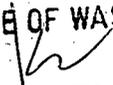


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 46464-1-II

COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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MARY JO FABER, Respondent

v.

KENNETH L. FABER, Appellant.

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BRIEF OF APPELLANT

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## ASSIGNMENTS OF ERROR

1. The trial court erred by including a nonexistent certificate of deposit in the property division.  
Findings of Fact, para. 2.8, §7.
2. The trial court erred by including Mr. Faber’s inheritance in the property division.  
Findings of Fact, para. 2.9, §3.
3. The trial court erred by including Social Security benefits not actually received by Mr. Faber as part of his current income stream.  
Findings of Fact, para. 2.11.

4. The trial court erred by ordering Mr. Faber to pay Mrs. Faber's attorney's fees.

Findings of Fact, para. 3.7.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- I. Did the trial court err by including a certificate of deposit in the property division when there was no evidence the account existed?

Assignment of Error 1.

- II. Did the trial court err by including Mr. Faber's inheritance in the property division when there was no evidence presented at trial that Mr. Faber still had those funds?

Assignment of Error 2.

- III. Did the trial court err by including Social Security benefits in Mr. Faber's income stream when he was not yet collecting that benefit?

Assignment of Error 3.

- IV. Did the trial court err by awarding Mrs. Faber attorney's fees when, based on the trial court's division of property, Mrs. Faber's need for the assistance was no greater than Mr. Faber's need, and Mr. Faber's ability to pay was no greater than Mrs. Faber's ability to pay?

Assignment of Error 4.

## **STATEMENT OF THE CASE**

### **IDENTIFICATION OF PARTIES**

The dissolution of a 19 year marriage underlies this appeal. CP

1. The appellant is Kenneth Faber; the respondent is Mary Jo Faber.<sup>1</sup>

### **PROCEDURAL HISTORY/BACKGROUND**

Mr. and Mrs. Faber were married on September 11, 1993. CP 1, 38, 231.

Mrs. Faber had worked for TAPCO Credit Union for twenty-four years. CP 138. After losing that job in 1991, she briefly worked for the City of Tacoma. CP 139. She next worked for the Tacoma Housing Authority until October of 1998. CP 138, 139. She then worked for Johnny's Seafood until 2003 when she retired. CP 138, 140. Mrs. Faber wanted to begin drawing her Social Security benefit at age 65, but Mr. Faber persuaded her to wait until age 68. CP 155, 543-44.

Mr. Faber worked for the City of Tacoma Light Division until his retirement in July of 2011. CP 231.

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<sup>1</sup> For clarity, the parties will be referred to herein as Mr. Faber and Mrs. Faber. No disrespect is intended by the use of these designations.

During the marriage, the parties agreed that Mr. Faber would manage the parties' investments and financial planning, and Mrs. Faber would manage their day-to-day finances.<sup>2</sup> CP 154, 238-39, 542.

The Fabers separated on May 8, 2012. CP 1, 38, 231.

At the time of trial, Mrs. Faber was seventy years of age; CP 1, 138, 226; Mr. Faber was sixty-two years of age. CP 1, 231.

#### **TRIAL**

Trial took place on September 4, 2013 and September 9, 2013 with Judge Stephanie Arend presiding. CP 108-500. The focus of trial was on the distribution of property and Mrs. Faber's request for an award of attorney's fees. CP 21.

#### **Mrs. Faber's retirement**

#### ***PERS 2***

As stated above, at the time of trial, Mrs. Faber was already retired. CP 140-41, 235. She had begun to receive payments of \$394 per month from her PERS 2 retirement account in 2008. CP 3, 140-41, 560.

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<sup>2</sup> At trial, however, Mr. Faber testified that he had been paying many of the household bills on-line for the past two years. CP 362-63.

### ***Social Security***

Mrs. Faber was also drawing a monthly Social Security benefit of \$1,817. CP 141–42. \$104.90 was deducted every month from that payment for her Medicare premium, and she also paid \$104 per month for Medicare Part B coverage with Sound Path. CP 142, 314, 559. Mrs. Faber received spousal support in the amount of \$550 per month during the pendency of the divorce proceedings.<sup>3</sup> CP 143, 560.

### ***IRA Accounts***

Mrs. Faber had two IRA accounts with American Funds, one a simple IRA and the other a Roth IRA. CP 4, 159. The account began as one simple IRA that Mrs. Faber had opened at TAPCO Credit Union. CP 160, 162. In 2003, she added to that account with retirement funds she had accrued at subsequent jobs. CP 160, 161.

In 2008, Mr. Faber transferred \$20,000 from the simple IRA into a Roth IRA in Mrs. Faber's name; in 2009, he transferred an additional \$25,000 into the Roth IRA, and in 2010, he transferred \$80,000 more into the Roth IRA. CP 162, 289, 290, 421. At the time of trial, there was \$192,479.11 in the Roth IRA and \$62,933.32 in the simple IRA. CP 24–25.

