressed the concern Antonio raises on appeal. To the extent Antonio challenges the court’s authority to require the security at all, the case he cites establishes that authority. That is, in Washington, life insurance may be ordered “as security for the support obligations” imposed on a party to the dissolution. *In re Marriage of Donovan*, 25 Wn. App. 691, 698, 612 P.2d 387 (1980).² Relatedly, the statute even permits the court to “expressly” provide for maintenance to continue despite death or remarriage. RCW 26.09.170(2). In any case, the court did not do what Antonio claims. Accordingly, this issue is illusory.

To the extent the husband’s objection extends to other considerations (e.g., not discounting the life insurance for tax purposes or present value), these issues were not raised at trial. Accordingly, there is no factual record to support the argument, the wife had not opportunity to respond, and the trial court had no

² It appears our Supreme Court has noted, but declined to address, the issue Antonio raises. See *Std. Ins. Co. v. Schwalbe*, 110 Wn.2d 520, 523 n. 1, 755 P.2d 802 (1988) (court need not decide whether ex-wife and children’s right to life insurance proceeds is limited to those “necessary to discharge [ex-husband’s] future support and maintenance obligations”). In any case, the facts here do not require this Court to decide this issue.

opportunity to rule. This Court should not consider these issues.

RAP 2.5(a).

C. THE TRIAL COURT HAS BROAD DISCRETION IN ORDERING CHILD SUPPORT AND DID NOT ABUSE IT HERE WHEN IT USED THE WIFE'S ACTUAL MAINTENANCE INCOME FOR PURPOSES OF CALCULATING CHILD SUPPORT.

The trial court ordered support for the two minor children.

CP 135-150. The court used the wife's maintenance as her income. CP 137, 146. The court did not impute income to the wife at minimum wage because it found she did not have "enough resources to pay all the bills." CP 145. The husband argues, for the first time on appeal, the court should have done so, presumably in addition to the maintenance income. Br. Appellant, at 13-16. This does not make sense.

Maintenance is Anna's actual income. RCW 26.19.071(3)(q) ("maintenance actually received" is income); see, e.g., *In re Marriage of Schnurman*, 178 Wn. App. 634, 316 P.3d 515 (2013) (maintenance income used for purposes of calculating child support). She receives this maintenance because she needs to rehabilitate herself as a worker. CP 112. She is not, therefore, "voluntarily unemployed," and the court did not find otherwise. She is eager to get a job (RP 269), but has been out of the workforce for

20 years and needs education and training to re-enter the workforce at a level where she can sustain herself and support her children, i.e., to make herself employable.

The court could not advance these goals, important not only to Anna but to the children, by forcing the wife to take a minimum wage job, as the husband insists she should. Br. Appellant, at 13-15. There is something a little mean about this argument, which would deprive Anna of the time to improve her marketability, so that she can earn something more than minimum wage, while the husband spent the entire marriage pursuing his advanced degrees, so that he can now command an impressive income. Clearly, the court tuned into these equities, noting, for example, that the husband continued to contribute \$411 to his own retirement during the separation. RP 311, 363-365. The gross inequality in earnings potential made it difficult enough for the court to achieve its intent to leave the parties in comparable circumstances. RP 366-367. See, *In re Marriage of Bulicek*, 59 Wn. App. 630, 635, 800 P.2d 394 (1990) (the future economic circumstances of the parties is the court's paramount concern). The court expressly declined to impute income for the reason that it would render it impossible for

the wife to pay her bills. The court has this discretion and the husband fails to cite a single case to the contrary.

D. THE TRIAL COURT PROPERLY ENTERED THE PARTIES' STIPULATION REGARDING PAYMENT OF THE ADULT DAUGHTER'S TREATMENT.

Antonio also complains about the CR 2A stipulation entered by the court requiring him to pay for the adult daughter's eating disorder treatment. Br. Appellant, at 26-29. He complains the order does not conform to the parties' agreement in that it includes no limitation on his obligation. He claims he agreed to pay only up to \$20,000. Id. There are several problems with this argument.

First, he did not make this argument in the trial court. RAP 2.5(a); see *Richmond v. Thompson*, 130 Wn.2d 368, 384, 922 P.2d 1343 (1996) (appellate court will not consider a nonconstitutional issue raised for the first time on appeal). There is no indication he asked the trial court to include this limitation in the order. He restates some of the pertinent exchanges that took place on the record, then argues they imply this limitation.³ But this Court has no way to tell if the trial court would agree with that conclusion, and the record certainly does not settle the matter.

³ The issue was addressed a number of times at trial. RP 12, 19-25, 77, 105-06, 130-131, 164-165, 211-214, 279, 287-288.

For example, the parties disagreed regarding what the past or future treatment expense was or would be. See RP 20-24, 211-214. Antonio offers no authority in support of this Court reading a specific monetary limitation into the order. See *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357 (1993) (normal contract principles apply to the interpretation of a CR 2A). The face of the order reveals no error nor any intent of the court's to monetarily limit the order. The record nowhere indicates the parties stipulated to a particular amount. The court was not asked to resolve a dispute between the parties as to the content of their stipulation. In short, the husband fails to demonstrate any kind of an error.

He also fails to demonstrate any injury. The harm about which Antonio complains is entirely speculative; that is, he speculates the order, as entered, could obligate him to pay for Sarah's Swiss faith healing 20 years from now. Br. Appellant, at 27. This speculative injury, if it is an injury, is not one this Court should address. CR 2A becomes useful when there is a "genuine dispute" about the terms of an agreement. *In re Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993). There is no dispute here, beyond a conjectural one. If the day arrives when the parties disagree about the meaning of the stipulation, they may

need to return to court for interpretation of the order. However, for the moment, there is simply no basis for this Court to rewrite the order in terms preferred by Antonio.