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<sup>3</sup> Mrs. Faber did not request an award of spousal support at trial. CP 145.

Mr. Faber testified he made these transfers in light of Mrs. Faber's age and because he wanted to lessen the tax burden on any retirement funds ultimately distributed to her. CP 163, 287-88, 411-13. He wanted to complete the conversion before Mrs. Faber reached seventy years of age. CP 291.

**Mr. Faber's Retirement**

***TERS ("457")/ICMA-RC Account***

As also mentioned above, at the time of trial Mr. Faber was retired. CP 153. He had worked for the City of Tacoma (Light Division) beginning in 1987 until he retired in 2011 at age 60. CP 153, 231-32, 237.

Mr. Faber had retired at the age of 60½ because he has a mentally handicapped brother who needed his care and because he had problems with his knees, back and hearing. CP 232. Mr. Faber had done HVAC work, which required a significant amount of physical exertion. CP 232. His physical condition made it difficult for him to continue to do that work. CP 232.

Mr. Faber had accrued funds in a retirement account/pension (referred to in the record as his "457 account", ICMA-RC account or TERS account) during his employment with the City of Tacoma. CP

283–84. As of June 30, 2013, the account had a balance of \$360,379.12. CP 284. Mr. Faber believed that \$335,800 of those funds had been accrued during the marriage. CP 286.

Mr. Faber was receiving \$3,056.37 per month (gross) from this pension, and was paying \$608 per month for his medical insurance. CP 313, 421.

### ***Social Security***

At the time of trial, Mr. Faber had not yet begun to draw Social Security retirement benefits. CP 304. If he took that benefit at age 62, he could expect to receive about \$1,743 per month. CP 304. If he waited until age 66, he could expect to receive about \$2,237 per month. CP 304–05. If he waited until age 68, he estimated he would receive approximately \$2,700 per month. CP 305.

### **Mr. Faber's inheritance**

Mr. Faber's father had passed away on December 9, 2009. CP 185, 241. Mr. Faber inherited the following from the estate:

- |                            |                           |                     |
|----------------------------|---------------------------|---------------------|
| ▪ \$66,356.32              | cash from Timberland Bank | CP 185, 336         |
| ▪ \$252.14 <sup>4</sup>    | cash from BECU savings    | CP 186              |
| ▪ \$60,663.78 <sup>5</sup> | CD from BECU              | CP 186–87           |
| ▪ \$4,326.24               | cash from Valley Bank     | CP 187, 337         |
| ▪ \$2,000.00               | death benefit – Boeing    | CP 338              |
| ▪ \$13,000.00              | cash and coins            | CP 338 <sup>6</sup> |

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<sup>4</sup> Mr. Faber testified at trial that the account balance was \$252.02. CP 337.

<sup>5</sup> Mr. Faber testified at trial that the balance was \$60,565.82. CP 337.

- \$1,300.00 traveler's checks CP 339
  - \$4,000.00 estimated proceeds – garage sales CP 339<sup>7</sup>
- \$151,898.48 Total

Mr. Faber also inherited his father's house in Puyallup, which he deeded to the marital community. CP 241. Although Mr. Faber estimated he had received a total of approximately \$215,000 – \$220,000 in cash from his father's estate, the specific assets identified above totaled \$151,898.48. CP 339, 349, 390, 391–92, 400.

Mr. Faber had transferred these funds, in various increments and at various times, to various financial institutions between the time of his father's death and the trial. CP 185–96, 382.

**Certificates of Deposit**

On August 10, 2009, Mr. Faber used some of the funds inherited from his father to purchase a CD in both parties' names at Home Street Bank in the amount of \$76,356.32. CP 187, 189. The CD was comprised of \$66,356.32 from Timberland Bank and \$10,000 from a BECU account belonging to Mr. Faber's handicapped brother. CP 187–88.

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<sup>6</sup> Mr. Faber testified that the cash and coins were discovered in his father's home. CP 338.

<sup>7</sup> Mr. Faber testified that he also sold his father's trailer and boat, but did not state what the sale proceeds totaled. CP 339.

Mr. Faber opened another account at Home Street Bank on August 10, 2009 with an initial balance of \$40,775.12. CP 189, 505.

Mrs. Faber believed this account was funded with cash from an account at BECU that had been owned by Mr. Faber's brother. CP 189, 190, 505.

Mr. Faber purchased a third CD at Home Street Bank on August 10, 2010 for \$70,000, comprised of funds from his father's checking account (\$4,000), the parties' Columbia Bank checking account (\$22,000), cash (\$9,000) and funds from the parties' BECU account (\$35,000). CP 190-91.

These CDs were liquidated in May of 2012. CP 193. Those funds were used to open an account at American West Bank with an opening balance of approximately \$171,000.<sup>8,9</sup> CP 193.

### **Cash Distributions**

In early May of 2012, Mr. Faber distributed \$85,797.88 to his son, Jason, and \$86,141.33 to his daughter, Katy. CP 196, 199, 401, 403, 405. Those distributions totaled \$171,939.21. CP 406.

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<sup>8</sup> Mrs. Faber testified that approximately \$192,000 was withdrawn from Home Street Bank, and that \$20,600.92 was used from those funds to satisfy a loan for Mr. Faber's truck. The remainder was approximately \$171,000. CP 192-93.

<sup>9</sup> These remaining funds were apparently transferred to various accounts at OBEE Credit Union (comprised of two CDs) and Bank of the Northwest. CP 194-95.

On December 31, 2012, Jason and Katy's accounts were apparently liquidated. CP 199-200. From those funds, \$83,423.25 was deposited into a PMA account at Wells Fargo Bank with Mr. Faber, Jason Faber and Katy Faber named as owners. CP 200. A second PMA account under the same names was also opened with a beginning balance of \$83,146.20. CP 200. These opening account balances totaled \$166,569.45.<sup>10</sup> CP 200.

### **Mr. Faber's Tools**

Mrs. Faber testified that Mr. Faber had an "extensive" collection of tools that she believed should be valued at \$10,000. CP 578. Mr. Faber testified that he had worked for many years as a mechanic and had indeed accumulated a lot of tools over the years, mostly prior to the marriage. CP 331. He had also inherited more tools from his father's estate. CP 332. He had not actually purchased many tools during the marriage, so he believed the garage sale value of the tools accumulated during the marriage was \$2,500. CP 332.

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<sup>10</sup> A third PMA account intended to fund a special needs trust for Mr. Faber's brother was also opened. CP 201.

### **Savings Bonds**

Mr. Faber had savings bonds obtained prior to the marriage totaling \$6,785.16 (CP 572) and savings bonds that were acquired during the marriage with a value of \$7,662.40. CP 4, 212, 572.

### **COURT'S RULING**

The trial court rendered its oral ruling on September 12, 2013. CP 20 – 36.

### **Valuation and Distribution of Property**

The trial court first acknowledged and adopted the following stipulated values of some of the marital community's assets (CP 23 – 24):

<u>Asset</u>	<u>Mr. Faber</u>	<u>Mrs. Faber</u>
▪ Savings bonds (SP) <sup>11</sup>	\$6,785.16	
▪ Savings bonds (CP) <sup>12</sup>	\$3,831.20	\$3,831.20
▪ Tacoma home	\$247,500.00	
▪ 2002 Honda Accord (CP)		\$4,474.00 <sup>13</sup>
▪ 2011 Toyota Tacoma (CP)	\$22,489.00 <sup>14</sup>	

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<sup>11</sup> SP = separate property. At trial, the parties stipulated to the characterization, valuation and distribution of the savings bonds. CP 212, 573.

<sup>12</sup> CP = community property.

<sup>13</sup> The parties stipulated to the value of the Honda Accord. CP 210.

<sup>14</sup> The parties stipulated to the value of the Toyota Tacoma. CP 210–11.

The trial court then valued and distributed the remaining assets (CP 24):

<u>Asset</u>	<u>Mr. Faber</u>	<u>Mrs. Faber</u>
▪ Simple IRA (American Funds)		\$62,933.32 <sup>15</sup>
▪ Roth IRA (American Funds)		\$192,479.11 <sup>16</sup>
▪ CDs – PMA	\$45,124.00 <sup>17</sup>	
▪ 457 deferred comp (SP)		\$33,579.12
▪ 457 deferred comp (CP)	\$168,400.00	\$168,400.00 <sup>18</sup>
▪ Puyallup home		\$235,000.00 <sup>19</sup>
▪ Cost to sell Puyallup home	50%	50% <sup>20</sup>
▪ Cost to maintain Puyallup home	50%	50% <sup>21</sup>
▪ Tools	\$10,000.00 <sup>22</sup>	
▪ Inheritance	\$220,000.00	
TOTAL	\$745,258.20	\$667,117.63

CP 23–29, 38–39, 44.

The trial court did not award an equalization payment to Mrs. Faber because “the significant portion of the difference between those two values is Mr. Faber’s separate inheritance value.” CP 29.

<sup>15</sup> The trial court stated it had valued this asset as of the most recent account statement. CP 24–25.

<sup>16</sup> The trial court stated it had also valued this asset as of the most recent account statement. CP 25. It characterized this account as part separate and part community property. CP 25. These amounts total \$255,412.43. However, the most recent portfolio statement indicated an account balance of \$259,380.78 for both IRAs combined. CP 419.

<sup>17</sup> The trial court adopted Mrs. Faber’s proposed valuation of the CDs. CP 25.