E. THE COURT HAS DISCRETION TO VALUE THE RETIREMENT BENEFITS AS OF THE DATE OF TRIAL.

The husband complains the court awarded the relatively small retirement benefits in equal parts. He complains this award included his separate property interest in those benefits, acquired during the 14 months of separation. Br. Respondent, at 22. He fails to show an abuse of discretion.

The husband correctly notes the court must characterize the property. Br. Respondent, at 23. He fails to add that the characterization does not control the distribution. *In re Marriage of Konzen*, 103 Wn.2d 470, 478, 693 P.2d 97 (1985). Rather, the character of the property is one consideration for the court in making a distribution. *Id.* Indeed, the character of the property is not given any more weight than the other factors in the statute (RCW 26.09.080). *Id.* As recently observed, “*Konzen* leaves no doubt that separate property is no longer entitled to special treatment.” *In re Marriage of Larson*, 178 Wn. App. 133, 140, 313 P.3d 1228, 1231 (2013).

Rather, “the ultimate question is whether, under the circumstances, the award is just.” *In re Marriage of Williams*, 84 Wn. App. 263, 269, 927 P.2d 679 (1996). The trial court is in the best position to determine what is “fair, just and equitable under all the circumstances.” *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999) (internal citations omitted). Thus, the spouse who challenges the trial court’s decision bears the heavy burden of showing an abuse of discretion. *In re Marriage of Zahm*, 138 Wn.2d 213, 226-27, 978 P.2d 498 (1999).

Here, the husband fails to carry that burden. The cases he cites do not alter that conclusion. One case merely confirms the trial court’s discretion to choose separation or trial as the valuation date for a pension benefit. *In re Marriage of Manry*, 60 Wn. App. 146, 149, 803 P.2d 8 (1991). Moreover, the asset in that case did not exist prior to separation. In any case, what was just and equitable under the facts in *Manry* does not control the outcome under the different facts in this case.

Likewise, the second case he cites is inapposite, dealing instead with the problem of the court not at all accounting for the depreciated value of an asset between trial and separation. *Lucker v. Lucker*, 71 Wn.2d 165, 168, 426 P.2d 981 (1967). If anything,

Lucker confirms that Washington law permits a trial court to value property at date of separation or date of dissolution. While other states may require the use of one or the other for particular assets,

Washington has adopted a flexible and much more equitable rule. In Washington, the trial court is given broad discretion to pick an evaluation date that is equitable to both parties. ... The court not only may select a valuation date that is fair to both parties, but the court is free to select a different valuation date for different assets if to do so would bring about a fair distribution of the assets.

Weber, 20 *Wash. Pract., Family and Community Property Law* § 32.7. Antonio concedes the standard of review and utterly fails to demonstrate any abuse of discretion in the trial court's decision to equally split the retirement, which again was carefully calculated to achieve a just and equitable result.

**F. THE WIFE SHOULD RECEIVE HER FEES ON APPEAL;
THE HUSBAND SHOULD NOT.**

Antonio asks for an award of attorney fees on the basis of RCW 26.09.140. He does not explain why the wife is able to pay his fees. In fact, she has been found to be the spouse in need of support, justifying an award of maintenance. The trial court also noted that the wife would be unable to pay her expenses even with the family support she receives. Tacitly, this recognition that the wife will have to borrow in order to live flatly refutes any claim the

husband can make to an award of fees. To the contrary, it supports an award of fees to the wife. This appeal has no merit, involving only challenges to the court's discretion, which was exercised in full compliance with the applicable statutory mandates and in consideration of the pertinent facts. All this appeal can achieve is a reduction in funds available to the wife for life's necessities. The husband should pay her fees. His ability is amply demonstrated. For example, pending dissolution, he paid \$4100 in family support and the \$3000 mortgage. RP 171. Even so, he was able to save \$411 every month in voluntary retirement. RP 85, 311. He expects to receive annual raises, which, at several dollars per hour, amount to \$4000 annually. RP 84. Meanwhile, Anna must continue, as she has for 20 years, to live "paycheck to paycheck," as she seeks, at midlife, to improve her workforce marketability. Antonio lives in a large house costing \$3,000 monthly, which Anna described as "lavish," while he asks Anna, with all three children, to rent for \$1,700. RP 145, 242-243, 293. The court acknowledged it could not, given the lack of assets, put these people on an equal footing. RP 365. To further diminish Anna's award with litigation expense undermines the result the court sought to achieve. For these reasons, this Court should award the mother her fees.

IV. CONCLUSION

For the reasons above, the mother respectfully asks this Court to affirm the trial court in all respects and to award her fees.

Dated this 31st day of July 2014.

RESPECTFULLY SUBMITTED,

s/ Patricia Novotny
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August 02, 2014 - 9:58 AM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Marriage of:

ANTONIO JOSE CARRASCO
Appellant

and

ANNA MARIE CARRASCO
Respondent

No. 45767-9-II

DECLARATION
OF SERVICE

Patricia Novotny certifies as follows:

On August 2, 2014, I served upon the following a true and correct copy of the Corrected Brief of Respondent, Letter to Clerk, and this Declaration, by arranging for delivery by: email

Josephine C. Townsend
211 E. 11th Street, Suite 104
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DATED this 2nd day of August, 2014.

s/ Patricia Novotny
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