<sup>18</sup> The trial court adopted Mr. Faber’s characterization and distribution of the separate and community property elements of these accounts. CP 25–26.

<sup>19</sup> The trial court adopted the lowest proposed value of this property. CP 26.

<sup>20</sup> CP 27.

<sup>21</sup> CP 27–28.

<sup>22</sup> The trial court valued the tools at \$10,000, despite the fact that she observed “Mr. Faber testified that the community portion of his tools were valued at \$2,500, but that most of his tools were separate property that he brought with him to the marriage. So I am adopting \$10,000 as a total value of all the tools, separate and community, and awarding them to Mr. Faber.” CP 28.

### Distribution of Income Streams

Finally, the court characterized and divided the parties' income streams as follows:

<u>Source</u>	<u>Mr. Faber</u>	<u>Mrs. Faber</u>
▪ TERS; City of Tacoma (SP)	\$814.00 <sup>23</sup>	
▪ TERS; City of Tacoma (CP)	\$1,121.18	\$1,121.18
▪ Social Security (his)	\$1,743.00 <sup>24</sup>	
▪ PERS (CP)		\$394.00 <sup>25</sup>
▪ Social Security (hers)		\$2,123.90 <sup>26</sup>
TOTAL	\$3,678.18	\$3,639.08

CP 30–31, 40.

Counsel for Mr. Faber questioned why the trial court included Social Security income for Mr. Faber when he had not yet begun to draw that benefit. CP 34. The trial court responded:

He can choose not to get [Social Security], absolutely, but then I believe with his \$220,000 inheritance that he has sufficient assets to support himself. I used that as a means of trying to equalize the income stream of the two parties because the economic circumstances of each spouse at the time of the division of the property is to become effective and all the case law interpreting that talk about – – and for purposes of not requesting spousal maintenance, the proposal was a 50/50 division of assets, and so I was trying to make things as 50/50 as I could without going to a spousal maintenance circumstance.

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<sup>23</sup> The trial court adopted Mr. Faber's characterization of the separate and community property components of his TERS account. CP 30–31.

<sup>24</sup> CP 31.

<sup>25</sup> CP 31.

<sup>26</sup> CP 31, 559.

So he can choose not to withdraw that Social Security. Absolutely, and I think he has sufficient assets to support himself if he doesn't.

CP 34.

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

Mr. Faber testified that he still owed his attorney unpaid fees at the time of trial. CP 348. He also testified that he had no funds available to pay them. CP 348.

The trial court found "Mrs. Faber needs assistance with attorney's fees and Mr. Faber has the ability to pay, so I am ordering payment to Mrs. Faber of attorney's fees by Mr. Faber." CP 32. The trial court noted she wanted to consider Mrs. Faber's affidavit of attorney's fees before determining the amount to be paid by Mr. Faber. CP 32.

The trial court later awarded Mrs. Faber \$15,000 as and for her attorney's fees. CP 43, 46.

#### **FINAL ORDERS**

Final orders were entered on January 24, 2014. CP 37 - 48.

## **MOTION FOR RECONSIDERATION**

Mr. Faber brought a motion for reconsideration on February 3, 2014. CP 48 – 54. Mr. Faber raised the following issues with regard to the trial court's final orders:

- The Toyota Tacoma truck had been purchased with his separate funds, but was included in the property division by the trial court.
- The trial court failed to identify and apportion the separate and community portions of Mrs. Faber's Roth IRA.
- The trial court included two certificates of deposit in the property division, when no evidence was presented at trial that they existed at the time of trial.
- The trial court valued Mr. Faber's tools at \$10,000, but there was no evidence adduced at trial to support that valuation.
- The trial court improperly valued the inheritance Mr. Faber received from his father's estate.
- The trial court incorrectly found that Mr. Faber testified he had no idea what happened to the inheritance he received from his father's estate.
- The trial court had failed to include Mr. Faber's separate liabilities when dividing the parties' property.
- The trial court included Social Security benefits not yet claimed or received by Mr. Faber in his income stream for purposes of equalizing the parties' incomes.

CP 48–54.<sup>27</sup> The motion was denied in its entirety. CP 746–47.

Mr. Faber timely brought this appeal.

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<sup>27</sup> Mr. Faber also sought correction of a scrivener's error, not appealed here. CP 53.

## ARGUMENT

### Standard of Review

In dissolving a longer term marriage, a trial court's objective is to place the parties in generally equal financial positions for the rest of their lives. Washington Family Law Deskbook, § 32.3(3) at 17 (2<sup>nd</sup> Ed. 2000); *see also Sullivan v. Sullivan*, 52 Wash. 160, 164, 100 P. 321 (1909) (for a marriage lasting over 25 years, "after [which] a husband and wife have toiled on together for upwards of quarter of a century in accumulating property . . . the ultimate duty of the court is to make a fair and equitable division under all the circumstances").

A trial court's exercise of its broad discretion in applying statutory factors will be reversed on review only if there has been a manifest abuse of that discretion. *In re Griswold*, 112 Wash. App. 333, 339, 48 P.3d. 1018 (citing *In re Marriage of Kraft*, 119 Wn.2d 438, 450, 832 P.2d 871 (1992)).

Abuse of discretion is manifest when it is exercised on untenable grounds. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108 P.3d 779 (2005). A decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the

factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997), *superseded on other grounds* by RCW 26.09.520(2).

If a trial court has weighed the evidence, a reviewing court simply determines if substantial evidence supports the trial court’s findings of fact, and if so, whether those findings in turn support the trial court’s conclusions of law. *In re Marriage of Green*, 97 Wn. App. 708, 986 P.2d 144 (1999). “Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002).

When a decree of dissolution “**results in a patent disparity in the parties’ economic circumstances, a manifest abuse of discretion has occurred.**” *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1997) (emphasis added). That is precisely what occurred here.

**I. THE TRIAL COURT'S FINDING THAT THERE WAS A CERTIFICATE OF DEPOSIT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

As part of the property division, the trial court awarded a PMA CD with a value of \$45,124.00 to Mr. Faber. CP 25. This award is not supported by any evidence adduced at trial. In fact, in her response to Mr. Faber's motion for reconsideration as to this issue, Mrs. Faber acknowledged as much:

The three CD's opened at Homestreet Bank in August 2009 and August of 2010, totaled the sum of \$187,131.44. This total involved contributions from various sources. Of these, the sum of \$45,124.02 was itself comprised of \$22,000.00 from the parties' joint Columbia Bank checking account, \$9,000.00 cash and \$14,124.02 from the parties' joint savings account at BECU. **Petitioner, Mary Jo Faber, would have not testified that there was a specific CD of \$45,124.02.** However, she may well have testified that this specific sum contributed to the purchase of the August 2009 and August 2010 CD's. Also that sum was set out in the Petitioner's Domestic Relations Information Form in the property division section labeled "cash" and requested by the Petitioner to be awarded to the Respondent.

CP 58 (emphasis added).

Mrs. Faber's own trial testimony contradicts the statement that "she may well have testified that this specific sum contributed to the purchase of the August 2009 and August 2010 CD's." CP 58. Instead, trial testimony makes it possible to trace the various CDs that Mr. Faber purchased over time.

Mrs. Faber testified that when the “August 2009 and August 2010” CDs were liquidated, a total of approximately \$192,000 was withdrawn from Home Street Bank. \$20,600.92 was used from those funds to satisfy an outstanding loan for Mr. Faber’s truck. This left a remainder of approximately \$171,000. CP 192–93.

Mrs. Faber then testified that those remaining funds were used to open an account at American West Bank with an opening balance of approximately \$171,000. CP 193.

Mr. Faber ultimately distributed \$85,797.88 to his son, Jason, and \$86,141.33 to his daughter, Katy. CP 196, 199, 401, 403, 405. Those distributions totaled \$171,939.21. CP 406. Nothing remains.

Therefore, the property “awarded” to Mr. Faber is therefore overstated by \$45,124.00. CP 25. This asset did not and does not exist, and this finding is not supported by any evidence.

This matter should be remanded to the trial court for a property division supported by the evidence adduced at trial.

**II. THE TRIAL COURT’S FINDING THAT MR. FABER HAD \$220,000 IN SEPARATE PROPERTY WAS SIMILARLY UNSUPPORTED BY SUBSTANTIAL EVIDENCE.**

As stated above, Mr. Faber no longer has all of the funds he inherited from his father’s estate. In dividing the marital estate, the

trial court included Mr. Faber's inheritance from his father as a means to "equalize the income stream[s]" and property division of the parties. CP 34.

The evidence clearly shows how Mr. Faber managed the funds he had inherited from his father's estate in 2009. CP 339, 349, 390, 391-92, 400. Although Mr. Faber testified he believed he inherited \$215,000-\$220,000 from his father's estate, his trial testimony and Mrs. Faber's trial testimony accounted for \$151,898.48. CP 185, 186-87, 336, 337, 338, 339.

As already stated above, the initial CDs obtained through Home Street Bank totaled \$187,131.44. CP 187, 189, 505. Mrs. Faber testified that when these CDs were liquidated, a total of approximately \$192,000 was withdrawn from Home Street Bank. \$20,600.92 was used from those funds to satisfy a loan for Mr. Faber's truck. This left a remainder of approximately \$171,000. CP 192-93.

Mrs. Faber then testified that those remaining funds were used to open an account at American West Bank with an opening balance of approximately \$171,000. CP 193.

But most recently, in early May of 2012, Mr. Faber distributed \$85,797.88 to his son, Jason, and \$86,141.33 to his daughter, Katy. CP

196, 199, 401, 403, 405. Those distributions totaled \$171,939.21. CP 406. This accounts for Mr. Faber's inheritance.

Therefore, the trial court's "equalization" was in theory only. In rendering her ruling, the trial court stated "I always think that we should try to value things as close to the date of trial as possible unless everything is being valued as of the date of separation." CP 24-25.

Mr. Faber's testimony indicates that he believed he inherited \$215,000-\$220,000 *at or near the time of his father's death*, not at the time of trial, approximately four years later. CP 339, 349, 390, 391-92, 400. Attributing a value of \$220,000 to Mr. Faber's inheritance is not supported by substantial evidence. Trial testimony, primarily from Mrs. Faber, indicated how Mr. Faber had managed those funds over time. CP 339, 349, 390, 391-92, 400.

When a decree of dissolution "**results in a patent disparity in the parties' economic circumstances, a manifest abuse of discretion has occurred.**" *In re Marriage of Pea*, 17 Wn. App. 728, 731, 566 P.2d 212 (1997) (emphasis added). That is precisely what has occurred here. The trial court valued Mr. Faber's inheritance as of 2009, not at the time of trial, contrary to its own preference to value

assets as of a date close as possible to the date of trial. CP 24–25. Mr. Faber’s testimony demonstrated that these funds had been largely dissipated. Most recently, Mr. Faber distributed \$171,939.21 to his two adult children and himself. CP 406. At best, his interest in that amount would be \$57,313.07. However, that final distribution occurred in May of 2012, over one year prior to trial. There is no evidence in the record to support an accurate value of Mr. Faber’s inheritance as of the date of trial.

To value Mr. Faber’s inheritance at \$220,000 and to include it in the property division was an abuse of discretion. This should be remanded to the trial court in order to obtain a division of property consistent with the evidence adduced at trial and based on evidence supporting valuations as of a date as close in possible to the date of trial.

**III. THE TRIAL COURT SHOULD NOT HAVE INCLUDED UNDISTRIBUTED SOCIAL SECURITY BENEFITS IN MR. FABER’S INCOME STREAM WHEN HE IS NOT ACTUALLY COLLECTING THAT BENEFIT.**

RCW 26.09.080 sets forth factors a trial court is required to consider and weigh in determining an equitable distribution of marital property. These factors include

- (1) The nature and extent of the community property;

- (2) The nature and extent of the separate property;
- (3) The duration of the marriage . . . ; and
- (4) **The economic circumstances of each spouse . . . at the time the division of the property is to become effective[.]**

Emphasis added.

A trial court is required to make a “just and equitable” distribution of marital property after weighing these factors. RCW 26.09.080.

**A. MR. FABER’S ACTUAL INCOME IS SIGNIFICANTLY LESS THAN MRS. FABER’S**

A trial court is required by statute to consider “the economic circumstances of each spouse . . . **at the time the division of the property is to become effective[.]**” RCW 26.09.080 (emphasis added). Here, the trial court considered Mr. Faber’s income, including Social Security retirement benefits he is not yet receiving.

The court characterized and divided the parties’ income streams as follows:

<u>Source</u>	<u>Mr. Faber</u>	<u>Mrs. Faber</u>
▪ TERS; City of Tacoma (SP)	\$814.00	
▪ TERS; City of Tacoma (CP)	\$1,121.18	\$1,121.18
▪ Social Security (his)	\$1,743.00	
▪ PERS (CP)		\$394.00
▪ Social Security (hers)		\$2,123.90
TOTAL	\$3,678.18	\$3,639.08

CP 30–31, 40. But Mr. Faber is not receiving *any* compensation from Social Security; therefore, the parties’ actual incomes are as follows:

<u>Source</u>	<u>Mr. Faber</u>	<u>Mrs. Faber</u>
▪ TERS; City of Tacoma (SP)	\$814.00	
▪ TERS; City of Tacoma (CP)	\$1,121.18	\$1,121.18
▪ PERS (CP)		\$394.00
▪ Social Security (hers)		\$2,123.90
TOTAL	\$1,935.18	\$3,639.08

Mr. Faber’s actual income is 52% less than what is indicated in the trial court’s final orders. Mr. Faber’s actual income is 53% of Mrs. Faber’s actual income. This is contrary to RCW 26.09.080.

In reality, Mr. Faber has \$1,935.00 per month to live on, while Mrs. Faber has \$3,639.08. CP 30–31, 40. Mrs. Faber has two IRAs that will produce additional income for her. CP 25. Mr. Faber has no asset that will produce any additional income for him other than Social Security. Therefore, he should be afforded the ability to maximize that benefit.

This is not a just and equitable distribution of marital property or income. This allocation “results in a patent disparity in the parties’ economic circumstances.” *Pea*, 17 Wn. App. at 731. This is a manifest abuse of discretion. This distribution also contravenes RCW 26.09.080, and is an error of law.

**B. MR. FABER'S SOCIAL SECURITY EXPECTANCY SHOULD NOT HAVE BEEN INCLUDED FOR PURPOSES OF EQUALIZING THE PROPERTY DIVISION OR THE PARTIES' POST-DISSOLUTION INCOME STREAMS**

Mr. Faber testified throughout the trial how, over the years, he had diligently managed the marital finances in order to maximize the parties' post-retirement incomes and minimize their tax liability. CP 154, 238-39, 542.

At the time of trial, Mr. Faber had not yet begun to draw Social Security retirement benefits. CP 304. If he took that benefit at age 62, he could expect to receive about \$1,743 per month. CP 304. If he waited until age 66, he could expect to receive about \$2,237 per month. CP 304-05. If he waited until age 68, he estimated he would receive about \$2,700 per month. CP 305.

In its ruling, the trial court noted:

[Mr. Faber] can choose not to get [Social Security], absolutely, but then I believe with his \$220,000 inheritance that he has sufficient assets to support himself. I used that as a means of trying to equalize the income stream of the two parties because the economic circumstances of each spouse at the time of the division of the property is to become effective and all the case law interpreting that talk about -- and for purposes of not requesting spousal maintenance, the proposal was a 50/50 division of assets, and so I was trying to make things as 50/50 as I could without going to a spousal maintenance circumstance.

So he can choose not to withdraw that Social Security. Absolutely, and I think he has sufficient assets to support himself if he doesn't.

CP 34.

There is no Washington case law squarely on point with this issue. Case law from other jurisdictions is highly instructive. Although it deals with a child support obligation, the rationale employed and cases relied on by the Michigan Court of Appeals in one particular case is highly analogous here. *Clarke v. Clarke*, 823 N.W.2d 320, 297 Mich. App. 172 (2012).

The parties had divorced in 2007. At the time, the parties had equal residential time with their son. 823 N.W.2d 320. By 2010, the parties had a dispute over child support. Mr. Clarke was 64 years of age at that time. 823 N.W.2d 321.

Given his age, Mr. Clarke had begun investigating Social Security retirement benefits. 823 N.W.2d 321. If he elected to receive benefits in 2010, he would be entitled to \$1,968 per month. If he waited until he was 66 years of age, he would be entitled to a benefit of \$2,347 per month. 823 N.W.2d 321.

Mr. Clarke elected to receive Social Security, because he learned he was also entitled to also receive a monthly dependent

benefit of \$1,173 per month for his son. 823 N.W.2d 321. He received retirement benefits for three months when he learned the dependent benefit was being sent directly to his former wife. 823 N.W.2d 321. Mr. Clarke withdrew his application for Social Security benefits and repaid all monies received to the Social Security Administration. 823 N.W.2d 321.

During a child support modification proceeding also occurring in late 2010, the trial court imputed Social Security retirement benefits to Mr. Clarke as income “because it was income that he had the ability to earn but had voluntarily eliminated.” 823 N.W.2d 322. Mr. Clarke appealed.

The Michigan Court of Appeals addressed whether Mr. Clarke’s Social Security retirement benefits, which were *potential* income, could be imputed to him (for purposes of child support). 823 N.W.2d 323.

The court observed that Mr. Clarke’s refusal to collect early Social Security retirement benefits did not constitute an unexercised ability to earn. 823 N.W.2d 325. Specifically, the court held

when the evidence establishes that a parent has declined to receive early Social Security retirement benefits in order to receive a higher benefit at a later time, the parent has not demonstrated an unexercised ability to earn.

823 N.W.2d 325. In making this determination, the *Clarke* court looked to a case that is more directly on point. *Moore v. Moore*, 619 N.W. 2d 723, 242 Mich. App. 652 (2000).

Mr. Moore objected to his former wife's motion to increase her alimony because she had not yet claimed benefits awarded to her from his pension in their divorce. Mr. Moore argued that these potential benefits should be imputed to Ms. Moore as income. 619 N.W. 2d at 724.

Importantly, the Michigan Court of Appeals first concluded that the propriety of imputing potential pension benefits as income depended upon whether making an early election to receive benefits would result in a reduced benefit. 619 N.W. 2d at 725. In that event, the court would deem that as a voluntary reduction in income. 619 N.W. 2d at 725.

The court distinguished between the intentional delays of an expected retirement benefit resulting in a reduced benefit versus a delay resulting in an increased benefit. The court determined:

**For [a party] to defer election of pension benefits to a later date when the benefits would be larger should not be viewed as a voluntary reduction in income, but rather as a possibly prudent investment strategy.**

619 N.W.2d at 725.

If Mr. Faber takes his Social Security retirement benefit at age 62, he can expect to receive about \$1,743 per month, the amount imputed to him by the trial court. CP 304. However, If he waits until age 66, he can expect to receive about \$2,237 per month. CP 304-05. If he waits until age 68, he estimates his benefit will be approximately \$2,700 per month. CP 305. Mrs. Faber presented no evidence at trial to contradict that testimony.

Therefore, if Mr. Faber waits until age 66 to collect his Social Security retirement benefit, he can expect to realize nearly \$500 per month more than if he collects that benefit now. CP 304-05.

But if Mr. Faber waits until age 68 to collect his Social Security retirement benefit, he can expect to realize nearly \$1,000 per month more than if he collects that benefit now. CP 304, 305. This is not insignificant. This is prudent strategy. 619 N.W.2d at 725.

The trial court abused its discretion by including retirement benefits not actually distributed to Mr. Faber. This matter should be remanded to the trial court for an award of property and income stream consistent with the evidence adduced at trial.

**IV. MRS. FABER SHOULD NOT HAVE BEEN AWARDED HER ATTORNEY'S FEES**

RCW 26.09.140 provides:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorneys' fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

An award made pursuant to this statute is reviewed for abuse of discretion. *Marriage of Spreen*, 107, Wn. App. 341, 351, 28 P.3d 769 (2001); *In re Marriage of Terry*, 79 Wn. App. 866, 871, 905 P.2d 935 (1995). However, a party is not entitled to an award of attorney fees as a matter of right. 79 Wn. App. at 871.

In this case, the trial court ruled it was distributing the marital property equally (CP 23-29, 38-39, 44), despite the fact that there was no evidence presented at trial that Mr. Faber still had the entire inheritance from his father available to him. CP 187-88, 189, 190-91, 193, 196, 199, 339, 349, 390, 391-92, 400, 401, 403, 406, 505.

The trial court also allocated the parties' income streams including Social Security income to Mr. Faber that he was not yet drawing. CP 304-05.

Therefore, Mr. Faber does not have a greater ability to pay Mrs. Faber's attorney fees than she has to pay them herself, especially in light of the trial court's property division and allocation of income streams. The trial court's property division renders Mrs. Faber's need for an award of attorney's fees no greater than Mr. Faber's. In reality, it renders Mrs. Faber's need far less than Mr. Faber's.

The trial court abused its discretion in making this award; it should be reversed.

#### **CONCLUSION**

Mr. Faber expended great effort to maximize the parties' assets and income expectancy to carry them through their retirement. The trial court's property distribution and income stream allocation leaves Mr. Faber with meager means to support his basic needs.

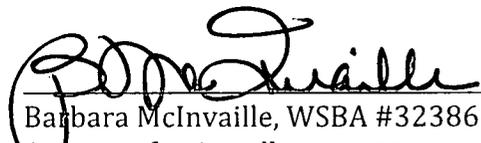
The trial court's award of an IRA was not supported by any evidence. The trial court's valuation and award of Mr. Faber's inheritance was not based on timely evidence, and results in a significantly disproportionate division of property. The inclusion of Social Security benefits not actually being distributed to Mr. Faber in his income stream was a further abuse of discretion. Finally, an award

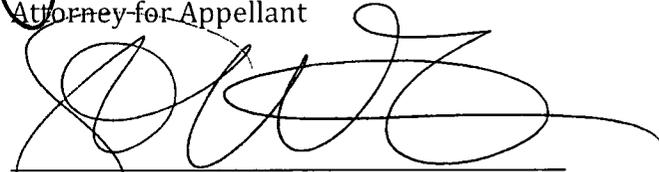
of Mrs. Faber's attorney's fees was also an abuse of discretion, when Mrs. Faber has a far greater ability to pay them than does Mr. Faber.

This matter should be remanded to the trial court in order to fashion a property division and allocation of income streams that is truly just and equitable.

DATED this 8<sup>th</sup> day of January, 2015.

RESPECTFULLY SUBMITTED,

  
\_\_\_\_\_  
Barbara McInville, WSBA #32386  
Attorney for Appellant

  
\_\_\_\_\_  
Stephen W. Fisher, WSBA #7822  
Attorney for Appellant

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STATE OF WASHINGTON

BY  DEPUTY

**Declaration of Transmittal**

Under penalty of perjury under the laws of the State of

Washington I affirm the following to be true:

On this date I transmitted the original document to the  
Washington State Court of Appeals, Division II by personal service,  
and delivered a copy of this document via legal messenger, to the  
following:

Jennifer A. Wing  
Law Office of Jennifer A. Wing PLLC  
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Tacoma, WA 98402-5300  
Jennifer@jwinglaw.com

Signed at Tacoma, Washington on this 8<sup>th</sup> day of January, 2015.

  
Barbara McInville